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Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, D.C. 20210

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

Ladies and Gentlemen:

Prudential Financial, Inc. ("Prudential") appreciates the opportunity to comment on the U.S. Department of Labor (the "Department") proposal to broaden the criteria under ERISA section 3(5) for purposes of determining when employers may join together to sponsor a single retirement benefit plan.¹

Prudential is a financial services leader with a more than 140-year history of helping Americans secure their financial futures and achieve financial wellness. We, therefore, applaud the Department's commitment to facilitating and encouraging expansion of opportunities for working Americans to achieve financial security through participation in retirement plans. As recognized by the Department, millions of working Americans do not have access to a retirement plan, and multiple employer plans (MEPs) represent a potential solution to closing this retirement savings coverage gap.²

While Prudential fully supports the goals of the Department, we are writing to encourage the Department to expand its consideration of entities that can sponsor multiple employer plans (MEPs) and the benefits that can be offered through such plans.

¹ 83 FR 53534, October 23, 2018

² *Id.* at 53534 and 53535.

Broadening MEP Sponsorship

As described by the Department, “[t]he Executive Order called on the Department to consider more generally whether businesses or organizations other than groups or associations of employers and PEOs should be able to sponsor a single MEP under title I of ERISA by acting indirectly in the interest of participating employers in relation to the plan within the meaning of ERISA section 3(5).”³ We do not believe the proposal adequately reflects such consideration. As discussed below, we believe the Department’s proposal is too limiting in defining permissible MEP sponsorship and, as a result, is unlikely to result in significantly greater retirement savings opportunities for working Americans, particularly those working for smaller employers.

Prudential has long believed that MEPs could be a possible solution to closing the retirement savings gap and, therefore, has supported the broadening of MEP sponsorship opportunities.⁴ However, we also believe that in order for MEPs to be a possible solution, there must be a legislative and/or regulatory environment that will ensure a robust and competitive MEP marketplace. Such a marketplace is critical to ensuring broad, cost-effective coverage. In order to induce employer participation in MEPs, particularly that of smaller employers, MEPs must be able to offer high-quality, reasonably priced administrative and fiduciary services, and investment alternatives. In this regard, we are concerned that the Department has taken an unnecessarily narrow approach to addressing MEP sponsorship in the subject proposal.

As proposed, the rule would limit MEP sponsorship of retirement plans to certain “groups or associations of employers” and “professional employer organizations.”⁵ With regard to what constitutes a bona fide “group or association of employers,” the Department continues its application of principles set forth in prior interpretive issuances, with a modification to the “commonality of interest” test that takes into account geographic boundaries.⁶ The proposal also provides that a “group or association” for purposes of MEP sponsorship cannot be a bank, trust company, insurance issuer, broker-dealer, or similar financial services firm (including pension recordkeepers and third-party administrators).⁷

³ *Id.* at 53542.

⁴ See: Prudential’s *Closing the Retirement Savings Coverage Gap - Multiple Employer Plans* (Oct. 2018) at: https://www.prudential.com/media/managed/documents/rp/mep_paper_final_2015.pdf

⁵ See 2510.3-55(a), at 83 FR 53560, October 23, 2018.

⁶ See 2510.3-55(b), at 83 FR 53560, October 23, 2018. The proposal, at paragraph (b)(2)(i), would treat employers sharing a principal place of business in a state or metropolitan area as having a “commonality of interest.”

⁷ See 2510.3-55(b)(vii), at 83 FR 53560, October 23, 2018.

As recognized by the Department, many MEPs already exist, although, for a variety of reasons, their availability has been limited.⁸ In this regard, while the proposal represents an improvement over the current state-of-the-law, we are concerned that there may not be a significant number of “groups or associations” of employers, or PEOs, taking on MEP sponsorship to ensure meaningful advancement in expanding retirement savings opportunities. That is, we are concerned that there may be only a limited number of entities that qualify as a “bona fide” group or association of employers or professional employer organizations, even with a broadening of the “commonality of interest” requirement, and, of those that may qualify, only a limited number will be able or willing to sponsor a retirement savings program for their employer members.

Given the magnitude of the retirement savings coverage gap,⁹ we believe that, if MEPs are to be a realistic retirement savings option for the employees of smaller employers, there must be a robust and competitive MEP marketplace. We believe this fact was recognized by many of the sponsors of the various MEP legislative proposals, as identified by the Department, in providing for a MEPs framework not conditioned on sponsorship by a group or association of employers or professional employer organizations.¹⁰ While we agree that, unlike Congress in framing legislation, the Department is constrained in its interpretations by the language of the statute,¹¹ we believe with respect to the subject proposal, the Department is pursuing an unnecessarily narrow approach to defining MEP sponsorship.

As the Department notes in the preamble, ERISA applies only to employee benefit plans sponsored (“established or maintained”) by an “employer” or by an “employee organization” or by both.¹² Pursuant to ERISA section 3(5), the term employer not only includes a person acting directly as an employer, but “any person” acting “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.”

