GROOM LAW GROUP

September 30, 2020

Submitted Electronically

Ms. Jeanne Klinefelter Wilson
Acting Assistant Secretary
Employee Benefits Security Administration
Office of Exemption Determinations
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Registration Requirements for Pooled Plan Providers (RIN 1210-AB94)

Dear Acting Assistant Secretary Klinefelter Wilson:

We write on behalf of a group of interested stakeholders (the "Group") in response to the proposed regulation (the "Proposed Regulation") concerning the registration requirements for pooled plan providers ("PPPs") for pooled employer plans ("PEPs") published by the Department of Labor ("DOL") in the Federal Register on September 1, 2020. The Group includes a diverse cross-section of stakeholders, including advisors, consultants, investment managers, plan sponsors, recordkeepers, plan administrators, and trust companies. The Group appreciates DOL's efforts to implement the provisions of the Setting Every Community Up for Retirement Enhancement Act of 2019 (the "SECURE Act") permitting the establishment of PEPs, and we have provided comments on specific provisions of the Proposed Rule below.

The Group's primary concern is that DOL provide potential PPPs with certainty regarding the PPP registration requirements as soon as possible. As you know, the SEECURE Act permits the establishment of PEPs beginning on January 1, 2021. That is a mere *three months* away, and a number of potential PPPs are prepared to establish PEPs as early as January 4, 2021. However, PPPs must register before "beginning operations." This limited window is leading to confusion and a wide variety of practices. Therefore, we respectfully urge DOL to complete final guidance as soon as possible.

We also urge DOL to immediately issue sub-regulatory guidance acknowledging that PPPs can take good faith steps to register and "begin operations" before the issuance of a final registration regulation. Congress understood that it could take DOL and Treasury time to issue PEP-related guidance and did not want the guidance process to impede the establishment of PEPs. Therefore, Congress allowed PPPs to operate under a good faith compliance standard prior to the issuance of any DOL guidance.[1] Many potential PEP service providers, including members of the Group, have reasonably relied on this good faith compliance standard to move their PEP services forward and should not be penalized for being innovators and relying on the statutory good faith compliance standard.

[1] That rule provides, in pertinent part, that a PPP "shall not be treated as failing to meet a requirement of guidance issued by the Secretary… if, before issuance of such guidance… [the PPP] complies in good faith with a reasonable interpretation of the provisions of…" section 3(43) and 3(44) of ERISA. ERISA § 3(44)(D).

Congress also intentionally permitted DOL to implement the PEP-related provisions of the SECURE Act through "guidance" rather than requiring formal regulations.[2] We ask that DOL exercise this authority by immediately issuing sub-regulatory guidance (*e.g.*, a statement, FAQ, or letter) acknowledging the good faith compliance standard and clarifying that PPPs who register within 30 days of the publication of final guidance in the Federal Register will be deemed to comply with the registration timing rules. Temporary guidance is absolutely necessary to avoid delaying the establishment of PEPs, and this guidance would in no way negatively impact DOL or its ability to oversee PEPs. And the Group would support guidance that requires PPPs to satisfy the final registration requirements once the registration rule is finalized.

Although the Group is primarily focused on ensuring that PEPs can be established on or around the date Congress intended, we offer several discrete comments on specific requirements of the Proposed Regulation. As a preliminary matter, however, we note that the purpose of the PPP registration requirement was to ensure that DOL can identify PPPs at or around the time PPPs establish PEPs rather than not having visibility into PPPs establishing PEPs until the PPP files a Form 5500.[3] However, the Proposed Rule requires the disclosure of information that goes materially beyond what is necessary to simply identify PPPs. That means PPPs would likely be required to routinely update their registration statements and make supplemental filings for even modest business changes that have no bearing on PEP administration. Therefore, we encourage DOL to streamline the registration requirements to eliminate disclosures that are not necessary for DOL to identify PPPs. At the very least, DOL should consider addressing the following issues:

- **Disclosure of Compliance Officer**. Proposed Rule requires disclosure of the PPP's "primary compliance officer" because, according to the preamble, the disclosure is intended to give DOL and others with compliance concerns a means of contacting a responsible person at the registrant. However, that assumes (i) that PPPs have a single compliance officer and (ii) the compliance officer listed would be the correct person for DOL or "others" to contact. However, neither of those assumptions is correct. A PPP may have multiple compliance officers, each handling different compliance issues related to the PPP's duties. Additionally, the compliance officer is often not the appropriate individual to field inquiries from DOL of other parties. Participating employers, for example, likely have their own point of contact with the PPP and PEP. Moreover, the individual(s) serving as compliance officers likely will change periodically, and such a change would require the PPP to update the registration statement, resulting in additional costs ultimately borne by plan participants. Lastly, to require the creation of a "primary compliance officer" role serves to increase, rather than decrease, the regulatory burdens related to PEPs and is not supported by Congress' legislative language. Given the foregoing, we see no value in listing the compliance officer on the registration statement and ask that DOL eliminate the requirement.

- **Disclosure of Convictions.** The Proposed Regulation's requirement that the PPP disclose criminal convictions and findings of fraud for any employee of the PPP is overly broad. It is no consequence

---

[2] *C.f.*, ERISA § 3(44)(C) (directing DOL to "issue such *guidance* as the Secretary determines appropriate to enforce and carry out" the PEP provisions (emphasis added)) *with* ERISA § 103(g)(2)(A) (permitting the Secretary to allow simplified annual reports *by regulation*).

[3] There is no indication that Congress intended the registration requirement to "assist" employers considering PEP participation. Employers are perfectly capable of determining on their own what information is relevant to their decision-making process and can request that a PPP provide that information.

to DOL or others if an employee with no PEP-related responsibilities (*e.g.*, a maintenance worker) has a criminal conviction, and the disclosure has the potential to unfairly draw public attention to, and scrutiny of, people who made mistakes in the past. Additionally, it would be very difficult for a PPP to monitor the criminal convictions of all employees, and there are concerns that asking rank-and-file employees to disclose criminal convictions may, in some cases, increase the risk of employment-related litigation. We note that ERISA already prohibits people convicted of certain crimes from serving in a fiduciary capacity

- **Disclosure of Enforcement Actions.** The Proposed Regulation would require a PPP to make a supplemental filing upon receipt of written notice of any administrative or enforcement action related to the provision of services to any employee benefit plan, including a PEP by any regulatory authority. Most PPPs will likely be financial service organizations that are routinely subject to investigations, audits, and other administrative actions by any number of federal and state agencies. Requiring a PPP to report such actions would be burdensome and potentially misleading as to the "risks" of working with a specific provider.

We appreciate the opportunity to provide these comments and would be happy to discuss the issues in more detail.

Sincerely,

David Levine Michael Kreps George Sepsakos Brigen Winters