



October 29, 2019

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
Attention: 1210-AB92

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

Re: “Open MEPs” and Other Issues Under Section 3(5) of ERISA; RIN 1210-AB92

BlackRock, Inc. (together with its affiliates, “**BlackRock**”) respectfully submits its comments to the Department of Labor (“**DoL**”) in response to the DoL’s request for information (“**RFI**”) regarding the definition of “employer” in section 3(5) of the Employee Retirement Income Security Act of 1974, as amended (“**ERISA**”), which was published concurrently with the final regulation (the “**MEP Regulation**”) clarifying the circumstances under which an employer group or association or a professional employer organization (a “**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 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 saving for retirement easier – both for employers to offer retirement plans, and for their employees to participate. Accordingly, while BlackRock supports the DoL’s MEP Regulation, which will enable easier access to, and more widespread use of, retirement plans, BlackRock suggests that the DoL go even further and amend the MEP Regulation to facilitate the creation of “Open MEPs” by a broader range of MEP sponsors. Along those lines, the following is our response to a few specific questions raised by the DoL in the RFI.

1. Question A.1: Support for “Open MEPs”

BlackRock believes the DoL should amend 29 CFR 2510.3-55 to expressly permit financial institutions or other persons to maintain “Open MEPs.” 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.¹ 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

¹ 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>.

risk associated with doing so. Thus, we urge the DoL to enable widespread use of MEPs by permitting the use of Open MEPs.

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 MEP Regulation 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 MEP Regulation contains conditions for commonality of interest. To satisfy the commonality of interest requirements, the employer 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.

As noted in our comment letter on the proposal for the MEP Regulation, one of the principal benefits of MEPs 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, and 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 MEP Regulation might not prevent businesses located in metropolitan areas or highly-populated states from participating 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 enable more employers to join one plan, and to allow employers in suburban and rural areas to participate in MEPs that include many employers and participants. We do not believe it is necessary or beneficial to impose the geographic or commonality requirements contemplated by the MEP Regulation. So, while we commend the DoL for its changes relating to the establishment of MEPs by PEOs and certain groups and associations, we believe the DoL should go even further to allow Open MEPs.

2. Question A.2: Support for Permitting “Commercial Entities” to act as “Employers”

The definition of employer under ERISA includes a person acting “indirectly in the interest of an employer, in relation to an employee benefit plan.” The RFI asks who should be recognized as capable of being an “employer” under this criterion for purposes of establishing and maintaining an Open MEP, and in particular whether various financial services firms servicing retirement plans and investments (“**Commercial Entities**”) should be recognized for this purpose. There is nothing in the plain language of the section 3(5) of ERISA that would preclude a Commercial Entity or other persons from acting in the interests of an employer to sponsor an Open MEP. Accordingly, BlackRock supports allowing a broad range of entities, including Commercial Entities, to serve as “employers” for purposes of sponsoring Open MEPs.

Further, in August 2018, the President issued an Executive Order on Strengthening Retirement Security in America (the “**Executive Order**”), which outlined the Federal Government’s policy to “expand access to workplace retirement plans for American

workers.”² The Executive Order states that: “Expanding access to multiple employer plans, under which employees of different private-sector employers may participate in a single retirement plan, is an efficient way to reduce administrative costs of retirement plan establishment and maintenance and would encourage more plan formation and broader availability of workplace retirement plans, especially among small employers.” To increase the number of Open MEPs and maximize their utility and efficiency BlackRock believes it would be best to allow a broad range of entities to serve as “employers” to be able to sponsor Open MEPs.

3. Question A.3: Dealing with Conflicts of Interests.

Fiduciary conflicts of interests are generally prohibited under ERISA unless an exemption applies. Given the practical efficiencies of one fiduciary service provider handling multiple aspects of a plan’s administration and investments, ERISA already has an exemption framework to allow for these efficiencies while protecting plan interests. Although sponsorship of Open MEPs could potentially give rise to conflicts of interests, BlackRock believes the current exemption framework or concepts similar to the current exemption framework could be utilized to protect MEP participants from decisions that could favor the interests of the Commercial Entity over the interests of the MEP and its participants. Further, we believe the benefits of allowing Commercial Entities to sponsor Open MEPs are important enough for the DoL to make amendments to existing exemptions or add new exemptions, if necessary.

We thank the DoL for providing the opportunity to comment in response to the DoL’s RFI regarding the definition of “employer” in section 3(5) of ERISA. Please contact the undersigned if you have any questions or comments regarding BlackRock’s views.

Sincerely,

Kate Fulton
Managing Director

Joe Craven
Managing Director

² Executive Order on Strengthening Retirement Security in America (Aug. 31, 2018), available at <https://www.whitehouse.gov/presidential-actions/executive-order-strengthening-retirement-security-america/>.