EXHIBIT A

November 8, 2018
Revised as of January 15, 2019
Revised as of February 28, 2019

Submitted Electronically via email

Joseph Canary
Director, Office of Regulations and Interpretations
U.S. Department of Labor
Employee Benefits Security Administration
Office of Regulations and Interpretations
200 Constitution Avenue, NW
Suite N-5655
Washington, DC 20210

RE: Request for Advisory Opinion Concerning a Limited Partnership and Its Sponsorship of a Single-Employer Self-Insured Group Health Plan

Dear Director Canary:

The Law Office of Alexander Renfro ("Renfro") makes this request for consideration and possible issuance of an Advisory Opinion on behalf of our client, LP Management Services, LLC, a Georgia Limited Liability Company ("LPMS"). The primary business purpose of LPMS is to serve as General Partner of various Limited Partnerships and manage the day-to-day affairs of these Partnerships. At least one of these Limited Partnerships (the "LP") desires to sponsor an "employee welfare benefit plan" as defined under section 3(1) of the Employee Retirement Income Security Act ("ERISA"). The primary business purpose of LP is the aggregation and profitable sale of electronic user data from its partners. In addition to other inducements, including guaranteed payments, LP wishes to offer access to its group health plan as an inducement to attract, retain, and motivate partners. The plan will be organized as a single-employer self-insured group health plan that will provide major medical health benefits to LP's eligible employees, along with LP's limited partners. On behalf of LPMS, Renfro hereby seeks confirmation from the Department of Labor, Employee Benefits Security Administration (the "Department") that:

(1) The single-employer self-insured group health plan sponsored by LP is an "employee welfare benefit plan" within the meaning of ERISA section 3(1).

(2) The limited partners participating in LP's single-employer self-insured group health plan are "participants" within the meaning of ERISA section 3(7).

(3) The single-employer self-insured group health plan sponsored by LP is governed by Title I of ERISA.

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Renfro and LPMS recognize that any contemplated expansion of the traditional scope of ERISA, even if permissible under the existing statutes, may raise concerns at the Department as to the potential for plan failure(s), whether due to ill-conceived structure, inadequate (re)insurance reserves, fraud, or some combination of these and other factors. We share these concerns, and LPMS has established strong safeguards as a commitment to employees and partners – which are described in detail below – to address each partnership plan vulnerability both as to sponsorship and participation. LPMS anticipates that if the Department provides the confirmations requested above, it will do so in explicit consideration of all the specific facts and circumstances provided herein, and that neither LPMS nor any other ERISA plan sponsor will be able to rely upon a favorable Advisory Opinion letter unless all such safeguard standards are met or exceeded.

Further, while Renfro and LPMS have gone to considerable effort to foresee and guard against all possible causes of plan failure, we welcome input from the Department as to any additional areas of concern and solutions thereto. Such solutions could be incorporated into LP's manual of Standard Operating Procedures, as well into a further revision of this request (and any subsequent Advisory Opinion). Finally, we believe that while an Advisory Opinion is the appropriate first step toward defining allowable uses of partnerships as ERISA plan sponsors, it should perhaps be followed by informal Department guidance, and/or rulemaking in accordance with the Administrative Procedures Act, primarily in order to strengthen the enforceability of the safeguard requirements.

I. Background

A. Statement of Facts Concerning the Corporate Structure of LP

LP is a Limited Partnership duly registered and formed in the State of Georgia. LP's Partnership Agreement appoints LPMS as General Partner and delegates day-to-day business management decisions to LPMS, including but not limited to the execution of rental/office lease agreements, employment contracts, distribution of revenue producing agreements, and grantor decisions to form a group health plan. LP's Limited Partners ("LPartners") are individuals who have obtained a Limited Partnership Interest ("LPI") through the execution of a joinder agreement with LP. LPMS, as General Partner, correspondingly counter-executes such agreements, files a resolution on the addition of a new LPartner, and updates LP's partnership information to include the addition of a new LPartner. LPartners participate in global management issues through periodic votes of all Partners, as well as contribute time and service to revenue-generating activities of LP. Income distributions by LP to LPartners resulting from such revenue-generating activities will be reported as guaranteed payments and subject to employment taxes. Together, LPMS, as General Partner, and LPartners wholly control and operate LP.

