

July 20, 2020

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave, NW, Ste 400
Washington DC 20210
via Federal eRulemaking Portal at www.regulations.gov

Re: Request for Information Regarding Prohibited Transactions Involving Pooled Employer Plans Under the SECURE Act and Other Multiple Employer Plans–Z–RIN: 1210–ZA28

Dear Department of Labor,

The American Retirement Association (ARA) is writing in response to the Request for Information (RFI) regarding prohibited transactions involving pooled employer plans (PEPs) under the SECURE Act and other multiple employer plans. The questions posed in the RFI are squarely within the expertise and experience of ARA's members and we believe that we can provide meaningful assistance to the Department of Labor (DOL). In addition to providing responses to the RFI, in an effort to inform the DOL's considerations of PEPs, we are providing background on the group retirement plan marketplace, including descriptions of assorted structures for group plans as well as discussion of sponsorship, compensation, and other issues.

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The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), the American Society of Enrolled Actuaries (ASEA), and the Plan Sponsor Council of America (PSCA). 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 has more than 28,000 individual members who provide consulting and administrative services to the sponsors of retirement plans. ARA and its underlying affiliate organizations are diverse but united in their common dedication to the success of America's private retirement system.

The ARA very much appreciates the DOL's commitment to expanding access to workplace retirement savings plans for America's workers. The ARA shares this goal and looks forward to working with the DOL to make PEPs a viable and meaningful retirement savings vehicle.

Background: the Group Retirement Plan Marketplace and Associated Issues

The following background on the group retirement plan marketplace, including types of group plan structures as well as sponsorship, compensation, and other issues will inform the DOL's consideration of PEPs. We believe that, as with our responses to the RFI, this will assist DOL with producing an exemption that protects retirement plan participants against conflicts of interest in a practical and workable fashion. We respectfully include numerous "real world" examples, in order to supplement the understanding the DOL has already gained through its outreach.

Types of Arrangements

The marketplace for group retirement plans does not consist of a singular type of arrangement. Rather, an assortment of structures exist, including the following types.

1. **Multiple Employer Plans (MEPs).** MEPs are described in both ERISA¹ and the Code², but because MEPs predate both statutes, the terminology used to describe them and the applicable statutory and regulatory vary considerably. A number of MEP structures have arisen over the years:
 - a. *Association Retirement Plans (ARPs).* ARPs are MEPs that meet the 29 CFR 2510.3-55 requirements to be considered single ERISA plans. There are two general categories of ARPs: (1) bona fide group or association of employers ("association plans"), which may include, for example, sponsorship by not-for-profit associations, groups of employers in the same trade or line of business, employers in a particular city or state, and business organizations such as chambers of commerce; and (2) bona fide professional employer organizations (PEO plans), which generally are limited to sponsorship by organizations which meet the "bona fide PEO" definition.
 - b. *MEPs That Are Not ARPs (Non-ARP MEPs).* These arrangements are sometimes referred to as: (1) "Corporate" MEPs.³ Corporate MEPs are the most common type of MEP in the U.S. Corporate MEPs are similar to large single employer plans, and differ from association plans, PEO plans, PEPs, or other Non-ARP MEPs, other than falling in the same regulatory classification;⁴ and (2) Code section 413(c) plans, which are not single ERISA plans (the old "open" MEPs) and are treated as a

¹ Section 210 of the Employee Retirement Income Security Act of 1974, as amended.

² Section 413(c) of the Internal Revenue Code of 1986, as amended.

³ The preamble to the October 2018 proposed ARP regulations (Definition of "Employer" Under Section (3)(5) of ERISA – Association Retirement Plans and Other Multiple Employer Plans, 83 Fed. Reg. 53534, 53542 (October 23, 2018)) uses the term "corporate" MEP to describe a MEP whose adopting employers are part a group of employers that are all related by common ownership, but not to the extent that they would be treated as a single plan under the controlled group or affiliated service group rules.

⁴ The 2019 ARP final rule (Definition of "Employer" Under Section (3)(5) of ERISA – Association Retirement Plans and Other Multiple Employer Plans, 84 Fed. Reg. 37508 (July 31, 2019)) leaves a gap in coverage of MEPs in that the rule supersedes previous guidance, yet does not cover corporate MEPs.

collection of single employer plans for ERISA purposes. These plans are similar to other MEPs in most respects.

- c. *Pooled Employer Plans (PEPs)*. A PEP is a section 413(c) plan that has a pooled plan provider as described in Code section 413(e). PEPs are a subtype of MEPs.
2. **Group Trusts**. Group trusts can take various forms and are treated differently under statutory and regulatory regimes in the U.S. (labor, tax, banking, and securities law). For purposes of the RFI, they are pertinent only in that such trusts may wish to convert to or participate in PEPs or other MEPs.
3. **“Aggregation” Arrangements**. Following the DOL’s publication of Advisory Opinions 2012-03A and -04A, multiple structures arose in the marketplace. Terms like “aggregation arrangement,” “exchange,” “multiple employer program,” and others appeared as descriptors of marketing bundles for single employer plans that had features such as the same investment manager, fund lineup, and recordkeeping platform. Some programs included a trustee and/or a professional ERISA section 3(16) plan administrator for all participating employers, and others included these services as options. Some of these programs are logical candidates to convert to PEPs or “groups of plans.”
4. **“Groups of Plans” (GoPs)**. GoPs were created under SECURE Act⁵ section 210 as an alternative to PEPs and other MEPs. A GoP can be thought of as an aggregation arrangement in which participating employers have the same funds, fiduciaries, and plan year, which allows the filing of a consolidated Form 5500.
5. **Association Member Service Offerings**. Not-for-profit organizations commonly offer a range of products and services to their members, often at discounted prices or with special features and benefits. Such arrangements may not involve an explicit endorsement by the association, but are sometimes referred to as “endorsement arrangements.” Associations often have robust member services departments focused on delivering highly competitive, high quality products and services to members. The association typically receives compensation for such products and services.

