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Submitted via
Federal eRulemakingPortal: www.regulations.gov

March 6, 2018

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

Re: EBSA RIN 1210-AB85
Definition of "Employer"

Ladies and Gentlemen:

Prudential Financial, Inc. ("Prudential") appreciates the opportunity to comment on the U.S. Department of Labor's (the "Department") proposal to broaden the criteria under ERISA section 3(5) for purposes of determining when employers may join together in an employer group or association that is treated as the "employer" sponsor of a single employee benefit plan.[1]

Established in 1875, Prudential has a long history of helping Americans achieve a more secure financial future. We, therefore, applaud the Department's commitment to facilitating and encouraging expansion of opportunities for working Americans to participate in employer-sponsored group health plans. However, we are concerned that addressing this problem alone will be a missed opportunity to expand access to retirement savings, as well as other ERISA-covered benefit programs for millions of American workers employed by small businesses, as well as self-employed workers in the growing "gig" economy. In this regard, we are writing to encourage the Department to expand its consideration of who should be treated as an "employer" under ERISA to accommodate multiple employer employee benefit plans. As discussed below, we believe such an accommodation is not only consistent with the goals of the Administration, but can be achieved while furthering the goals of the subject proposal.[2]

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[1] 83 Fed Reg 614, January 5, 2018

[2] While the focus of this letter is on MEP retirement plans, there appears, in our view, to be little basis for not expanding the "employer" definition for purposes of all ERISA-covered benefit programs sponsored by multiple employers.

Policy Considerations

It has been well documented that employer-sponsored retirement savings programs are serving to enhance the retirement security of those working Americans who have access to such plans in the workplace. According to research by the Employee Benefits Research Institute, people earning between $30,000 and $50,000 per year are 16.4 times more likely to save for retirement if they have access to a workplace plan. However, millions of working Americans do not have the same opportunity to achieve economic security because they do not have access to retirement savings and other employee benefit programs through their workplace.[3] The lack of access to retirement savings programs is most acute for workers employed by small businesses.[4] According to the Government Accountability Office (GAO), only about 14 percent of small employers sponsor some type of plan for their employees to save for retirement and these employers in general can face numerous challenges establishing and maintaining a plan, noting that many small employers indicated they felt overwhelmed by the number of plan options, plan administration requirements, and fiduciary responsibilities.[5]

Prudential, and many others, have long believed that multiple employer plans (MEPs) offer a potential solution to closing the retirement coverage gap.[6] Legislation has been introduced over the past several years in both the U.S. Senate and U.S. House of Representatives that would serve to expand and foster MEP sponsorship and employer participation.[7] These legislative initiatives were driven by a recognition of the importance of workplace-based savings programs for employees and the regulatory impediments to expanding retirement savings opportunities through multiple employer plans, plans that enable employers, particularly smaller employers, to enjoy the economies of scale, simplified administration and reduced fiduciary liability currently available to larger employers and union-sponsored employee benefit programs.

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[3] The Department of Labor estimated that more than 68 million working Americans do not have access to workplace based retirements savings programs. See 80 Fed. Reg. 72008 (November 18, 2015), ftnt 1.
[4] Rhee, Nari and Boivie, Ilana (2015), "The Continuing Retirement Savings Crisis," University of California, Berkley – Institute for Research on Labor and Employment, p.4.
https://www.nirsonline.org/reports/the-continuing-retirement-savings-crisis/

[5] See GAO (2013) "Retirement Security: Challenges and Prospects for Employees of Small Businesses (GAO 13-748T) at https://www.gao.gov/assets/660/655889.pdf.

[6] See Prudential's "Multiple Employer Plans – Expanding Retirement Savings Opportunities" at http://research.prudential.com/documents/rp/mep_paper_final_2015.pdf.

[7] S. 3471, sec. 101 *et seq.* (114th Cong.), H.R. 4637 (115th Cong.), H.R. 4523 (115th Cong.), among others.

With regard to the foregoing, we believe the same policy concerns cited by the Department in support of Association Health Plan (AHP) sponsorship apply to sponsorship of Multiple Employer Plans offering retirement benefits and other ERISA-covered benefit programs (such as accident, disability, and death benefits). Specifically, the Department makes reference in the preamble to its proposal that allowing businesses, especially small businesses, more flexibility to form AHPs would facilitate "more choice and potentially make health care coverage more affordable."[8] In this regard, the Department references the potential benefits of AHP participation, including reduced costs and burdens resulting from "increased bargaining power, economies of scale, administrative efficiencies, and transfer of plan maintenance responsibilities from participating employers to AHP sponsors." [9]

In all respects, the aforementioned benefits flowing to employers through participation in an AHP have long been cited as benefits that would serve employers electing to offer their employees a retirement savings plan through a MEP. Accordingly, we see no policy reason why the Department's effort to redefine "employer" should be limited to AHPs. To the contrary, we believe the Department should view this proposal as an opportunity to be at the forefront of expanding access to ERISA-covered retirement plans, in particular, rather than deferring to state efforts to promote retirement savings through individual retirement accounts.[10]

We would further note that a single, uniform definition of "employer" would enable smaller employers to join together in the same employer group to offer a variety of ERISA-covered benefits with reduced costs and administrative burdens, all to the benefit of the employees of such employers.

Sole Proprietors and Other Working Owners

Also of significance is the Department's intention to include "sole proprietors and other working owners" within the definition of "employer" for purposes of the proposal.[11] While we have concerns with limiting such interpretation to employers participating in AHPs,[12] we fully support the Department's well-reasoned legal analysis and underlying policy goals of affording owner-employees the same access to ERISA plan coverage,

[8] 83 Fed. Reg. 618, January 5, 2018.
[9] Ibid.
[10] Further support for the Department's leadership role in this area can be found in the report of the Advisory Council on Employee Welfare and Pension Benefit Plans entitled "Outsourcing Employee Benefit Plan Services", November 2014; and in the "General Explanation of the Administration's Fiscal Year 2017 Revenue Proposals", Department of the Treasury, February 2016, p. 147 et seq.
[11] 83 Fed. Reg. 620, January 5, 2018.
[12] 83 Fed. Reg. 621-622, January 5, 2018

benefits and protections.[13] In this regard, we believe that the same legal rationale and policy should extend to sole proprietors and other working owners electing to participate in a MEP sponsored retirement plans; that is, individuals who might otherwise be viewed as precluded from participating in an ERISA-covered plan.

