United States Government Accountability Office

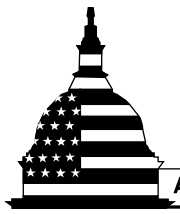
GAO

Report to the Chairman, Committee on Health, Education, Labor, and Pensions, U.S. Senate

September 2012

PRIVATE SECTOR PENSIONS

Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans



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Accountability * Integrity * Reliability

GAO-12-665

September 2012

PRIVATE SECTOR PENSIONS

Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans

GAO Accountability * Integrity * Reliability

Highlights

Highlights of GAO-12-665, a report to the Chairman, Committee on Health, Education, Labor and Pensions, U.S. Senate

Why GAO Did This Study

GAO has reported that millions of U.S. workers lack access to employer-sponsored pension plans and that some small businesses, which offered plans at lower rates than large businesses, may be deterred by the cost of plan administration. MEPs, a type of pension plan maintained by more than one employer, have been supported as an option that could expand coverage by lowering administrative costs. For this report, GAO examined (1) the characteristics of private-sector MEPs, (2) the advantages and disadvantages of MEPs and how their perceived advantages are used to market them, and (3) how IRS and Labor regulate MEPs.

GAO interviewed MEP sponsors, pension experts, officials at the Department of Labor (Labor), the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC), and analyzed the primary source of pension data reported to the government—the Form 5500.

What GAO Recommends

GAO recommends that Labor lead an effort to collect data on the employers that participate in MEPs. GAO also recommends that Labor and IRS formalize their coordination with regard to statutory interpretation efforts with respect to MEPs. Furthermore, Labor and IRS should jointly develop guidance on the establishment and operation of MEPs. Agencies generally agreed with GAO's recommendations.

View GAO-12-665. For more information, contact Charles Jeszeck at (202) 512-7215 or jeszeckc@gao.gov.

What GAO Found

Little is known about the characteristics of private sector multiple employer plans (MEP), especially information regarding the employers that participate in them. Although no participating employer information is currently collected in the Form 5500, the primary source for pension information reported to the government, some plan-level information on MEPs is available. GAO's analysis of 2009 plan-level data shows that the bulk of MEP participants and assets resided in the largest 25 private-sector MEPs. Three major sponsor types emerged among the top 25 plans: large corporations, associations, and professional employer organizations (PEO), which are firms that provide payroll and other human resources services to clients. These sponsor types differ in various ways, but notably, associations and PEO sponsors GAO interviewed tended to have a large number of employers participating in their plans. Little is also known about a fourth category of sponsor type called "open" MEPs, a type of MEP in which employers in the plan share no common relationship or affiliation with the other employers in the plan. This sponsor type appears to have come about in response to 2002 IRS guidance that allowed certain PEOs to avoid tax disqualification of their pension plans if they were converted to MEPs. Soon after this guidance was issued, practitioners began offering open MEPs.

MEPs are marketed as providing several advantages for employers over single-employer plans, but GAO found that these advantages may not always be unique to MEPs. MEPs are marketed as providing reduced fiduciary liability, administrative responsibility, and cost. However, other types of single-employer plans may also offer reduced fiduciary responsibility and third-party administrators can reduce administrative responsibilities. Overall, among MEP representatives and pension experts, there was no consensus on whether or not open MEPs or PEO-sponsored MEPs could substantially expand pension coverage. Given that employers do not directly oversee the plan, there was also some concern from Labor officials regarding the risk of MEP abuses, such as charging excess fees or mishandling the plan's assets. Additionally, because all of the participating employers are responsible for maintaining the MEP, if one employer becomes noncompliant with the tax requirements the plans of all the employers in the MEP may lose their tax-qualified status.

Labor regulates MEPs for participant protections under the Employee Retirement Income Security Act of 1974 (ERISA), while the IRS regulates them for preferential tax treatment under the Internal Revenue Code (IRC). However, ERISA places requirements on plans that are not required under the IRC, and Labor and IRS do not coordinate to reduce the impacts of defining a MEP differently. For example, although Labor recently opined that open MEPs are a collection of single plans, each separately sponsored by participating employers for their employees, open MEPs still qualify for preferential tax treatment under the IRC. Pension experts told GAO that such differing treatment can create compliance challenges. For example, an open MEP may be able to file a single annual report for the IRS but may also have to file annual reports for each of its component plans for Labor. Pension experts agreed that compliance guidance from either agency would be helpful.

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Abbreviations

EBSA	Employee Benefits Security Administration
EFAST	ERISA Filing Acceptance System
ERISA	The Employee Retirement and Income Security Act of 1974
IRC	Internal Revenue Code
IRS	Internal Revenue Service
Labor	Department of Labor
MEP	Multiple Employer Plan
MEWA	Multiple Employer Welfare Arrangement
NAPEO	The National Association of Professional Employer Organizations
PBGC	Pension Benefit Guaranty Corporation
PEO	Professional Employer Organization
Treasury	Department of the Treasury

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GAO
Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

September 13, 2012

The Honorable Tom Harkin
Chairman
Committee on Health, Education, Labor and Pensions
United States Senate

Dear Chairman Harkin:

Millions of American workers lack access to employer-sponsored pension plans. Those who work for small employers are typically less likely to have a pension than workers in larger firms. GAO recently reported that small employers face several challenges to establishing and maintaining pension plans.[1] In particular, small employers may be reluctant to sponsor a plan because the employer is overwhelmed by the number of plan options, administrative requirements, and fiduciary responsibilities. Consequently, some have argued that pension arrangements that pool costs and administrative responsibilities could lead to increased coverage.

Multiple employer plans (MEP),[2] a type of pension plan covering employees of more than one employer, have been suggested as a viable way to increase coverage by pooling costs. A range of legislative proposals, going at least as far back as the 1970s, have been put forth to encourage pooled pension arrangements for employers, but were never enacted. Further, an emerging trend in private sector MEP sponsorship seems to suggest a renewed interest in private sector MEPs; however, little is known about private sector MEPs and the importance or effectiveness of these plans for small employers. Additionally, little is known about the challenges, if any, that MEPs may present to the agencies charged with oversight of pension plans: the Department of Labor (Labor), the Department of the Treasury's (Treasury) Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation

[1] GAO, *Private Pensions: Better Agency Coordination Could Help Small Employers Address Challenges to Plan Sponsorship*, GAO-12-326 (Washington, D.C.: Mar. 5, 2012).

[2] Although the term MEP can be used to refer to employee welfare benefit plans as well as employee pension benefit plans, in this report, we use that term to refer only to employee pension benefit plans or arrangements that purport to be employee pension benefit plans.

(PBGC). This report provides an overview of the characteristics and utilization of these plans. To this end we will answer the following questions:

(1) What are the characteristics of private sector MEPs?

(2) What are the advantages and disadvantages of MEPs and how are the perceived advantages being used to market MEPs as a pension design option?

(3) How do IRS and Labor regulate MEPs?

To address our objectives, we assessed and analyzed 2009 Form 5500 data,[3] the primary source of information for both the federal government and the private sector on employee benefit plans. We also analyzed 2001 Form 5500 data to assess trends over time, as well as information on participating employers that existed at that time. We interviewed at least three plan-sponsor representatives from each of the four private sector MEP sponsor types we identified via research and interviews. The major sponsor types include: certain large corporations, associations, professional employer organizations (PEO), and unaffiliated or "open" MEPs.[4] We identified three sponsor types from a list of MEPs drawn from Form 5500 data and we selected interviewees from among the largest sponsors of each type.[5] We identified open MEPs as an emerging sponsor type, though sponsors of these plans were often new and not

[3] The Employee Retirement Income Security Act of 1974 (ERISA) establishes requirements for employee benefit plans Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 26 U.S.C §§ 219, 401-404, 405-408, 910-915, 1379, 4971, 4973-4975, 6057-6059, 6103, 6104, 6688, 6690, 6692 and 7802; 29 U.S.C. §§ 1001-1461; and 42 U.S.C. § 1131). Labor, IRS and PBGC jointly developed the Form 5500 so employee benefit plans could utilize it to satisfy annual reporting requirements under ERISA and the Internal Revenue Code (IRC). The Form 5500 is part of ERISA's overall reporting and disclosure framework, helping to assure that employee benefit plans are operated and managed in accordance with certain prescribed standards and that participants and beneficiaries, as well as regulators, are provided or have access to sufficient information to protect the rights and benefits of plan participants and beneficiaries.

[4] A PEO, very generally, is a firm that provides a means for outsourcing of various human resource management and administration tasks for client employers.

[5] Where possible, we selected and interviewed sponsors that offered both defined benefit and defined contribution MEPs. However, some of the sponsor types offered only defined contribution MEPs.

necessarily identified by Form 5500 filings. We selected these open MEP sponsors through Internet searches and interviewed them as well. We also conducted a literature review, and interviewed agency officials, including officials at Labor, IRS, and PBGC, as well as pension professionals and experts. Our selection of pension experts included actuarial experts representing their professional association, as well as various other pension experts, particularly those with administrative and legal expertise.[6] We reviewed relevant federal laws and regulations, as well as agency guidance—most notably in the form of advisory opinions issued by Labor. Following the issuance of recent advisory opinions, we sought reactions from the MEP sponsors and pension experts. We conducted our work from March 2011 to September 2012 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe the information and data obtained, and the analysis conducted, provide a reasonable basis for our findings and conclusions based on our audit objectives.

Background

Under Title I of the Employee Retirement Income Security Act of 1974 (ERISA),[7] employers are permitted to sponsor two broad categories of pension plans. They are (1) defined benefit plans—in which employers generally maintain a fund to provide a fixed level of monthly retirement income based on a formula specified in the plan[8]—or (2) defined contribution plans—in which retirement income is based on employer and employee contributions and the performance of investments in individual employee accounts.[9] A MEP may be a defined benefit plan or a defined contribution plan.

[6] These experts included a representative of a pension consumer rights organization; a representative of a nonprofit, nonpartisan, retirement research organization; representatives of a private law firm specializing in employee benefits; representatives of a membership organization dedicated to retirement plan professionals; and the author of a book and journal article on multiple employer benefit arrangements.

[7] Pub. L. No. 93-406, 88 Stat. 829.

[8] These formulas may take into account factors such as salary, years of service, and age at retirement, regardless of the investment portfolio's performance.

[9] 29 U.S.C. § 1002(34) and (35).

There are three types of pension plans that share some features with MEPs but are not the focus of this report: (1) A single-employer plan is established and maintained by only one employer and for that employer's employees.[10] (2) A multiemployer plan is another form of multiple employer arrangement where a plan is established and maintained pursuant to the terms of a collective bargaining agreement between at least one employee organization and more than one employer.[11] Specifically, management and labor representatives must jointly govern these plans, in which participants can negotiate the plan benefits through a union.[12] (3) A master or prototype plan is based on a largely uniform plan document sponsored by an organization for adoption by employers who are either its customers or members.[13] An employer who adopts a master or prototype plan completes an adoption agreement to elect certain options specified in detail in a separate plan document, but generally the provider or sponsor centrally administers the plan and, in the case of a master plan, pools the assets of the adopting employers into a central investment trust.[14] Banks, trade or professional organizations, insurance companies, and mutual funds are generally allowed by the IRS to provide master or prototype plans.

[10] 29 U.S.C. § 1002(41) and (42).

[11] 29 U.S.C. § 1002(37).

[12] We have recently initiated work on multiemployer plans. The work is expected to examine efforts to improve multiemployer funded status and policy options that could facilitate such an aim.

[13] The main parties in the master and prototype plan system are mass submitters, sponsors, and adopting employers, and each one is involved at a different "level" in the process with respect to the IRS. Mass submitters, or U.S. businesses that submit opinion letter applications on behalf of at least 30 unaffiliated sponsors, usually have reduced procedural requirements and get expedited treatment from the IRS because of the high volume of sponsors they represent and the number of identical or near-identical plans they submit to the IRS. This makes it easier and more efficient for IRS to review the large number of identical plans. The IRS issues opinion letters (on the acceptability of the form of the plan) to mass submitters and/or sponsors of master and prototype plans that have been submitted to the IRS for approval. 26 C.F.R. § 601.201(q) (2012). The master and prototype sponsor, or a U.S. business that has at least 30 employer-clients each of which is reasonably expected to timely adopt the sponsor's basic lead plan document, then makes its plan(s) available for employers to adopt.

[14] A prototype plan differs from a master plan in that it does not centralize, or pool, investment accounts like a master plan. A separate trust or custodial account is established for each employer in the case of a prototype plan.

In addition to employee pension benefit plans, ERISA covers employee welfare benefit plans for health care and other employee benefits as well. MEPs as pension plans have an analogous welfare arrangement called multiple employer welfare arrangements (MEWA). These are also maintained by multiple employers, and depending on the facts and circumstances, are single employer or multiple employer plans subject to requirements under ERISA.

