



December 21, 2018

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue NW, Suite 400  
Washington, DC 20210

Submitted online via <http://www.regulations.gov>

**Re: Definition of “Employer” Under Section 3(5) of ERISA – Association Retirement Plans and Other Multiple-Employer Plans; RIN 1210-AB88**

BlackRock, Inc. (together with its affiliates, “**BlackRock**”) respectfully submits its comments to the Department of Labor (“**DoL**”) in support of the DoL’s proposed regulation (the “**Proposal**”) clarifying the circumstances under which an employer group or association or a professional employer organization (“**PEO**”) may sponsor a multiple employer pension plan (a “**MEP**”). Retirement security is an important financial priority for every American and, especially as our population ages, it is clear that changes are needed to ensure that a secure retirement is available to all. BlackRock believes that a key goal of any change to the retirement landscape should be to make retirement planning easier – both for employers to offer retirement plans, and for their employees to participate. Accordingly, BlackRock supports the DoL’s proposed rule, which will enable easier access to and more widespread use of retirement plans, and suggests that the DoL go even further to allow more small businesses to band together to adopt a single retirement plan.

As we discuss in our January 2018 *ViewPoint* titled “Increasing Access to Open Multiple Employer Plans,” MEPs present a promising way to encourage small employers to offer retirement plans.<sup>1</sup> MEPs allow businesses to share administrative and other responsibilities associated with establishing and maintaining a retirement plan. We believe that MEPs can significantly reduce and simplify the burdens on employers, particularly smaller companies that would like to offer plans but are concerned about the costs, resources, complexity, and fiduciary risk associated with doing so. Thus, while we recognize that the DoL may be somewhat constrained by the current definition of “employer” in Section 3(5) of ERISA, we urge the DoL to use the broadest possible interpretation of the definition of “employer” to enable widespread use of MEPs. In particular, we believe the DoL should expand on its proposed regulation in the following manner.

**1. Relax the criteria to be a Bona Fide Group or Association of Employers**

The definition of “employer” under ERISA includes a group or association of employers acting for an employer in relation to an employee benefit plan. Thus, one focus of the Proposal relates to the requirements that need to be met to be considered a bona fide group or association of employers. As part of the requirements, the Proposal contains conditions for commonality of interest. To satisfy the commonality of interest requirements, the employer

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<sup>1</sup> BlackRock, *ViewPoint*, Increasing Access to Open Multiple Employer Plans (Jul. 2018), available at <https://www.blackrock.com/corporate/literature/whitepaper/viewpoint-increasing-access-open-multiple-employer-plans-january-2018.pdf>.

members of the group or association must either be in the same trade, industry, line of business or profession, or they must have a principal place of business in the same State or metropolitan area.

One of the principal benefits of MEPs if the rule is adopted will be the ability for employees of small businesses to join a larger plan and benefit from the economies of scale inherent in a large plan. The DoL should do what it can to provide regulatory guidance that will allow as many small businesses as possible to avail themselves of these benefits. While the common geographic area criteria in the proposed rule might make it easier for more businesses located in metropolitan areas or highly-populated states to participate in MEPs, the geographic criteria and the same trade, industry, line of business or profession criteria may pose difficulties for many small businesses in suburban and rural areas in less populated states. Further, even if there is a MEP available for businesses in their state, the MEP may not be large enough to reap the benefits of the economies of scale that can be had from a larger pool of participants.

Thus, we urge the DoL to expand the geographic boundaries to allow employers to band together within larger regional areas of the country to enable more employers to join one plan, and to allow employers in suburban and rural areas to participate in MEPs that include more participants. We believe the DoL should modify the current requirements such that members of a group or association will be treated as having commonality of interest if the employers are located within larger geographical boundaries, such as the regional divisions used by the U.S. Census Bureau, the districts used by the Federal Reserve or the regions used by the Bureau of Economic Analysis. At a minimum, we encourage the DOL to clarify that a MEP for employers in a metropolitan area that crosses two or more states does not need to exclude employers that are in those states even if they are outside the metropolitan area.

## **2. Take a more expansive view to allow “open” MEPs**

We commend the DoL for its changes relating to the establishment of MEPs by PEOs, and we believe the DoL could go even further to allow what the proposal refers to as “open MEPs.” The definition of employer under ERISA includes a person acting “indirectly in the interest of an employer, in relation to an employee benefit plan.” Even if the MEP sponsor is a business, there is nothing in the plain language of the statute that would preclude that business from acting in the interests of an employer.

We recognize that the analysis of the DoL in limiting that phrase to allow only PEOs to offer MEPs could be colored by the abuse that may be possible with welfare benefit plans in this context. Health insurance is heavily regulated by the states, and employer health and welfare plans are not subject to many of the rules applicable to ERISA pension plans. The concern could exist that opportunistic businesses may establish multiple employer welfare arrangements to take advantage of ERISA’s preemption of state law in a veiled attempt to avoid health insurance regulation.

However, pension plan services are not covered by specific state or other federal regulations that relate to the pension aspect of the services, so there should not be a concern that providers are trying to utilize ERISA preemption to avoid other more onerous regulatory requirements. To the contrary, by offering pension plan services in the form of establishing a MEP, the provider would become subject to the rigorous requirements of ERISA applicable to pension plans (including fiduciary, vesting, funding, and disclosure requirements), which would apply to any open MEPs. We believe these requirements should adequately protect plan

participants and beneficiaries. Thus, we encourage the DoL to take a more expansive reading of the plain meaning of the statute, and allow the flexibility to establish open MEPs.

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We thank the DoL for providing the opportunity to comment on the proposed regulation regarding the definition of “Employer” under Section 3(5) of ERISA – Association Retirement Plans and Other Multiple-Employer Plans. Please contact the undersigned if you have any questions or comments regarding BlackRock’s views.

Sincerely,

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