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.[14] The challenges facing "gig" workers, however, are not limited to health plan coverage. Significantly, fewer gig-only workers have assets in an employer-sponsored retirement plan (16%) than their full-time counterparts (52%).[15] 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 a MEP-sponsored retirement plan would be a major step toward addressing the retirement challenges currently facing a growing part of the U.S. workforce and economy.

We, therefore, recommend that the Department amend the proposal and/or 29 CFR § 2510.3-3 to clarify the permissible participation of sole proprietors and working owners in all ERISA-covered employee benefit plans and, in particular, retirement plans (in addition to AHPs).

Uniform definition of "employer"

As recognized by the Department, neither the Department's advisory opinions nor relevant case law foreclose the Department from adopting a more flexible test in a regulation or from departing from the factors applied to date by the Department 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 section 3(5). As also recognized by the Department, the statute itself does not specifically refer to or impose the elements applied to date by the Department on a determination as to whether any particular group or association acts as an "employer" or "in the interest of an employer."[16] Thus, the Department, in framing a rule for purposes of section 3(5), may be more broadly guided by ERISA's purposes and policies, including the need to expand access to employee benefit plans and address changes in workforce and market dynamics.

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[13] Ibid, 622.
[14] See Prudential's "Gig Workers in America" at http://research.prudential.com/documents/rp/Gig_Economy_Whitepaper.pdf.
[15] Ibid.
[16] 83 Fed. Reg. 617, January 5, 2018

To date, in determining whether an arrangement in which two or more unrelated employers are expected to participate constitutes a single ERISA-covered plan, the Department, in the absence of regulations, has generally looked to, among other things, whether the sponsor of the plan is a bona fide group or association with respect to which participating employers, either directly or indirectly, exercise control and the extent to which there is a "commonality of interest" among the individuals that benefit from the plan and the party sponsoring the plan.[17] In 2015, the Department, in an effort to facilitate state sponsorship of multiple employer plans abandoned its traditional analysis under section 3(5) and concluded that "a state [or a designated agency or instrumentality] has a unique representational interest in the health and welfare of its citizens that connects it to in-state employers that choose to participate in a state MEP and their employees, such the state should be considered to act indirectly in the interest of the participating employers."[18]

As a policy matter, Prudential expressed concern that the 2015 guidance, while recognizing the retirement challenges facing employees of small employers, disregarded the need for a private sector retirement savings solution in favor a state government solution.[19] With the subject proposal, we are concerned that the Department again deviates from its traditional analysis, introducing a third interpretation, solely to address a specific coverage solution, AHPs,[20] without addressing the need for a private sector solution for expanding access to retirement savings programs. While we fully support the Department's commitment to expanding access to ERISA covered plans, we believe that, rather than dealing with the definition of "employer "on a piecemeal basis, the Department should pursue a single, comprehensive regulatory approach. The regulated community has long sought uniform, consistent definitions within agencies and among agencies in an effort to facilitate plan establishment, maintenance and compliance with applicable federal law.

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[17] See Advisory Opinion 94-07A and 2012-04A.

[18] See Interpretive bulletin relating to state savings programs that sponsor or facilitate plans covered by the Employee Retirement Income Security Act of 1974, 29 CFR § 2509.2015-02, 80 Fed Reg 65127 (Oct. 26, 2015).

[19] See January 14, 2016 comment letter from Prudential to the Department (attached as Appendix A, in which concerns are raised regarding both the policy and legal analysis set forth in the support of Interpretative Bulletin § 2509.2015-02.

[20] The proposal, at paragraph (c) of § 2510.3-5, addressing the "commonality of interest" requirement, provides that such can be determined "based on relevant facts and circumstance and may be evidenced by: (1) Employers being in the same trade, industry, line of business or profession; or (2) Employers having a principal place of business in a region that does not exceed the boundaries of the same State or the same metropolitan area (even if the metropolitan area includes more than one State." 83 Fed Reg 635 (January 5, 2018).

Specific recommendations:

1. Expand scope of the regulation to apply to all ERISA-covered employee benefit plans and, most importantly, retirement plans in which two or more employers are expected to participate, with the exception of a "multiemployer plan" within the meaning of ERISA section 3(37).

2. Reframe the regulation to permit sponsorship of multiple employer plans by an employer that is either: a "bona fide group or association," with criteria similar to those proposed in paragraph (b); **or** any other "person acting indirectly in the interest of an employer" in relation to an employee benefit plan. This approach would expand sponsorship of multiple employer plans beyond those sponsored by a bona fide group or association and participating employers with a commonality of interest.

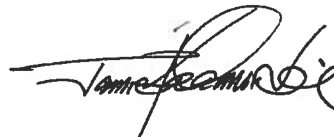
3. Such an approach should be modeled after the "pooled employer plan" provisions set forth in Section 101 of S. 3471 (114th Congr., 2D Session), a copy of which is attached as Appendix B, to the extent applicable, including registration, audit and bonding requirements.

4. The application of any nondiscrimination or other requirements as a result of the Affordable Care Act should be limited to the offering of health care benefits through an AHP.

