

# Morgan Stanley

Morgan Stanley  
2000 Westchester Avenue  
Purchase, NY 10577

December 20, 2018

Mr. Preston Rutledge, Assistant Secretary of Labor  
c/o Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655

U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

**RE: RIN 1210-AB88 – Definition of "Employer" Under Section 3(5) of ERISA – Association Retirement Plans and Other Multiple-Employer Plans**

Mr. Rutledge:

We respectfully submit Morgan Stanley's comments pursuant to the Department of Labor's Request for Information regarding its notice of proposed rulemaking titled "Definition of "Employer" Under Section 3(5) of ERISA – Association Retirement Plans and Other Multiple-Employer Plans" published in the Federal Register on October 23, 2018 ("Open MEP Proposal").

Morgan Stanley, through its retail brokerage arm, Morgan Stanley Smith Barney LLC<sup>1</sup>, is interested in the promulgation of rules and regulations affecting all of its clients, notably including small employers that either provide, or desire to provide, retirement plan benefits for their employees. As a firm, we support the notion of making it easier for these small business owners who have lacked the resources and/or expertise to allow for the creation of, say, a 401(k) plan. We believe that that in expanding access or "opening" multiple employer plans to more employers, the Department would be paving the way for the financial services industry to assist employers in creating a tangible benefit to millions of American employees that would now have access to retirement savings. Morgan Stanley supports such expansion.

As a large financial institution that has a very strong presence in the retail retirement market, we believe that the expansion of rules relating to multiple employer plans, similar to what is described in the Open MEP Proposal, would have a positive impact on the availability of retirement benefits, particularly in the smaller part of the market. For one, by pooling together a number of smaller plans to create a larger plan, there would be a necessary reduction in the fees

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<sup>1</sup> Morgan Stanley Smith Barney LLC ("MSSB") offers a wide variety of financial products and provides financial services to a large and diversified group of clients, financial institutions and individuals. MSSB is a broker-dealer and investment advisor registered with the SEC and a member of FINRA and the NYSE.

and expenses associated with opening and operating the plan. Recordkeeping fees, investment management fees and other plan administration costs would be reduced as the economies of scale operate. For example, a group of ten plans that form a multiple employer plan would only have to file one Form 5500 and undergo one plan audit as opposed to each plan paying for its own. Additionally, each of the participating employers would enjoy a significant reduction in fiduciary liability. For some small businesses, the idea of sponsoring an employee benefit plan can seem daunting; however, under an expansion of the rules relating to multiple employer plans, as contemplated in the Open MEP Proposal, these small business owners would take on a more limited role in prudently selecting and monitoring the arrangement and forwarding the required contributions. And, as a result more employees would have access to an employer sponsored plan.

While this specific Open MEP Proposal goes a long way towards liberalizing the use of multiple employer plans, we believe that the Department could go further in two important ways. First, this Open MEP Proposal limits the type of entities that would be able to sponsor a multiple employer plan, precluding banks, trust companies, insurance issuers, broker-dealers or other similar financial services firms. Second, the Open MEP Proposal places a limit on the participating employers, requiring that the employers must either be in the same trade, industry, line of business or profession, or have a principal place of business within the same state or metropolitan area.

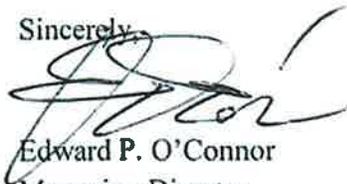
We respectfully differ with the Department on both of these issues. We appreciate that the Department applied similar standards and concepts in the “association health plan” rulemaking process and that there is a preference to maintain simplicity and uniformity; however, we urge the Department to reconsider expanding these definitions to allow for more of a fulsome solution to be offered by the financial services industry. The intent of Executive Order 13847, which served as a catalyst for this examination of the current state of retirement security in America, was to expand access to workplace retirement plans for all American workers. If permitted to function as plan sponsors of multiple employer plans, financial services entities can use their extensive reach, resources, and expertise to present unique products and services to employers of all sizes and to offer economies of scale, similar to the PEO model discussed in the Open MEP Proposal. Furthermore, it is notable that there is currently bipartisan multiple employer legislation currently pending before Congress that does not pose the same restrictions present in this Open MEP Proposal<sup>2</sup>. We would very much like the opportunity to meet with you to demonstrate why these two restrictions are unnecessary and, to the contrary, limit the overall effectiveness of the Open MEP Proposal. We are hopeful that if you were to entertain such a meeting, we could also address potential prohibited transaction exemptive relief that may be necessary with new rulemaking. It may be helpful to the Department to hear some of the practical impacts and effects that proposed rules and exemptions may have on the retirement savings industry and its participants.

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<sup>2</sup> For example, S. 2526 and H.R. 5282, the Retirement Enhancement and Savings Act of 2018, are identical bills that would, among other things, allow unrelated employers to join a “pooled employer plan” that would designate, per a written plan document, a “pooled plan provider” to assume responsibility for the proper operation of the plan under ERISA and the Internal Revenue Code, and to serve as the plan’s named fiduciary. Other legislation under consideration in the 115th Congress also seeks a similar outcome for open MEPs.

We thank the Department for considering our thoughts and comments on the Open MEP Proposal and look forward to continued dialogue in the months to come.

Sincerely,

A handwritten signature in black ink, appearing to read 'E. P. O'Connor', written over the word 'Sincerely,'.

Edward P. O'Connor  
Managing Director  
Morgan Stanley