



December 24, 2018

Employee Benefit Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: RIN 1210-AB88

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to respond to the Department of Labor’s proposed regulation with regard to Association Retirement Plans and Other Multiple-Employer Plans. The Department proposes to expand access to affordable and quality retirement savings options by clarifying the circumstances under which an employer group or association may sponsor a workplace retirement plan.

We are encouraged to see the Administration and Department of Labor taking steps to improve retirement security for Americans. We support the initiative and hope that these comments enable to Department to expand its approach and use all of its authority under ERISA. Under the Department’s approach to multiple employer defined contribution plans (“MEPs”), sponsors must have either a geographic or industry bond, or must be a professional employee organization (“PEO”) registered with the Internal Revenue Service. Considering the importance of individuals preparing for retirement, we believe the Department should take a more robust approach to expanding the options for providing retirement coverage. In particular, we focus on two areas in this letter : (1) we believe the Department should expand its proposed rulemaking and use its authority to broadly interpret what it means to “be acting indirectly in the interest of the employer” to include pooled employer plans where the employers are unaffiliated and are not linked by either industry or geography, often referred to as “open MEPs”, and (2) with respect to MEPs that are not linked by either industry or geography, we believe the regulation should permit financial institutions, in addition to leasing organizations, to sponsor such arrangements. Such an expansion would go a long way to increasing access to retirement plans at work and improving the retirement security of millions of Americans.

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

The Importance of Addressing Retirement Savings

SIFMA shares the Department's concern that American workers are not saving enough for retirement. We strongly believe individuals need to save more and make more educated choices with respect to their retirement savings. That goal requires a steady focus on education and disclosure, and greater partnership between employers, providers and employees. Financial literacy and general investment education needs to become a part of the basic curriculum from grammar school through high school. Beyond that, there needs to be collaborative outreach by the states, the federal government, employers and providers to educate individuals about their likely retirement income needs, accessible methods of estimating those needs and the amount necessary to set aside monthly to meet those needs.

Access to retirement plans, especially those with automatic enrollment and automatic escalation, is one of the key ways in which Americans begin, and continue, to save. Participating in an employer-sponsored retirement plan is often the easiest and most convenient way for workers to save. Expanding the availability of these plans is critical to ensuring that more Americans are adequately preparing for their retirement. The Employee Benefit Research Institute (EBRI) found that 73% of workers earning a moderate income, from \$30,000 to \$50,000, participated in an employer-sponsored plan when a plan was available.² Furthermore, according to an Investment Company Institute (ICI) survey, 51% of those surveyed said they probably would not be saving for retirement if they did not have access to an employer-sponsored plan.³

Many employers offer automatic enrollment, tax-deferred payroll deductions and matching contributions, all of which encourage employees to build their retirement nest eggs. There is no question that employers recognize that offering a plan helps attract and retain talent. Small businesses universally list having a retirement plan as second in importance only to offering health insurance.⁴ Allowing employers to join a pooled arrangement addresses all of these issues. However, too many businesses face significant barriers to establishing and maintaining retirement plans for their employees. Employers often cite the costs of setting up a plan, the confusing regulatory landscape, and the very real legal risks inherent in sponsoring a plan, including the potential for expensive and time consuming litigation. Accordingly, it is incumbent on the Department to make sure that the pool of potential arrangements for small and medium sized employers be as broad as possible.

The proposed regulation would allow for unconnected business owners to pool their assets to create a single plan. Such a structure can reduce the employer's cost of sponsoring a benefit plan while also transferring much of the legal risk to professional fiduciaries responsible for the management of the plan. But we are concerned that the Department has significantly limited the pool of responsible, credit worthy, regulated and state or federally supervised entities in favor of PEOs, who are primarily leasing companies, which may not have the skills and experience in this area that other financial institutions can afford these smaller employers. We hope the Department will reconsider "open MEPs", which would allow unaffiliated business owners to pool their assets even when their only relationship to each other is through their participation in the MEP.

² Retirement Plan Participation: Survey of Income and Program Participation (SIPP) Data, 2012. (2013). Employee Benefit Research Institute Notes, 34(8), p. 6. Retrieved, from http://www.ebri.org/pdf/notespdf/EBRI_Notes_08_Aug-13_RetPart-CEHCS1.pdf

³ Holden, S. and Bass, S. (2013). America's Commitment to Retirement Security: Investor Attitudes and Actions, 2013. (p. 12,fig 6). Washington, DC: Investment Company Institute. Retrieved from http://www.ici.org/pdf/ppr_13_retir_sec_update.pdf

⁴ Pew Charitable Trusts: <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/09/business-owners-perspectives-on-workplace-retirement-plans-and-state-proposals-to-boost-savings>

Opportunity to Expand Definition of Employer

The heart of expanding access to MEPs for small business owners under ERISA has been to determine what types of entities may be considered an “employer” for purposes of sponsoring a pooled arrangement. Under ERISA section 3(5), the term “employer” means: “any person acting directly as an employer, or *indirectly in the interest of an employer*, in relation to an employee benefit plans....”⁵ ERISA does not explain further what it means to be “indirectly in the interest of an employer, in relation to an employee benefit plan.” That lack of limitation could and should as a policy matter cause the Department to interpret ERISA section 3(5) expansively. The plain language of the statute does not limit “indirectly as an employer” to PEOs, or to any particular function, such as payroll processing. The Department itself notes in the preamble that the relevant court cases do not limit the phrase “indirectly as an employer.”⁶