Labor, IRS, and PBGC share federal responsibility for regulating pension plans under ERISA. Labor enforces rules concerning how pension plans should operate in the best interest of participants and beneficiaries. Accordingly, Labor has the statutory authority to bring legal action against all fiduciaries under ERISA. Within Labor, the Employee Benefits Security Administration (EBSA) is charged with interpreting and enforcing laws designed to assure the security of the pension, health, and other employment-based benefits of American workers and their families. EBSA issues advisory opinions in which it facilitates compliance with ERISA through interpretative guidance.[15] A plan sponsor may request a determination from EBSA that its arrangement constitutes an employee benefit plan under ERISA. Through its advisory opinions, EBSA provides the position of the department as to the application of one or more sections of ERISA. An advisory opinion, which is limited to the facts in the opinion, can be relied upon, as a legal matter, only by the parties in the opinion. However, these opinions serve as guidance to others on what arrangements are considered employee benefit plans under ERISA.

IRS, on the other hand, is charged with determining whether a plan qualifies for preferential tax treatment in accordance with the Internal Revenue Code (IRC). Qualified pension plans receive favorable tax treatment, with deferral of taxes on contributions and investment earnings until benefits are received in retirement, and to be qualified a plan must, among other things, be maintained for the exclusive benefit of the plan sponsor's employees or their beneficiaries.[16] Plans may apply to the IRS seeking an advance determination as to their qualified status. A favorable determination letter provides the plan sponsor with IRS's opinion that the

[15] ERISA Procedure 76-1 for ERISA Advisory Opinions, http://www.dol.gov/ebsa/regs/aos/ao_requests.html.

[16] 26 U.S.C. §§ 401(a) and 501(a).

terms of the plan as presented to the IRS, conform to the requirements of the IRC.

Lastly, PBGC acts as an insurer of private-sector defined benefit pension plans by guaranteeing participant benefits up to certain statutory limits and, in the case of covered single-employer plans, protecting participants when the plan terminates with insufficient assets to pay all benefits, such as the bankruptcy of plan sponsors with underfunded plans.

Little Is Known About Key MEP Characteristics

Little is known about the characteristics of private sector MEPs, particularly information about the employers that participate in them. No information with respect to participating employers in MEPs is currently collected in the Form 5500, which is the primary source of pension plan information for government oversight activities. However, basic plan and sponsor-level information on MEPs is available in the Form 5500 data, and we were able to analyze this data. The data show that MEPs are a small portion of the overall pension universe and that the bulk of plan assets and participants reside among the largest 25 defined contribution and defined benefit MEPs. Lastly, we identified a new sponsor type of MEP: the "open" MEP. Unlike the other sponsors we identified, the employers that participate in open MEPs share no common relationship or affiliation with the other employers in the plan.

MEPs Are Characterized by the Employers Participating in Them

As described previously, a MEP is a type of pension plan maintained by more than one employer.[17] Typically, employers participating in a MEP have a common interest in some business or association, but do not share common ownership control.[18] When employers decide to participate in a MEP, they legally adopt the plan as their own, as do other participating employers. A participating employer may sign an agreement that serves to identify the plan terms that will apply to its employees.[19]

[17] The IRC sets out specific requirements applicable to MEPs, imposing, for example, participation, exclusive benefit and vesting requirements. 26 U.S.C. § 413(c).

[18] In this report we refer to the employers that participate in a MEP as participating employers.

[19] This is sometimes referred to as a joinder agreement. It may also outline the delegation of authority necessary under the plan to permit a given MEP to operate.

Oversight agencies and plan administrators treat individual employers within the MEP as maintaining separate, single-employer plans for some purposes. For example, the IRS tests individual employers in a MEP separately against certain requirements designed to promote equity and inclusiveness of contributions and benefits across employees.[20] Additionally, a MEP may allow each participating employer to specify employer and employee contributions and allow participating employers to maintain unique plan benefit formulas.

For other purposes, notably certain reporting and auditing requirements, oversight agencies treat the MEP as one plan.[21] Specifically, a MEP under ERISA must only file a single Form 5500. In addition, a defined benefit MEP pays a single-employer insurance premium to PBGC for the plan as a whole.

Key Data That Characterize MEPs Are Not Collected

Currently, the federal government collects little MEP-specific information. Most notably, the Form 5500 is the primary source of pension plan information for government oversight activities. The Form 5500 used to include an IRS schedule that required information on, among other things, the number of additional (or participating) employers in a MEP. However, it no longer collects this information; consequently, the agencies have no

[20] 26 U.S.C. §§ 410(b) and 416. These requirements are often referred to as nondiscrimination rules and "top heavy" rules. Nondiscrimination testing is done to assure that benefits are provided to a cross-section of employees consistent with requirements intended to keep plans from disproportionately benefiting highly compensated employees and company owners or executives.

[21] Generally, ERISA requires pension plans with 100 or more participants to have an audit as part of their obligation to file an annual return/report, known as the Form 5500. 29 U.S.C. §§ 1023(9)(3)(A) and 1024(a)(2)(A). When an audit is required, the plan administrator must select an independent qualified public accountant. A plan audit is one way to help protect the assets and financial integrity of the pension plan and ensure that the necessary funds will be available to pay promised retirement benefits. An audit helps the sponsor carry out legal responsibilities to file a complete and accurate annual return/report for the plan each year. In addition, the audit serves as financial disclosure to the participants and beneficiaries.

current data with respect to participating employers in a MEP.[22] Participating employer information for a MEP is important because each employer may be unique in relation to the plan overall, with regard to discretionary plan options or its portion of the overall participants in the MEP.

While the federal government no longer collects participating employer data, both IRS and Labor agreed that such information could be helpful to their oversight efforts. For example, Labor officials said that basic information about a MEP's participating employers, such as the number of employers or a list of names could be useful oversight information.[23] Pension experts we talked with said that MEPs with especially large numbers of participating employers may be more challenging to administer. For example, as a MEP adds participating employers, the likelihood increases that one or more employers may fail nondiscrimination testing. This could ultimately jeopardize an entire MEP's preferential tax treatment. An IRS official acknowledged the value

[22] Prior to 2005, certain plan sponsors used a Schedule T attachment to the Form 5500 to satisfy certain tax qualification requirements applied at the employer level. The Schedule T included fields for individual employer information along with data to use for nondiscrimination testing of employers participating in a MEP. However, as a result of a series of events related to electronic collection of data, Labor, IRS, and PBGC no longer collect this data. IRS officials pointed out that statute limits the collection of information electronically by the IRS. 26 U.S.C. § 6011(e)(1). In 1999 Labor took over responsibility for collection of the Form 5500 and, along with IRS and PBGC, implemented a new computerized system known as the ERISA Filing Acceptance System (EFAST) to improve the processing of forms. Because there was no electronic filing requirement when EFAST was implemented, forms were mainly submitted in paper format. Around the late-to-mid 2000s, Labor led an effort to collect Form 5500 information in direct, electronic form, an initiative known as EFAST2. In anticipation of the changes in EFAST2, the IRS requested the removal of the Schedule T. The all-electronic system of EFAST2 was instituted as of January 2010. Labor and IRS officials said that, because the now-defunct Schedule T was not required annually and included calculations that were not necessarily timely, the information on participating employers was not particularly direct or timely.

[23] According to the official, the agencies could change the Form 5500 to include participating employer information after the department complies with the legally required steps for implementing regulations, including regulatory analysis and notice-and-comment rulemaking, as well as requirements under the Paperwork Reduction Act of 1995 (Pub. L. No. 104-13, 109 Stat. 163 (codified as amended at 44 U.S.C §§ 3501-3521)) and the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. No. 104-121, tit. II 110 Stat. 847, 857-74. Any added information would require changes to systems administered by Labor's contractor, with the cost of such a change depending on the format of the change.

that having access to participating employer information could have in targeting plans that may have such plan testing issues.

Besides participating employer information, Labor officials suggested that information identifying key MEP sponsor types or employer relationships may also be useful. As a possibility for gathering information about MEPs, Labor officials suggested requiring an initial Form 5500 filing immediately upon plan establishment. Another option would be to implement a registration requirement for newly-formed MEPs, though officials stated that Labor has no specific statutory authority to initiate collection of such information.

According to some MEP sponsors, reporting basic information about the number of participating employers in a MEP would not be burdensome. However, a few sponsors also told us that, to avoid creating complex and burdensome reporting requirements, agencies would need to carefully consider the information to be collected. For example, dynamic interrelationships among participating employers, such as one employer being a subsidiary of another, would require carefully defining the term "participating employer."[24] Nevertheless, a plan sponsor representative said participating employer information could be used for measuring a MEP's cost-effectiveness.

[24] For example, a MEP may include employers that have changing ownership interests in one another. If and when ownership interests with respect to two or more employers reaches certain levels set out in the IRC (26 U.C.S. § 1563), those employers would generally, in effect, be considered a single employer. 26 U.S.C. § 414(b) and (c). For MEPs that have a particularly large number of participating employers engaging in complex transactions, keeping track of the number and identities of participating employers may be burdensome.

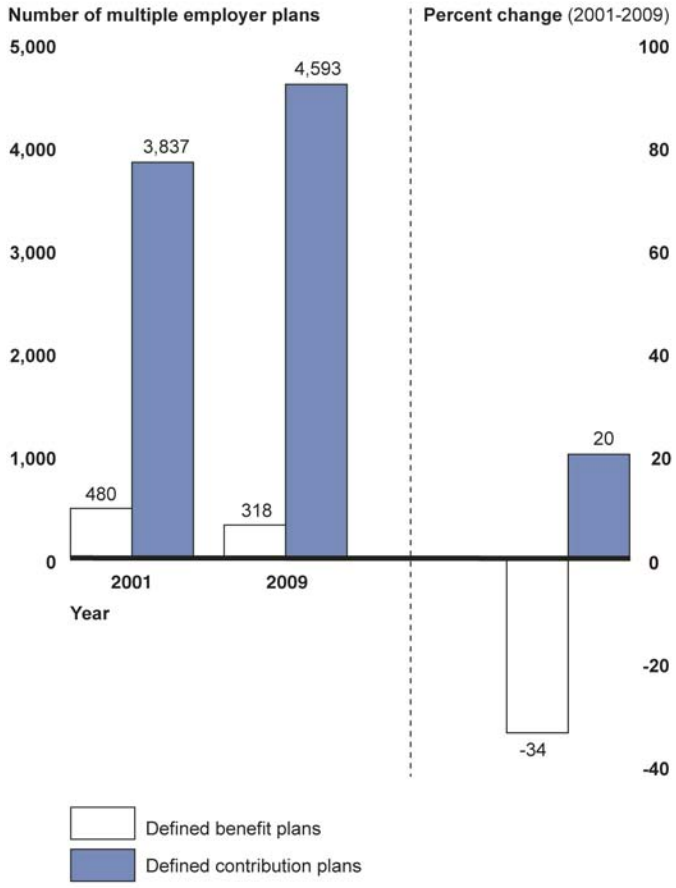
MEPs Are a Small Portion of the Pension Plan Universe

The 2009 plan and sponsor-level Form 5500 data, the most current and complete year of data at the time of our analysis, show that MEPs comprise a relatively small portion of the universe of pension plans.[25] Defined benefit and defined contribution MEPs each represent only 0.7 percent of approximately 46,000 private sector defined benefit plans and approximately 654,000 private sector defined contribution plans. The vast majority of pension plans are single-employer plans. More specifically, MEPs account for only 318 defined benefit plans and 4,593 defined contribution plans. MEP sponsorship seems to be following the general trend away from traditional defined benefit plans and towards defined contribution plans. For example, from 2001 to 2009 the number of defined contribution MEPs appears to have grown by 20 percent, while the number of defined benefit MEPs shrank by over a third.[26] (See fig. 1).

[25] While key, current information about participating employers is missing, we were able to identify important sponsor-level plan information from the 2001 and 2009 Form 5500 filings. Additionally, we supplemented our data analysis with data from plan interviews.

[26] Though MEPs may follow more general pension trends in plan-type sponsorship, others suggest possible MEP-specific trends as well. Actuarial experts told us that certain requirements may make it particularly difficult to establish a defined benefit MEP today. Defined benefit MEPs established after 1988 must be funded as if each participating employer is funding a separate plan so that plan assets have to be allocated among the participating employers. 26 U.S.C. § 413(c)(4)(A). Plans established before 1989 that did not elect to be treated as plans established after 1988 must be funded as if all participating employers maintain one single-employer plan. 26 U.S.C. § 413(c)(4)(B). According to the experts, allocating assets across employers requires application of onerous, detailed allocation techniques that may result in certain employers receiving asset allocations that are disproportionate to their individual contributions. Disproportionate allocations may give certain participating employers the impression that the plan is inequitable—that is, for example, that certain employers are contributing more to the funding of the plan than they would have were the plan not funded separately, while other participating employers may receive particularly favorable asset allocations. Roughly 37 percent of defined benefit MEPs were subject to the post-1988 funding rules as of the 2009 plan year. See appendix I, table 1 for additional detail.

Figure 1: Number of Defined Benefit and Defined Contribution MEPs with Percent Change between Periods, 2001 and 2009



Source: GAO analysis of 2009 and 2001 Form 5500 data.