Again, thank you 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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APPENDIX A

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January 14, 2016

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

Re: RIN 1210-AB71
Savings Arrangements Established by States for Non-governmental Employees

Ladies and Gentlemen:

Prudential has long been committed to expanding retirement savings opportunities for all working Americans.[1] It is well recognized that far too many of today's working Americans do not have access to retirement savings programs in their workplace. We believe the subject proposed rulemaking in conjunction with the Department's interpretive guidance (§ 2509.2015-02) represent an important commitment to work with states in attempting to address issues critical to the retirement security of millions of Americans. However, we are very troubled by the Department's use of its regulatory and interpretive authority to favor state plan sponsorship over the private sector by effectively empowering states with the authority to use automatic enrollment in conjunction with payroll deduction IRAs and sponsor multiple employer plans, while specifically precluding the use of such tools and plans by private sector sponsors.

As recognized by the Department, more than 68 million working Americans currently do not have an opportunity to participate in a workplace based retirement savings program.[2] The solution to this problem cannot, in our view, be left solely to the states, as the Department's guidance appears to suggest, but must encompass private sector

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[1] See Prudential white paper entitled *Multiple Employer Plans: Expanding Retirement Savings Opportunities* (2015) at http://research.prudential.com/documents/rp/mep_paper_final_2015.pdf.

[2] 80 Fed. Reg. 72008 (November 18, 2015), ftnt 1.

efforts, with regulatory and interpretive guidance that encourages and facilitates private sector plan sponsorship. We look forward to working with the Department on the development of such guidance. In the interim, we respectfully submit the following observations and comments on the Department's November 18, 2015 guidance.

Comments on Proposed Rule - §2510.3-2(h)[3]

At the outset, we are concerned that the Department unnecessarily, in our view, opted to pursue guidance that not only precludes private sector employers from utilizing an automatic enrollment feature as part of their payroll deduction program, but imposes conditions on both states and participating employers that may serve to limit a state's certainty as to the status of its arrangement under title I of ERISA, while exposing both the state and participating employers to increased risks and liabilities.

In our view, the Department could – and should - have reasonably interpreted its existing payroll deduction IRA guidance (29 CFR § 2510.3-2(d) and 2509.99-1) to conclude that an automatic enrollment feature with adequate advance notice and a reasonable period for employees to opt out does not contravene the requirement that such programs be "completely voluntary" with respect to employee participation in a payroll deduction IRA program[4] Such an interpretation, being an interpretation of the Agency's own guidance, would, in our view, almost certainly be entitled to judicial deference.[5] Moreover, such an interpretation would have been wholly consistent with the policies underlying the Department's 1999 guidance (29 CFR § 2509-99-1) to further employee savings opportunities through payroll deduction arrangements.[6]

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[3] 80 Fed. Reg. 72006 (November 18, 2015).

[4] While the Department noted that courts in various contexts have found opt-out arrangements inconsistent with a "completely voluntary" arrangement, we note that such arrangements were different from the payroll deduction IRA programs at issue in the proposed rule. Most of the cited cases appeared to involve group insurance arrangements under which employee contributions paid for current insurance coverage and, as a result, were unlikely refundable after the coverage period. In contrast, employees contributing to a payroll deduction IRA program have the ability to opt-out, recover their contributions, or roll such contributions over to an IRA outside the program. Such rights, in our view, argue strongly in favor of a "completely voluntary" program. In other contexts, both the Congress and the Department have found that adequate advance notice, coupled with a right to direct investments is tantamount to a participant's exercise of control. See ERISA sections 404(c)(5), 514(e) and 29 CFR § 2550.404c-5. If an exercise of control can be deemed, it arguably would be completely voluntary.

[5] In contrast to the Department's interpretation in § 2509.2015-02, it would appear that the posited interpretation could satisfy the factors set forth in *Skidmore v Swift*, 323 US at 140 (1944).

[6] We also note that in describing the requirements of the payroll deduction regulation at 29 CFR § 2510.3-2(d), the Interpretive Bulletin at paragraph (a) of 29 CFR 2509.99-1 merely references "voluntary" contribution, rather than the "completely voluntary," raising a question as to whether the Department over-interpreted the significance of "completely" in explaining why the regulation was necessary, particularly when considered with an employee's unilateral right to rollover funds to an IRA outside the state program, as required by paragraph (h)(1)(iv) of the proposal.

However, as noted above, rather than an interpretive approach that would have accommodated both private sector and state sponsored programs, the Department proposed a safe harbor that, if adopted, would only benefit employees of employers in those states that offer or mandate participation in a state payroll deduction program. If, consistent with what was believed to be the Department's long held view, payroll deduction programs continue to represent a viable means by which employers can offer their employees an opportunity to save for retirement,[7] we strongly encourage the Department to reconsider its analysis of its existing payroll deduction guidance and clarify that the use of automatic enrollment features by an employer would not, in and of itself, affect the voluntary nature of the program for purposes of 29 CFR §§ 2510.3-2(d) and 2509.99-1.

Should the Department continue to pursue its limited safe harbor approach to guidance, we submit the following for consideration.

Paragraph (h)(1)(ii) of the proposal provides that the state or subdivision thereof is responsible for investing employee savings or selecting investment alternatives for employees to choose. Paragraph **(h)(2)(ii)** clarifies that a state may utilize one or more service providers to operate or administer the program, but the state or subdivision thereof retains full responsibility for the operation and administration of the program. Inasmuch as a state otherwise meeting the conditions of the safe harbor will be operating and maintaining a program **not** subject to ERISA's fiduciary standards, the questions presented by the aforementioned paragraphs is what standards of conduct, if any, will states be subject to with respect to how they invest employees' monies and select investments from which employees may choose? In addition, to assist states in more fully understanding the liabilities and risks attendant to offering such programs and attaining the expected benefits, it would be helpful for the Department to clarify whether and to what extent a state operating a program within the safe harbor may be subject to the prohibited transaction and related excise tax provisions of the Internal Revenue Code (including the Department of Labor's investment advice regulation and related exemptions). It would also be helpful for states and participating employers to understand whether or to what extent noncompliance with the conditions of the safe harbor may result in a state program being treated as an ERISA-covered plan and the implications of such coverage for both states and participating employers.