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LP's primary business purpose and main source of revenue is the capture, segregation, aggregation, and sale to third-party marketing firms of electronic data generated by LPartners who share such data with LP. Participating LPartners install specific software which, among other things, tracks the capture of such data by other companies, such as Google or Facebook, and provides access of such data to LP. LP then decides how such data is used and sold to third-party marketing firms, generating revenue. LPartners control and manage the capture, segregation, aggregation, and sale of their own data, empowering LPartners in a manner not otherwise available to them when they utilize services over the Internet through their computers, phones, televisions, and other devices.

As discussed above, LPartners all gain status as a limited partner in LP by executing a joinder agreement, establishing each LPartner's rights. These rights are subsequently exercised on a regular basis through votes on how aggregated data will be sold or used by LP as well as votes on other partnership matters. Finally, through the sharing of data, LPartners are committing time and service to revenue-generating activity on behalf of LP. Income distributions by LP to LPartners resulting from such revenue-generating activities will be reported as guaranteed payments and subject to employment taxes.

LP also employs at least one common law employee to assist the partnership with administrative and/or revenue generating services.

B. Statement of Facts Concerning LP's Single-Employer Self-Insured Group Health Plan

In an effort to attract, retain, and motivate talent in service of LP's primary business purpose, LP will establish a single-employer self-insured group health plan (the "Plan"). The Plan will reflect the substantial commitment that LP is making to employees and LPartners. Since this Plan is formed and sponsored only by LP – and not in concert with any other employer – the Plan is a single-employer self-insured group health plan. LPMS, as the General Partner, serves as the Named Fiduciary and Plan Administrator of the Plan. LPMS intends to appoint an independent fiduciary to assist with fiduciary obligations and administration matters associated with the Plan.

The Plan has a number of third-party vendors which LPMS engages on behalf of LP to administer the Plan. First, LPMS hires a consulting and benefits design firm for guidance and assistance with fulfilling plan requirements pursuant to the ERISA and related statutes. Second, LPMS appoints a licensed and bonded Third Party Administrator ("TPA") to collect funds and allocate funds, adjudicate claims, manage claims appeals, execute the payment of claims for benefits under the Plan, and perform other traditional services performed by a TPA. Third, LPMS appoints a benefits administrator to assist its staff in managing eligibility data and plan participant customer service issues on an ongoing basis. Fourth, LPMS creates a Trust to hold any plan assets related to the Plan. Finally, LPMS obtains a reinsurance policy for the Plan. This reinsurance policy is of a comprehensive and specific nature, as described more fully below.

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The terms of the Plan are outlined in a Plan Document and are intended to comply with ERISA, including but not limited to, Parts 1, 4, 5, and 7. This Plan Document contains information on the benefits provided by the Plan to Plan participants, eligibility information, instructions on claims for benefits, claims appeals information, coordination of benefits provisions, disclaimers concerning certain federal statutes, and other information. With respect to eligibility, the Plan Document notes that both employees and partners are eligible to participate in the Plan. As discussed above, at least one common law employee participates in the Plan, as well as a number of LPartners, although not all LPartners participate in the Plan. LP will pay 100% of the premiums for coverage under the Plan for LP's employees. LPartners will be 100% responsible for paying their own premiums for coverage under the Plan. According to the enrollment procedures as outlined in the Plan Document, annual Open Enrollment periods, as well as Special Enrollment periods, as required by law, are utilized to permit eligible plan participants to join the Plan.

The aforementioned third-party vendors service the Plan as their delegated duties require. For example, the TPA collects monthly premium payments from the Plan's participants. The TPA allocates these funds appropriately, routing plan assets to the Trust (which is solely controlled by a Directed Trustee), paying vendors their fees, and ensuring premium payments are timely made to the reinsurance carrier underwriting the Plan's reinsurance policy. The TPA withholds a certain amount of premium due to the reinsurance carrier covering the Plan in order to expedite payment of claims for benefits. With respect to paying claims for benefits, in cases where the TPA has received and approved a claim, the TPA will access the plan assets held in Trust to pay said claim. Should a claim require a payment in excess of the funds available to the TPA on an immediate basis, the TPA coordinates with the reinsurance carrier covering the Plan for transmission of additional funds to the TPA's claims-paying account. Once received, the TPA will continue paying claims.