In discussing the scope of the Department’s authority under section 3(5) in the recently finalized rule with regard to Association Health Plans, the Department stated 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.”⁷

The preamble to that regulation continues: “Rather, the terms ‘employer’ and ‘indirectly in the interest of an employer’ are ambiguous as applied to a group or association in the context of ERISA section 3(5), and the statute does not specifically refer to or impose the ‘commonality’ test on the determination of whether a group or association acts as the ‘employer’ sponsor of an ERISA-covered plan within the scope of ERISA section 3(5).”⁸

We agree, and urge the Department to be bolder in addressing the very serious lack of retirement savings in this segment of American business. As directed in the President’s Executive Order, we urge the Department to use the regulatory process to expand the usefulness of MEPs.⁹

We believe that nothing in the statute or case law precludes the Department from proposing a regulation that defines “acting in the interest of an employer” to include:

- the act of providing employees with an opportunity to participate in an Open MEP
- sponsoring such an Open MEP
- providing the necessary education, and
- engaging in the investment, benefit payment, contribution processing, tax withholding, and other related functions

⁵ 29 U.S.C. 1002(5); ERISA section 3(5)

⁶ 83 Federal Register 53534 (October 23, 2018)

⁷ 83 FR 28914, June 21, 2018.

⁸ Id.

⁹ In Executive Order 13847, the President declared it the policy of the Executive Branch to expand access to multiple employer plans as an efficient way to reduce costs and “encourage more plan formation and broader availability of workplace retirement plans, especially among small employers.”⁹ The Department has the opportunity to encourage more plan formation and broader availability of workplace retirement plans by expanding this regulation to include the provision of retirement plan coverage. Executive Order 13847 (83 FR 45321) (Sept. 6, 2018)

Such a regulation would provide significantly more opportunities for business owners to establish and maintain retirement plans for their employees.

While PEOs may in many cases have the requisite skills and experience for plan sponsorship, so do financial institutions, such as banks, broker dealers and insurance companies. These financial institutions already sponsor prototype plans, with excellent participant communication and education modules that these types of pooled arrangements will need. There is nothing about PEOs that make them unique in their ability to sponsor pooled arrangements, or in fact, to do a better job than others already in the retirement space. We see no reason to limit the pool of potential sponsors of MEPs to such a limited universe, particularly when many financial-services firms already have the necessary expertise and experience to provide responsible and safeguarded programs.

Thus, we believe that the proposal should be expanded to permit sponsorship by leasing organizations, registered broker-dealers, U.S. or State supervised banks and state supervised insurance companies. The proposal provides that a “group or association” for purposes of MEP sponsorship cannot be a bank, trust company, insurance issuer, broker-dealer, or similar financial services firm.¹⁰ This limitation does not seem warranted, and seems contrary to the interest of expanding retirement coverage. Financial institutions currently service the retirement marketplace well, with longstanding and well proven safeguards to ensure that retirement savings remain safe and secure. As ERISA and the Internal Revenue Code have been interpreted consistently over the last 44 years, banks, insurers and broker-dealers have been approved and recognized providers of retirement services. See, for example, the IRA custodial rules in the Code, and prohibited transaction relief for banks, broker-dealers and insurers, as well as custodians for abandoned plans and lost participants.

The retirement security of Americans is enhanced by the availability of employer-sponsored savings plans. While tens of millions of Americans benefit from such plans, we welcome proposals to create more plan coverage, especially for small businesses and their employees. Open MEPs are one promising means for expanding coverage and promoting retirement savings.

We believe it is very important that proposals to expand private sector retirement savings opportunities reach as many working Americans as possible. In addition to expanding coverage for employees of small businesses, we believe proposals to expand the availability of MEPs should also recognize the critical need to provide new retirement savings opportunities for workers in the growing “gig” economy, in which millions of Americans work in alternative work arrangements, including independent contractors, temporary agency workers, on-call workers, and workers provided by contract firms. We strongly urge the Department to consider changes to its proposal that would expand retirement savings opportunities through a MEP to these workers as well, and which could be achieved through expanded use of open MEPs.

Conclusion

We would encourage the Department to take a broader look at the options for expanding access to retirement plans, particularly through the expansion of the availability of multiple employer plans. The Department has the ability to interpret expansively what is deemed to be “indirectly in the interest of the employer” to include pooled employer plans where the employers are unaffiliated and are not

¹⁰ See 2510.3-55(b)(vii), at 83 FR 53560 (October 23, 2018)

linked by either industry or geography. In SIFMA's view, to be any more limiting would undermine efforts to expand retirement savings programs to the workers that do not currently have access to an employer-based plan. We believe the proposal should permit a broad array of institutions and organizations to sponsor MEPs, including financial-service providers.

Thank you for the opportunity to comment on the proposed regulation. If you have any questions or would like to discuss these comments further, please contact me at (202) 962-7329.

Sincerely,

A handwritten signature in cursive script that reads "Lisa J. Bleier".

Lisa J. Bleier

Managing Director and Associate General Counsel