EMPOWER RETIREMENT

July 20, 2020

Office of Regulations and Interpretations
Employee Benefits Security Administration
Office of Exemption Determinations
U.S. Department of Labor
200 Constitution Avenue
Washington, DC 20210

Filed Electronically

RE: Z-RIN 1210-ZA28

"Prohibited transactions involving Pooled Employer Plans under the SECURE Act and other Multiple Employer Plans"

Dear Sir or Madam:

Thank you for this opportunity to provide comments on behalf of Empower Retirement to your Request For Information (RFI) regarding Prohibited transactions involving Pooled Employer Plans under the SECURE Act and other Multiple Employer Plans. Empower serves more than 40,000 retirement plans and 9.7 million participants, including many MEPs and other pooled arrangements. Our clients range from start-up plans to plans with over 200,000 participants. We currently serve approximately 35,000 plans that have less than $10 million in assets, which is the market where use of PEPs and open MEPs would be most common. We believe the SECURE Act's creation of Pooled Employer Plans[i] (PEPs) offers the potential to significantly impact the number of employers in that market willing to adopt a retirement plan for their employees. We also believe that the Department of Labor's implementation guidance will be a determinative factor in whether that potential is realized.

<u>The SECURE Act does not limit the types of entities that can serve as a Pooled Plan Provider. The Department of Labor (DOL) should not indirectly impose those limits.</u>

In our prior comment letter to the DOL's Request for Information on Open MEPS and Other Issues Under Section 3(5) of ERISA, we outlined why we believe there is nothing in the ERISA statute that would either require commonality in multiple employer plans (MEPs), or prohibit retirement plan service providers from serving as the sponsor of a MEP. The DOL's existing guidance on MEPS[ii] takes the position that commonality is required and that association retirement plans cannot be offered by a bank or trust company, insurance issuer, broker-dealer, recordkeeper, third-party administrator or other similar financial services firm.

Congress took a different approach. Rather than prohibiting financial services firms from serving as the sponsor of a pooled arrangement, it added requirements for entities wanting to serve in that role which, when considered in light of ERISA's pre-existing protections, address the potential conflicts of interest that will occur in these arrangements. Pooled Plan Providers (PPPs) must:

1. Register with the DOL and Treasury and provide any information required by those agencies before beginning operations.
2. Agree in writing to serve as the plan administrator and named fiduciary and be so named in the plan document.
3. Agree to ensure compliance with ERISA and Internal Revenue Code rules, as more fully to be defined in future guidance.
4. Agree to provide participating employers any disclosures or additional information DOL may require, including information to facilitate the selection and monitoring of the PPP.
5. Ensure proper bonding of anyone handling assets of the plan.
6. Agree to be subject to audits, examinations and investigations as DOL or IRS deem necessary to ensure Pooled Plan Providers are fulfilling their obligations.
7. Comply with whatever Form 5500 requirements are determined to apply to PEPs in future guidance.

The SECURE Act language on PEPs allows any person or entity to serve as a PPP if they comply with these requirements. We believe many types of entities, including those prohibited from offering association retirement plans as well as payroll providers, consultants and others, may offer a PEP. We do not think the intent of Congress to create PEPs as a means of increasing coverage among small employers will be served if DOL adds conditions and requirements that would make it economically infeasible for financial service providers or other categories of entities to serve as PPPs. It is essential that the PEP market evolve in a manner that protects plan participants against the conflicts of interests that will inevitably exist in a PEP arrangement, and we fully support the DOL's role in accomplishing that objective. We encourage the DOL to execute that function in a manner that will encourage a robust PEP market with a multitude of price-competitive offerings for employers to choose from.

We firmly believe that the commercial entities specifically excluded in the DOL's final association retirement plan rules are the retirement service providers that are most qualified to sponsor and administer PEPs. One of the perceived benefits of PEPs is alleviating the administrative burdens on the participating employers, particularly small employers. Many retirement service providers, such as Empower, have committed significant resources to creating state-of-the-art recordkeeping systems, hiring and training staff to work with employers and plan participants, and developing and implementing programs that encourage retirement savings and help workers understand and meet their retirement goals.

Retirement service providers currently perform many of the day-to-day tasks associated with maintaining a retirement plan. These tasks include providing recordkeeping services, preparing and distributing plan and participant level tax reporting, generation and distribution of required participant notices, compliance testing under section 401(a) of the Internal Revenue Code, processing plan distributions, implementing participant enrollment and contribution elections, implementing participant investment elections, and administration of plan participant loan programs and hardship withdrawals to name but a few.