Sponsorship Structures and Sponsor Compensation

Historically, MEP sponsorship structures have varied. And the SECURE Act adds a new sponsorship structure in the pooled plan provider (PPP). Any sponsorship structure and the question of who approves services and compensation for fiduciaries⁶ are key elements in potential prohibited transactions. Significantly, and unlike single employer plans, many MEPs are initiated and/or

⁵ Setting Every Community Up for Retirement Enhancement Act of 2019, which became law as part of the Further Consolidated Appropriations Act, 2020.

⁶ The Department’s regulation under ERISA section 408(b)(2), 29 CFR 2550.408b-2, provides the basic three-part framework for allowing compensation of service providers in ERISA plans: provide a necessary service for a reasonable fee based on a reasonable contract or arrangement. Section 408b-2(e) of the regulation provides additionally that, if the service provider is a fiduciary, the fiduciary’s services and compensation, direct or indirect, must be approved by an independent fiduciary.

sponsored by commercial entities or member service organizations, including PEOs and not-for-profit associations. PEPs of course greatly expand the range of possible sponsors to include a wide range of service providers and financial institutions.

But compensation for ERISA plan sponsors commonly generates prohibited transactions and this is especially relevant for PEP sponsors. All of these organizations require compensation in order to provide services to the group plan, but compensation of ERISA plan sponsors commonly gives rise to prohibited transactions. There is therefore a need for clarity from the DOL regarding compensation and prohibited transaction questions. A starting point for providing this clarity is to enumerate and describe the various sponsorship and compensation structures possible in group retirement programs.

MEP sponsorships may be structured to consist of a lead employer, as in a corporate MEP, where is typically one employer who takes the lead in sponsoring the plan, which “related”⁷ employers can adopt. Alternatively, there may be an association sponsor, where a not-for-profit organization sponsors and controls the plan. Some group plans involve a board of directors or plan committee whose voting members consist solely of participating employers sponsors and controls the plan on behalf of all participating employers, who may be described as “co-sponsors.”⁸ Another example is a PEO sponsor, a professional employer organization that sponsors the plan on behalf of recipient employers. Finally, there may be a pooled plan provider. In a PEP, the PPP is the plan sponsor under ERISA Section 3(16)(B), although the participating employers are also identified as co-sponsors with respect to their portions of the PEP.

Service Provider Structures and Compensation

A key question in the rapidly evolving group retirement plan marketplace is the circumstances under which MEP or PEP service providers and PPPs may receive compensation for their services to a PEP. The SECURE Act enables service providers to accept the PPP role and become plan sponsors of open MEPs. But the question remains whether the SECURE Act sufficiently establishes that PPPs can be compensated, and that no additional independent fiduciary approvals or prohibited transaction exemptions are needed.

Vertical Integration of Service Providers

Many service providers receive compensation from a variety of sources. For example, a broker-dealer that is also a recordkeeper and an asset manager may receive revenues from float, trading, asset management, direct fees, revenue sharing from other asset managers, and more. In such cases,

⁷ The employers are unrelated for purposes of the controlled group and affiliated service group rules under the Code, but typically have some common ownership and are thus “related” in the ordinary sense of the term.

⁸ Historically, some MEPs describe participating employers as “co-sponsors” and some do not. Under a board sponsorship structure, the board is typically characterized in all plan documents as the plan sponsor even if participating employers are also described as “co-sponsors.” This is because the board represents all co-sponsors in sponsoring and governing the plan.

the broker-dealer would typically limit its fiduciary duties to a very narrow scope, and act as a non-fiduciary for all other purposes. Vertically integrated service providers to ERISA plans include some of the largest and most respected institutions in the United States, operating under a vertically integrated model.

Plan Level Service Provider Engagement

Participating employers in a MEP have a fiduciary obligation to ensure that the decision to participate, or to continue participation, is consistent with the requirements of ERISA section 404(a). Furthermore, employers may wish to contract locally for additional services with respect to participants and beneficiaries of their portion of the plan. The need for local services raises a potential prohibited transaction issue in that a service provider to the MEP as a whole may also offer local services, and some might view this as a conflict. For example, an RIA serving as the ERISA section 3(38) investment manager to a MEP may also offer local consulting to individual participating employers and/or education or advice to participants for added fees. Some participating employers choose to engage the advisor for the added services and fees, others do not. ARA does not believe that an advisor should be prohibited from serving in multiple capacities in a MEP, just as service in multiple capacities is permitted in single employer plans. Some commentators have suggested that there is a conflict in such a dual role. Conflicts may be possible for other reasons (e.g., variable compensation caused by service as both plan investment manager for added fees with respect to managed portfolio QDIAs and participant fiduciary advisor), but not due to providing services in multiple capacities.