In the preamble, the Department states that “ERISA does not explain what is meant by an entity to act “directly as an employer” or “indirectly in the interest of an employer, in relation to an employee benefit plan.” “Nor,” the Department continues, “does the

⁸ 83 FR 53535, October 23, 2018.

⁹ *Id.* at 53534. The Department estimates that approximately 38 million private-sector employees in the U.S. do not have access to a retirement savings program through their employers.

¹⁰ *Id.* at 53435, n. 10.

¹¹ *Id.* at 53436.

¹² *Id.* at 53437.

statute explain what is meant by a ‘group or association of employers.’”¹³ While we agree with the abovementioned statements, what does appear clear from the statutory text and the legislative history is that Congress did not intend the term “includes”¹⁴, unlike the proposal, to limit plan sponsorship to “groups or associations of employers.” Thus, in our view, the Department clearly can look to define plan sponsorship under section 3(5) more broadly than “groups or associations or employers” or “professional employer organizations.”

In discussing the scope of the Department’s authority under section 3(5), the Department stated, in connection with its final regulation on Association Health Plans, that “... neither the Department’s previous advisory opinions, nor relevant court cases, foreclose DOL from adopting a more flexible test in a regulation, or from departing from particular factors previously used in determining whether a group or association can be treated as acting as an “employer” or “indirectly in the interest of an employer” for purposes of the statutory definition.”¹⁵ We agree. In fact, the Department, in our view, demonstrated the breadth of its perceived interpretive authority in the issuance of Interpretive Bulletin 2015-02, in which it expressed the view that a state should be considered to “act indirectly in the interest of the participating employers” for purposes of sponsoring a multiple employer plan.¹⁶

With regard to the foregoing, we believe the most effective means by which to ensure a robust and competitive MEP marketplace is to extend MEP sponsorship opportunities to “commercial service providers,” such as banks, trust companies, and insurance companies. To that end, we note that the Department, in other contexts, has recognized the important role of such providers in carrying out critical plan administrative and fiduciary activities, with little or no risks to participants and beneficiaries. For example, in limiting persons that could serve as a “qualified termination administrator,” the Department opted to permit only trustees and issuers of an individual retirement plan within the meaning of section 7701(a)(37) of the Internal Revenue Code, noting that “the standards applicable to such trustees and issuers are well understood by the regulated community and the Department is unaware of any problems attributable to weaknesses in the existing Code and regulatory standards for such persons. Separately, the Department in Field Assistance Bulletin 2006-1 also acknowledged the importance of “intermediaries” (e.g., commercial service providers) in handling and ensuring the

¹³ *Id.*

¹⁴ The word “include” generally connotes a part of a whole, not the whole. *See* Merriam-Webster Dictionary.

¹⁵ 83 FR 28914, June 21, 2018.

¹⁶ *See* 29 CFR 2509.2015-02 Interpretive bulletin relating to state savings programs that sponsor or facilitate plans covered by the Employee Retirement Income Security Act of 1974. (80 FR 71937, Nov. 18, 2015). We note that the Department was able to reach such a conclusion without regard to the fact that a “state”, separately defined in section 3(10), does not constitute a “person” within the meaning of ERISA section 3(9).

allocation of mutual fund trading settlements to plans and plan participants in a manner consistent with ERISA, thereby performing certain functions normally expected of employer fiduciaries. The application of similar standards represents one approach that could significantly expand MEP sponsorship opportunities and, thereby, expand retirement savings opportunities for today's working Americans.

We also note that expanding MEP sponsorship, as we propose, would mitigate the current bias in favor of ERISA-covered state-sponsored MEPs as a result of Interpretive Bulletin 2015-02. Should states, in reliance on the Department's Interpretive Bulletin, undertake to sponsor MEPs, it is foreseeable that employers, particularly smaller employers, would be inclined to gravitate to a state-sponsored arrangement, rather than a MEP sponsored by a group or association, believing that plans offered by and operated under the auspices of a state government represent the least risk of fiduciary liability. Similarly, MEPs offered by bona fide associations and groups of employers may have difficulty competing solely on the basis of lower administrative costs with a MEP sponsored by a state by virtue of a state's economic leverage and bargaining power. We believe that fostering MEP sponsorship by commercial service providers will help establish a level playing field and, thereby better ensure a robust and competitive private-sector marketplace for retirement savings.

In support of the proposal's exclusion of such providers from MEP sponsorship, the Department notes that "[i]n a broad colloquial sense, it is possible to say that commercial service providers, such as banks, trust companies, insurance companies, and brokers, act "indirectly in the interest of" their customers, but that does not convert every service provider into an ERISA-covered 'employer' of their customer's employees."¹⁷ We do not disagree. On the other hand, neither does or should such a finding necessarily preclude such persons from opting to act indirectly in the interest of its employer-customers in the sponsorship of an employee benefit plan for its customers. The Department's concerns about conflicts of interest by commercial service providers can be addressed, as noted below, through prohibited transaction relief.