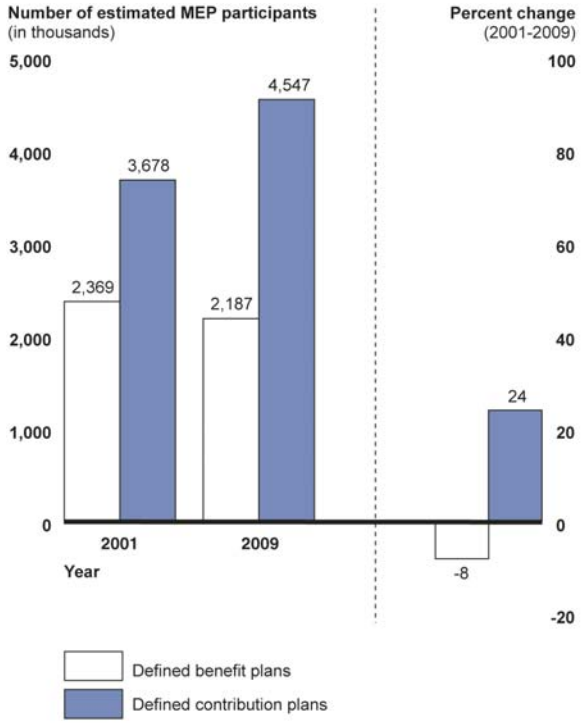
While MEPs represent a relatively small percentage of pension plans, based on available data, they appear to represent a somewhat larger percentage of pension assets. For example, defined benefit MEPs represented about $110 billion in plan assets as of 2009—about 6 percent of all defined benefit assets. Defined contribution MEPs represented an estimated $175 billion in assets—also about 6 percent of all defined contribution assets.[27] The portion of all participants

[27] See appendix I, tables 2 and 3 for additional asset information.

represented by MEPs is generally similar to the proportion of all assets represented by MEPs. In 2009, defined benefit MEPs included about 2.2 million participants—about 5 percent of all defined benefit plan participants. At the same time, defined contribution MEP participation grew—defined contribution MEPs currently cover over 4.5 million participants (about 5 percent of all defined contribution participants).[28] (See fig. 2.)

[28] Particularly for defined contribution plans in this instance, plan participation implies eligibility to contribute to the plan. Thus, some participants may not have account balances if they have not made or received contributions to the plan and, given the construction of the definition of participant in the Form 5500, our estimates include participants with zero account balances. For our analysis, we measured participants using the definition of total participants on the Form 5500 and Form 5500-SF (for small plans) which includes active; retired; separated vested participants not yet in pay status; and deceased participants whose beneficiaries are receiving or are entitled to receive benefits. The number of participants also includes double counting of workers in more than one plan.

Figure 2: Number of Defined Benefit and Defined Contribution MEP Participants with Change between Periods, 2001 and 2009



Source: GAO analysis of 2009 and 2001 Form 5500 data.

MEP Sponsorship Is Highly Concentrated among the Largest 25 Defined Benefit and Defined Contribution Plans

The preponderance of MEP assets and participants reside in a relatively small number of plans. Specifically, the largest 25 defined benefit MEPs ranked by number of participants represent nearly 76 percent of all defined benefit MEP assets and 72 percent of all defined benefit MEP participants. Similarly, the largest 25 comparably ranked defined contribution MEPs represent about 51 percent of all defined contribution MEP assets and about 41 percent of all defined contribution MEP participants. Three major sponsor types appear among the largest 25 MEPs: large corporations, associations, and professional employer organizations (PEO). Additionally, we identified an emerging plan sponsor type that does not appear among the largest plans: the open MEP.

Large Corporate MEPs

Large, Fortune 500, or Fortune Global 500 corporations make up the majority of plan sponsors among the largest 25 MEPs (see figs. 3 and 4 in appendix I).[29] For example, the defined benefit MEP maintained by General Electric is overall the third largest defined benefit plan in terms of total participants—representing 24 percent of all defined benefit MEP participants. The defined contribution MEP maintained by General Electric is the second largest defined contribution MEP and, when compared to all defined contribution plans, is the ninth largest defined contribution plan overall.

Each of the sponsors we interviewed among these large corporate MEPs told us their plans became MEPs as a result of their corporate structure or transactions under which some or all employers were no longer in the same controlled group.[30] In other words, the MEP may cover a corporation and its subsidiaries that are not under common control of the parent corporation.[31] The large corporate MEP sponsors we interviewed reported few participating employers in their plans. One sponsor reported only two participating employers. The sponsor with the largest number of participating employers reported eight.

[29] All three of the sponsors we interviewed in this category had both defined benefit and defined contribution MEPs.

[30] For most purposes, all employees of employers in the same controlled group are treated as employed by a single employer. 26 U.S.C. § 414(b). The status of these large, corporate plans as MEPs may be temporary if the transactions that resulted in them becoming MEPs are undone. For example, one plan sponsor representative we interviewed said that the sponsor's defined benefit and defined contribution plans became MEPs in the early-to-mid 2000s as a result of a merger within a business segment. Not long after, however, that particular segment was spun-off from the company and, by sometime in 2012, both the defined benefit and defined contribution plans will no longer be MEPs, but may be single-employer plans.

[31] The extent to which two or more corporations are considered in the same controlled group has to do chiefly with the percentage of ownership one has in the other. 26 U.S.C. § 1563.

Association MEPs

Association-sponsored plans also appear among the 25 largest defined benefit and defined contribution MEPs.[32] The largest association-related defined benefit MEPs include the National Rural Electric Cooperative Association Retirement Security Plan, the United Benefits Group Co-op Retirement Plan, and the Pentegra Defined Benefit Plan for Financial Institutions. Among the largest defined contribution MEPs are The Young Men's Christian Association Retirement Fund Retirement Plan and the National Rural Electric Cooperative Association 401(k) Pension Plan.

In contrast to our interviews with the large corporations that did not have common control of one or more employers in the plan, the associations had long-standing, continuously operating MEPs that, in most cases, were established prior to the enactment of ERISA. Additionally, these associations included a relatively large number of participating employers—well over 100 in most cases—and tended to be organized around a common trade or industry that served smaller employers. Two of the associations we interviewed reported an average of between 20 and 60 employees per participating employer.

The association representatives we interviewed also said that they had a number of common operational structures. For example, each association had an appointed board made up of association members that served as the named fiduciary of the plan. Most of these associations required member representatives who sat on the association board to participate in the MEP.

Additionally, a number of the association representatives noted the many advantages of the MEP model for associations. For example, especially in the case of defined benefit plans, as long as a participant remains an employee of an employer within the association, they can change jobs and continue earning additional benefits and vesting service credit towards association plan benefits. Moreover, because MEPs can pool resources, the plans can offer a broad enough array of benefit options to satisfy association members and participants. In order to leverage

[32] For the purposes of identifying MEPs sponsored by association for this report, we found indications (e.g., terms like association, cooperative, farm bureau, etc.) in both the names and websites of MEP sponsors which we used to determine which MEPs were sponsored by associations. We did not assess whether these plan sponsors would meet Labor's definition of "bona fide" association under ERISA. All four of the associations from which we interviewed representatives for our study also sponsored both defined benefit and defined contribution MEPs.

economies-of-scale, the MEP must keep the number of investment and benefit options manageable. However, one expert we spoke with said that certain association plans have been very effective at offering efficient, cost-effective retirement options for their members.

Professional Employer Organization MEPs

PEOs are the last sponsor type that appeared among the largest MEPs.[33] Specifically, two PEOs existed among the list of the largest 25 defined contribution MEPs in 2009—the ADP Totalsource Retirement Savings Plan and the Gevity 401(k) plan.[34] According to the National Association of PEOs (NAPEO), PEOs provide human resource services to their small business clients by processing and administering wage and tax payments and assuming responsibility and liability for compliance with various state and federal laws and regulations.[35] By NAPEO's estimate, PEO arrangements include between 2 and 3 million employees.

The PEO representatives we interviewed said their PEOs operated under what they referred to as a "coemployer" contract.[36] Though the term coemployer is not well-defined, according to the PEO sponsor representatives we interviewed, generally it means that a client employer signs a contract whereby the PEO assumes certain employer rights and responsibilities through the establishment and maintenance of an employer relationship with the workers assigned to its client. This usually includes administering a suite of human resources functions for the client such as payroll services, a worker's compensation program, and a health insurance plan. Additional services may also be offered or required, but

[33] We were unable to identify any PEOs that sponsored defined benefit MEPs, but interviewed representatives from three large PEO MEPs that exclusively sponsored defined contribution plans.

[34] TriNet, also a PEO, acquired Gevity in 2009.

[35] The NAPEO, until 1994, was known as the National Staff Leasing Association.

[36] We did not find coemployer defined in federal statute and many states do not specifically regulate PEOs in any way. Because the term PEO is not well-defined either, and the actual services are contractually determined, some refer to certain PEO practices as "employee leasing" or "payrolling," which involves providing administrative or financial services to employers, rather than serving as an employer in the sense of hiring or supervising workers. According to the Center for a Changing Workforce, in the late 1980s and early 1990s, many employee leasing firms went bankrupt or were forced out of business due to fraud, including payroll fraud and mishandling of employee retirement funds. See Center for a Changing Workforce, *PEOs and Payrolling: A History of Problems and a Future without Benefits* (Seattle, Washington: December 2001).

each PEO representative we interviewed said their PEO also offered a 401(k) defined contribution plan. According to one PEO representative, the PEO-sponsored 401(k) MEP was the fourth-most selected service option by clients. However, another PEO noted that the client could also sponsor a separate, non-MEP, single-employer plan—such as a 401(k)-style defined contribution plan—if it so chose.

The PEOs from which we interviewed representatives offered many plan benefit features that could be highly customized to the client. For example, one PEO representative said their plan allows client employers to specify vesting schedules, choose among various levels of employer contributions or matches, and add profit-sharing features.[37] The PEO representatives we interviewed said their PEOs had large numbers of participating employers in their plans.[38] Each PEO-sponsored defined contribution plan had at least 400 participating employers, but one had about 2,700—nearly three times the largest number of participating employers that we estimated for 2001.[39] The size of the typical client employer varied significantly and ranged both across and within industry sectors. For one PEO, the typical client employer had between 20 and 50 employees, but the PEO also had a client with nearly 3,000 employees. Two PEO representatives reported that their PEOs serve a broad array of industry sectors, though one representative noted that client employers are generally in various "white collar" industries, such as health care or public relations.

According to pension experts familiar with the industry and our analysis, PEO-sponsored MEPs grew both in size and number after IRS issued guidance in 2002 that identified defined contribution MEPs as a plan

[37] Profit-sharing plans, or similarly stock bonus plans, are a type of defined contribution plan that give employees a share of company profits. More specifically, these plans are a feature of a defined contribution plan under which an employer may determine, annually, how much will be contributed to the plan out of profits or revenue.

[38] According to our analysis, two industries associated with the PEOs observed marked growth with respect to both the number of defined contribution plans and participants from 2001 to 2009. Plan sponsors representing the "employment services" and "payroll services" industries combine to represent about 7 percent of MEPs and 10 percent of MEP participants. Notably, participation in plans represented by these industries saw a nearly three-fold increase over the 2001 to 2009 period and represent almost one-half million MEP participants as of 2009.

[39] See appendix I, table 4 and figure 5 for additional analysis of data we tabulated on participating employers from the 2001 Form 5500.

design some PEOs could use to avoid plan tax disqualification.[40] According to one plan sponsor, since the guidance was issued, MEPs have been the default plan design for PEOs—but the guidance did not address what constituted a PEO.

Open MEPs

Though not found among the largest plans, our review found that another MEP sponsor type emerged in recent years. As PEO-sponsored MEPs continued to grow, one firm, TAG Resources, LLC, started a new type of MEP: a defined contribution plan it called an "open" MEP.[41] The key differences between PEO MEPs and open MEPs appear to be that open MEPs do not (1) offer payroll management or other administrative services PEOs typically offer, or (2) purport to be an employer of plan participants. Employers in open MEPs are related solely by their participation in the MEP.

Since its inception in 2003, the TAG Resources open MEP grew to include 8,402 plan participants and about $64 million in assets at the end of the 2010 plan year. Another open MEP sponsored by 401kSafe, LLC was established in 2009 and already had 1,509 plan participants at the end of its 2010 plan year.[42] According to its website, that plan had been maintained by the largest PEO in the southeastern United States and became an open MEP to expand its pension plan to non-PEO clients.

While we identified only these two and two other open MEPs in Form 5500 data,[43] we independently identified many more that were apparently too new to appear in the data but were actively soliciting clients online. Plan sponsor representatives at one open MEP we spoke with said the plan already had about 500 participating employers and was adding up to

[40] Rev. Proc. 2002-21, 2002 -19 I.R.B. 911. The IRS guidance provided relief to PEOs sponsoring plans for employees who were working at client worksites but paid by the PEO to provide services to the client pursuant to a contract. The IRC provides that an employer's plan may be tax-qualified only if maintained for the exclusive benefit of its employees. 26 U.S.C. § 401(a)(2). The revenue procedure specified circumstances under which a PEO could cover employees located at client worksites under a pension plan by establishing a MEP with those client employers and thereby not violating the exclusive benefit requirement.