Compensation for Not-for-Profit Associations

Associations typically conduct non-fiduciary due diligence on various products and services (not just retirement plans) on behalf of members, and members view such assistance as one of the primary reasons for joining the association. The association expends resources on these programs, for which it needs to be compensated. There are four principal methods of compensation: (1) licensing agreements, under which the product or service provider pays a licensing fee from its own assets to the association in exchange for the right to use the association's marks in marketing the benefit to association members; (2) commission or fee sharing, where the association is paid a portion of service provider revenues in the form of a commission, finder's fee, or other payment tied to product distribution; (3) sponsorship payments, where service providers pay to attend association conferences or receive other marketing access to members; and (4) fee-for-service arrangements under which the association provides services for compensation. Examples of services include educating members about the product or service and its benefits, serving as a liaison with service providers, providing logistical support for board or committee meetings, and assisting with due diligence. In some cases, the association is the direct provider of a service, in other cases it acts to facilitate the service.

Level Playing Field for Associations Versus PPPs

The ARA expects that many PPPs will be commercial entities which sponsor PEPs to sell their products and services, in exchange for which the PPP will be compensated. Associations, on the other hand, are typically not-for-profit groups or associations acting on behalf of members independent of any product provider, and thus can be a valuable source of independent assistance to group members. Associations must still be compensated for the work they do, just like PPPs. Associations cannot provide ARPs as an independent alternative to PEPs if the rules governing their compensation are not on a “level playing field” with compensation for purely commercial entities acting as PPPs.

Uniform Fee Schedule

Most long-term MEP providers require a “uniform fee schedule.” For example, a MEP’s total costs might be \$3,000 per participating employer plus \$50 per participant plus a tiered asset-based fee schedule. There can also be multiple classifications of participating employers, with different classifications paying different fees according to a uniform schedule. There is no specific statutory or regulatory requirement for a MEP to apply a uniform fee schedule, but such a fee schedule, uniformly applied to all participating employers, is consistent with the treatment of a MEP as a single plan and trust for purposes of tax, labor, and securities law as well as trust law duty of impartiality.

The use of a uniform fee schedule raises certain practical questions, including managing a potential transitional period for fee changes, the charging of fees to a provider’s or PPP’s own employees, as well as discounts or premiums, i.e., .to the degree a fee schedule calls for discounts or premiums in certain situations, is this still “uniform?” Clarification of the permissibility of such fee schedules would be welcome

The Independent Fiduciary

Another issue relating to fiduciary and service provider compensation in the context of the operation of PEPs is the required approval under 29 CFR 2550-408b-2. Approval may be achieved variously, including:

1. *Approval by participating employers (“vote with your feet”).* ERISA section 3(43)(B), requires that under a PEP, “each employer in the plan retains fiduciary responsibility for...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.” In other words, a PEP’s participating employers “vote with their feet”—serving, in effect, as the independent fiduciary for purposes of approving the PPP’s services and compensation. Historically, DOL has cast doubt on whether “voting with their feet” by participating employers provides

sufficient control over services and fees to satisfy this requirement.⁹ Therefore, the SECURE Act language may have generated an inconsistency in how the independent fiduciary requirement is met in a PEP versus other MEPs. ARA therefore requests clarification on this point.

2. *Board or committee approval.* A board or committee consisting solely of participating employers can serve as the independent fiduciary for purposes of approving compensation of fiduciaries and/or service providers. The board members themselves typically do not receive compensation from plan assets.
3. *Independent fiduciary approval.* A third party independent fiduciary can be engaged to approve services and compensation. Historically, some MEPs have engaged third party independent fiduciaries for specific purposes, but using such a mechanism as the primary method of approving services and compensation is the exception and not the rule, partly because such a structure can incur additional costs for participants.

Responses to RFI Questions

1. What types of entities are likely to act as pooled plan providers? For example, there are a variety of service providers to single employer plans that may have the ability and expertise to act as a pooled plan provider, such as banks, insurance companies, broker-dealers, and similar financial services firms (including pension recordkeepers and third-party administrators).

In addition to the entities described above in the Background section, types of possible PPPs include: (1) entities that qualify to sponsor ARPs but prefer the PEP structure. This includes bona fide groups or associations of employers and bona fide PEOs; (2) organizations that are similar to PEOs in certain respects but do not meet the definition of “bona fide PEO,” such as payroll companies, human resources (HR) consultancies, HR outsourcing firms, or PEO firms acting in an “administrative services only” (ASO) capacity; (3) technology firms that provide business services such as accounting software and services or human capital management software; (4) accounting firms; (5) asset managers; (6) registered investment advisers (RIAs); (6) insurance brokers; and (7) trusted centers of influence for employers and/or financial advisors (e.g., organizations that are trusted by employers and advisors as a source of product or service research and/or negotiated pricing).

Are these types of entities likely to act as a pooled plan provider?

Especially in the near term, the most likely PPPs, are financial services firms that are already operating in the retirement investing and administration space, including asset managers, insurance companies, recordkeepers, third party administrators, broker-dealers, and RIAs.