Paragraph (h)(1)(iii) of the proposal provides that the state assumes responsibility for the security of payroll deductions and employee savings. We note that the preamble accompanying the proposed rule provides no guidance to the states as to the types of programs, audits, etc. that would be necessary to assure the Department that they met such requirements. In an effort to bring certainty to compliance with this condition of the safe harbor, we believe it would be helpful if the Department delineated for the

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[7] 29 CFR § 2509-99-1(b).

states the minimum requirements necessary to demonstrate a commitment to ensuring the timely receipt of employee contributions and the collection of delinquent contributions.[8]

Paragraph (h)(1)(vi) of the proposal provides that the program does not require an employee or beneficiary to retain any portion of contributions or earnings in the program and does not otherwise impose any restrictions on withdrawals or impose any cost or penalty on transfers or rollovers. We request that this provision be clarified to distinguish restrictions, costs, or penalties imposed by the program itself from restrictions, costs and penalties that are a feature of an investment available to employees through the program. Specifically, we request that the Department clarify that a program that offers investments with reasonable limitations upon withdrawals or fees or penalties on transfer or rollover will not, itself, cause a program to run afoul of this requirement, provided that all such limitations, restrictions, fees or penalties are disclosed to employees in advance.[9] Such a clarification would avoid the elimination of certain investments intended to satisfy the Department's safe harbor, while affording states the flexibility to prudently select investment options determined to best meet the needs of participating employees. It would also recognize the value that certain investment products, including insurance products, may offer retirement savers in the form of lower costs, greater returns and insurance guarantees, some of which may be available only with reasonable liquidity restrictions and fees.

Paragraph (h)(1)(vii) provides that all rights of the employee under the program are enforceable "only by the employee, …., or the State …." Inasmuch as noncompliance by a state, or possibly a participating employer, with any one condition of the safe harbor may result in the establishment of an ERISA-covered plan and given the Department's interest in protecting employees in the workplace generally, we recommend that the Department amend this paragraph to make clear that nothing in the regulation precludes an action by the Secretary of Labor on behalf of one or more employees covered by the program.

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[8] For example, the Department could clarify the extent to which the trust and fiduciary principles discussed in Field Assistance Bulletin No. 2008-01, relating to the collection of delinquent contributions, would apply to states for purposes of compliance with the proposed safe harbor. http://www.dol.gov/ebsa/pdf/fab2008-1.pdf.

[9] Such a clarification, in our view, could be included in either paragraph (h)(1)(vii) or in paragraph (h)(2) making clear that a state savings program will not fail to satisfy the provisions of (h)(1) merely because the program: (iv) Includes investment alternatives that may impose reasonable restrictions, costs or penalties on withdrawals, transfers or rollovers, provided that notice of any such restrictions, costs or penalties is furnished to participants and beneficiaries in advance of the investment. For an example of the confusion surrounding this provision, see *Report to Legislature, State of Connecticut Retirement Security Board, January 1, 2016.*

Paragraph (h)(1)(viii) conditions applicability of the safe harbor for state programs on employer compliance with certain delineated requirements. While some of the requirements are similar to the limits set forth in the regulatory exclusion at 29 CFR § 2510.3-2(d), we are concerned that compliance with such requirements may in some instances be beyond the control of the state; thereby leaving applicability of the safe harbor with respect to a state program highly uncertain at any given point in time. We note that employers opting to offer a payroll deduction program outside of ERISA have an incentive to ensure compliance with the requirements of § 2520.3-2(d). We are concerned that that same incentive may not exist under the proposed safe harbor for state sponsored programs given that many employers may be participating solely because of a state mandate, rather than voluntarily.

This aspect of the Department's proposal, therefore, highlights questions as to the impact of noncompliance by one or more employers with the requirements imposed by paragraph (h)(1)(viii). For example, assume that one or more employers fail to remit some contributions, as required by paragraph (h)(1)(viii)(A); or fail to maintain adequate records regarding the collection or remittance of contributions, as required by paragraph (h)(1)(viii)(B); or fail to distribute the information described in paragraph (h)(1)(viii)(D). Does such noncompliance result in the state program becoming an ERISA-covered plan or does such noncompliance result in the noncompliant employer having established an ERISA-covered plan (which, in turn, might take the employer outside the scope of the state mandate by virtue of now maintaining an ERISA-covered retirement plan for its employees) or could the noncompliant employer be viewed as maintaining a payroll deduction IRA program within the meaning of § 2520.3-2(d), assuming all the conditions of that regulation are otherwise met? We believe the Department's views on these issues are critical to providing the states the certainty they need both respect to the viability of their program and with respect to their exposure to responsibilities and liabilities under ERISA. In addition, the Department's responses are critical to potential or actual participating employers in terms of their exposure to responsibilities and liabilities that may result from one or more noncompliant participating employers and their analysis as to whether to sponsor a retirement plan independent of the state program to the extent there is uncertainty attendant to such programs.

Paragraph (h)(1)(ix) conditions the applicability of the safe harbor on, among other things, an employer providing "no bonus or other monetary incentive to employees participating in the program." It is not clear to us why the Department, in pursuing a safe harbor that is intended to expand retirement coverage and savings, would affirmatively preclude an employer from incentivizing its employees to save. It is not hard to imagine that some employers may want to encourage such savings through a bonus, pay increase, or some other monetary or non-monetary reward. We encourage the Department to eliminate this condition from the safe harbor. We further note that

such a limitation does not exist with respect to employers that opt to offer a payroll deduction IRA program pursuant to 29 CFR § 2510.3-2(d).

