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October 29, 2019

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

Re: EBSA RIN 1210-AB92  
"Open MEPs" and Other Issues Under  
Section 3(5) of ERISA

Ladies and Gentlemen:

Prudential Financial, Inc. ("Prudential") appreciates the opportunity to respond to the U.S. Department of Labor's (the "Department") Request for Information (RFI) on "Open MEPs" and other issues under section 3(5) of the Employee Retirement Income Security Act (ERISA).<sup>1</sup>

Prudential is a financial services leader with more than a 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 the 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.<sup>2</sup>

While the Department's Association Retirement Plan (ARP) rule represents an important step forward in expanding access to retirement savings programs,<sup>3</sup> we believe more needs to be done to ensure a robust, competitive MEP marketplace from which employers can compare and choose high quality, competitively priced MEP offerings for their employees. As discussed below, we believe that permitting financial services entities to sponsor MEPs will better ensure such a MEP marketplace. As also discussed below, we believe the Department should broaden open MEP benefit

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<sup>1</sup> 84 FR 37545, July 31, 2019.

<sup>2</sup> 84 FR 37508 *et seq.*, July 31, 2019.

<sup>3</sup> 84 FR 37543, July 31, 2019, § 2510.3-55 Definition of Employer – Association Retirement Plans and Other Multiple Employer Plans.

offerings, beyond health and retirement benefits, to all ERISA-covered benefits (including life and disability benefits) that can play an important role in the overall financial security of today's working Americans.

### *Importance of Expanding MEP Sponsorship to Include Financial Services Entities*

Prudential has long believed that MEPs could play a significant role in bringing retirement savings opportunities to millions of working Americans.<sup>4</sup> However, in order to achieve such a goal, there must be a legislative and/or regulatory environment that will ensure that employers have access to a robust, competitive MEP marketplace, a marketplace consisting of MEPs offering high quality, competitively priced products and services. Only with such a marketplace from which to choose a MEP can an employer, in our view, be assured of being able to discharge its fiduciary obligations under ERISA with respect to the prudent selection of a MEP for its employees.

While, as noted, we believe the Department's ARP rule represents a step forward, we are concerned that there may not be a sufficient number of "groups or associations" of employers taking on MEP sponsorship to ensure the creation of a MEP marketplace sufficient to meaningfully expand 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, 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,<sup>5</sup> we believe that, if MEPs are to be a realistic retirement savings option for the employees of smaller employers, there must be a sufficient number of MEPs to afford employers competitive choices; namely choices among high quality, cost competitive MEPs. We believe this fact was recognized by many of the sponsors of the various MEP legislative proposals in providing for a MEPs framework not conditioned on sponsorship by a group or association of employers or professional employer organizations. While we agree that, unlike Congress in framing legislation, the Department is constrained in its interpretations by the language of the statute,<sup>6</sup> we believe that the Department has the authority to pursue a broader approach to defining MEP sponsorship than is reflected in the ARP rule.

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<sup>4</sup>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](https://www.prudential.com/media/managed/documents/rp/mep_paper_final_2015.pdf)

<sup>5</sup> 84 FR 37508, July 31, 2019. 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.

<sup>6</sup> 84 FR 37509.

As the Department noted in the preamble to the ARP rule, ERISA applies only to employee benefit plans sponsored (“established or maintained”) by an “employer” or by an “employee organization” or by both.<sup>7</sup> 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 to the ARP rule, the Department also noted 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 statute explain what is meant by a ‘group or association of employers.’”<sup>8</sup> While we agree with the quoted statements, what is clear from the statutory text and the legislative history is that Congress did not intend the term “includes”<sup>9</sup> to limit plan sponsorship to “groups or associations of employers.” Thus, in our view, there is statutory support to define plan sponsorship under section 3(5) more broadly than “groups or associations of employers” and “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.”<sup>10</sup> 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.<sup>11</sup>

We also note that expanding MEP sponsorship to include financial services entities would mitigate the current bias in favor of ERISA-covered state-sponsored MEPs as a

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<sup>7</sup> *Id.* at 37510.

<sup>8</sup> *Id.*

<sup>9</sup> The word “include” generally connotes a part of a whole, not the whole. *See* Merriam-Webster Dictionary.

<sup>10</sup> 83 FR 28914, June 21, 2018.

<sup>11</sup> *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).

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 or financial services entity, 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 financial services entities will help establish a level playing field and, thereby better ensure a robust and competitive private-sector marketplace for retirement savings.

With regard to the foregoing and the specific issues raised by the subject RFI, Prudential strongly supports extending MEP sponsorship opportunities to financial services entities, such as banks, trust companies, and insurance companies. In this regard, we believe that participation of financial services entities in MEP sponsorship may, as discussed above, be necessary to ensure the robust, competitive MEP marketplace required to address demand for MEP offerings and to provide employers comfort regarding the discharge of their fiduciary duties under ERISA in the MEP selection process. In addition, financial services entities generally bring a level of product, legal, and compliance expertise unique to the employee benefits marketplace.