⁹ Advisory Opinion 2012-04A (May 25, 2012).

Are some of these entities more likely to take on the role of the pooled plan provider than others? Why or why not?

Organizations that are not accustomed to ERISA fiduciary responsibility may be reluctant to assume such responsibility, and the comprehensive nature of a PPP's duty is such that any potential PPP may be cautious about assuming the role. The most likely candidates for the role of PPP are therefore firms with experience in ERISA compliance and fiduciary duty. Furthermore, the liability and compliance burdens associated with the role are potentially substantial. As a business proposition, therefore, there are many reasons not to accept the PPP role, and therefore to prefer alternative group structures. Furthermore, higher liability and greater compliance burdens equate to added costs which must be passed on to participants—and which make it more difficult for MEPs and PEPs to compete on price, which many view (perhaps incorrectly) as the primary purpose of MEPs. These challenges will lead some firms who would otherwise be logical PPPs not to embrace the role.

How many entities are likely to act as pooled plan providers? Will a single entity establish multiple PEPs with different features?

Some service providers will establish multiple PEPs for different audiences and/or with different features. There will be a diversity of business models and a proliferation of independent PPPs and PEPs, within logical limits. "Logical limits" simply means that there is a finite number of employers and ERISA plans in the U.S., and a consolidation of clients in PEPs suggests a mathematical limit to the number of PEPs. As individual PEPs grow, the number of PEPs will shrink over time, but there may be scores or hundreds of PPPs emerging in the next few years.

2. What business models will pooled plan providers adopt in making a PEP available to employers? For example, will pooled plan providers rely on affiliates as service providers, and will they offer proprietary investment products?

Service providers will seek to showcase the best of their capabilities in their PEPs. Vertically integrated providers will wish to leverage their scale and comprehensive capabilities to provide an all-in-one solution. Investment advisers and managers will wish to create programs with their best investment solutions. Broker-dealers and RIAs with retail distribution will wish to leverage their "boots on the ground" presence to deliver the best possible on-site service for employers and their workers. And every service provider with the capability to deliver other products and services to employers and their employees will wish to do so, and can consider the total value of client relationships in their pricing models, which can drive down costs within the PEP. None of this is possible without the ability of a PPP to leverage the capabilities of its affiliates. Another way to view the role of affiliates is simply to see the marketplace as it exists today: most service providers offer multiple capabilities. It is not reasonable to expect a provider to hire others to do what the provider itself already does, professionally, as part of its offering.

A purely independent model in which a PPP chooses others to perform all services has considerable merit and is highly protective of participants' interests, but other business models also have merit, when appropriate protections are in place. Permitting firms to find efficiencies through bundling services, including the use of affiliates, is a logical alternative to a purely independent model and will help ensure competition and marketplace diversity.

Business Models

There are multiple potential business arrangements for PPPs and other PEP service providers, including:

1. *Joint venture PPPs.* Two or more service providers may join together, perhaps in a separate joint venture entity, to create a PPP or offer other services to PEPs.
2. *"Bundled" PEPs.* Service providers who commonly bundle multiple services in a marketplace offering will wish to offer similar bundles in PEPs.
3. *Protective covenants.* To the extent permissible under ERISA, service providers will be reluctant to commit to discounted, specialized service arrangements (as many PEPs will require) without reasonable business protections such as mutual non-solicitation, indemnification, and termination provisions.
4. *"White label" PEPs.* A service provider may wish to offer a PEP to its clients but not be the PPP.
5. *Outsourcing.* PPPs will wish to outsource functions with respect to which they lack expertise or infrastructure. For example, many potential PPPs wish to outsource the plan administrator role, as is possible in any other ERISA plan. Some PPPs may wish to outsource many or most plan administrator functions to a subordinate fiduciary under ERISA section 3(21)(A)(iii). Others will wish to hire an ERISA section 3(38) investment manager. This is one of the most important areas in need of clarification.

3. What conflicts of interest, if any, would a pooled plan provider (along with its affiliates and related parties) likely have with respect to the PEP and its participants? Are there conflicts that some entities might have that others will not?

Like many service providers to plans, PPPs may have conflicts of interest with respect to their plan clients. Indeed, similar conflict-of-interest concerns currently exist with professional employer organizations, which have been operating as sponsors of MEPs for some time. Prohibited transaction relief may be required, including for conflicts of interest that may arise with a service provider that offers products in conjunction with PEP sponsorship. For example, in addition to the fundamental service provider prohibited transactions, conflicts for PPPs may occur relating to the types of fees applied and compensation received by the commercial entity, as well as use of propriety products and investments.

ARA believes that commercial entities, particularly those entities that already provide retirement plan services, present the greatest opportunity to expand the retirement plan coverage gap through PEP sponsorship. All commercial entities will have conflicts of interest acting in the role of employer as they will be providing services to plans and plan participants in a fiduciary capacity and will be compensated for those services. Commercial entities, of course, can also offer mutual funds.

Commercial entities today typically provide services, including for example recordkeeping, administration, investment management, and trust and custodial services to single-employer retirement plans as covered service providers under ERISA. The relationship between the plan fiduciary and the non-fiduciary service provider is considered a prohibited party-in-interest transaction as defined in section 406(a) of ERISA.