C. Additional Plan Features

LP is sensitive to prospective concerns with respect to the solvency of its Plan as well as the need for credibility of its Named Fiduciary. To that end, LP has made a substantial commitment to offer a reliable health plan including, but not limited to, offering health benefits backed by extremely well-funded layers of reinsurance policies, and LPMS – as General Partner and Named Fiduciary – has obtained a fiduciary liability policy in addition to the required fidelity insurance coverage under ERISA section 412. The intended hiring of an independent fiduciary provides yet another substantial level of protection of Plan participants.

With respect to the primary reinsurance policy covering the Plan, coverage is obtained from first-dollar and to an unlimited degree per the terms of the reinsurance policy. This policy is supported by multiple layers of retrocessionary coverage without a risk corridor by retrocessionaires with an excess of $7,000,000,000 in assets to cover risk with respect to the Plan. LPMS requires the following features of any policy it obtains to cover the Plan now or in the future:

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Any group health plan sponsored by LP, or by any other entity managed by LPMS and which offers ERISA plan participation to its eligible plan participants, including certain employees and partners, must first obtain Qualifying Reinsurance Coverage. "Qualifying Reinsurance Coverage" means excess/stop loss insurance, indemnity insurance for a self-insured plan or employee benefit trust, insurance for a self-insured plan or trust, or reinsurance coverage purchased from an excess/stop loss, indemnity, insurance, or reinsurance carrier that meets the following requirements:

- The carrier providing Qualifying Reinsurance Coverage must provide the following information to LPMS:
    - The name, address, and phone number of the carrier;
    - Statement(s) certifying compliance with all requirements described in below;
    - A statement of compliance with the reserve requirements described below;
    - A notification of any material changes to the Qualifying Reinsurance Coverage.

- The Qualifying Reinsurance Coverage:
    - Must (re)insure, without limitation, all benefits covered by the Group Health Plan which it (re)insures. Plan and Reinsurance coverage must be identical as to benefits and limitations.
    - May only be issued by a carrier which establishes and maintains retrocessionary coverage from one or more (re)insurer(s) with at least $100,000,000 in aggregate equity for any claims which the plan is unable to satisfy by reason of a solvency event affecting said carrier's ability to pay claims, to an unlimited degree;
    - Must note on any contract for coverage a definite starting or attachment point of such coverage which is conspicuous and clear to the plan member(s) prior to purchase of such coverage, and qualifying (re)insurance coverage issued on a non-stop loss (re)insurance basis must have a first-dollar starting point;
    - Must note on any contract for coverage an unlimited liability of the carrier issuing such coverage for benefits covered by such coverage which is conspicuous and clear to the plan member(s) prior to purchase of such coverage;
    - Must have been approved by one or more regulatory body or bodies duly authorized to license and regulate the business of insurance within the United States and/or a member of the National Association of Insurance

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Commissioners, for a minimum of twenty-four months, and been issued to at least one insured party for the direct and/or indirect coverage of health and/or medical benefits, and in force throughout said period;

- May only be issued by a carrier which establishes and maintains reserves with respect to covered benefits, in an amount recommended (or the mid-point of multiple recommendations) by an actuary certified by the American Academy of Actuaries, consisting of reserves sufficient for:
    - Unearned contributions;
    - Benefit liabilities which have been incurred, which have not been satisfied, and for which risk of loss has not yet been transferred, and for expected administrative costs with respect to such benefit liabilities;
    - Any other obligations of the plan; and
    - A margin of error and other fluctuations, taking into account the specific circumstances of the plan.
- May only be issued by a carrier which establishes and maintains additional reserves of at least $500,000 above the reserves noted above.

- Carriers issuing Qualifying Reinsurance Coverage may demonstrate compliance with the reserve requirements described above with alternative reserves in the form of a contract of indemnification, lien, bonding, (re)insurance, letter of credit, or security.

- Any business of insurance, including but not limited to the obtaining of Qualified Reinsurance Coverage, conducted in any State must comply with the insurance laws of said State, and obtain all required State approvals.

II. Law and Analysis

A. Treatment of a Partner as an "Employee" Under ERISA

ERISA provides specific rules and regulations applicable to (1) an "employee welfare benefit plan," (2) "employees," and (3) "participants" that may participate in an "employee welfare benefit plan."

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An "employee welfare benefit plan" is defined as:[1]

> "any plan, fund, or program…established or maintained by an employer…for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits…"

An "employee" is defined as:[2]

> "an individual employed by an employer."