[41] This plan is known as the 401K Advantage, LLC 401K Plan.

[42] This plan is known as the 401K Safe, LLC Multiple Employer 401(K) Plan.

[43] These plans were the Benefitguard Retirement Income Security Plan and the National Retirement Security Cash Balance Plan.

30 employers per month. Additionally, we identified a consulting group that was designing open MEPs to be sponsored in such a way as to appeal to third-party service providers.[44] The third-party service provider would tailor the design of the plan to appeal to clients who might ultimately adopt the MEP as participating employers.

MEP Advantages Marketed to Employers May Not Be Unique

Reflecting some of the content of the marketing material we reviewed from PEO MEPs and open MEPs, MEP representatives told us that MEPs provide several advantages for employers over single-employer plan sponsorship: reduced fiduciary liability, reduced administrative responsibility, and reduced cost.[45] However, we found that these advantages may not always be unique to MEPs.[46] Based on our interviews with MEP representatives and the fact that, as stated earlier in this report, PEO and open MEPs are new and different compared to the other MEP types, it may be that PEO MEPs and open MEPs are the only MEP types marketing MEPs to employers. Consequently, the following section focuses on the advantages of MEPs overall in the context of how they would be presented to employers.

Reduced fiduciary liability—According to all of the PEO and open MEP representatives we interviewed, the firms that offer MEPs take on some fiduciary duties that would otherwise remain solely with the employers if employers managed their own plans; however, exactly how much relief

[44]Third-party service providers are outside professionals that may manage some or all of a plan's day-to-day operations. These services can include investment management, consulting and providing financial advice, record keeping, custodial or trustee services for plan assets, telephone or web-based customer services for participants and other third-party administrative services.

[45] The advantages and disadvantages identified in this section apply to whenever a sponsor can establish a MEP. Later in this report, we discuss how Labor and IRS regulatory interpretations influence MEP sponsorship, particularly with respect to open MEPs.

[46] In identifying individual alternatives to the possible advantages provided by MEPs, we did not assess whether these individual alternatives would be more appealing to an employer than the combination of advantages provided by MEPs.

from liability, if any, the firm can provide to employers is unclear.[47] In taking some of the fiduciary responsibility, these firms have control over the management or assets of the plan, which, according to one MEP representative, includes fund selection, due diligence in tracking the investment performance, and employee communication. Prior GAO work identified the burden of fiduciary liability as a possible impediment to small-employer plan sponsorship.[48] According to one open MEP representative, reducing fiduciary liability is the primary reason employers participate in MEPs. Our prior work suggests this may be because some employers are not familiar with how to manage a plan. However, there may be other ways for employers to gain the same degree of reduced fiduciary responsibility as afforded by a MEP. For example, we found a firm marketing its willingness to establish and manage the investments of single-employer plans on the behalf of individual employers.[49]

In contrast to the claims made by some MEP representatives, several plan representatives and pension experts we spoke with said firms that offer MEPs cannot assume all fiduciary liability on behalf of the participating employer. Although a firm that offers a MEP can generally control the plan on behalf of the participating employers, as Labor notes on its website, at a minimum, the employers must still select a MEP to join, which is considered a fiduciary function, and retain responsibility to monitor the plan's investments and fees. However, some MEP marketing materials we reviewed may give an impression that enrolling in MEPs eliminates fiduciary liability for employers entirely. Further, two of the MEP representatives stated that MEPs did eliminate fiduciary liability for employers.

[47] Under ERISA, a fiduciary is anyone who exercises any discretionary authority or discretionary control respecting management of a plan or exercises any authority or control respecting its assets or renders investment advice for a fee or compensation to the plan or has authority to do so. ERISA provides that a plan's fiduciaries must carry out their responsibilities prudently and do so solely in the interest of the plan's participants and beneficiaries. 29 U.S.C. §§ 1002(21) and 1104(a).

[48] GAO-12-326.

[49] In a previous report, we noted that, unlike this firm, service providers sometimes do not acknowledge that they are plan fiduciaries even though plan sponsors assume them to be. When a service provider is not a plan fiduciary, it is not bound by the fiduciary duty under ERISA to act prudently and solely in the plan's best interest. See GAO, *Private Pensions: Fulfilling Fiduciary Obligations Can Present Challenges for 401(k) Plan Sponsors*, GAO-08-774 (Washington, D.C.: July 16, 2008).

Reduced administrative responsibility—All of the PEO and open MEP representatives we interviewed said firms that offer MEPs assume administrative responsibilities that employers would retain if they managed their own plans. Several MEP representatives said MEP administrators can complete the record keeping and annual testing, and submit required filings such as a single Form 5500 for the MEP on behalf of all the participating employers. Additionally, a couple of the interviewees said that employers not already offering plans might find it easier and faster to join a MEP than to create their own administrative structure with a single-employer plan. However, our prior work has shown that individual sponsoring employers can also use service providers to perform administrative functions similar to those that MEPs offer.[50] Further, PEOs that offer payroll services may offer similar plan administrative services for small employers that sponsor a single-employer plan through the PEO.[51] Consequently, it is unclear how, if at all, the administrative services offered by a MEP differ significantly from those offered for a single plan through a PEO. Finally, a couple of MEP representatives identified the difficulty involved with tracking some of the administrative tasks needed for a MEP if the participating businesses did not have a common payroll remitter. One pension expert thought that this complexity increased the chance that the MEP could fail to meet some of its administrative responsibilities.

Reduced cost—All of the PEO and open MEP representatives we interviewed thought that participating in MEPs may offer reduced costs as compared to single-employer plan sponsorship since participating employers can pool assets to obtain the lower pricing available to the larger plans. Additionally, several interviewees described how employers may not need to pay for additional services from third-party administrators or financial experts, which may be similar to what our prior work described as bundled services.[52] Further, while enrolling in MEPs can save time for employers without a prior plan, as mentioned earlier, a couple of interviewees said MEPs may also save money since the employer will not need to spend money to create an initial plan document for a new single-employer plan. Lastly, in some cases, a firm offering a

[50] See GAO-12-326.

[51] See GAO-12-326.

[52] See GAO-12-326.

MEP is only required to conduct a single plan audit, which a few interviewees told us can be expensive for individual employers sponsoring their own plans. This may reduce costs for larger participating employers; however, employers with fewer than 100 participants are not required to audit their plans.

Overall, no consensus existed among MEP representatives and pension experts on whether or not MEPs such as PEO MEPs or open MEPs would substantially expand pension coverage. Several MEP representatives thought that MEPs had the potential to expand coverage, especially among small to mid-size employers that could benefit from the potential administrative and cost advantages. However, a couple of pension experts were skeptical that open MEPs would have much of an impact in expanding retirement plan coverage. For example, one pension expert said employee demand, rather than cost benefits offered by MEPs, drives whether or not a business sponsors a plan. In our prior work, small employers reported that employees may prefer to have health care coverage or may not be interested in participating in a retirement plan.[53] The pension expert also observed that small businesses do not extensively research retirement plans or actively seek them out. As a consequence, marketing may be the biggest determinant of MEP growth. Additionally, while a couple of the MEPs we spoke with had offerings for employers to start new plans through the MEP, several targeted businesses with existing plans. For example, an open MEP representative said their adopting employers usually have over 100 employees or plan assets of $2 million to $5 million.

There is also concern about whether MEPs are any more or less prone to abuse than other types of pension arrangements. Labor officials said the potential for inadequate employer oversight of the MEP is greater because employers have passed along so much responsibility to the entity controlling the MEP. Labor officials noted that potential abuses might include layering of fees, misuse of the assets, or falsification of benefit statements.[54] One pension expert agreed that there was potential

[53] See GAO-12-326.

[54] As an illustration of the potential risk, an individual acting as the trustee and fiduciary of several MEPs has been indicted for allegedly using plan funds for personal use and misrepresenting the fund investments to clients. *Solis v. Hutcheson*, 12-cv-236 (D. Idaho). The district court has entered a temporary restraining order removing defendant Matthew Hutcheson from plan administration and appointing an independent fiduciary to take control of plan assets.

for MEPs to charge excess fees without the enrolled employer being aware of those fees.[55] While Labor officials acknowledged that single-employer plans could be subject to similar abuses, they cautioned that MEPs' structure and operation could make them particularly susceptible to such abuses.

Finally, a number of interviewees identified the "bad apple rule" as a potential problem for MEPs. Specifically, in order to retain its tax-qualified status and the associated tax advantages for the employer and employees, IRS requires the firm offering the MEP to annually test each employer to ensure that the contributions or benefits provided under the plan do not discriminate against rank-and-file workers in favor of highly compensated employees.[56] If the tests find that one participating employer discriminated against its rank-and-file workers, this might cause the entire MEP to be considered noncompliant. However, many MEP representatives we had spoken with said that, to date, they had never needed to expel a participating employer because of noncompliance and that making voluntary compliance corrections with the IRS was not difficult.[57]

[55] A GAO report found that single employers that sponsored plans may not be aware of the fees they were charged and likely paid more than they realized. See GAO, *401k Plans: Increased Education Outreach and Broader Oversight May Help Reduce Plan Fees*, GAO-12-325 (Washington, D.C.: Apr. 24, 2012).

[56] 26 U.S.C. § 401(a)(4); 26 C.F.R. §§ 1.401(a)(4)-1, 1.401(a)(4)-4 and 1.413-2(a)(3)(iv) (2012).

[57] The firm offering the MEP can voluntarily resolve plan compliance problems through the IRS's Employee Plans Compliance Resolution System. One MEP representative told us that IRS is helpful in correcting any compliance issues or mistakes.

IRS and Labor Treat MEPs Differently, Reflecting a Lack of Coordination

Labor and IRS treat MEPs differently because they are charged with interpreting different titles of ERISA.[58] Labor is primarily responsible for interpreting and applying Title I of ERISA, which, among other things, defines an employee benefit plan.[59] In contrast to Labor, IRS is responsible for determining whether plans qualify for preferential tax treatment under Title II of ERISA, which amended the IRC. For Labor's purposes, under ERISA a plan can be maintained only by an employer, an employee organization, or both.[60] For the IRS's purposes, the IRC does not contain a definition of "employee benefit plan," nor does it include any explicit requirement that a plan be maintained by an employer or an employee organization.

Labor and IRS have not fully coordinated their statutory interpretations related to MEPs with Labor's advisory opinions. On May 25, 2012, Labor issued two advisory opinions on open MEP arrangements and found an open MEP was not a single employee benefit plan under Title I of ERISA.[61,62] However, applying tax law, IRS has found at least one open

[58] Title II of ERISA amended the IRC. Although those provisions are, therefore, usually thought of and referred to only as part of the IRC, they were enacted as part of ERISA. ERISA, §§ 1001-2007, 88 Stat. 898-994.

[59] 29 U.S.C. § 1002(3).

[60] 29 U.S.C. § 1002(1) and (2). Therefore, unless a plan is maintained by an employee organization such as a union, it can only be maintained under ERISA by an employer. The Title I definition of employer is "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(5). Under its advisory opinions, Labor has long looked at certain factors, such as pre-existing relationships among employers, to determine if a group of employers constitutes a bona fide association of employers that may, therefore, sponsor a single employer plan under Title I of ERISA. Pension and Welfare Benefits Admin., U.S. Dept. of Labor, Advisory Opinion 83-15A, 1983 ERISA Lexis 43.

[61] Department of Labor Advisory Op. 2012-04A was issued to an operating open MEP. In addition, on May 25, 2012, Labor released another relevant opinion. Department of Labor Advisory Op. 2012-03A was issued to a firm interested in maintaining a MEP comprised of the abandoned plans of multiple employers.

[62] While we note that Labor and IRS have not coordinated their statutory interpretations more broadly, the agencies did directly collaborate on the advisory opinions themselves. According to agency officials, Labor, IRS, and PBGC extensively discussed Labor's two recently issued advisory opinions related to MEPs prior to their publication.

MEP, operating since 2003, qualified for preferential tax treatment.[63] IRS officials said IRS does not take into consideration a MEP's status under Title I of ERISA when considering whether it qualifies for preferential tax treatment. IRS focuses solely on compliance with IRC provisions. In the advisory opinions, Labor, and more specifically EBSA, opined that it considers the participating employers in an open MEP to be sponsoring their own plans for their own employees. The advisory opinions mean that an open MEP is simultaneously considered both a single plan by IRS, for purposes of certain tax laws, and a series of plans by Labor.[64] This presumably means that an open MEP will have to file annual reports on behalf of each individual employer to satisfy Labor and also as one single plan to satisfy IRS. Filing both ways would create duplications in reporting and redundancies in Form 5500 data.[65]

The May 25th advisory opinions are the latest in a series of advisory opinions dating back to at least the late 1970s on benefit plans maintained by multiple employers.[66] On both MEWAs (arrangements providing welfare benefits such as health coverage) and MEPs, Labor has held that multiple employers may maintain a single plan through a bona fide employer group or association of employers. However, Labor has been careful to define the nature of such an association in advisory

[63] While the opinion clarified that open MEPs are not considered single-employee benefit plans under ERISA, the opinion does not preclude the possibility of IRS determining that an open MEP qualifies for preferential tax treatment under the IRC. Indeed, the advisory opinion specifically states that Labor was not expressing any opinion on the tax-qualified status of pension plans that cover employees of multiple employers.