Many potential conflicts are eliminated by the provisions of the new ERISA section 3(43)(B), which requires the PEP, by its terms, to make participating employers responsible for selection and monitoring of the PPP and other named fiduciaries and for plan investments if the PPP does not appoint an investment fiduciary. However, as noted previously, this is an area in which clarification is needed. Also, there is the issue that the new statutory language applies to PEPs but not other MEPs, potentially creating a disparity in the treatment of PEPs vs. other MEPs, and potentially creating an unlevel playing field for association retirement plan sponsors vs. commercial providers.

Issues or situations that could potentially give rise to prohibited conflicts of interest under certain circumstances include (1) the basic conflict of being compensated as a sponsor of a PPP or other MEP, using affiliates to assist in providing services, receiving variable compensation, such as from trading, float, revenue sharing, using affiliates, use of proprietary products, managed portfolios, and the sale of insurance and annuity contracts within the plan; (2) an RIA or trust company acting as PPP and accepting responsibility for plan investments as a named fiduciary, trustee, or investment manager versus hiring another RIA or trust company to serve as investment fiduciary; (3) cooperative structures for MEP or PEP sponsorship and operation, such as a joint venture between an asset manager and a recordkeeper to create a PPP; and (4) a service provider's participation in a MEP or PEP and receipt of compensation with respect to its own participants and beneficiaries; conversely, it could be viewed as a conflict of interest for such a provider not to receive such compensation solely with respect to its own workers, which causes other participating employers' participants to subsidize the provider's own workers.

Bundled Approvals

In a single employer plan, a service provider may offer a bundle of services for approval by a plan sponsor, who acts as the independent fiduciary for purposes of approving fees and services. The bundle may include services of affiliates. Once selected, the provider may not subsequently change its compensation without an approval process such as the methodology articulated in DOL Advisory Opinion 97-16A. Fiduciary service providers may follow the same approach of offering bundled services, though their compensation is subject to additional rules, such as the need for revenue

neutrality as described in Advisory Opinion 97-15A. We believe that this same interpretation of ERISA should apply in a MEP or PEP. A clarification by DOL to this effect would be helpful, and could avoid the need for additional individual exemptive relief.

For example, a vertically integrated provider is able, under current law and regulation, to offer a bundle of services that includes recordkeeping, administration, a directed trustee, and a platform of investments that includes some proprietary funds. In the PEP environment, such a provider might additionally wish to serve as a PPP, plan administrator, and discretionary trustee or investment fiduciary. These services would be provided through one or more affiliates. Under current law and regulation, such a bundle of services may be offered on a “take it or leave it” basis for selection by a single employer plan. It is counterintuitive that the same legal principles would not apply in a PEP, but some commentators have suggested that the use of affiliates results in a prohibited transaction. Clarification is therefore desirable.

4. To what extent will a pooled plan provider be able to unilaterally affect its own compensation or the compensation of its affiliates or related parties through its actions establishing a PEP or acting as a fiduciary or service provider to the PEP? What categories of fees and compensation, direct or indirect, will pooled plan providers and their affiliates and related parties be likely to receive as a result of operating a PEP, including through the offering of proprietary investment products? Are there likely to be any differences in types of fees and compensation associated with operation of a PEP as compared to a single employer plan?

The issue of whether a PPP can unilaterally affect its own compensation relates directly to the question of whether the “voting with your feet” approval by participating employers, as discussed above, represents sufficient control in the view of the DOL, or if additional requirements must be met. One such requirement that must logically be met is the use of a process for fee changes such as that articulated in Advisory Opinion 97-16A, whereby a service providers gives adequate notice of a fee change and sufficient time for a client to make other arrangements if it does not agree to the fee change.

Another issue discussed above that relates to the question of affecting one’s own compensation is that of using affiliates. A PPP who sets out to conduct a prudent process for selecting a recordkeeper, for example, could not select itself as part of such a process without having a conflict of interest. But the same PPP could offer a bundle of services that includes recordkeeping, and the participating employers or other independent fiduciary can approve the entire bundle. The bundled approval model, as discussed above, is available in single employer plans, and should logically be permitted in MEPs, including PEPs, but clarification in this regard would be helpful.

5. Do respondents anticipate that the Department's existing prohibited transaction exemptions will be relied on by pooled plan providers, and if so, which exemptions are most relevant? Are any amendments needed to the Department's existing exemptions to address unique issues

with respect to PEPs? Do respondents believe that there is a need for additional prohibited transaction exemptions? If so, please describe the specific transactions and the prohibited transactions provisions that would be violated in connection with the transactions.

ARA believes that commercial entities, particularly those entities that already provide retirement plan services, present the greatest opportunity to expand the retirement plan coverage gap through PEP sponsorship. All commercial entities will have conflicts of interest acting in the role of employer as they will be providing services to plans and plan participants in a fiduciary capacity and will be compensated for those services. The DOL should rely on the strength of its fiduciary and prohibited transaction rules and its ability to implement new rules to deal with unique concerns presented by different types of commercial entities and association retirement plan sponsors rather than favor one type of entity over another.

Existing exemptions and other guidance will be important. For example, service providers today rely on many of the following exemptions, and will probably continue to do so in PEPs and other MEPs: (1) statutory exemptions, such as ERISA sections 408(b)(2)-(6) and (8); and class exemptions, such as PTEs 75-1, 77-3, 77-4, 80-83, 83-1, and 84-24.

