

February 12, 2020

The Hon. Preston Rutledge
Assistant Secretary for Employee Benefits
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave, NW, Ste S-2524
Washington DC 20210

RE: Guidance Issues Related to the Setting Every Community Up for Retirement Enhancement ("SECURE") Act of 2019

Dear Assistant Secretary Rutledge:

The American Retirement Association ("ARA") is writing to share with the Department of Labor ("DOL") our views on guidance needed under the SECURE Act,¹ which we discussed with you at our recent meeting. We hope that our input will be helpful as the DOL considers provisions of the SECURE Act which present guidance priorities. ARA thanks the DOL for the opportunity to provide our views on these matters.

ARA's nearly 28,000 members are a diverse group of retirement plan professionals of all disciplines dedicated to the success of America's private retirement system, including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA's individual members provide consulting and administrative services to sponsors of retirement plans. The ARA is the coordinating entity for its five underlying affiliate organizations, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-Deferred Savings Association ("NTSA"), Plan Sponsor Council of America ("PSCA"), and the American Society of Enrolled Actuaries ("ASEA").

Discussion

ARA believes that guidance from the DOL regarding changes brought by the SECURE Act is essential to sponsors of retirement plans and the professionals who assist them. Each item described below represents issues which are significant to retirement plan sponsors and practitioners. ARA recommends that the items listed below be the subject of DOL guidance, in the following order of priority:

¹ Pub. L. No. 116-94, Division O, signed into law on December 20, 2019.

Multiple Employer Plans; Pooled Employer Plans (Sec. 101), effective for plan years beginning after December 31, 2020. We suggest guidance as follows:

- Exemptive relief for prohibited transactions involving pooled plan providers (“PPPs”) maintaining pooled employer plans (“PEPs”) is the most pressing guidance need. This relief is critical for implementation and operation of most PEPs. In addition to the service provider prohibited transactions of ERISA section 406(a), conflicts of interest for many commercial entities which serve as PPPs, may occur. For example, conflicts may arise with a PPP that offers products for sale in conjunction with a PEP depending on the types of compensation received by the commercial entity and the use of proprietary products and investments. As we have discussed with the DOL, the ARA intends to formally request a prohibited transaction exemption from the DOL with respect to PPPs which are commercial entities, including broker-dealers and investment managers.
- Guidance regarding the duties and responsibilities of PPPs under ERISA is needed, in particular, on delegation of the PPP’s responsibilities. Under the SECURE Act, a PPP must be a named fiduciary for a PEP and is responsible for plan administration. PPPs are also responsible for ensuring that ERISA’s bonding requirements are met, for filing the Form 5500 with the DOL, and responding to any DOL audit or investigation. Guidance is needed regarding what administrative duties, in addition to those required as the ERISA §3(16) plan administrator, a PPP must perform itself and which may be allocated among other entities. In addition, guidance relating to collecting and remitting employer contributions to PEPs and how the entity designated trustee should carry out this function should be issued. Finally, it is not clear whether under a PEP that consists solely of deduction IRA arrangements, ERISA responsibilities apply to the PPP.
- ARA also believes that employers should be adequately informed regarding the structure of PEPs and how they differ from other pooled arrangements and single employer plans. The DOL should issue guidance regarding information that PPPs must provide to employers upon joining a PEP.
- Clarification of whether a plan would fail to meet the definition of a PEP if the plan terms described in new ERISA section 44(b) are not part of the PEP. In other words, does inclusion of the specified terms ensure PEP status whereas omitting them would not preclude qualifying PEP status? The statutory language arguably is in the nature of a safe harbor.
- Guidance should be issued regarding how a plan administrator of a multiple employer plan that is in existence as of a plan year beginning after December 31, 2020, makes the election for the plan to be treated as a PEP. For example, the DOL may determine that this election should accompany registration with DOL as a PPP.
- Clarification of “employers” which may participate in PEPs is needed. In particular, it is not clear whether working owners may participate in PEPs.
- Participating employers are responsible for selecting and monitoring the PPP. Clarification

including fiduciary obligations applicable to employers participating in a PEP, including information the employer must provide to the PPP, would be valuable.