#### *Possible Conditions for MEP Sponsorship by Financial Services Entities*

We recognize that sponsorship of a MEP by a financial services entity may raise concerns about the ability of such an entity to both offer its own products and services and discharge its responsibilities to the plan and its participants as a fiduciary under ERISA. However, we believe such concerns can be mitigated through the establishment of meaningful and protective standards and an appropriate level of oversight. In this regard, we offer the following for the Department's consideration:

#### Limit MEP Sponsorship to Select Financial Entities

MEP sponsorship opportunities for financial services entities could be limited to only those entities that would qualify as trustees and issuers of individual retirement plans within the meaning of section 7701(a)(37) of the Internal Revenue Code. 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.”<sup>12</sup> Separately, the Department in Field Assistance Bulletin 2006-1 acknowledged the importance of “intermediaries” (e.g., commercial service providers) in handling and ensuring the 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 to MEP sponsors should provide a degree of comfort to the Department and employers regarding the entities permitted to take on fiduciary responsibilities as a MEP sponsor.

#### Establish a Registration Requirement

In advance of offering a MEP, the Department could establish a general registration requirement for open MEPs. Such registration could, among other things, serve to identify the financial services entity sponsoring the MEP, the MEP’s designated plan administrator and fiduciaries, and the extent to which the MEP and sponsor are in compliance with established bonding and other requirements. Such registration would serve as notice to the Department of MEP sponsors and, if made available publicly, could be a source for employers to identify potential MEP offerings.

#### Establish Disclosure Requirements

In an effort to ensure that employers have the information they may need to make an informed fiduciary decision regarding participation in a MEP sponsored by a financial services entity, such MEPs could be required to provide disclosures modeled after the service provider disclosures required under ERISA section 408(b)(2) and the participant disclosures required under ERISA section 404(a) regarding conflicts, services and fees applicable to the MEP.<sup>13</sup> We believe these types of disclosures will not only serve to assist employers in assessing and comparing services and costs of available MEPs, but also in understanding the nature and extent of any conflicts of interest.

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<sup>12</sup> 71 FR 20821, April 21, 2006.

<sup>13</sup> See 29 CFR §§ 2550.408b-2, 2550.404a-5.

## Condition Use of Proprietary Services and Products

The use of any proprietary services (e.g., recordkeeping) or products (e.g., investment funds) should, consistent with ERISA fiduciary provisions, be conditioned on such services and products being necessary to the prudent operation of the plan, appropriate for the plan's participants and beneficiaries, and, with respect to which, the financial services entity/MEP sponsor receives no more than reasonable compensation. While many investment platforms may include non-proprietary as well as propriety investment options, determinations as to whether or to what extent non-proprietary investments should be offered are best left to the financial services entity/MEP sponsor to determine, taking into account their particular business model and the desires of participating employers/fiduciaries.

## Establish a Compliance Review Requirement

To further mitigate conflicts of interest, MEP sponsorship by a financial services entity, particularly one using proprietary services and products, could, in lieu of engaging an independent fiduciary, be conditioned on engaging an independent expert to conduct a periodic review of the entity's compliance with the MEP sponsorship requirements. Such a review could assess compliance with any applicable sponsor qualification requirements, bonding requirements, reporting and disclosure requirements, and any applicable prohibited transaction exemption requirements. Such reviews would be conducted by a qualified expert who is wholly independent of the financial services entity/MEP sponsor. Under this approach, the independent expert would not have the authority to unilaterally address deficiencies, but rather would report identified deficiencies to the MEP sponsor, who, in turn, would have an opportunity to correct.

We note that the Department has employed similar requirements in implementing regulations under 408(b)(14) and 408(g)(1) of ERISA and sections 4975(d)(17) and 4975(f)(8) of the Internal Revenue Code.<sup>14</sup>

The foregoing represents a few of our preliminary thoughts on regulatory approaches to protecting plan participants and participating employers, while mitigating conflicts with respect to the offering of proprietary services and products by a MEP sponsor. We would further note the existence of a number of prohibited transaction exemptions, such as 77-3 (in-house mutual funds), 77-4 (selection of proprietary funds), 84-24 (service provider receipt of commissions) 2006-06 (abandoned plan), that, with modification, could be helpful in addressing conflict concerns. We recognize that more

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<sup>14</sup> See 29 CFR § 2550.408g-1. Also see 29 CFR § 2550.408b-2(c)(1)(ix)(C) for an example of reporting noncompliance to the Department.

may be required to further develop a workable regulatory/prohibited transaction exemption framework and we would welcome the opportunity to work with the Department on issues attendant to such an initiative.

### *Broaden MEP benefits*

In comment letters to the Department on both its proposed rule addressing association health plans and proposed rule addressing association retirement plans, Prudential encouraged the Department to expand its consideration of MEPs, beyond those offering health and retirement benefits, to include those offering other ERISA-covered benefits, such as life and disability benefits.<sup>15</sup> While the Department ultimately opted to limit the scope of its final rules, 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.”<sup>16</sup> (Emphasis supplied). In this regard, the Department, in the preamble accompanying the association health plan rule, 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.”<sup>17</sup> (Emphasis supplied).

We note that with the adoption of the ARP rule – which we fully support – the Department has 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 earlier letters, 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 financial security, with 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 association health and retirement plans 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 MEPs and PEOs offering health and

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<sup>15</sup> 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> and comment letter, dated December 18, 2018, at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB88/00019.pdf>.

<sup>16</sup> 83 FR 28915, n. 10 (June 21, 2018)

<sup>17</sup> *Id.* at 28916, n. 10 cont.

retirement benefits. To the contrary, we believe the Department should, independent of its review of comments on the subject RFI, take steps to expand access to benefits that serve to enhance the financial security and overall financial wellness of American workers.

We would welcome the opportunity to pursue this request further with the Department.

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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