Modifications or Clarifications of Existing Exemptions Versus New Exemptions

Many possible conflicts involving PEPs and other MEPs are covered by existing exemptions. But there are gaps in service providers' ability to rely on these exemptions. For example, a bank serving as a PPP might wish to include within its PEP a bank deposit product such as a bank investment contract, to offer FDIC protection to participants and beneficiaries. The statutory exemption for bank deposit products under ERISA section 408(b)(4) may be available, but a bank acting as PPP might view existing guidance as insufficient to clarify that the PPP can safely rely on the statutory exemption within the PEP structure. Another example is PTE 77-4, which provides essential relief in many arrangements but would be largely infeasible in a pooled plan scenario. This is because obtaining affirmative written consent is prohibitively unwieldy in a pooled plan, effectively preventing PTE 77-4 from being available in those arrangements. To alleviate this problem, PTE 77-4 should be amended to allow for negative consent to fund pricing changes.

Additional examples involve PTEs 77-3 and 77-4, which permit an asset manager to use its own mutual funds in plans it serves as a fiduciary. But these exemptions do not cover collective investment funds (CIFs, often referred to as collective investment trusts, or CITs) and separate accounts. Yet CIFs and separate accounts have emerged as a major driver of reduced costs, and are currently and will continue to be popular investments in MEPs. ERISA section 408(b)(8) would allow a PPP to offer CIFs, but may not apply to variable compensation. Amendments to these PTEs could therefore solve this particular problem without requiring a new PTE. Similarly, amendment of the current proposed exemption for fiduciary advice could be a vehicle for providing clarity.

Plan sponsors will also seek managed account services. These products and services can be offered by the PPP itself or one of its affiliates, or by a third party for additional compensation. The offering

of these products and services could create a conflict of interest with the plan and participants. The PPP, in its fiduciary capacity, may determine the offering of a proprietary product or service would ultimately benefit plan and participants, but the availability of prohibited transaction exemptions to allow a PPP to receive compensation in connection with these product offerings is unclear. ERISA section 408(b)(2) would provide relief for managed account arrangements.

However, DOL should address prohibited transaction exemption relief for proprietary general account group annuity products, mutual funds, CIFs, separate accounts, and other investments in a balanced way that allows a PPP to offer proprietary products but also protects participants from potential harm arising from potential conflicts of interests. The inability to offer these proprietary products will create a significant impediment for commercial entities to enter the PEP market.

Possible New Exemption or Regulation: Compensation of MEP sponsors and service providers

An exemption or regulation or sub-regulatory guidance regarding compensation of MEP sponsors and service providers could clarify the extent to which approval of services and compensation by participating employers in both PEPs and other MEPs is sufficient to meet the independent fiduciary approval requirement. To the extent approval is needed from a board, committee, or third party independent fiduciary, guidelines could be included on when such approvals are needed and any requirements that must be met in order for the independent fiduciary approval requirement to be satisfied. The exemption could provide a clear, unambiguous set of guidelines for compensation and disclosure so that all stakeholders in all types of MEP have a roadmap.

ARA believes that commercial entities, particularly those entities that already provide retirement plan services, present the greatest opportunity to expand the retirement plan coverage gap through PEP sponsorship. ARPs also present a significant opportunity to expand coverage. But the sponsors of these arrangements, unlike the employer sponsors of single employer plans, require compensation, and existing guidance on compensation is geared almost exclusively to single employer plans, making new guidance beneficial to all parties.

6. If additional prohibited transaction relief is necessary, should the Department consider developing distinct exemptions for different categories of pooled plan providers (e.g., to specifically address the unique prohibited transactions involved for certain entities) or should the Department address pooled plan provider conflicts more generally, in a single exemption? What are advantages and disadvantages of either approach?

In connection with amendments to certain existing exemptions, a single exemption or regulation covering compensation of MEP sponsors and service providers could include all relevant guidance. Separate exemptions for different categories of sponsor or provider could make sense as well. What is important is that stakeholders have an unambiguous roadmap. The form of the guidance is less important than the content. The proposed exemption for fiduciary advice, as has been described in the foregoing, should be amended to take into account the role of fiduciaries in PEPs and other MEPs.

7. To the extent respondents do not believe additional prohibited transaction relief is necessary, why? How would the conflicts of interest be appropriately addressed to avoid prohibited transactions? Are different mitigating provisions appropriate for different entities? Why or why not?

Part of the debate over the SECURE Act and its predecessor bills concerned whether to include new statutory exemptions in connection with PEPs. Of course, the SECURE Act does not include any new exemptions.

Experienced MEP practitioners have developed reasonable, prudent methods for addressing questions concerning MEP sponsor or provider compensation and conflicts of interest based on advice of counsel and a thorough understanding of existing guidance concerning MEPs. Practitioners have generally been comfortable with their methods, and have not felt that additional guidance was needed. However, PEPs create an entirely new category of MEP, with a new type of sponsor, and guidance is now needed—whether in the form of clarifications of existing rules or new rules. But any such guidance should be crafted based on a comprehensive view of the entire MEP marketplace, not just PEPs, and should ensure uniformity of regulation and enforcement and a level playing field for market participants.