A "participant" is defined as:[3]

> "any employee or former employee of an employer…who is or may become eligible to receive a benefit…from an employee benefit plan which covers employees of such employer."

On its face and without further context provided elsewhere in ERISA, it appears that a partner in a partnership is not an "employee" within the meaning of ERISA section 3(6). Relying on the common law definition of an "employee," a partner also would not be considered an employee.[4] If a partner is not considered an "employee" for ERISA purposes, a partner cannot be considered a "participant" in an ERISA-covered "employee welfare benefit plan."

DOL Reg. section 2510.3-3(b) confirms that, for limited purposes, a partner is not considered an "employee" for purposes of determining the existence of an "employee benefit plan," which includes an "employee welfare benefit plan." DOL Reg. section 2510.3-3(b) further explains that a "plan without employees" is excluded from the requirements under Title I of ERISA (i.e., a plan covering partners is not considered an ERISA-covered plan).

Importantly, however, DOL Reg. section 2510.3-3(b) does *not* prohibit a partner from participating in a Title I ERISA-covered plan, *nor does* the regulation prohibit a partner from being considered an "employee" for ERISA purposes. There are multiple circumstances in which the Department – and the courts – have found that partners do have "employee" status.

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[1] Section 3(1) of the Employee Income Retirement Security Act ("ERISA").
[2] ERISA section 3(6).
[3] ERISA section 3(7).
[4] In accordance with the Supreme Court's ruling in *Nationwide Mutual Insurance Company v. Darden*, the Department has found that the common law standard for determining employee status is whether someone is hired by an employer, with the employer having the "right to control and direct" the individual's work. [*See* DOL Information Letter (May 8, 2006); DOL Advisory Opinion 95-29A (Dec. 7, 1995); DOL Advisory Opinion 95-22A (Aug. 25, 1995)].

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For example, the Department acknowledges that the U.S. Supreme Court in *Yates v. Hendon*[5] concluded that under ERISA, a "working owner" – which may include a partner – may have dual status (i.e., he or she can be an employee entitled to participate in a plan, and, at the same time, the employer (or owner or member of the employer) who established the plan).[6] The Department has also noted that section 401(c) of the Internal Revenue Code ("Code") treats partners (including owners of entities taxed as partnerships, such as limited liability companies) as employees of the partnership.[7]

In addition, according to ERISA section 732(d) – which is the only section of ERISA that contemplates partners participating in a group health plan – a "bona fide partner" is considered an "employee" for purposes of regulating a group health plan that covers partners. The regulations implementing ERISA section 732(d) provide that for purposes of treating a partner as an "employee" – and thus a "participant" in a group health plan subject to the requirements under Part 7 of ERISA – the "the term employee includes any bona fide partner."[8] The implementing regulations go on to state that "whether or not an individual is a bona fide partner is determined based on all the relevant facts and circumstances, including whether the individual *performs services on behalf of the partnership*."[9]

Although a bona fide partner is not further defined in ERISA or its implementing regulations, the term "bona fide partner" can be found elsewhere in Federal law, specifically in guidance from the Internal Revenue Service ("IRS").[10] According to the IRS, a bona fide partner is an individual with rights in a partnership, who exercises said rights, and who *commits time and energies in the conduct of the trade or business of the partnership*.[11] The consistency between the IRS's definition of a bona fide partner and the manner in which the Department described a bona fide partner in ERISA section 732(d) implementing regulations supports the interpretation that for purposes of ERISA, a partner should be defined as "an individual who commits time to and performs services on behalf of the partnership." Upon the satisfaction of this definition, the bona fide partner would be considered an "employee" for ERISA purposes.

LPMS believes that the LPartners satisfy the definition of a "bona fide partner." LPartners have actual rights in LP as dictated in both LP's Partnership Agreement and the joinder to said agreement signed by each LPartner. LPartners regularly exercise these rights in periodic votes on partnership business. Finally, LPartners contribute time and energies/services to LP by sharing data and assisting in LP's primary business purpose and revenue generation activity. The time and energies/services contributed by LPartners comprise the sole means of revenue generation of LP. In other words, without this activity, LP would not earn revenue or survive as an entity. By these acts,

[5] 541 U.S. 1 (2004).
[6] 83 Fed. Reg. 614, 621 (Jan. 5, 2018).
[7] *Id*.
[8] DOL Reg. section 2590.732(d)(2).
[9] *Id*.
[10] *See* Rev. Rul. 69-184.
[11] *Id*.

