



Invested in America

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September 30, 2020

The Honorable Jeanne Klinefelter Wilson
Acting Assistant Secretary
Employee Benefits Security Administration
Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Registration Requirements for Pooled Plan Providers

Dear Secretary Wilson:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to respond to the Department of Labor’s (the “Department”) proposal with regard to registration of pooled employer plans (PEPs). We strongly support the Department moving this rulemaking forward in a timely manner.

We worked closely with Members of Congress in support of the Setting Every Community Up for Retirement Enhancement Act (the “SECURE Act”), which provided for the creation and establishment of PEPs. Included in that law are new Sections 3(44) of ERISA and 413(e)(3) of the Internal Revenue Code of 1986, as amended, that require Pooled Plan Providers (PPPs) to register with the Department and the Treasury Department, respectively, before beginning operations as a PPP.

The Department’s proposal of a new Form PR (Pooled Provider Registration) is an important first step in implementing the SECURE Act’s PEP provisions. Our comments are intended to improve and streamline Form PR and to enhance efficiency in the PPP registration process, which we believe is important to encouraging the adoption and growth of the PEP marketplace and increasing retirement savings in America.

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>.

PEPs Represent a Critical Opportunity to Expand Access to Retirement Savings Plans

Establishing a robust marketplace for PEPs has significant potential to expand cost-effective opportunities for individuals to save and invest for their retirement, particularly for those who work for small businesses. It is important to keep the PPP registration process simple and efficient to foster a strong and diversified PEP marketplace.

Small businesses indicate that offering their employees access to a retirement plan is second in importance only to offering them access health insurance.² However, many small businesses face significant barriers to establishing and maintaining retirement plans for their employees. According to a GAO report, 67% of individuals who work for firms with 50 or fewer workers do not have access to an employer-sponsored retirement plan.³ Further, according to this report, individuals in the lowest income quartile are less likely to work for an employer that offers a retirement plan.⁴

Allowing employers to join a PEP addresses many of the practical issues and barriers facing small employers in providing access to a qualified retirement plan. Specifically, access to PEPs mitigates these issues and barriers by providing the benefits of economies of scale, while outsourcing many of the legal and compliance risks to experts. The administrative chores that small employers see as barriers to maintaining a plan will be shouldered by the PPP, as will navigation of the legal requirements, both under the Code and under ERISA.

Thus, to best address these problems confronting employees of small businesses and workers in the lowest income quartile, the Department should facilitate increased access to PEPs. By limiting the administrative burden associated with registering as a PPP, the Department would encourage additional firms to sponsor PEPs as PPPs, thereby generating a more competitive retirement plan marketplace and better facilitating access to PEPs for employees whose employers do not currently sponsor a retirement plan.

Scope of “Beginning Operations as a Pooled Plan Provider” Should be Narrowed

Under the proposal, any person must register as a PPP before beginning operations as a PPP. The Department defines “beginning operations as a pooled plan provider” as “publicly marketing services as a pooled plan provider or publicly offering a pooled employer plan.”

We believe this definition should exclude marketing and solicitation efforts so that the initial registration is tied solely to beginning to operate a pooled employer plan. We are concerned that the proposal would require potential PPP providers to register before they have fully considered and designed a product or approach to bring to market. The proposal’s limitation may unnecessarily limit innovation and PEP adoption, as any decision to move forward with regard to a PEP offering will generally include determining market demand and product structure. We are

² 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>

³ GAO Report to Congress: The Nation’s Retirement System, October 2017, GAO-18-111SP (Figure 2.2): <https://www.gao.gov/assets/690/687797.pdf>

⁴ Id, Figure 2.4

concerned that the uncertainty in the proposal could discourage potential PPPs from assessing whether to enter the market.