A “no new exemptions” approach to PEPs might therefore be appropriate, but there is clearly need for guidance in some form. Some combination of updates to existing exemptions to take PEPs and other MEPs into account, new regulations, or new sub-regulatory guidance is needed.

8. Do employer groups, associations, and PEOs described in the Department's MEP Final Rule face similar prohibited transactions to those of pooled plan providers, and do they have similar need for additional prohibited transaction relief? Are there prohibited transaction issues unique to employer groups or associations, or PEOs?

See the discussion in the “Background” section above for issues related to non-PEP MEP providers. Service providers and sponsors to non-PEP MEPs face similar issues to those faced in PEPs.

ARA believes that the DOL should address prohibited transaction exemption relief or other guidance for PPPs, bona fide groups or associations, and bona fide PEOs in a balanced way that protects participants and beneficiaries while allowing an association or other ARP sponsor, PPP, or other MEP service provider to offer a diverse range of products and solutions, and to be compensated for doing so.

B. Plan Investments

1. What plan investment options do respondents anticipate will be offered in PEPs and MEPs? Are the investment options likely to be as varied as those offered by large single employer plans? Are the options likely to be more varied than those offered by small single employer plans?

Service providers wish to bring the best of what they offer to PEPs and MEPs. As such, there is interest in offering the full spectrum of available investments, and to do so on a highly competitive basis. MEP investments typically include (1) designated investment alternatives (DIAs) including mutual funds, exchange-traded funds (ETFs), CIFs, and separate accounts (2) self-directed brokerage accounts (SDBA); and (3) qualified default investment alternatives (QDIA), in the form of lifestyle, balanced, or target date funds or managed accounts.

Furthermore, the provisions of the new ERISA section 3(43)(B) suggest that PEPs may include investments that are rarely, if ever, found in other MEPs historically, such as (1) employer stock; (2) local investment menu selection (i.e., instead of a global fund menu used by all participating employers, the structure of the law makes it possible to leave the choice of investments in the hands of individual employers, as in single employer plans), (3) investments that take into account environmental, social, and governance (ESG) factors, to the extent not prohibited by ERISA, which individual participating employers might choose to adopt where professional investment managers might not due to perceived regulatory risks; and (4) alternative investments, which individual participating employers might choose to adopt where professional investment managers might not due to perceived regulatory risks.

2. What role will the entities serving as pooled plan providers or MEP sponsors, or their affiliates or related entities, serve with respect to the investment options offered in PEPs and MEPs?

Service providers to PEPs and other MEPs will wish to leverage their full capabilities and those of their affiliates. It is therefore reasonable to expect a service provider to wish to provide some or all of the products and services it ordinarily provides in the marketplace, which therefore covers the full spectrum of possible roles in an ERISA plan. A fundamental issue is the circumstances under which service providers will be able to do so. Examples of such roles include, but are not limited to (1) plan administrator; (2) non-fiduciary third party administrator (TPA) services; (3) third party administration services for which the TPA is a fiduciary under ERISA section 3(21)(A)(iii); (4) ERISA section 3(38) investment manager or investment advice provider at the plan level; (5) ERISA section 3(38) investment manager or investment advice provider at the participating employer level in the case of a MEP or PEP that does not appoint an investment fiduciary at the plan level; (6) ERISA section 3(38) investment manager or investment advice provider at the individual participant level; (7) Asset management product provider through closed-end or open-ended investment companies (i.e., open-ended mutual funds and ETFs), CIFs, and separate accounts; (8) self-directed brokerage account provider; (9) custodian and/or trading platform; (10) cash account provider (typically compensated via float); (11) trustee for custodial and/or investment purposes; (12) trustee for purposes of monitoring contributions; (13) payroll provider; (14) health savings account (HSA) provider (as such accounts grow increasingly integrated with retirement accounts); (15) insurance or annuity provider; and (16) provider of participant services such as financial wellness, education, and advice.

C. Employers in the PEP or MEP

1. How many employers are likely to join a PEP or MEP? Will joining a PEP or MEP be more appealing to employers of a particular size? Are there any estimates of the total number of employers and participants likely to be covered by newly formed PEPs and MEPs? Are there any estimates of the number of employers and participants that will migrate from a single employer plan to a newly formed PEP or MEP?

ARA notes that the Employee Benefits Research Institute (EBRI) has previously published estimates of adoption rates for open MEPs. (Under the Dome — A Closer Look at Legislative Proposals Impacting Retirement, which reports on results of EBRI's Retirement Security Projection Model[®]).

2. Will larger employers also seek to join PEPs or MEPs in order to take advantage of additional economies of scale? Will any additional prohibited transactions exist as a result of substantial size differences between employers in the PEP or MEP (e.g., because a large employer has greater ability to influence decisions of a pooled plan provider or MEP sponsor as compared to a small employer)?

Initial feedback from the marketplace is that some larger employers will join MEPs and PEPs. A disparity in the size of participating employers creates considerations for both the participating employers and for other plan fiduciaries. These considerations do not necessarily create additional prohibited transactions, but they are worthy of mention, and perhaps worthy of clarifying guidance or exemptions.