[64] EBSA is the entity within Labor that determines what constitutes an employee benefit plan under Title I of ERISA. However, PBGC, which is also within Labor, defines a MEP differently for purposes of Title IV of ERISA, and uses a definition based on whether plan assets are available to pay the benefits of all participants and beneficiaries, according to PBGC officials.

[65] As an additional example, the IRC requires pension plans subject to ERISA's vesting requirements to report annually (using IRS Form 8955-SSA) on information such as the names and taxpayer identification numbers of plan participants who have separated from the plan and are entitled to deferred vested benefits but received none during the year. 26 U.S.C. § 6057(a)(1). As part of a qualified MEP it is not clear whether participating employers must submit this form to IRS or not.

[66] For example, in 1983, Labor opined that over 100 agencies affiliated with a local United Way lacked the relationship necessary to sponsor a single employee pension benefit plan under ERISA, even though they coordinated services and made a common appeal for donations. Pension and Welfare Benefits Admin., U.S. Dept. of Labor, Advisory Opinion 83-21A, 1983 ERISA Lexis 38.

opinions.[67] A bona fide association may establish a plan because Labor considers the association to be an "employer" under section 3(5) of ERISA.[68] Labor clarified in the May 25th opinions that it interprets the term "employer" in ERISA as having the same meaning whether applied to MEWAs or MEPs.[69]

Labor and Treasury are required to coordinate under ERISA.[70] Labor and IRS have discussed these issues, but they have not coordinated to develop rules, policies, or practices to reduce the duplication of reporting and the burden of compliance with ERISA. IRS officials said they recognize the need to work with Labor on these issues, but they have not yet formulated the changes that may need to be implemented. Labor and IRS maintain an agreement relating to coordinating investigations generally, but the agreement does not include any coordination of statutory interpretations reflected in Labor's advisory opinions related to MEPs.

Labor's Response to Open MEPs Leaves Unanswered Compliance Questions

Labor's May 25th advisory opinions have implications for those administering or planning to administer an open MEP. These opinions clarify that reporting, auditing, and bonding requirements—which MEPs applied across participants in the aggregate—must be applied to each

[67] According to Labor officials, a PEO does not represent a bona fide association but establishes an employer relationship with the employees of its clients through the services it offers them. A bona fide association is established in part when participating employers control the plan.

[68] 29 U.S.C. § 1002(5).

[69] Labor's advisory opinions on MEWAs may have been prompted by abuses by their promoters. Labor officials said not long after Congress enacted ERISA, Labor began enforcement actions against MEWA operators for charging excessive administrative fees and leaving plans unable to pay promised benefits, among other abuses. See GAO*, Employee Benefits: States Need Labor's Help Regulating Multiple Employer Welfare Arrangements,* GAO/HRD-92-40 (Washington, D.C.: Mar. 10, 1992). When state insurance regulators found such practices violated their insurance laws, MEWAs claimed to be ERISA-covered plans preempted from state regulation. According to a Labor official, the MEWAs that failed to maintain adequate funds to pay promised benefits were often comprised of otherwise unrelated employers. Labor is still confronting challenges stemming from participant abuses. On December 6, 2011, under new authority Labor was granted by the Patient Protection and Affordable Care Act (Pub. L. No. 111-148 § 6606, 124 Stat.119, 781, (codified at 29 U.S.C. § 1021(g) (2010), Labor proposed new reporting requirements to better regulate MEWAs. 76. Fed. Reg. 76,222. (Dec. 6, 2011).

[70] 29 U.S.C. § 1204.

participating employer in an open MEP. Employee benefit plans under ERISA are subject to ERISA's fiduciary provisions and are required to file an annual report with Labor (using a Form 5500).[71] Labor may fine plan administrators who fail to file an annual report up to $30,000 per year until the report is filed.

The advisory opinions will likely prompt a range of responses according to those we interviewed. Two open MEP representatives reported they will take steps to bring their arrangements into compliance. An open MEP's fiduciaries can conduct new plan audits, assure employer compliance with ERISA fidelity bond requirements, and file Form 5500s for each employer, according to an open MEP representative and a pension expert. Others will likely exit the market, according to one pension expert. Some representatives of MEPs sponsored by PEOs and associations reported that the opinions had no impact on their plans.

The advisory opinions may also affect federal oversight of open MEPs. A pension expert said open MEPs would be more likely to be selected for an IRS audit as a result of the increased reporting. The pension expert also suggested that disaggregating open MEPs into their underlying ERISA plans may reveal prohibited transactions that were not obvious before.[72]

The advisory opinions could also lead to higher costs for open MEPs. Treating participating employers as plan sponsors will be expensive, according to some MEP representatives and pension experts. Some open MEP representatives said firms would pass costs associated with compliance on to plan participants. One representative estimated administrative fees covering plan maintenance costs could increase by up to 50 percent and that increased costs will create a disincentive to plan formation and contract pension coverage.

MEP sponsors have already raised questions about the broader applicability of the advisory opinions. Specifically, they have made informal inquiries to Labor as to whether their pension benefit

[71] 29 U.S.C. §§ 1002(21) and 1104, and 1023(a)(1), respectively.

[72] Certain transactions between plans and parties-in-interest or fiduciaries are statutorily prohibited. Such transactions generally include activities that could be characterized as forms of self-dealing and other conflicts of interest. 29 U.S.C § 1106.

arrangements are in fact open MEPs. Labor officials encouraged those sponsors to submit a formal request for an advisory opinion. Labor officials said each advisory opinion is based on the facts presented and, as established under its procedure for advisory opinions, only the parties described in the request for the opinion may rely on the opinion. However, advisory opinions provide a legal interpretation of ERISA and a discussion of factual situations that may be useful to persons not subject to it. Labor officials said that they issued opinions on two different plan structures to show that the agency's reasoning would hold under various circumstances.

Compliance assistance from Labor or IRS would help open MEP sponsors navigate the compliance requirements, according to two pension experts. One pension expert said that prompt guidance would be vital since certain plan sponsors submit requests for IRS determinations of their plans' tax-qualified status on a 5-year cycle, and MEPs are in such a cycle now.[73] However, IRS officials reported that as of June 21, 2012, they were still in the process of analyzing Labor's advisory opinions, and did not yet know if they would need to change their determination procedures accordingly. IRS officials told us it was premature to consider changes to their determination procedures until they analyze the full impact of the opinions and more fully discuss them with Labor. IRS officials noted any such change would necessitate an outreach program to employers and practitioners. Labor officials said they are responding to inquiries by open MEPs on a case-by-case basis as part of their normal compliance and enforcement activities.[74]

Policy questions may still need to be addressed. One pension expert explained that while Advisory Opinion 2012-04A clarified Labor's position on open MEPs, it did not explain Labor's underlying policy concerns in detail. The opinion also did not provide Labor's view on the potential of open MEPs to lower plan costs or expand coverage. One pension expert suggested Labor officials may have felt bound to the agency's prior position by decades of existing precedent. However, another pension

[73] The cycle for multiple employer plans is "cycle B" and the current determination letter submission period opens on February 1, 2012, and ends on January 31, 2013.

[74] For example, Labor officials told us they intend to address open MEP compliance issues such as prohibited transactions through the established processes of EBSA regional offices.

expert suggested Labor could have deemed open MEPs to be plans under ERISA but gave greater weight to its objective of ensuring benefit security. Both open MEP representatives and these pension experts said open MEP-like designs will continue to receive the attention of policymakers, given interest in expanding pension coverage.[75] Pension experts also cautioned that any legislative change allowing certain open MEPs should ensure that there are appropriate safeguards to protect plan participants.[76]

Conclusions

MEPs are touted by some as a way for small employers to centralize administration and reduce pension plan costs. However, given that no data are collected on participating employers in MEPs, pension experts and agency officials cannot determine how employers utilize MEPs, let alone how beneficial the MEP design may be to employers and plan participants. While MEPs have long been affiliated with associations or complicated employer relationships, new sponsor types have emerged that call into question the current understanding of these relationships, which are a key aspect of ERISA's requirements on employee benefit plans. Furthermore, it appears that actions taken by IRS, while providing some relief to certain PEOs has fostered the adoption of these new sponsor types of MEPs, including the most recent: "open" MEPs. Yet, at this time, no one knows for certain how many open MEPs there are, who is in them, or how they may affect future pension coverage. To identify ways to assess, mitigate, and monitor risks of MEPs in the future, Labor

[75] For example, one California proposal would provide for a retirement savings trust administered by the state and generally require employers with five or more employees to offer a payroll deposit arrangement so employees could contribute part of their pay to an account in that retirement savings trust. Calif. SB 1234 (2012). Effective June 20, 2012, Massachusetts permits the state treasurer to administer a plan for small, nonprofit employers after getting "approval" from the IRS and assurances that the plan is consistent with ERISA. Mass. Gen. Laws ch. 29, § 64E (2012). We did not assess whether such arrangements would operate as private sector or governmental plans, any preemption issues, or whether they could be structured as bona fide MEPs consistent with Labor's recent advisory opinions. State and local government plans are excepted from coverage under Title I of ERISA.

[76] Specifically, one expert suggested a safe harbor design may be an ideal model for an open, defined contribution MEP. A safe harbor 401(k) must provide for mandatory employer contributions that are fully vested when made. The safe harbor 401(k) plan is not subject to the annual nondiscrimination tests that apply to traditional 401(k) plans. 26 C.F.R. § 1.401(k)-3 (2012).

needs comprehensive and more current information about MEPs and their designs.

There also appears to be a lack of coordination between IRS and Labor on the application of different statutory requirements to MEPs. Newer MEP designs appear to be a result of practitioners interpreting IRS guidance on their tax-qualified status as a broader endorsement of their plan designs. However, following the IRC, IRS does not take into account ERISA Title I standards for employee benefit plans when determining tax-qualified status. The IRS may continue to find that an open MEP qualifies for preferential tax treatment and promoters may use such qualification as a tool for marketing their arrangements to employers—even though Labor does not consider an open MEP to be a single employer benefit plan under ERISA. Inadequate coordination, rather than setting the groundwork for sound, sensible, and cost-efficient oversight, is likely to lead to future compliance uncertainty and may ultimately risk participants' retirement security.

Labor's recently issued advisory opinions, consistent with previous opinions on employee benefit plans, establish that a common employment nexus or other genuine organizational relationship unrelated to the provision of benefits is required to maintain a pension plan among multiple employers. Labor's expectation is that the recently issued opinions on open MEPs will serve as guidance to the pension industry at large. However, the application of such specific opinions is not always clear, and may be shaped by future requests for additional advisory opinions.

Recommendations for Executive Action

Labor

The Secretary of Labor should direct the EBSA to take the lead in gathering useful oversight information about the employers that participate in MEPs. A likely source for collection of this data would be the Form 5500, as it is the primary source of private pension data for government oversight activities.

Labor and Treasury

The Secretary of Labor should instruct the Assistant Secretary of EBSA and the Secretary of the Treasury should instruct the Commissioner of

Internal Revenue to formalize their coordination with regard to the statutory interpretations reflected in Labor's advisory opinions related to MEPs. Furthermore, the agencies should coordinate to develop compliance-related guidance on the establishment and operation of MEPs under ERISA and the IRC.

Agency Comments and Our Evaluation

We provided a draft of this report to Labor, Treasury (specifically including IRS), and PBGC for their review and comment. Labor, Treasury and PBGC provided written comments, which are reproduced in Appendix II, III, and IV respectively. PBGC and Labor provided technical comments, which we incorporated where appropriate.

The agencies generally agreed with the findings and conclusions of the report. Additionally, they expressed a commitment to expanding retirement plan coverage while also protecting the retirement benefits of workers, retirees and their families. GAO shares this commitment to expanding and promoting pension coverage in a manner that bolsters the retirement security of American workers. However, largely due to a lack of data, we could not fully examine how MEPs are utilized by employers or how they affect pension coverage overall. With better information to permit appropriate oversight, new MEP designs may prove to be viable options for sponsors and participants.

The agencies generally agreed with the recommendation on data and suggested that, as part of their regular evaluations of changes to the Form 5500, they would consider the merits of alternative methods of collecting additional data about employers that participate in MEPs, among other possible changes to the Form 5500. We believe that such an evaluation is an important first step in determining how to collect useful information on employers that participate in MEPs.

The agencies also agreed with our recommendation to provide for coordination of the statutory interpretations of Title I of ERISA and Title II of ERISA (as reflected in the IRC) in connection with MEPs. We are encouraged that that the agencies coordinated on the advisory opinions to some extent during their development and issuance—consulting on the text of the opinions, making revisions, and discussing issues arising from their issuance. We added language in our report to reflect this coordination. Additionally, we modified the recommendation to acknowledge that there are a variety of mechanisms they could use to improve and formalize their coordination. Labor and IRS said they would amend their coordination agreement when compliance issues become

more apparent or if the impact of the advisory opinions suggests such coordination would be helpful.