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LPartners meet both the IRS's and the Department's standards to qualify as bona fide partners, and thus, would be considered "employees" for ERISA purposes.

B. A Partner May Be a "Participant" In an ERISA-Covered Single-Employer Plan Alongside At Least One Common Law Employee

In line with the reasoning discussed above, the Department has concluded that a "working owner" – in particular, a partner – may have dual status as an "employer" and an "employee," and thus, permissibly be considered a "participant" in an ERISA-covered plan.[12] Specifically, the Department opined that ERISA section 402(a)(2), ERISA section 403(b)(3)(A), ERISA section 408, ERISA section 4001(b)(1), ERISA section 4021(b)(9), and ERISA section 4022(b)(5)(A) all serve as an indication that "working owners" – including partners – may be considered "participants" for purposes of ERISA coverage.[13] The Department has found that there is a clear Congressional design to include "working owners" – including partners – within the definition of "participant" for purposes of Title I of ERISA.[14]

The Department has also concluded that if a partner participates in an employee benefit plan along with at least one common law employee, DOL Reg. section 2510.3-3 does *not* exclude this plan from being covered by Title I of ERISA.[15] Specifically, the Department has found that a plan covering partners (who are considered "working owners") as well as their non-owner employees clearly falls within ERISA's scope.[16] The Department explained that "[t]he definition of 'plans without employees' in DOL Reg. section 2510.3-3(b) simply defines a limited circumstance in which the only parties participating in a benefit arrangement are an individual owner/partner…and declines to deem the individual[], in that limited circumstance, as [an] employee[]…for purpose of the regulation."[17] The Department explains further that DOL Reg. section 2510.3-3(b) "does not apply, however, outside that limited context and, accordingly, does not prevent sole proprietors or other working owners – [including partners] – from being participants in broader benefit plan arrangements…"[18]

The conclusion that partners can participate in an ERISA-covered plan where the plan also covers at least one common law employee is consistent with the finding of the courts. For example, the Supreme Court in *Yates v. Hendon*[19] found that a plan covering both a "working owner" – including a partner in a partnership – and at least one common law employee is governed by ERISA.[20]

[12] DOL Adv. Op. 99-04A (Feb. 4, 1999).
[13] *Id*.; *see also*, 83 Fed. Reg. at 621 (Jan. 5, 2018) and 83 Fed. Reg. at 28930 (June 21, 2018).
[14] *Id*.
[15] 83 Fed. Reg. at 621 (Jan. 5, 2018).
[16] *Id*.
[17] *Id*.; *see also*, 83 Fed. Reg. 28912, 28930 (June 21, 2018).
[18] *Id*.
[19] 41 U.S. 1 (2004).
[20] *Id.* at 9.

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In other words, in cases where a benefit plan covers both partners and common law employees, the plan will be covered by Title I of ERISA.[21]

The Fifth Circuit Court of Appeals, in *House v. American United Life Insurance Company*,[22] also concluded that ERISA applies to a benefit arrangement that provided coverage to a firm's partners that also covered the firm's common law employees. In *House*, a partnership established a plan that provided disability benefits to both employees of the partnership, as well as the partners. The partnership – as the employer of the employees – paid 100% of the premiums for the disability coverage for its employees. The partners, on the other hand, were responsible for 100% of their own premium payments. The Circuit Court found that despite the differences in the manner in which premiums were paid, the partnership established a comprehensive employee welfare benefit plan covering both partners and employees, thus creating a single-employer ERISA-covered plan.[23]

LPMS believes *House* is particularly instructive because of its similarities to the facts described in Section I.B. above, where LPartners will be required to pay their own premiums for the self-insured group health plan coverage sponsored by LP, while LP will pay 100% of the premiums for eligible employees. Based on the conclusion in *House*, the Supreme Court in *Yates*, and the Department's interpretations as set forth in proposed and final regulations, it is clear that LPartners may permissibly be considered "participants" in an ERISA-covered plan where at least one common law employee participates in the plan.