Large Employers Subsidizing Small Employers

This is the classic MEP pricing dilemma, especially in MEPs focused on startup and very small plans. Startup plans have no assets and few participants, and therefore have very little revenue potential for service providers, who need revenue in order to provide services at an appropriate level of quality and compliance. One model, therefore, is to price using asset-based fees, which cause employers with more assets and larger average participant balances to pay more. Startup plans get a bargain, but as they grow, their purchasing power grows, increasing the incentive to leave the MEP. If they stay in the MEP, their increasing fees can end up subsidizing the fees of smaller employers. Pricing models that favor startup plans could be viewed as an excellent approach to national retirement policy, but such models can create dilemmas for participating employers and other plan fiduciaries.

Community Pricing (Equal Fees for All Participants)

Unions offer an example of community pricing. In the typical Taft-Hartley multiemployer plan, the sponsoring union typically considers it a high priority to ensure that all plan participants pay the same fees, regardless of who their employer is. As a practical matter, the cost to administer this

arrangement may be far greater with respect to participants employed by small employers versus larger ones, but the ethos of the arrangement calls for uniformity of pricing at the individual level.

But in the context of a MEP or PEP, uniformity of fees at the participant level, however fair it may sound, can create problems for potential adopting employers. If the employer could negotiate a better deal outside of the MEP, it arguably has a fiduciary obligation to do so. Because community pricing is “one size fits all,” there is a moral hazard to the pricing model: employers for whom the pricing is a bargain (smaller employers) are incentivized to join, while larger employers are incentivized not to join or to leave. The result is an inability to cover costs, which leads to rising fees and stress on the quality of service and compliance. Community pricing can work well in two circumstances: union plans and groups or associations with static (and fairly homogeneous) populations of participating employers.

Influence of “Anchor” Employers

In a MEP or PEP, participation of large, reputable organizations – “anchor” employers – can boost the purchasing power of the group, just as an “anchor tenant” is critical to the success of a shopping mall—and its smaller tenants. If a goal of MEPs is to drive down costs and improve outcomes through purchasing power, the inclusion of “anchor” employers helps achieve that goal. ERISA’s protections mitigate the likelihood that any added influence attributable to larger employers will harm the workers of smaller employers in a MEP. ERISA’s protections and fiduciary duty provisions combined with the reduced impact of employer self-interest mitigate the concern that anchor employers might have disproportionate influence that is harmful to smaller employers

PPPs who join their own PEPs

Some MEP practitioners historically have argued that certain MEP structures *required* participation by their lead employers. In the case of PEPs and other MEPs, it is viewed as a vote of confidence by potential participating employers that the sponsor “eats its own cooking.” It could be argued, therefore, that it is a best practice for a MEP sponsor or PPP to participate in a plan it sponsors.

But participation by a sponsor could lead to the sponsor being the largest participating employer—perhaps by a large margin. There are several policy implications to consider with respect to this issue. First, if it is, in fact, a best practice for MEP sponsors and PPPs to “eat their own cooking,” participation in their sponsored MEPs should be encouraged through appropriate regulatory clarifications. On the other hand, it may be appropriate to review existing protections to ensure they are sufficient. For example, in an association MEP, it is logical for the association’s own plan to participate in the MEP, and for the association to play a leading role in plan governance. But under ERISA, the association would have to recuse itself from decisions with respect to its own services or compensation.

3. Will the existence of multiple employers in a PEP or MEP cause greater exposure to prohibited transactions in connection with investments in employer securities or employer real property? In what form will PEPs and MEPs hold employer securities or employer real property?

With a PEPs, in the absence of the appointment by the PPP of a discretionary investment fiduciary, the individual participating employers are responsible for investment decisions. This opens the door to the inclusion in PEPs of employer securities,¹⁰ which can present substantial advantages to employees. But there are also substantial litigation risks of including employer securities. For this reason, MEPs have traditionally forbidden investment in employer securities. And while including employer securities in a PEP is an interesting possibility, it does not create any new prohibited transactions insofar as discretion over the choice to include them remains at the level of individual participating employers. But largely because of the aforementioned potential liabilities, it is likely that PPPs will hesitate to include this feature.

4. Do respondents anticipate that prohibited transactions will occur in connection with a decision to move assets from a PEP or MEP to another plan or IRA, in the case of a noncompliant employer? Do respondents anticipate that any other prohibited transactions will occur in connection with the execution of that decision?

Guidance with respect to such transactions would be welcome, because the default approach will be to move the noncompliant employer to a single employer plan on the current platform. In the case of a PPP that is a recordkeeper, for example, the spinoff would be to a single employer plan in a different product offered by the recordkeeper, which may have higher fees and/or different features and benefits—which could be considered a prohibited transaction. Yet the nature of unresponsive employers may make a default option necessary, making an exemptive relief or clarification especially desirable.

¹⁰ The inclusion of employer real property in ERISA plans is limited almost exclusively to defined benefit plans, and it is hard to imagine it being permitted in a PEP.

Conclusion

The ARA very much appreciates the DOL's commitment to expanding access to workplace retirement savings plans for America's workers. The ARA shares this goal and looks forward to working with the DOL to make PEPs a viable and meaningful retirement savings vehicle. ARA would welcome the opportunity to discuss PEP issues further with you. Please feel free to contact Allison Wielobob, General Counsel, at AWielobob@USARetirement.org. Thank you for your time and consideration.

Sincerely,

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