While our recommendation did not specify how or when the agencies should modify or formalize coordination agreements on statutory interpretations, we believe that it would be prudent to do so sooner rather than later. With respect to mechanisms for formalizing future coordination of statutory interpretations on MEPs in a more deliberative way, the agencies could modify their existing agreement on investigations or, if more appropriate, the agencies could initiate a new agreement, for example, via a memorandum of understanding or similar document. Further, our report contains evidence that the conditions the agencies believe would warrant modifying or formalizing agreements are already evident, namely concerns about compliance and the possible impacts of the opinions. Additionally, our report notes that the advisory opinions do not preclude the IRS from determining that open MEPs qualify for preferential tax treatment in the future. Currently, each of the three primary agencies regulating MEPs uses different criteria to define these plans for plan sponsors and administrators. Absent coordinated federal decisions, the potential exists for uncertainty within the regulated community and confusion for employers. By coordinating their statutory interpretations and subsequent guidance, these agencies could start to help create a clear, unified regulatory environment to optimize the potential for MEPs as an effective vehicle of pension coverage.

As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 21 days from the report date. We are sending copies of this report to the Secretary of Labor, the Secretary of the Treasury, the Director of PBGC, and other interested parties. This report is also available at no charge on the GAO website at http://www.gao.gov.

If you or your staff have any questions regarding this report, please contact me at (202) 512-7215 or jeszeckc@gao.gov. Contact points for

our Offices of Congressional Relations and Public Affairs can be found on the last page of this report. Key contributors are listed in appendix V.

Sincerely yours,

Charles Jeszeck
Director, Education, Workforce,
and Income Security Issues

Appendix I: GAO Analysis of Multiple Employer Plan Data

To determine the largest multiple employer plan (MEP) sponsors and other key MEP characteristics, we analyzed electronic Form 5500 information, the primary source of private pension data.[1] We analyzed 2009 Form 5500 information, the most current and complete year, and also used 2001 information to compare trends over time. We chose 2001 Form 5500 data as the comparison year because 2001 information is known to have fewer errors than certain prior years. The 2001 data also includes the Schedule T, which allowed us to estimate employers participating in MEPs for that year.

Problems with the electronic data of the Form 5500 have been previously documented.[2] However, we took steps to assess the reliability of the data and determined the data to be sufficiently reliable for our purposes. For example, we performed computer analyses of the data and identified inconsistencies and other indications of error and took steps to correct inconsistencies or errors. A second analyst checked all computer analyses.

We chose to use "raw" 5500 data rather than Labor's research files because the research data do not specifically focus on MEPs. According to Employee Benefits Security Administration (EBSA) officials, the research data are cleaned for common mistakes and the main focus of the effort is to assure that the historical relationship between single and multiemployer plans is accurate. Thus, the research data are not specifically cleaned with respect to MEP identification. Thus, MEPs may be recoded in the research data to single or multiemployer plans and there is no specific effort to better identify MEPs in the data.

We found the Department of Labor's (Labor) characterization of MEPs in the research files not to be well-suited for our analysis. Labor's research data appear to recode a sponsor's indication of MEP status using an inconsistent method. This inconsistency is noted in certain Labor

[1] Relatedly, Labor notes that the data collected for the Form 5500 is not easily used to determine the number or characteristics of MEPs because the research data files and the methodology underlying the analysis is designed to support Labor's statistical categorization and not designed to separately identify MEPs.

[2] See GAO, *Retirement Income Data: Improvements Could Better Support Analysis of Future Retirees' Prospects*, GAO-03-337 (Washington, D.C.: Mar. 21, 2003).

publications.[3] For example, Labor does not publish basic pension plan information about MEP sponsorship in its Private Pension Bulletins. The bulletins include only information about single-employer and multiemployer plans and include MEPs as either a single- or multiemployer plan type. In the footnotes, which disclose how MEPs are allocated across the single- and multiemployer categories, indication of collectively bargained participants in the MEP is the key determinant. For example, one of the footnotes indicates that if the MEP includes collectively bargained participants it would be characterized as a multiemployer plan in the bulletin. This is inaccurate—and at odds with the Form 5500 instructions—as MEPs may or may not include participants that are subject to collective bargaining; however, the collective bargaining agreement does not define the conditions and maintenance of the plan as it does for a multiemployer plan. Further, MEP administrators pay single-employer premiums for the MEP as a whole for purposes of Pension Benefit Guaranty Corporation (PBGC) insurance.

We also found that that Labor does not consistently recode MEPs in the Form 5500 research file according to collective bargaining status—which violates the stated allocation rules in the footnotes of the pension bulletin. Certain MEPs that include participants that are subject to collective bargaining may be recoded as single-employer plans.

For our analysis we made no attempt to recode plan types, notably for those plans identified as MEPs. Labor officials told us that certain plans may be mistakenly identified as MEPs on the Form 5500, but may actually be another plan type. However, to identify such mistakes would require detailed and time-consuming review of plan and sponsor documentation that is not publically available and may not be definitive. Thus, our analysis of MEP and other plan types is limited to the self-reported plan status as indicated by the Form 5500 filer.

Given that little information about MEPs is known or publically available, we have included additional tables and figures from our analysis that were not included in the body of this report. These figures and tables

[3] See U.S. Department of Labor Employee Benefits Security Administration, *Private Pension Plan Bulletin Historical Tables and Graphs*, 2009 Data Release Version 1.2 (Washington, D.C.: March 2012) and U.S. Department of Labor Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2009 Form 5500 Annual Reports*, Version 1.0 (Washington, D.C.: December 2011).

include information about the largest MEPs, plan funding methods, key sponsor industries, and participating employer information culled from Schedule T attachments.

Figure 3: Top 25 Plan Sponsors of Defined Benefit MEPs, as Measured by Total Plan Participants, 2009

Rank	Plan sponsor (Plan name)	Year plan established	Total participants	Percentage of all defined benefit MEP participants represented by plan	Plan assets (actuarial assets in billions of dollars)	Percentage of DB MEP (actuarial) assets represented by plan	Sponsor or sponsor subsidiary is among 2011 Global/ Fortune 500
1	**General Electric Company** (GE Pension Plan)	1912	529,666	24.2%	$44.80	40.6%	X
2	**American International Group, Inc.** (American International Group, Inc. Retirement Plan)	1985	73,289	3.4%	$2.72	2.5%	X
3	**Siemens Corporation** (Siemens Pension Plan)	1965	68,632	3.1%	$2.79	2.5%	X
4	**YUM Brands, Inc.** (YUM Brands Retirement Plan)	1997	64,028	2.9%	$0.65	0.6%	X
5	**National Rural Electric Cooperative Association** (Retirement Security Plan)	1948	63,537	2.9%	$4.32	3.9%	
6	**Supervalu Inc.** (Supervalu Inc. Retirement Plan)	1976	62,802	2.9%	$1.17	1.1%	X
7	**The Cleveland Clinic Foundation** (CCHS Retirement Plan)	1941	51,600	2.4%	$0.62	0.6%	
8	**Gannett Co., Inc.** (Gannett Retirement Plan)	1949	51,497	2.4%	$1.78	1.6%	X
9	**UPMC** (UPMC Basic Retirement Plan)	1974	50,898	2.3%	$0.72	0.7%	
10	**Continental Airlines, Inc.** (The Continental Retirement Plan)	1988	49,608	2.3%	$1.05	1.0%	X
11	**Nationwide Mutual Insurance Company** (Nationwide Retirement Plan)	1946	49,322	2.3%	$3.49	3.2%	X
12	**Ahold USA Inc.** (Ahold USA Inc. Pension Plan)	1978	49,295	2.3%	$0.91	0.8%	X
13	**Pentegra DB Plan for Financial Inst.** (Pentegra Defined Benefit Plan for Financial Inst.)	1943	41,378	1.9%	$2.05	1.9%	
14	**Sutter Health** (Sutter Health Retirement Plan)	1959	40,238	1.8%	$1.36	1.2%	
15	**Time Warner Inc.** (Time Warner Pension Plan)	1943	36,907	1.7%	$1.71	1.5%	X
16	**United Benefits Group** (Co-op Retirement Plan)	1946	34,025	1.6%	$0.93	0.8%	
17	**Xerox Corporation** (Xerox Corporation Retirement Income Guarantee Plan)	1977	33,980	1.6%	$1.33	1.2%	X
18	**Dana Limited** (Dana Retirement Plan)	1942	33,067	1.5%	$1.11	1.0%	X
19	**Thomson Reuters Holdings Inc.** (Thomson Reuters Group Pension Plan)	1971	32,268	1.5%	$1.34	1.2%	
20	**Citizens Financial Group, Inc.** (RBS Americas Pension Plan)	1961	30,892	1.4%	$0.88	0.8%	X
21	**Cargill, Incorporated** (Cargill, Inc. and Associated Companies Salaried Employees Pension Plan)	1955	29,828	1.4%	$1.04	0.9%	
22	**John Hancock Financial Services, Inc.** (John Hancock Pension Plan)	1960	27,133	1.2%	$1.79	1.6%	X
23	**Meadwestvaco Corporation** (MWV Corporation Retirement Plan for Salaried and non-bargained Hourly Employees)	1944	24,145	1.1%	$1.62	1.5%	X
24	**Robert Bosch LLC** (Bosch Pension Plan)	1963	22,899	1.0%	$0.83	0.7%	X
25	**Babcock & Wilcox Technical Services Y-12, LLC** (Retirement Program Plan for Employees of Certain Employers at the U.S. Department of Energy Facilities at Oak Ridge, TN)	2000	19,408	0.9%	$2.72	2.5%	
	Totals		**1,570,342**	**71.8%**	**$83.7**	**75.8%**	

Source: GAO analysis of 2009 Form 5500 data as well as 2011 Global Fortune 500 and 2011 Fortune 500 data.

Figure 4: Top 25 Plan Sponsors of Defined Contribution MEPs, as Measured by Total Plan Participants, 2009

Rank	Plan sponsor (Plan name)	Year plan established	Total participants	Percentage of all defined contribution MEP participants represented by plan	Plan assets (EOY assets in billions of dollars)	Percentage of MEP assets represented by plan	Sponsor or sponsor subsidiary is among 2011 Global/ Fortune 500
1	**Target Corporation** (Target Corporation 401(k) Plan)	1967	276,763	6.1%	$4.8	2.7%	X
2	**General Electric Company** (GE Savings and Security Program)	1958	263,098	5.8%	$17.3	9.9%	X
3	**ADP Total Source Group, Inc.** (ADP Total Source Retirement Savings Plan)	1988	149,393	3.3%	$1.1	0.6%	X
4	**Siemens Corporation** (Siemens Savings Plan)	1980	100,353	2.2%	$6.9	3.9%	X
5	**FirstGroup America, Inc.** (FirstGroup America, Inc. Retirement Savings Plan)	2009	75,608	1.7%	$0.2	0.1%	
6	**Young Men's Christian Association Retirement Fund** (Young Men's Christian Association Retirement Fund Retirement Plan)	1922	72,948	1.6%	$3.0	1.7%	
7	**Microsoft Corporation** (Microsoft Corporation Savings Plus 401(k) Plan)	1987	69,207	1.5%	$5.9	3.4%	X
8	**National Rural Electric Cooperative Association** (401(k) Pension Plan)	1967	68,964	1.5%	$4.5	2.6%	
9	**Computer Sciences Corporation** (Computer Sciences Corporation Matched Asset Plan)	1967	62,947	1.4%	$2.9	1.6%	X
10	**American International Group, Inc.** (American International Group, Inc. Incentive Savings Plan)	1985	62,681	1.4%	$2.8	1.6%	X
11	**Ahold USA Inc.** (Ahold USA Inc. Pension Plan)	1968	53,765	1.2%	$0.8	0.5%	X
12	**UPMC** (UPMC 401(a) Retirement Savings Plan)	1996	51,284	1.1%	$0.7	0.4%	
13	**Quest Diagnostics Incorporated** (The Profit Sharing Plan of Quest Diagnostics Incorporated)	1973	49,359	1.1%	$2.3	1.3%	X
14	**Xerox Corporation** (Xerox Corporation Savings Plan)	1945	48,155	1.1%	$4.1	2.3%	X
15	**The Cleveland Clinic Foundation** (The Cleveland Clinic Health System Savings and Investment Plan)	1971	48,057	1.1%	$1.7	1.0%	
16	**Nationwide Mutual Insurance Company** (Nationwide Savings Plan)	1968	45,783	1.0%	$2.9	1.6%	X
17	**Time Warner Inc.** (Time Warner Savings Plan)	1977	43,286	1.0%	$3.3	1.9%	X
18	**Hilton Worldwide, Inc.** (Hilton Hotels 401(k) Savings Plan)	1979	42,974	0.9%	$0.7	0.4%	
19	**Exxon Mobil Corporation** (Exxonmobil Savings Plan)	1961	42,538	0.9%	$18.1	10.3%	X
20	**MGM Mirage** (The MGM Mirage 401(k) Savings Plan)	1993	40,178	0.9%	$0.8	0.5%	X
21	**Gannett Co., Inc.** (The Gannett 401(k) Savings Plan)	1990	39,221	0.9%	$1.2	0.7%	X
22	**UPMC** (UPMC 403(b) Retirement Savings Plan)	1967	39,025	0.9%	$0.8	0.5%	
23	**Barnes & Noble, Inc.** (Barnes & Noble, Inc. 401(k) Savings Plan)	1987	34,559	0.8%	$0.3	0.2%	X
24	**Gevity HR Inc** (Gevity 401K Plan)	2003	31,993	0.7%	$0.2	0.1%	
25	**Novartis Pharmaceuticals Corporation** (Novartis Pharmaceuticals Corporation Investment Savings Plan)	1967	28,851	0.6%	$2.7	1.5%	X
	Totals		**1,849,186**	**40.5%**	**$90.0**	**51.3%**	

Source: GAO analysis of 2009 Form 5500 data as well as 2011 Global Fortune 500 and 2011 Fortune 500 data.