Regulatory Impact Analysis

In proposing the subject safe harbor, the Department clearly recognizes that it will be providing a needed mechanism for states to move forward with IRA-based mandatory savings programs. In the absence of such a safe harbor or similar guidance from the Department, such state efforts clearly would be frustrated. The Department, therefore, must, in our view, take into account in determining whether the rulemaking is economically "significant" for purposes of E.O. 12866 and whether the rulemaking impacts a substantial number of small entities for purposes of compliance with Regulatory Flexibility Act, the ultimate impact of the rulemaking on employers, particularly small employers, in states, potentially all states, that may take advantage of the Department's safe harbor.

We note first that the "minimal" employer involvement contemplated by the proposal in the state program does not necessarily equate to "minimal" burden or "minimal" costs being expended by employers. The Department's regulatory impact analysis appears to contemplate that at least some subset of employers will need to update their payroll systems to accommodate a state program and specifically requests information and data to make a thorough assessment. We suggest that, even if the cost of a systems change is small, the aggregate number of impacted employers impacted by the safe harbor will result in an annual effect on the economy of more than $100 million or more. We further note that impact of the safe harbor on employers goes beyond mere payroll system updating, but, in fact, contemplates that all employers will be providing notices to their employees and maintaining records regarding the collection and remittance of contributions (paragraph (h)(1)(viii)(B); providing information to the state necessary to facilitate the operation of the program (paragraph (h)(1)(viii)(C); and distributing program information to employees (paragraph (h)(1)(viii)(D), all of which will involve employer time and effort and; therefore, should be taken into account in determining whether the rulemaking is significant for EO 12866 purposes.

In addition, as recognized by the Department, the compliance "costs that are incurred could fall most heavily on small and start-up companies, which tend to be the least likely to offer pensions."[10] We agree with the Department's assessment and for that reason, given the magnitude of the small employer community nationwide, questions are raised concerning the basis for the Department's conclusion that the safe harbor "would not have a significant economic impact on a substantial number of small entities" for purpose of the Regulatory Flexibility Act.[11]

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[10] 80 Fed. Reg. 72012

[11] 80 Fed. Reg. 72013.

Comments on Interpretive Bulletin § 2509.2015-2[12]

While the Department did not invite public comment on its "interpretive" guidance, we nonetheless would like to share our concerns with the Department regarding the limited scope of the guidance and the novel interpretation set forth in support of state sponsorship of multiple employer plans (MEPs).

With regard to the scope of the subject guidance, we are troubled that the Department chose to limit its guidance to state sponsorship of MEPs. For several years there has been recognition that far too many working Americans do not have access to workplace based retirement plans and a growing recognition that private sector open MEPs could play a role in addressing this problem. This recognition is evidenced in part by the fact that bipartisan legislation has been introduced in both the House and the Senate that would promote and foster the use of MEPs through private sector sponsorship.[13] Until the subject guidance, the Department has refrained from providing any guidance, regulatory or interpretive, that would expand MEP sponsorship and participation opportunities.[14] Unfortunately, when the Department ultimately decided to engage in efforts to address the retirement coverage gap, rather than issuing guidance that would serve to expand the opportunities for MEP sponsorship generally, the Department elected to support only open MEPs sponsored by a state; a position that, in our view, tips the scale away from private sector plan sponsorship to government run retirement programs.[15]

The private retirement system has worked well for millions of working Americans.[16] In this regard, we believe that the Department of Labor, in addition to assisting states, should be attempting to build on the successes of the private retirement system by, among other things, removing impediments to plan sponsorship, including the use of MEPs. Therefore, we strongly encourage the Department, in consultation with the Department of the Treasury and the Internal Revenue Service, to issue interpretive and/or regulatory guidance that will facilitate the establishment and operation of open MEPs by private sector entities.

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[12] 80 Fed. Reg. 71936 (November 18, 2015).

[13] For example, S. 266 (Collins-Nelson), H.R. 557 (Buchanan-Kind), H.R. 4067 (Kind-Richert).

[14] See ERISA Advisory Opinion Nos. 2012-04A and 2008-07A

[15] We note that the Department's efforts to amend the definition of "fiduciary" may, by virtue of the proposed constraints placed on engaging small employers, further complicate the offering of private sector solutions; resulting in a further tilt in favor of government operated or sponsored programs. *See* proposed paragraph (b)(1) of proposed §2510.3-21 (80 Fed. Reg. 21957, April 20, 2015).

[16] See Our Strong Retirement System: A success story at https://www.ici.org/pdf/ppr_13_strong_retirement.pdf.

Turning to the substance of the guidance, we are concerned that the Department's analysis in favor of state sponsorship of MEPs appears to be without support in past interpretations or the statute. We, therefore, are concerned that the guidance may not garner the judicial deference necessary to assure states that any state sponsored MEP program would not run afoul of ERISA or its preemption provisions.

First, we understand that judicial deference to agency interpretations typically turns on, among other things, the thoroughness evident in an agency's interpretation, the validity of its reasoning, and its consistency with earlier interpretations.[17] In its effort to accommodate state sponsorship of MEPs, however, the Department appears to have abandoned its long held views regarding MEP sponsorship in favor a new interpretation that finds, for purposes of ERISA plan sponsorship, "a state has a unique representational interest in the health and welfare of its citizens that connects it to the in-state employers that choose to participate in the state MEP and their employees, such that a state should be considered to act indirectly in the interest of the participating employers."[18] The Department, providing no analysis or explanation as to what is "unique" about a state's representational interest or how such interest supports plan sponsorship, may limit a court's ability to afford the interpretation deference with respect to the application of ERISA or its preemption provisions, without regard to the well intentioned policy goals of the guidance.[19] In addition to expanding its scope to encompass private sector arrangements, we encourage the Department to further clarify and expand its analysis taking into account the foregoing.

Second, we are concerned that the Department's analysis may not, without further explanation, fully comport with the statute. As recognized by the Department , for a "person"(other than an employee organization) to sponsor an ERISA-covered plan, such "person" must either act directly as the employer or indirectly in the interest of an employer in relation to an employee benefit plan.[20] The Department then expresses the view that "a state has a "unique representational interest" such that it can be considered to "act indirectly in the interest of the participating employers."[21] The analysis, however, does not explain how a "state," as defined in ERISA section 3(10), can be a "person" for purposes of plan sponsorship under Title I of ERISA. In this regard, we note that ERISA section 3(9) defines the term "person" to mean "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization."

