NPPG
FIDUCIARY SERVICES
A Fiduciary Consulting Group

September 18th, 2020

Office of Regulations and Interpretations
Employee Benefit Security Administration Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20201

Attention: Proposed Registration Requirements for Pooled Plan Providers RIN 1210–AB94.

To whom it may concern,

I am an attorney, and I write on behalf of NPPG Fiduciary Services, LLC ("NPPG") in response to the Department of Labor's ("DOL") recent request for comments on Registration Requirements for Pooled Plan Providers (the "Notice"). We are thankful for the opportunity to comment on these matters. Our responses are formatted in question-response fashion and are limited to those matters upon which NPPG has submitted comments.

1. Is the definition of "beginning operations as a pooled plan provider," which determines whether initial registration is required, appropriate in scope? Should the definition exclude marketing and solicitation efforts so that the initial registration is tied solely to beginning operation of a pooled employer plan? Should the deadlines for filing an initial registration be nearer to the date of actual public marketing activities if the pooled plan provider intends only to engage in marketing and solicitation efforts, and will not enroll any employer or employee in a pooled employer plan until at least 30 days after initial registration?[1]

It is our position that the interaction between restrictions on marketing and solicitation efforts prior to initial registration should be clarified along two indices. First, we believe that "beginning operations as a pooled plan provider" should exclude marketing and solicitation efforts and instead be solely tied to beginning operation of a pooled employer plan ("PEP"). As an initial matter, it is our understanding that the policies which currently animate the restrictions on marketing are fears that a potential pooled plan provider ("PPP") may:

(a) Advertise functions they will be prohibited from performing under the final regulations;

or

(b) Will not meet the minimum registration requirements under the final regulations.

Provided that a PPP disclaims its marketing material to make clear that all offers are contingent on successful registration, these policies can be satisfied without imposing direct restrictions on marketing. Contractual

[1] *See* Notice at page 28.

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arrangements between a PPP and a potential adopting employer are likely to indemnify a potential adopting employer for any damages caused by a PPP's failures to establish a marketed PEP.

By contrast, NPPG has already experienced some ambiguity over what constitutes marketing and solicitation efforts. Are references to working on becoming a PPP or on establishing a PEP in personal biographies acceptable? To what extent can a company that hopes to be a PPP provide information to clients that inquire about PEPs? Creating a clear framework for how to address these matters, and then communicating them to marketing personnel and employees, is challenging. Addressing these matters has a chilling effect on potential PPPs.

Accordingly, it is NPPG's position that any rule governing marketing and solicitation should be clear and unambiguous, such as the disclaimer requirement suggested above.

In addition, NPPG believes it would be prudent to provide additional guidance on the extent to which supplemental filings for new PEPs would be subject to these marketing and solicitation restrictions. While NPPG's position is that supplemental filings would not be subject to such restrictions, some entities appear to be adopting the opposite view. We consider such restrictions potentially overbroad as applied to supplemental filings for additional PEPs. Instead, we propose that, for pooled providers in good standing filing for supplemental PEPs, the pooled provider be allowed to fully market the supplemental PEP prior to its approval, provided the pooled provider properly disclaims its marketing and does not enroll any participating employers prior to approval.

The proposed rule states that the registration process shall be "a simple registration of contact information [and other information available to] . . . the pooled plan provider during its normal course of business".[2] For more established PPP's, the registration requirement is expected to be easily met.[3] The 'additional PEP' scenario presumes a provider has successfully registered, and successful registration presumes that a registration process is in place. Accordingly, allowing a registered pooled plan provider to market a PEP before its registration is unlikely to implicate the policies we understand to be behind the restrictions on marketing activities.

By contrast, restricting marketing activities will cause tangible burdens to plan providers. Advertising activities will need to be siloed, creating an additional layer of compliance responsibilities. Certain streamlined marketing campaigns will need to be run on individual tracks for each PEP, resulting in substantial duplicate expenses. While such additional costs are effectively unquantifiable at this stage, one can reasonably assume that the threat of such expenses will either (a) discourage certain plan providers from participating in the PEP space, or (b) result in increased administrative fees to defray these additional compliance costs. Neither scenario benefits PEP participants.

In lieu of a broad ban on marketing for supplemental filings, we propose that the rule be interpreted narrowly to forbid misleading marketing by a pooled plan provider. At minimum, this would require disclaiming all marketing to be clear that the supplemental PEP filing has not yet processed, and all marketing is contingent on perfection of the supplemental filing. Pooled plan providers should also be barred from accepting any fees or enrolling any participating employers until the supplemental filing is approved. It is our position that such restrictions will vindicate the public interest in having accurate information about PEPs and pooled plan providers, while also encouraging more pooled plan providers to enter this space.