Table 1: Percentage of Defined Benefit MEPs, by Reported Funding Method, 2009

	Percent of defined benefit MEPs
Post-1988 funding method	37.2
Pre-1989 funding method	59.1

Source: GAO analysis of 2009 Form 5500 data.

Note: If the "post-1988 funding method" is filed for a defined benefit MEP, the plan is funded as if each employer maintains a separate plan. This funding method is required for plans established after December 31, 1988, or, if the plan was established earlier, those plans which made a one-time election (some time after November 10, 1988, but before November 11, 1990) to fund as if each employer maintains a separate plan. If "pre-1989 funding method" is filed for a MEP, the plan is funded as if all participants were employed by a single employer. Values may not add to 100 percent as some plans do not specify the above funding method.

Table 2: Total Plan Assets of MEPs, by Plan Type and Plan Year

Dollars in billions			
	2001	2009	2001 - 2009 change
Defined benefit plans	113.8	110.5	-3%
Defined contribution plans	150.2	175.4	17%

Source: GAO analysis of 2009 and 2001 Form 5500 data.

Note: Defined benefit plan assets are the actuarial value of assets. The measurement of this reported value of assets changed as a result of the Pension Protection Act of 2006. Pub. L. No.109-280, § 102, 120 Stat. 780, 789-809. As a result these measures may be different over time. Defined contribution plan assets are the end-of-year total assets reported on either the Form 5500 schedule H (for large plans), schedule I (for small plans), or the Form 5500-SF (for certain small plans).

Table 3: Percentage of All Assets Represented by MEPs, by Plan Type and Plan Year

	2001	2009	2001 - 2009 change
Defined benefit plans	6.5	5.6	-14%
Defined contribution plans	9.1	5.6	-39%

Source: GAO analysis of 2001 Form 5500 data.

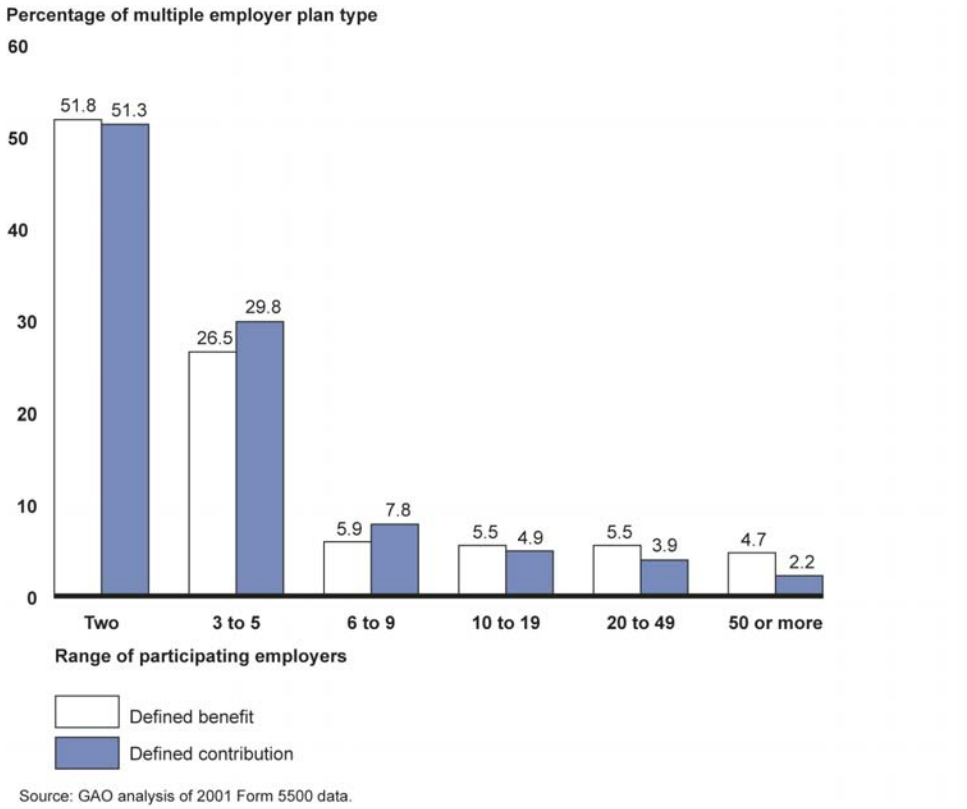
Table 4: MEP Participating Employer Estimates, Mean, Median and Maximum Employers, 2001

	Mean number of participating employers associated with MEPs, by plan type, 2001	Median number of participating employers associated with MEPs, by plan type, 2001	Maximum number of participating employers associated with MEPs, by plan type, 2001
Defined benefit plans	16	2	862
Defined contribution plans	9	2	999

Source: GAO analysis of 2001 Form 5500 data.

Note: Under a MEP, some qualification requirements are applied as if all employees of each employer are employed by a single employer (e.g., 26 U.S.C. §§ 401(a) (exclusive benefit), 410(a) (participation), and 411 (vesting)). 26 U.S.C. 413(c)(1)-(3). Prior to 2004, certain plans would file a Schedule T to substantiate compliance with minimum coverage requirements. For purposes of Schedule T, each controlled group and each other employer that have employees benefiting under a plan that benefits the employees of more than one employer are referred to as "participating employers." Up until 2004, the schedule T was only required every third year for certain employers, while other employers were to file it annually. Thus, these figures are estimates of a sample of MEPs for 2001. There were 3,307 (or 87 percent of the total of 3,796 identified) MEP defined contribution plans and 388 (or 81 percent of the total 478 identified) MEP defined benefit plans that filed a Schedule T in 2001. Additionally, employers reporting only one participating employer are assumed to not have a reporting requirement for 2001.

Figure 5: Percentage of MEPs by Range of Participating Employers in the Plan, 2001 Estimate



Source: GAO analysis of 2001 Form 5500 data.

Note: Data reflects only those that reported two or more participating employers. Those MEP sponsors that did not file participating employer reports, also known as the Schedule T attachment to the Form 5500, are not shown. Additionally, employers reporting only one participating employer are assumed to not have a reporting requirement for 2001.

Table 5: Maximum Number of Participants and Percentage of Participants in MEPs by Sponsor Industry and by Plan Type, 2009

	Sponsor industry	Participants	Participants as percentage of all MEP participants
Defined benefit plans	Other Electrical Equipment & Component Manufacturing	547,129	25.0%
Defined contribution plans	Hospitals	290,855	6.4%

Source: GAO analysis of 2009 Form 5500 data.

Table 6:Maximum Number of MEPs and Percentage of MEPs by Sponsor Industry and by Plan Type, 2009

	Sponsor industry	Plans	Plans as a percentage of all MEPs
Defined benefit plans	Religious, Grantmaking, Civic, Professional, & Similar Organizations	44	13.8%
Defined contribution plans	Offices of Physicians (except mental health specialists)	282	6.1%

Source: GAO analysis of 2009 Form 5500 data.

Table 7: Percentage of Benefit Types Represented within Each Defined Benefit Plan Type, 2009

	Multiple employer	Single employer	Multiemployer
Hybrid/cash balance	16.0	14.7	1.6
Other/undefined defined benefit plan	1.9	2.6	10.3
Primarily flat dollar benefits	6.9	8.1	66.1
Primarily pay related benefits	75.2	74.6	22.0

Source: GAO analysis of 2009 Form 5500 data.

Table 8: Percentage of Pension Feature Types Represented within Each Defined Contribution Plan Type, 2009

	Multiple employer	Single employer	Multiemployer
401k plan	87.0	76.6	28.8
Profit sharing plan	9.1	17.3	25.6
Stock bonus plan	0.2	0.7	0.5
Target benefit plan	0.2	0.1	0.5
Money purchase plans	2.0	2.4	38.2
Annuity-403(b)(7)	1.1	2.6	2.5
Custodial account-403(b)(7)	0.1	0.1	0.0
Other defined contribution	0.3	0.2	3.8

Source: GAO analysis of 2009 Form 5500 data.

Note: Defined contribution plan features generally follow the order of the feature categories assigned in Labor's Private Pension Plan Bulletins Abstract of Form 5500 Annual Reports. Although a plan may list multiple defined contribution pension plan features, we assign such plans to only one pension feature code from the above list—giving primacy to the codes in order of the above listing. For example, a plan could list both a 401(k) plan feature along with a stock bonus plan feature; however we list it as a 401(k) plan because the 401(k) plan feature is the primary listing above. Alternatively, "other defined contribution" is assigned last in the list and thus "other defined contribution" includes no plan features that are listed above it.

Table 9: Percentage of Defined Contribution Plans by Single, Multiple, and Multiemployer Plan Status by Range of Plan Participants, 2009

	10,000 or more participants	5,000-9,999 participants	1,000-4,999 participants	100-999 participants	less than 100 participants
MEP	1.5	1.5	8.9	34.6	53.4
Single-employer plan	0.1	0.1	0.9	9.1	89.7
Multiemployer plan	4.8	6.5	32.1	39.2	17.3

Source: GAO analysis of 2009 Form 5500 data.

Table 10: Percentage of Defined Benefit Plans by Single, Multiple and Multiemployer Plan Status by Range of Plan Participants, 2009

	10,000 or more participants	5,000-9,999 participants	1,000-4,999 participants	100-999 participants	less than 100 participants
MEP	10.5	7.5	19.9	35.6	26.6
Single-employer plan	0.8	0.8	4.4	13.8	80.1
Multiemployer plan	12.4	8.0	39.6	37.7	2.2

Source: GAO analysis of 2009 Form 5500 data.

Appendix II: Comments from the Department of Labor

U.S. Department of Labor

Assistant Secretary for
Employee Benefits Security Administration
Washington, D.C. 20210

AUG 27 2012

Mr. Charles A. Jeszeck
Director, Education, Workforce, and Income Security Issues
United States Government Accountability Office
Washington, DC 20548

Dear Mr. Jeszeck:

Thank you for the opportunity to review the Government Accountability Office's (GAO) draft report entitled "Private Sector Pensions: Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans." We appreciate GAO's effort to evaluate the characteristics and status of different types of "multiple employer plans" (MEPs) under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (Code).

The draft Report recommends that the Department of Labor (Department) gather oversight information about the employers that participate in multiple employer plans. One obvious way to do this would be to revise the Form 5500 reporting requirements to include a requirement that a MEP disclose basic identifying information regarding the employers that participate in a MEP, such as the number of participating employers or a list of the participating employers. The Department, Internal Revenue Service (IRS) and Pension Benefit Guaranty Corporation (PBGC) developed the Form 5500 return/report as a three-agency form for plan administrators, employers, and others to use to satisfy various annual reporting obligations under ERISA and the Code. Given the importance of the Form 5500 information and data, the Department, IRS, and PBGC regularly evaluate possible changes to the Form 5500. As part of that evaluation process, we will have the opportunity to consider the merits of alternative methods of collecting additional data about employers that participate in MEPs, among other possible changes to the Form 5500.

The draft Report also recommends that EBSA and the IRS modify an existing coordination agreement to provide for coordination of the statutory interpretations reflected in the Department's recent advisory opinions related to open MEPs and develop compliance-related guidance on the establishment and operation of MEPs under ERISA and the Code. The draft Report describes two recent advisory opinions that the Department issued regarding open MEPs: ERISA Advisory Opinions 2012-03A and 2012-04A. The legal question we answered in the advisory opinions is whether particular "open" arrangements should be treated under ERISA as one "multiple employer plan" as the promoters maintained or, as we concluded as a legal matter under Title I of ERISA, as a collection of single employer plans sponsored by each adopting employer. As your draft Report describes, the Department has long recognized that various types of multiple employer plan structures may constitute a single plan under ERISA if there is a sufficient connection among the employers separate and apart from their participation in the MEP. In contrast, in an "open" MEP the only nexus among the employers typically is the purchase of the MEP coverage.