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[17] See *Skidmore v Swift & Co.* 323 US at 140

[18] § 2509.2015-02(b), 80 Fed. Reg. 71939

[19] Deference may be further complicated by the fact that neither the provisions of ERISA section 210 nor the provisions of Internal Revenue Code section 413(c), or the regulations issued thereunder, provide support for the interpretation set forth in the subject guidance.

[20] § 2509.2015-02(b), 80 Fed. Reg. 71938

[21] *See* § 2509.2015-02(b), 80 Fed. Reg. 71939

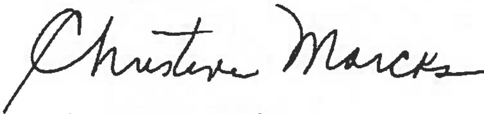
Inasmuch as the ERISA's definition of "person" does not include a "state" or any other governmental entity or subdivision thereof, we are concerned that courts might find, contrary to the Department's guidance, that states cannot sponsor ERISA-covered plans.[22] Such uncertainty raises questions for both states and participating employers. For example, should a state's MEP be found not to constitute an ERISA-covered plan, would each employer participating in that MEP be treated as maintaining their own standalone ERISA-covered plan, with respect to which they are responsible for compliance with the reporting, disclosure, fiduciary and other requirements of ERISA?

Taking into account the foregoing discussion, we strongly encourage the Department to provide the clarifications necessary to bring certainty to the issue as to whether a state can, consistent with ERISA, sponsor multiple employer plans.

We also encourage the Department to work with the Department of the Treasury to resolve tax issues relating to the risk of plan disqualification and participating employer liability attendant to noncompliance with the tax qualification requirements by any one participating employer. Such risk and liability will continue to be a concern for potential MEP participating employers so long as these issues remain unresolved.

We thank the Department for the opportunity to share these comments. Should you have any questions or wish to discuss any of the matters discussed herein, please contact Robert J. Doyle, Vice President, External Affairs, at robert.j.doyle@prudential.com or 202.306.9455.

Best Regards,



Christine Marcks

Copy to: Phyllis C. Borzi, Assistant Secretary
Judy Mares, Deputy Assistant Secretary
Timothy D. Hauser, Deputy Assistant Secretary for Program Operations
Joe Canary, Director of Regulations and Interpretations
Jeffrey Turner, Deputy Director of Regulations and Interpretations
Joseph Piacentini, Director of Policy and Research
Janet Song, Office of Regulations and Interpretations
Jim Craig, Plan Benefit Security Division, Office of the Solicitor

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[22] The Department appears to have recognized this ERISA coverage problem in an information letter from John J. Canary to J. Mark Iwry, U.S. Department of the Treasury (December 15, 2014) finding that a governmental entity can sponsor a retirement savings program for private sector employees without that program being treated as an ERISA-covered plan. While the referenced letter related to the myRA offered by the federal government, the rationale would appear applicable to any governmental entity.

APPENDIX B

Calendar No. 670

114TH CONGRESS
2D SESSION

S. 3471

[Report No. 114–375]

To amend the Internal Revenue Code of 1986 to encourage retirement savings, and for other purposes.

IN THE SENATE OF THE UNITED STATES
NOVEMBER 16, 2016

Mr. HATCH, from the Committee on Finance, reported the following original bill; which was read twice and placed on the calendar

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A BILL

To amend the Internal Revenue Code of 1986 to encourage retirement savings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE, ETC.

(a) SHORT TITLE.—This Act may be cited as the "Retirement Enhancement and Savings Act of 2016".

TITLE I—EXPANDING AND PRESERVING RETIREMENT SAVINGS

SEC. 101. MULTIPLE EMPLOYER PLANS.

(a) QUALIFICATION REQUIREMENTS.—

(1) IN GENERAL.—Section 413 of the Internal Revenue Code of 1986 is amended by adding at the end the following new subsection:

"(e) APPLICATION OF QUALIFICATION REQUIREMENTS FOR CERTAIN MULTIPLE EMPLOYER PLANS WITH POOLED PLAN PROVIDERS.—

"(1) IN GENERAL.—Except as provided in paragraph (2), if a defined contribution plan to which subsection (c) applies—

"(A) is sponsored by employers all of which have both a common interest other than having adopted the plan and control of the plan, or

"(B) in the case of a plan not described in subparagraph (A), has a pooled plan provider,

then the plan shall not be treated as failing to meet the requirements under this title applicable to a plan described in section 401(a) or to a plan that consists of individual retirement accounts described in section 408 (including by reason of subsection (c) thereof), whichever is applicable, merely because one or more employers of employees covered by the plan fail to take such actions as are required of such employers for the plan to meet such requirements.

"(2) LIMITATIONS.—

"(A) IN GENERAL.—Paragraph (1) shall not apply to any plan unless the terms of the plan provide that in cases of employers failing to take the actions described in paragraph (1)—

"(i) the assets of the plan attributable to employees of the employer will be transferred to a plan maintained only by the employer (or its successor), to an eligible retirement plan as defined in section 402(c)(8)(B) for each individual whose account is transferred, or to any other arrangement that the Secretary determines is appropriate, unless the Secretary determines it is in the best interests of such employees to retain the assets in the plan, and

"(ii) the employer described in clause (i) (and not the plan with respect to which the failure occurred or any other participating employer in such plan) shall,

except to the extent provided by the Secretary, be liable for any liabilities with respect to such plan attributable to employees of the employer.