Given the above guidance and precedent, it is also clear that the single-employer self-insured group health plan sponsored by LP – acting in the capacity of an employer – to provide major medical health benefits to LP's common law employees and limited partners is an "employee welfare benefit plan" within the meaning of ERISA section 3(1). As a result, because both LP's employees and LPartners may permissibly participate in this ERISA-covered "employee welfare benefit plan," the Plan would be governed by Title I of ERISA.

C. In Cases Where a Partner Receives Guaranteed Payments for Hours of Service Contributed to the Partnership, an Employment Relationship Exists Between the Partner and the Partnership

As discussed, the Department has concluded that (1) partners who qualify as "bona fide partners" are "employees" for ERISA purposes and (2) partners can participate in an ERISA-covered plan where the plan also covers at least one common law employee. An argument can be made, however, that a plan sponsored by a partnership that covers both partners and at least one common law

[21] *Id.*
[22] 499 F.3d 443 (5th Cir. 2007).
[23] *Id.* at 451-452.

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employee may not be considered an ERISA-covered plan if the partner-participants do not have some sort of employment relationship with the partnership sponsoring the plan.

In a traditional employment setting, an employer will have the right to direct and control employees, which results in a "common law" employer and employee relationship.[24] In this case, the employee is providing services directly to the employer. In the context of a partnership, however, this same "common law" principle may not apply. For example, in certain situations where a partnership exists, the partners of the partnership may merely hold an equity interest, whereby the partner may receive a distributive share without providing services directly for the partnership. However, there are other instances in which a partner of a partnership is indeed providing services directly for the partnership, which produces a "guaranteed payment" (i.e., earned income for services rendered).[25]

While partners earning distributive shares may have little connection to a partnership beyond equity ownership, partners earning guaranteed payments must be providing services directly to the partnership in the form of hours of service contributed by the partner to the partnership. Importantly, Congress intended partners who contributed hours of service to a partnership to pay employment taxes on the income derived from such services.[26] Distributive shares are distinguished from guaranteed payments based on whether they are paid with respect to hours of service contributed by the partner, which alters the tax treatment of such payments.[27]

Case law further supports the idea that partners contributing hours of service to a partnership have an employment connection to the partnership relative to a mere passive investor. For example, in *Renkemeyer, Campbell & Weaver LLP v. Commissioner*,[28] the Tax Court held that due to the contribution of hours of service by the partners, the income derived from such activity was self-employment income subject to employment taxes and deemed to be a guaranteed payment. The Tax Court explained that its decision was influenced by the fact that the partners made a nominal investment into the partnership, but nearly all of the income earned by the partnership was derived from hours of service contributed by its partners.[29] This contribution of hours of service fundamentally defined the relationship between the partners and partnership, evidenced by the tax treatment of income earned by the partners.

[24] *See e.g.*, *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992).
[25] *See* section 707(c) of the Internal Revenue Code ("Code").
[26] *See* H. Rept. 95-702 (Part 1) at 11 (1977).
[27] *See* Code section 1402(a)(13).
[28] 136 T.C. 137 (2011).
[29] *Id*. at 139, 150.

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As previously noted, LP's business model is based on the generation, aggregation, and sale of data from its userbase of LPartners. LP cannot sustain operations or profitability without contributions of data from LPartners. Contributions of data are not achieved without work. Specifically, contributing data requires actively using devices or performing activities from which data can be generated. A leading media research firm – Nielsen – has found that the average American spends approximately 254 minutes per day on internet-based activity from which data can be generated, or 4 hours and 14 minutes of activity per day.[30]

An argument can be made that the value of this data may not be worth the hours of service taken to generate the data. However, the data demonstrably has value. The largest tech companies in the world would not exist otherwise. Based on the foregoing, LPMS believes it has demonstrated that there is a substantive service-related obligation by each LPartners, evidenced by the fact that income received for the hours of services provided to LP will be reported as guaranteed payments as that term is used in Code sections 707(c) and 1402(a)(13) which specifically address the taxation of limited partners. As such, the income will be subject to employment taxes. Under Code section 1402(b), self-employment income is subject to Social Security taxes and in other important ways is treated as *de facto wages*.[31] This tax treatment, of course, is the hallmark of services performed by an employee on behalf of an employer, thus proving that an employment relationship between LPartners and LP exists.