The Department is committed to working together with the Treasury Department and the IRS in accordance with section 3004 of ERISA and with the PBGC. In the case of our recently issued advisory opinions on how ERISA section 3(2)'s definition of employee pension benefit plan and related ERISA provisions apply to open MEPs, the draft Report (on page 21) states that "Labor and IRS have not coordinated with regard to Labor's advisory opinions related to MEPs." The Department, however, did consult with the Treasury Department, the IRS and the PBGC on more than one occasion prior to the issuance of the opinions. We shared drafts of the advisory opinions with those agencies and the Department made adjustments in the text in response to comments from those agencies. After the advisory opinions were issued, the agencies discussed issues arising under the opinions.

With respect to the need to modify existing formal coordination agreements, we do not believe that it is necessary to make any changes in those agreements to reflect the advisory opinions at this time. The draft Report notes that Treasury has concluded that it is premature to make decisions on changes in IRS's determination letter practices until there has been an opportunity to analyze the full impact of the advisory opinions on open MEP practices, and until that occurs it is premature to make decisions on the need for formal coordination agreements in this area. Nonetheless, EBSA intends to and will continue to consult and coordinate with IRS, Treasury and the PBGC on compliance and policy matters relating to MEPs, and with respect to open MEPs in particular. To the extent that compliance issues become more apparent,[1] or further analysis of the impact of the advisory opinions indicates that a formal coordination agreement on statutory requirements applicable to open MEPs under ERISA and the Code may be helpful, the agencies will amend the coordination agreements accordingly.

The Department strongly supports efforts to expand the availability of retirement plan coverage to America's working men and women through their employer, especially in the small business sector. In doing so, however, it is essential that ERISA's protections for workers, retirees and their families be maintained in the context of an open MEP. Promoters are marketing these products to small employers as a way for the employer to offer a low cost pension plan, and some are falsely claiming the employers will have no ERISA reporting or fiduciary obligations if they sign up for an open MEP. A significant concern we have with open MEP arrangements is that the lack of direct employer involvement in the oversight of these products may make them more susceptible to abuse.

We appreciate having had the opportunity to review and comment on the draft Report. Please do not hesitate to contact us if you have questions concerning this response or if we can be of further assistance.

Sincerely,

for Phyllis C. Borzi

Phyllis C. Borzi
Assistant Secretary

[1] For example, in the case of the many traditional multiple employer plan arrangements that have been operating for years under both ERISA and the Code, it is unclear what compliance issues exist that require special coordination.

Appendix III: Comments from the Department of the Treasury

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

August 27, 2012

Mr. Charles A. Jeszeck
Director, Education, Workforce, and Income Security
United States Government Accountability Office
Washington, DC 20548

Dear Mr. ~~Jeszeck~~ Charlie,

Thank you for the opportunity to review the Government Accountability Office's (GAO) draft report entitled "Private Sector Pensions: Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans." We appreciate GAO's effort to evaluate the characteristics and status of different types of "multiple employer plans" (MEPs) under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (Code).

The draft Report recommends that the Department of Labor (DOL) gather oversight information about the employers that participate in multiple employer plans. One obvious way to do this would be to revise the Form 5500 reporting requirements to include a requirement that a MEP disclose basic identifying information regarding the employers that participate in a MEP, such as the number of participating employers or a list of the participating employers. DOL, the Internal Revenue Service (IRS) and the Pension Benefit Guaranty Corporation (PBGC) developed the Form 5500 return/report as a three-agency form for plan administrators, employers, and others to use to satisfy various annual reporting obligations under ERISA and the Code. Given the importance of the Form 5500 information and data, DOL, IRS, and PBGC regularly evaluate possible changes to the Form 5500. As part of that evaluation process, we will have the opportunity to consider the merits of alternative methods of collecting additional data about employers that participate in MEPs, among other possible changes to the Form 5500.

The draft Report also recommends that EBSA (the DOL division with the mission of assuring the security of the retirement, health and other workplace related benefits of America's workers and their families) and the IRS modify an existing coordination agreement to provide for coordination of the statutory interpretations reflected in DOL's recent advisory opinions related to MEPs[1] and coordinate to develop compliance-related guidance on the establishment and operation of MEPs under ERISA and the Code.

The Treasury Department and the IRS are committed to coordination with DOL in accordance with section 3004 of ERISA and with the PBGC. In the case of DOL's recently issued advisory opinions regarding how the ERISA section 3(2) definition of employee benefit plan and related

[1] The draft Report describes two recent advisory opinions that the DOL issued regarding open MEPs – ERISA Advisory Opinion Nos. 2012-03A and 2012-04A.

ERISA definitions apply to an open MEP, the draft Report (on page 21) states that "Labor and IRS have not coordinated with regard to Labor's advisory opinions related to MEPs." As noted in DOL's letter to GAO, DOL did consult with us and the PBGC on more than one occasion prior to the issuance of the opinions. After the advisory opinions were issued, the agencies discussed issues arising under the opinions.

With respect to the need to modify existing formal coordination agreements, we do not believe that it is necessary to make any changes in those agreements to reflect the advisory opinions at this time. We believe that it is premature to make decisions on changes in the determination letter practices until there has been an opportunity to analyze the full impact of the advisory opinions on open MEP practices, and that no changes in the formal coordination agreements in this area should be made until after that analysis is complete. Nonetheless, we intend to continue to consult and coordinate with DOL and PBGC on compliance and policy matters relating to MEPs, and with respect to open MEPs in particular. To the extent that compliance issues become more apparent,[2] or further analysis of the impact of the advisory opinions indicates that a formal coordination agreement on statutory requirements applicable to open MEPs under ERISA and the Code may be helpful, the agencies will amend the coordination agreements accordingly.

As noted in the draft Report (on page 21), the statutory rules with respect to MEPs are different under ERISA and the Code. Most significantly, section 413(c) of the Code (which, in coordination with other tax qualification rules set out in Code section 401, et seq., governs the tax treatment of MEPs) does not incorporate the ERISA section 3(2) definition of an employee benefit plan. Although DOL, in its advisory opinions, has limited the ability of particular open MEP arrangements to constitute a single employee benefit plan under ERISA based on the ERISA definition of an employee benefit plan and related ERISA provisions, it is not clear that the same analysis can or should be applied under the Code. Accordingly, even as the agencies continue to work together to develop and communicate to the benefits community compliance-related guidance on the establishment and operation of MEPs, different analyses may continue to apply under ERISA and the Code.

The Treasury Department and the IRS are committed to expanding retirement plan coverage and protecting the retirement benefits of workers, retirees, and their families and we appreciate having had the opportunity to review and comment on the draft Report. Please do not hesitate to contact us if you have questions concerning this response or if we can be of further assistance.

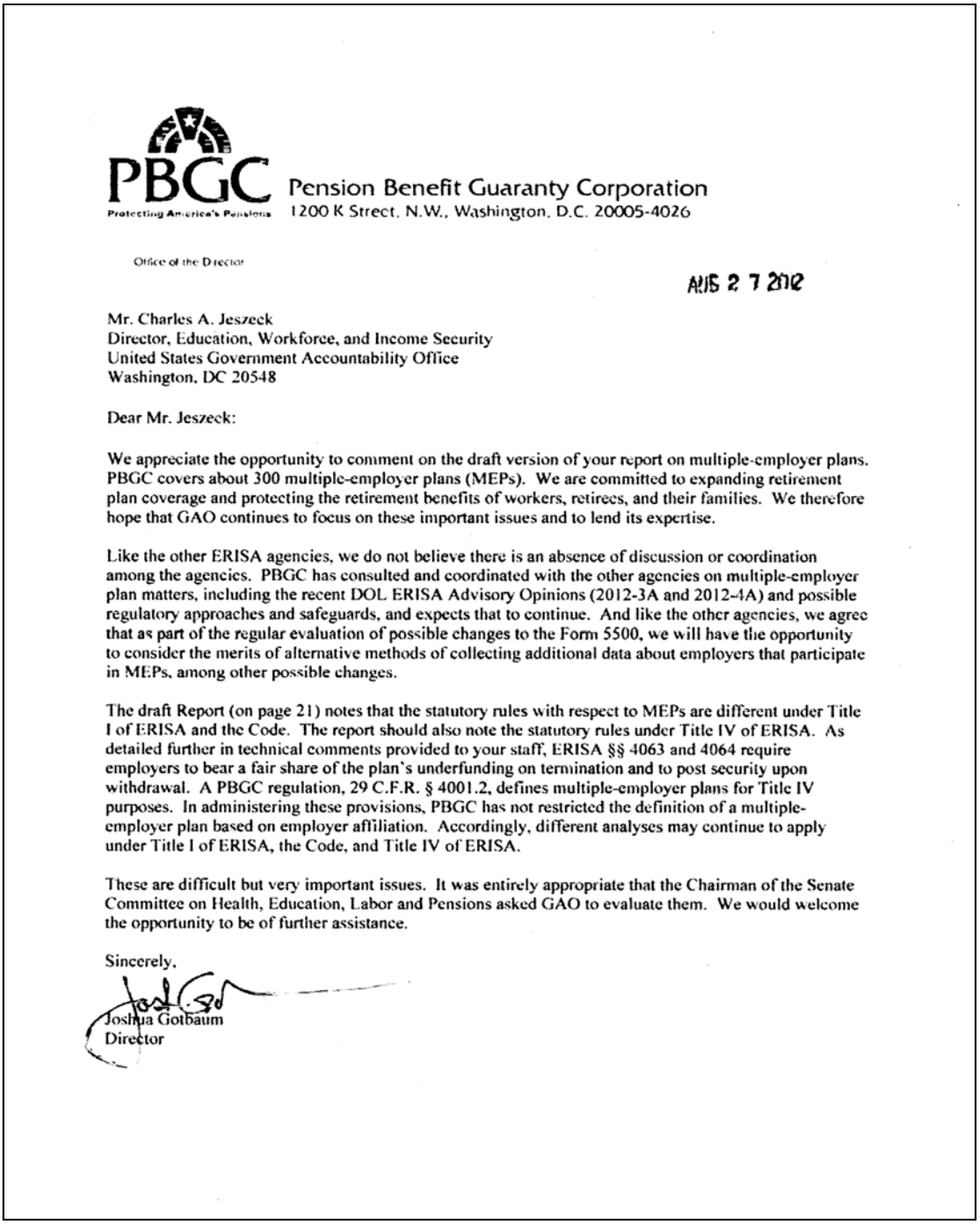
Sincerely,

J. Mark Iwry
Senior Advisor to the Secretary and
Deputy Assistant Secretary (Retirement and Health Policy)

[2] For example, in the case of the many traditional multiple employer plan arrangements that have been operating for many years under both ERISA and the Code, it is unclear what compliance issues exist that require special coordination efforts.

2

Appendix IV: Comments from the Pension Benefit Guaranty Corporation



PBGC
Protecting America's Pensions

Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

Office of the Director

AUG 2 7 2012

Mr. Charles A. Jeszeck
Director, Education, Workforce, and Income Security
United States Government Accountability Office
Washington, DC 20548

Dear Mr. Jeszeck:

We appreciate the opportunity to comment on the draft version of your report on multiple-employer plans. PBGC covers about 300 multiple-employer plans (MEPs). We are committed to expanding retirement plan coverage and protecting the retirement benefits of workers, retirees, and their families. We therefore hope that GAO continues to focus on these important issues and to lend its expertise.

Like the other ERISA agencies, we do not believe there is an absence of discussion or coordination among the agencies. PBGC has consulted and coordinated with the other agencies on multiple-employer plan matters, including the recent DOL ERISA Advisory Opinions (2012-3A and 2012-4A) and possible regulatory approaches and safeguards, and expects that to continue. And like the other agencies, we agree that as part of the regular evaluation of possible changes to the Form 5500, we will have the opportunity to consider the merits of alternative methods of collecting additional data about employers that participate in MEPs, among other possible changes.

The draft Report (on page 21) notes that the statutory rules with respect to MEPs are different under Title I of ERISA and the Code. The report should also note the statutory rules under Title IV of ERISA. As detailed further in technical comments provided to your staff, ERISA §§ 4063 and 4064 require employers to bear a fair share of the plan's underfunding on termination and to post security upon withdrawal. A PBGC regulation, 29 C.F.R. § 4001.2, defines multiple-employer plans for Title IV purposes. In administering these provisions, PBGC has not restricted the definition of a multiple-employer plan based on employer affiliation. Accordingly, different analyses may continue to apply under Title I of ERISA, the Code, and Title IV of ERISA.

These are difficult but very important issues. It was entirely appropriate that the Chairman of the Senate Committee on Health, Education, Labor and Pensions asked GAO to evaluate them. We would welcome the opportunity to be of further assistance.

Sincerely,

Joshua Gotbaum
Director

Appendix V: GAO Contact and Staff Acknowledgments

GAO Contact

Charles Jeszeck, (202) 512-7215 or jeszeckc@gao.gov

Staff Acknowledgments

In addition to the contact named above, Patrick DiBattista, Assistant Director; Chuck Ford; Ted Leslie; David Reed; Craig Winslow; and Frank Todisco made key contributions to this report. Also contributing to this report were Amy Anderson, David Chrisinger, Mimi Nguyen, Jodi Munson-Rodriguez, Roger Thomas, and Paul Wright.

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