"(B) FAILURES BY POOLED PLAN PROVIDERS.—If the pooled plan provider of a plan described in paragraph (1)(B) does not perform substantially all of the administrative duties which are required of the provider under paragraph (3)(A)(i) for any plan year, the Secretary, in the Secretary's own discretion, may provide that the determination as to whether the plan meets the requirements under this title applicable to a plan described in section 401(a) or to a plan that consists of individual retirement accounts described in section 408 (including by reason of subsection (c) thereof), whichever is applicable, shall be made in the same manner as would be made without regard to paragraph (1).

"(3) POOLED PLAN PROVIDER.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'pooled plan provider' means, with respect to any plan, a person who—

"(i) is designated by the terms of the plan as a named fiduciary (as defined in section 402(a)(2) of the Employee Retirement Income Security Act of 1974), as the plan administrator, and as the person responsible to perform all administrative duties (including conducting proper testing with respect to the plan and employees of each participating employer) which are reasonably necessary to ensure that—

"(I) the plan meets any requirement applicable under the Employee Retirement Income Security Act of 1974 or this title to a plan described in section 401(a) or to a plan that consists of individual retirement accounts described in section 408 (including by reason of subsection (c) thereof), whichever is applicable, and

"(II) each participating employer takes such actions as the Secretary or such person determines are necessary for the plan to meet the requirements described in subclause (I), including providing to such person any disclosures or other information which the Secretary may require or which such person otherwise determines is necessary to administer the plan or to allow the plan to meet such requirements,

"(ii) registers as a pooled plan provider with the Secretary, and provides such other information to the Secretary as the Secretary may require, before beginning operations as a pooled plan provider,

"(iii) acknowledges in writing that such person is a named fiduciary (within the meaning of section 402(a)(2) of the Employee Retirement Income Security Act of 1974), and the plan administrator, with respect to the plan, and

"(iv) is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the plan are bonded in accordance with section 412 of the Employee Retirement Income Security Act of 1974.

"(B) AUDITS, EXAMINATIONS AND INVESTIGATIONS.—The Secretary may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of this subsection.

"(4) GUIDANCE.—

"(A) IN GENERAL.—The Secretary shall issue such guidance as the Secretary determines appropriate to carry out this subsection, including guidance—

"(i) to identify the administrative duties and other actions required to be performed by a pooled plan provider under this subsection,

"(ii) which describes the procedures to be taken to terminate a plan which fails to meet the requirements to be a plan described in paragraph (1), including the proper treatment of, and actions needed to be taken by, any participating employer of the plan and the assets and liabilities of the plan with respect to employees of that employer, and

"(iii) identifying appropriate cases to which the rules of paragraph (2)(A) will apply to employers failing to take the actions described in paragraph (1).

The Secretary shall take into account under clause (iii) whether the failure of an employer or pooled plan provider to provide any disclosures or other information, or to take any other action, necessary to administer a plan or to allow a plan to meet requirements applicable to the plan under section 401(a) or 408, whichever is applicable, has continued over a period of time that clearly demonstrates a lack of commitment to compliance.

"(B) PROSPECTIVE APPLICATION.—Any guidance issued by the Secretary under this paragraph shall not apply to any action or failure occurring before the issuance of such guidance.

"(5) MODEL PLAN.—The Secretary shall, in consultation with the Secretary of Labor when appropriate, publish model plan language which meets the requirements of this subsection and of paragraphs (43) and (44) of section 3 of the Employee Retirement Income Security Act of 1974 and which may be adopted in order for a plan to be treated as a plan described in paragraph (1)(B).".

(2) CONFORMING AMENDMENT.—Paragraph (3) of section 413(b) of such Code is amended by striking "section 401(a)" and inserting "sections 401(a) and 408(c)".

(3) TECHNICAL AMENDMENT.—Subsection (c) of section 408 of such Code is amended by inserting after paragraph (2) the following new paragraph:

"(3) There is a separate accounting for any interest of an employee or member (or spouse of an employee or member) in a Roth IRA.".

(b) NO COMMON INTEREST REQUIRED FOR POOLED EMPLOYER PLANS.—Section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) is amended by adding at the end the following:

"(C) A pooled employer plan shall be treated as—

"(i) a single employee pension benefit plan or single pension plan; and

"(ii) a plan to which section 210(a) applies.".

(c) POOLED EMPLOYER PLAN AND PROVIDER DEFINED.—

(1) IN GENERAL.—Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) is amended by adding at the end the following:

"(43) POOLED EMPLOYER PLAN.—

"(A) IN GENERAL.—The term 'pooled employer plan' means a plan—

"(i) which is an individual account plan established or maintained for the purpose of providing benefits to the employees of 2 or more employers;

"(ii) which is a plan described in section 401(a) of the Internal Revenue Code of 1986 which includes a trust exempt from tax under section 501(a) of such Code or a plan that consists of individual retirement accounts described in section 408 of such Code (including by reason of subsection (c) thereof); and

"(iii) the terms of which meet the requirements of subparagraph (B).

Such term shall not include a plan with respect to which all of the participating employers have both a common interest other than having adopted the plan and control of the plan.

"(B) REQUIREMENTS FOR PLAN TERMS.—The requirements of this subparagraph are met with respect to any plan if the terms of the plan—

"(i) designate a pooled plan provider and provide that the pooled plan provider is a named fiduciary of the plan;

"(ii) designate one or more trustees meeting the requirements of section 408(a)(2) of the Internal Revenue Code of 1986 (other than a participating employer) to be responsible for collecting contributions to, and holding the assets of, the plan and require such trustees to implement written contribution collection procedures that are reasonable, diligent, and systematic;

"(iii) provide that each participating employer retains fiduciary responsibility for—

"(I) the selection and monitoring in accordance with section 404(a) of the person designated as the pooled plan provider and any other person who, in addition to the pooled plan provider, is designated as a named fiduciary of the plan; and

"(II) to the extent not otherwise delegated to another fiduciary by the pooled plan provider and subject to the provisions of section 404(c), the investment and management of that portion of the plan's assets attributable to the employees of that participating employer;