The Department also noted that its proposal is appropriate to ensure that the Department's regulation of employee benefit plans is focused on "employment-based arrangements," distinguishes an employee benefit plan from "commercial insurance" and addresses "concerns for simplicity and uniformity." We understand the Department's perspective but believe that a plan in which employees of employer members participate will continue to be an employment-based arrangement even if the sponsor is a commercial service provider. We also believe that regulators are capable of distinguishing such a plan from commercial insurance. While we understand the attractiveness of an approach that is similar to the AHP Rule, a desire for simplicity and

¹⁷ 83 FR 53539, October 23, 2018.

uniformity should not be allowed to stifle the goal of ensuring a robust and competitive MEP marketplace.

We, therefore, encourage the Department to consider amending the current proposal to permit MEP sponsorship by commercial service providers, such as those that are trustees or issuers of individual retirement plans within the meaning of section 7701(a)(37) of the Internal Revenue Code. We note that should the Department consider broadening MEP sponsorship along the lines suggested, some prohibited transaction relief will be required in order to address conflict of interest and other issues necessary to the offering of a provider's services and products in conjunction with MEP sponsorship. In this regard, we welcome the opportunity to work, both independently and in coordination with our trade organizations, with the Department in designing the relief necessary to ensuring a robust, competitive, and protective MEP marketplace consistent with the goals of the Department.

Broaden MEP benefits

In response to the Department's request for comments on its proposed rule addressing association health plans (AHPs), Prudential submitted a letter encouraging the Department to expand its consideration of MEP sponsorship to include plans offering retirement and other ERISA-covered benefits, such as life and disability benefits.¹⁸ While the Department ultimately opted to limit the scope of the final rule to health benefits, it did acknowledge that "as more Americans engage in part-time, contract, self-employment, or other alternative work arrangements, it is increasingly important that retirement plans and *employee benefit regulation in general* allow for more flexible, portable benefits." (Emphasis supplied).¹⁹ In this regard, the Department further indicated that it "will consider comments submitted in connection with this rule as part of its evaluation of MEP issues in the retirement plan and other welfare benefit plan contexts."²⁰

We note that while the current proposal addresses retirement benefits – and we fully support such consideration – the Department has once again opted to take a narrow, benefit-centric approach to defining a general statutory term, i.e., "employer," for purposes of MEP sponsorship. Consistent with our March 6, 2018, letter, we believe the same policies that support a review of the sponsorship rules pertaining to group health benefits and retirement benefits support a review of the rules pertaining to other ERISA-covered benefits. Namely, expanded employee access to coverages that enhance

¹⁸ See Prudential comment letter, dated March 6, 2018, at: <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB85/00497.pdf>

¹⁹ 83 FR 28915, n. 10 (June 21, 2018)

²⁰ *Id.* at 28916, n. 10 cont.

financial security, reduced fees and administrative expenses, plan management by benefits professionals, and reduced exposure for participating employers to fiduciary liability, among other things.

In virtually every respect, the identified benefits flowing to employers and their employees through participation in an AHP or a MEP offering retirement benefits would serve employers electing to offer their employees life, disability and other ERISA-covered benefits through a MEP. Accordingly, we see no policy reason why the Department's effort to redefine "employer" should be limited to AHPs or Association Retirement Plans and PEOs. To the contrary, we believe the Department should view this proposal as another opportunity to expand access to benefits that serve to enhance the financial security and overall financial wellness of American workers.

Dual treatment of working owners and employees

Consistent with our views on the Department's proposed AHP regulation,²¹ we fully support the Department's efforts to include working owners within the definition of "employer" for purposes of the proposal.²² While we have concerns with limiting such interpretation to employers participating in AHPs and association retirement plans, we fully support the Department's analysis and underlying policy goals of affording owner-employees the same access to ERISA plan coverage, benefits and protections as other working Americans.²³ In this regard, we believe that the same legal rationale and policy should extend to working owners electing to participate in MEPs offering other ERISA-covered benefits.

We commend the Department for its recognition of, and willingness to address, the challenges of a changing workforce. At present, we have what appears to be a growing and sustainable "gig" economy, an economy in which workers may act as independent contractors rather than as traditional employees.²⁴ The challenges facing "gig" workers, however, are not limited to health plan coverage. We believe that extending the Department's interpretation of "employer", as it relates to sole proprietors and other working owners, to "employers" that elect to participate in an association retirement plan represents a major step toward addressing the retirement challenges currently facing a growing part of the U.S. workforce and economy. However, we, again, encourage the Department to consider extending this analysis to plans offering other ERISA-covered benefits.

²¹ *Supra* n. 18.

²² 2510.3-55(d), 83 FR 53561, October 23, 2018.

²³ 83 FR 53541, October 23, 2018.

²⁴ See Prudential's "Gig Workers in America" at

http://research.prudential.com/documents/rp/Gig_Economy_Whitepaper.pdf.

In concluding, we, again, thank the Department for the opportunity to comment on this important issue. Far too many working Americans do not have access to ERISA-covered benefits which are critical to ensuring financial security during one's working years and throughout retirement. We welcome the opportunity to work with the Department in addressing these and other challenges facing today's workers.

Should you have any questions concerning any of the matters discussed herein, please contact Robert J. Doyle, Vice President, Government Affairs, at robert.j.doyle@prudential.com or 202.327.5244.

Sincerely yours,



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