It is important to note that whether an entity is a "partnership" – and whether an individual is a "partner" – is governed by State law. Thus, if the State law definitions of "partnership" as well as "partner" are satisfied, satisfaction of these State law requirements should control the determination as to whether an employment relationship exists. As the Tax Court explained in *Renkemeyer,* States, not the Federal government, determine and then directly regulate these hybrid corporate structures. As a result, LPMS believes that the Department must defer to the States to determine the threshold question of whether an employment relationship exists. In the case of LP, the partnership structure satisfies the State laws in which health coverage offered through LP's single-employer self-insured plan will be offered. As a result, whether an employment relationship between LPartners and LP exists cannot and should not be questioned. State law already confirms that such a relationship exists.

[30] *See* https://www.nielsen.com/us/en/insights/news/2018/time-flies-us-adults-now-spend-nearly-half-a-day-interacting-with-media.print.html.

[31] While partners are considered to be self-employed, when those partners are providing services on behalf of a partnership and paid for those services by the partnership, there is no functional difference between this partner and a common-law employee providing services for which they receive income. In fact, both the employee and the partner are subject to Social Security taxes on the income received for providing services on behalf of the entity to which they are related. There is no tax policy reason and no reason under ERISA to treat partners, limited or otherwise, differently from common-law employees under these circumstances.

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D. Tax Considerations

The IRS has for decades maintained and enforced a clear set of regulations regarding tax treatment of partners in all health and welfare benefit plans, including group health plans. The Internal Revenue Code (the "Code") does not comment on the ability of a partner to participate in a group health plan. However, once a partner becomes a participant, the IRS treats that participant differently than common law employee participants. For the purpose of tax treatment, said partners are treated as independent contractors by the IRS. As previously explained, LPMS will report income distributed to LPartners for services performed on behalf of the partnership as guaranteed payments.

Withholding from guaranteed payments to pay premiums for a group health plan on a pre-tax basis is not possible for partners.[32] Thus, partners are not allowed to join a section 125 cafeteria plan in order to pay premiums in a group health plan on a pre-tax basis. A further consequence of this rule is that Health Savings Accounts ("HSAs"), which are typically offered through cafeteria plans, are also not available (with a meaningful tax benefit) to partners participating in a plan sponsored by their partnership. LPMS acknowledges these standards and does not seek special or separate tax treatment for its partners. Inasmuch as LP does not pay wages to its partners, no pre-tax payment of premium could be available to partners participating in LP's plan. Finally, LP does not sponsor and does not plan to sponsor either a cafeteria plan or an HSA.

While the benefit of pre-tax payments of premium is not available to partners, such payments could under certain limited circumstances be deductible as an ordinary and necessary business expense.[33] The Code provides that if a partner qualifies as a working owner with earned income, said partner may deduct the cost of premiums for a group health plan against their earned income from the same source that sponsors said group health plan.[34] This regime both acknowledges that a plan sponsor of a group health plan may have participants who are partners and that a limited scope deduction should be available in said circumstances. With respect to LP's plan, as with any other partnership, this deduction would only be available if LP distributed income to partners participating in LP's plan which was then used to pay for premiums from LP's plan. (In the event that LP distributed funds to a partner insufficient to pay said partner's premium, any deduction would be limited to the amount distributed). LPMS is not seeking special or separate treatment with respect to this deduction. Other rules and limitations also apply and are acknowledged.[35]

[32] *See* Code section 125(d)(1)(A).
[33] *See* Code section 162(l).
[34] *Id*.
[35] *See* Code section 162(l)(2-5). *See also* 83 Fed. Reg. 28912, 28932 (June 21, 2018) (Where the Department noted in the preamble that deductibility under Code section 162(l) "informed" its view in support of establishing it regulatory framework for owner-employees.)

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The IRS has comprehensive, existing rules in place with respect to partners participating in a group health plan, within which LP's plan is regulated in similar fashion to any other partnership. No special treatment or extralegal tax benefit is sought by or available to partners participating in LP's plan.

III. Request for Determination

Based on the foregoing, Renfro respectfully asks that the Department to confirm that:

(1) The single-employer self-insured group health plan sponsored by LP is an "employee welfare benefit plan" within the meaning of ERISA section 3(1).

(2) LPartners participating in LP's single-employer self-insured group health plan are "participants" within the meaning of ERISA section 3(7).

(3) The single-employer self-insured group health plan sponsored by LP is governed by Title I of ERISA.

Thank you in advance for considering this request. Please do not hesitate to contact me with any questions, or with any request for additional information.

Respectfully submitted,

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