"(iv) provide that a participating employer, or a participant or beneficiary, is not subject to unreasonable restrictions, fees, or penalties with regard to ceasing participation, receipt of distributions, or otherwise transferring assets of the plan in accordance with section 208 or paragraph (44)(C)(i)(II);

"(v) require—

"(I) the pooled plan provider to provide to participating employers any disclosures or other information which the Secretary may require, including any disclosures or other information to facilitate the selection or any monitoring of the pooled plan provider by participating employers; and

"(II) each participating employer to take such actions as the Secretary or the pooled plan provider determines are necessary to administer the plan or for the plan to meet any requirement applicable under this Act or the Internal Revenue Code of 1986 to a plan described in section 401(a) of such Code or to a plan that consists of individual retirement accounts described in section 408 of such Code (including by reason of subsection (c) thereof), whichever is applicable, including providing any disclosures or other information which the Secretary may require or which the pooled plan provider otherwise determines is necessary to administer the plan or to allow the plan to meet such requirements; and

"(vi) provide that any disclosure or other information required to be provided under clause (v) may be provided in electronic form and will be designed to ensure only reasonable costs are imposed on pooled plan providers and participating employers.

“(C) EXCEPTIONS.—The term ‘pooled employer plan’ does not include—

“(i) a multiemployer plan; or

“(ii) a plan established before January 1, 2016, unless the plan administrator elects that the plan will be treated as a pooled employer plan and the plan meets the requirements of this title applicable to a pooled employer plan established on or after such date.

“(44) POOLED PLAN PROVIDER.—

“(A) IN GENERAL.—The term ‘pooled plan provider’ means a person who—

“(i) is designated by the terms of a pooled employer plan as a named fiduciary, as the plan administrator, and as the person responsible for the performance of all administrative duties (including conducting proper testing with respect to the plan and employees of each participating employer) which are reasonably necessary to ensure that—

“(I) the plan meets any requirement applicable under this Act or the Internal Revenue Code of 1986 to a plan described in section 401(a) of such Code or to a plan that consists of individual retirement accounts described in section 408 of such Code (including by reason of subsection (c) thereof), whichever is applicable; and

“(II) each participating employer takes such actions as the Secretary or pooled plan provider determines are necessary for the plan to meet the requirements described in subclause (I), including providing the disclosures and information described in paragraph (43)(B)(v)(II);

“(ii) registers as a pooled plan provider with the Secretary, and provides to the Secretary such other information as the Secretary may require, before beginning operations as a pooled plan provider;

“(iii) acknowledges in writing that such person is a named fiduciary, and the plan administrator, with respect to the pooled employer plan; and

“(iv) is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the pooled employer plan are bonded in accordance with section 412.

“(B) AUDITS, EXAMINATIONS AND INVESTIGATIONS.—The Secretary may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of this paragraph and paragraph (43).

"(C) GUIDANCE.—

"(i) IN GENERAL.—The Secretary shall issue such guidance as the Secretary determines appropriate to carry out this paragraph and paragraph (43), including guidance—

"(I) to identify the administrative duties and other actions required to be performed by a pooled plan provider under either such paragraph; and

"(II) which requires in appropriate cases that if a participating employer fails to take the actions required under subparagraph (A)(i)(II)—

"(aa) the assets of the plan attributable to employees of the participating employer are transferred to a plan maintained only by the participating employer (or its successor), to an eligible retirement plan as defined in section 402(c)(8)(B) of the Internal Revenue Code of 1986 for each individual whose account is transferred, or to any other arrangement that the Secretary determines is appropriate in such guidance; and

"(bb) the participating employer described in item (aa) (and not the plan with respect to which the failure occurred or any other participating employer in such plan) shall, except to the extent provided in such guidance, be liable for any liabilities with respect to such plan attributable to employees of the participating employer.

The Secretary shall take into account under subclause (II) whether the failure of an employer or pooled plan provider to provide any disclosures or other information, or to take any other action, necessary to administer a plan or to allow a plan to meet requirements described in subparagraph (A)(i)(II) has continued over a period of time that clearly demonstrates a lack of commitment to compliance. The Secretary may waive the requirements of subclause (II)(aa) in appropriate circumstances if the Secretary determines it is in the best interests of the employees of the participating employer described in such clause to retain the assets in the plan with respect to which the employer's failure occurred.

"(ii) PROSPECTIVE APPLICATION.—Any guidance issued by the Secretary under this subparagraph shall not apply to any action or failure occurring before the issuance of such guidance.

"(D) AGGREGATION RULES.—For purposes of this paragraph—

"(i) IN GENERAL.—In determining whether a person meets the requirements of this paragraph to be a pooled plan provider with respect to any plan, all persons who are members of the same controlled group and who perform services for the plan shall be treated as one person.

"(ii) MEMBERS OF COMMON GROUP.—Persons shall be treated as members of the same controlled group if such persons are treated as a single employer under subsection (c) or (d) of section 210.".

(2) BONDING REQUIREMENTS FOR POOLED EMPLOYER PLANS.—The last sentence of section 412(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1112(a)) is amended by inserting "or in the case of a pooled employer plan (as defined in section 3(43)" after "section 407(d)(1))".

(3) CONFORMING AND TECHNICAL AMENDMENTS.—Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) is amended—

(A) in paragraph (16)(B)—

(i) by striking "or" at the end of clause (ii), and

(ii) by striking the period at the end and inserting ", or (iv) in the case of a pooled employer plan, the pooled plan provider."; and

(B) by striking the second paragraph (41).

(d) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to years beginning after December 31, 2019.

(2) RULE OF CONSTRUCTION.—Nothing in the amendments made by subsection (a) shall be construed as limiting the authority of the Secretary of the Treasury or the Secretary's delegate (determined without regard to such amendment) to provide for the proper treatment of a failure to meet any requirement applicable under the Internal Revenue Code of 1986 with respect to one employer (and its employees) in a multiple employer plan.