- Guidance is needed regarding the types of arrangements which DOL considers appropriate for transfers of plan assets where an employer fails to meet the requirements for a PEP, as determined by DOL or the PPP. Similarly, we request clarification of what are “the best interests of the employees of the noncompliant employer” where the DOL would waive the requirement to transfer assets to another plan or arrangement.
- Guidance relating to operating a PEP should be developed by the DOL including (1) guidance relating to registration with DOL as a PPP before beginning operations and (2) requirements for disclosures to employers which facilitate selection and monitoring of the PPP, as well as (3) the administrative duties and other actions to be performed by the PPP (e.g., does the PPP hold beneficiary designations?).
- Guidance is requested regarding the simplified annual reporting provided under the SECURE Act and which groups of plans are eligible. For example, clarification is needed as to whether this simplified reporting is available for PEPs covering under 1000 participants and where no employer has more than 100 employees. In other words, can current rules used for determining whether an employer has 100 employees be relied on for purposes of this new rule?

Fiduciary Safe Harbor for Selection of Lifetime Income Provider (Sec. 204). This provision was effective on the date of enactment. Questions include whether, when engaging with annuity providers, the safe harbor eliminates the need to follow Interpretive Bulletin 95-1 or should a plan sponsor follow the Interpretive Bulletin in addition to receiving the provider’s assurance of financial stability? In addition, clarification regarding the scope of a fiduciary’s duty under this rule is needed. For example, what information might reasonably cause the fiduciary to question an insurer’s initial representations of financial capability? Additionally, what might reasonably justify questioning an insurer’s annual representations of financial capability? Further, is the “financial capability” of an insurer as under this provision different than the annuity provider’s “ability to make all future payments under the contract” as under 29 CFR § 2550.404a-4?

Disclosure Regarding Lifetime Income (Sec. 203) This provision requires benefit plan statements sent to plan participants to include a lifetime income disclosure at least once during any 12-month period, and applies with respect to benefit statements provided more than 12 months after the latest of the issuance by the Secretary of (1) interim final rules, (2) a model disclosure, or (3) prescribed assumptions that plan administrators may use in converting account balances into lifetime income stream equivalents. The DOL may prescribe a single set of specific assumptions or ranges of permissible assumptions. Plan sponsors and service providers have been providing participants with tools and other resources to calculate lifetime income for many years. We are concerned that this new rule could cause plan sponsors to retreat to provide lifetime income disclosures that are based on a one-size-fits-all set of assumptions instead of utilizing a range of assumptions that seek to provide lifetime income disclosures best suited for each particular plan’s unique participant base. The ARA suggests that DOL issue a request for information to help determine a usable range of permissible assumptions to be prescribed in a forthcoming rulemaking. DOL also may want to

consider providing guidance on the ability of a plan sponsor or service provider to include projections regarding continued contributions (for example, a projection based on an employee making the same rate of contributions until retirement). A request for information could also help to determine best practices, which ultimately could be beneficial in ensuring we advance participant education on lifetime income.

Combined Annual Report for Group of Plans (Sec. 202). This provision is effective for returns and reports for plan years beginning after December 31, 2021, and must be implemented by the DOL not later than January 1, 2022. As part of this implementing guidance, it would be helpful to clarify if combined reporting is permissible for multiple plans within a controlled group or an affiliated service group, and when there is a master trust with common investment options. Additionally, clarification is needed regarding how combined reporting affects the audit requirements.

Inclusion of Long-Term Part-Time Employees (Sec. 112). This provision generally applies to plan years beginning after December 31, 2020, except that for determining whether the three-consecutive-year measuring period requisite for plan participation has been met. In that case, the 12-month period beginning before January 1, 2021, will not be taken into account. The ARA suggests modification of the rules for counting employees for purposes of reporting and disclosure obligations. We believe that employers should be permitted to exclude employees who participate in a plan solely because of this new rule for part-time employees. Alternatively, we suggest that the rules for all plans be modified to allow exclusion of participants who do not make salary deferral contributions and those that do not have an account balance in the plan.

These comments are submitted on behalf of the ARA. Again, ARA thanks the DOL for the opportunity to provide our views on these matters. If you have any questions, please contact Will Hansen, Chief Government Affairs Officer, at WHansen@usaretirement.org or (703) 516-9300. Thank you for your time and consideration.

Sincerely,

/s/

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