2. Should the disclosure of "ongoing criminal, civil, or administrative proceedings related to the provisions of services to, operation of, or investments of any employee benefit plan by the pooled plan provider" be expanded? For example, would disclosing settlements of fiduciary liability claims against pooled plan

[2] *See* Notice, at page 48.
[3] *See Id.* (estimating registration to take 45 minutes for most providers)

providers with the Department or PBGC, including settlements under ERISA § 206(d)(4)(A)(iii), assist employers performing due diligence in selecting and monitoring pooled employer plans?

NPPG is active in the multiple employer plan ("MEP") space, and two overarching concerns of both MEP adopters and MEP sponsors are (a) the extent to which one actor in the MEP may be indirectly liable for the actions of another, and (b) the extent to which the MEP sponsor can insulate the MEP as a whole from major unexpected events. NPPG expects similar concerns to arise in the PEP space.

In order to instill confidence in PEPs, NPPG believes the required disclosures of ongoing criminal, civil, or administrative proceedings related to the provisions of services to, operation of, or investments of any employee benefit plan by the pooled plan provider should be highly thorough, even at the cost of slightly lengthening the registration process. These disclosures should at minimum be expanded to include the above-referenced matters, but should also extend to include a broader examination of an applicant's trustworthiness and financial health.

To that end, NPPG believes the requirement to disclose bankruptcies in supplemental filings should be extended to initial registration filings. Additionally, PPP's should be required to disclose any state or federal judgement liens or tax liens above a certain *de minimis* threshold.

More stringent registration requirements may, at first, slightly limit the field of available PPPs. In time, however, they would ensure that only more reputable actors sponsor PEPs, which will increase user trust in this new system and, ultimately, expand the universe of companies willing to provide retirement benefits to their employees.

3. The Department invites comments from interested persons on all facets of the proposed rule. Commenters are free to express their views not only on the specific provisions of the proposal as set forth in this document, but on other issues germane to the subject matter of the proposal.

In order to ensure maximal compliance, NPPG would desire clarification on the following matters:[4]

(a) What might constitute a reasonable period of time for a PPP to allow a non-compliant PEP adopter to come in to compliance before triggering the process of removing the non-compliant adopter from the PEP?

NPPG proposes linking the reasonable time period to the possibility of either individual participants or the PEP itself becoming exposed to substantial penalties. For example, if a non-compliant adopter had several loans not being administered properly, they could reasonably correct the matter until the statutory limits set forth in section 72(p) of the Code are exceeded. At that point, the individual participant suffers a tax penalty in the form of a deemed distribution, and the non-compliant adopter (assuming they had knowledge and the ability to remedy the issue) may be removed.

Or consider any plan operational failure that would normally be corrected through an IRS compliance program. If a non-compliant adopter learns of a self-correctible error within the self-correction window, then they should reasonably be expected to self-correct the matter before a Voluntary Compliance Program filing (and its attendant fees) is required.

[4] It is NPPG's understanding that several of these matters will be addressed in future proposed rulemakings. Nonetheless, NPPG deems it prudent to begin considering these matters at the outset, as they can affect how potential PPP's structure their PEPs.

(b) The Notice states that the DOL expects that most PPPs will be drawn from businesses that already provide one or more retirement plan services, such as recordkeepers, third-party administrators, and investment advisors. Will regulations regarding proper disclosure of interested party transactions and reasonableness of fees be modified to provide a safe harbor for PPPs that outsource services to affiliated entities?

It is our understanding that PEPs are expected to provide benefits to adopters by centralizing administrative burdens and taking advantage of economies of scale. To that end, the Notice directly contemplates that most PPPs will be companies that currently provide retirement plan services, as such companies are best able to create such administrative efficiencies. One can reasonably expect that such companies might, instead of creating an internal department to provide certain PPP services, engage an existing affiliate to provide such services.

We believe that it is inconsistent that a self-contained full-service PPP and a PPP who performs some services and outsources other services to its affiliates would have different obligations under the law. We also believe that, given recent litigation over fee reasonableness in MEPs, the affiliate arrangement is particularly vulnerable to expensive legal challenge. The possibility of such challenge and the current ambiguity in the rules might dissuade PPPs from registering and, it follows, limit the availability of PEPs to smaller businesses. Accordingly, it is our position that PPPs should be provided with a clearly defined safe harbor for what disclosures must be made and what fees might be reasonable in this situation. For example, provided a PEP adopter is charged reasonable fees in the aggregate for the services that PEP adopter receives from the PPP and its affiliates, no special fee disclosures should be required, and fee reasonableness should be determined in the aggregate as opposed to for individual services.

Thank you for your time and consideration.

Sincerely,

Jared Stipelman, Esq.