While we recognize that the preamble to the proposed rule expressly permits the PPP to “take actions and communications designed to evaluate market demand in advance of publicly marketing pooled plan provider services or publicly offering one or more pooled employer plans,” the line between “communications designed to evaluate market demand” and “publicly marketing services as a pooled plan provider” is not clear. Neither of these terms is clearly defined in the proposed rule, and there is no safe harbor communication design or disclaimer described that could be used to ensure that a communication provided by the PPP to evaluate market demand does not constitute public marketing material.

We would recommend defining “beginning operations” for PPP purposes the same way that the Department defined this term for PEP purposes in proposed Labor Regulation 2510.3-44(b)(6). Specifically, we recommend that a PPP be treated as “beginning operations” “when the first pooled employer plan offered by the pooled plan provider is positioned to enter into participation arrangements with employers.” If the Department is not willing to define “beginning operations” for PPPs in either of these manners, we would recommend clearly defining what constitutes “publicly marketing services as a pooled plan provider,” developing a safe harbor list of communication and activities that would constitute “communications designed to evaluate market demand in advance of publicly marketing pooled plan provider services” rather than public marketing material, and developing a safe harbor disclaimer that can be used to clearly identify communications designed to evaluate market demand in advance of publicly marketing PPP services.

Breadth of Disclosure of Ongoing Proceedings Related to the PPP is Too Broad

The proposal would require the registration form to include a statement disclosing “any ongoing criminal, civil, or administrative proceedings related to the provisions of services to, operation of, or investment of any employee benefit plan, in any court or administrative tribunal by the federal or state government or other regulatory authority against the pooled plan provider, or any officer, director, or employee of the pooled plan provider.”

We believe this is overly broad for purposes of the registration. In particular, we believe the inclusion of any and all administrative proceedings among the types of proceedings that must be disclosed in the Form PR is particularly inappropriate. The breadth of “administrative proceedings” could be interpreted to include minor issues, and routine regulatory sweeps, reviews, inquiries, and audits. As such, we recommend limiting the reporting obligations to such proceedings where an adverse finding against the PPP would constitute a material prohibition against acting as PPP.

Further, we believe this disclosure requirement should not include every officer, director and employee. Instead, it should be limited to officers, directors and employees of the PPP who (i) have authority, responsibility or control with regard to the activities of the PPP in a fiduciary capacity for a PEP, or (ii) have supervisory authority over persons who have such authority, responsibility or control.

We would also note that the Form PR requires an update within 30 days of any “initiation of any administrative or enforcement action.” If the Department agrees that it is not necessary to include all administrative proceedings, and to limit the personnel covered to PEP fiduciaries and their supervisors, then the Department should revise the follow-up requirements to be consistent.

Primary Compliance Officer Requirement Not Necessary

The Department proposes that the name and phone number of the PPP’s primary compliance officer be listed in the Form PR so that the Department and others with compliance concerns have a means of contacting a responsible person at the PPP. We appreciate the Department asking whether this should be a call center number instead. We believe it would be most appropriate and efficient to include a call center or department/division of the PPP instead. Our concern would be that a single individual may not be the person best positioned to handle all potential inquiries made to the number. By including a call center number or department/division instead, any inquiries could be more efficiently processed and directed more quickly to the right person.

If the Department would prefer that the contact be more specific, we would suggest that the Department require each PPP to include a contact phone number and title of the individual who would be available to help the Department and any other regulator address any PEP compliance concerns. This would help address concerns that personnel changes could require frequent updating to the Form PR.

PPPs Should Be Able to Operate PEPs as of January 1, 2021

It has been widely reported that certain financial institutions intend to sponsor PEPs beginning on January 1, 2021. Given the short window between October 1, 2020 (when comments are due) and December 1, 2020 (the date that final or interim final regulations would need to be effective for PPPs to begin operating on January 1, 2021 in accordance with the registration process as proposed), the Department may need to make any final or interim final regulations effective fewer than 30 days after the date such regulations are published in the Federal Register.

Please do not hesitate to contact me at bleier@sifma.org or 202-962-7329 if I can provide any further clarification.

Sincerely,

Lisa J. Bleier

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