Many in the consultant and advisor community also work closely with employers in the administration of retirement plans. These entities, often working in tandem with the retirement plan provider, will assist employers in plan design, selection of investment offerings, selecting service providers, monitoring investments and service providers, and designing participant communication programs. All of the activities listed above would typically be the responsibility of the employer, but instead the employer has selected service providers to act on their behalf in administering the plan. Many of the pooled arrangements we participate in today as a recordkeeper are created by consultants and advisors looking to create a more attractive product offering for their small plan clients, and we anticipate that at least some of these consultants and advisors will want to offer a PEP and serve as a PPP.

We believe that the SECURE Act's expansion of service providers that can sponsor a pooled plan arrangement will encourage more small employers to offer workplace savings arrangements to their employees. In October of 2018 the Empower Institute,[1] a division of Empower Retirement, conducted a survey of small business decision makers.[iii] Key findings included:

- Sixty-six percent of small businesses that do not offer a retirement plan today are likely to consider an open MEP. A similar percent of those with a plan today are likely to consider switching to an Open MEP.
- Those interested in an Open MEP are interested in potential lower costs to the organization and fees to employees, variety of plans and fund options and lower fiduciary risk.

[1] Formed in March 2015, the Empower Institute aims to critically examine investment theories, retirement strategies and assumptions. It suggests theories and changes for achieving better outcomes for employers, institutions, financial advisors and individual investors. The institute's mission is bringing together industry insights and expertise to address the personal finance issues and retirement savings challenges Americans face today.

- MEP Prospects are most likely to consider an Open MEP offered by a Retirement Provider and are least likely to consider one offered by the government.
- Not only are Retirement Plan Providers most considered, but they are also most trusted to provide an Open MEP.
- The largest inhibitor to offering a retirement plan is cost.

<u>In order to create a robust market and address the coverage gap, PEPs should be price competitive with individual plan offerings.</u>

One of the reasons we have a coverage gap among small employers is that it is very challenging to provide products and services in that market at a cost that employers are willing to pay. As noted above and in other surveys[iv] cost is the primary reason small employers don't offer a plan today. For commercial entities to enter the market and sponsor PEPs, there must be an expectation for the commercial entity to not only charge fees for services it provides to the PEP to cover its costs, but also allow it to earn a reasonable profit comparable to the fees it charges and other compensation earned related to other similarly situated single-employer plans. While pooling can create some cost efficiencies, there are unique costs in that market and in the application of tax code rules to pooled plans that make this challenging.

Tax code rules are burdensome for pooled plan administration in two distinct ways. One is that the general code rules applicable to all 401(a) plans tend to disproportionately create problems in small plans. Small plans are more likely to be top heavy, more likely to have nondiscrimination tests negatively impacted by the hiring or firing of a single employee, and more likely to have significant disparity in wages among highly compensated and non-highly compensated employees making it difficult to satisfy the average deferral percentage (ADP) test in 401(k) plans. Since all of these code requirements are applied at the individual participating employer level in a multiple employer plan, there is no cost savings from plan pooling.

Compounding this problem is that fact that under IRC § 413(c) other tax code rules, including vesting and eligibility, are applied across the entire MEP. This adds to the cost of administration, as it requires a tool to be developed so that participating employers can take service with other participating employers into account when determining when a new employee can enter the plan and what their vested percentage should be.

PEPs will incur additional costs that do not apply in other MEPs. The duties of a PPP are things typically performed today by non-fiduciary service providers so there will added risk and costs in taking on fiduciary status. The requirements of PPPs described previously will add cost, and it is difficult to predict the degree of cost without clear guidance on what those duties are. Perhaps most significantly, the requirement that the trustee of a PEP be a bank or similar institution willing to accept responsibility for collecting payroll contributions to the plan will be an added cost. Approximately 75% of the small market plans we serve are self-trusteed and to our knowledge none of them use a third-party bank trustee who is willing to accept payroll monitoring responsibility.

One of the strategies used today to reduce cost in small employer plans is to gain pricing efficiencies by using proprietary funds or other investment funds that contribute to the cost of running the plan. According to a Cerulli Associates DC Plan Recordkeeper Survey,[v] only 24% of plans in their survey did not offer proprietary investments in their plan lineups. In our experience, proprietary investments are selected more frequently by small plans than by larger plans in order to reduce recordkeeping fees to the employer and to plan participants. In other words, given a choice between selecting an investment menu with no proprietary products at a given cost, or a menu with proprietary products at a lower cost, the majority of small employers will opt for the lower cost option. While there is no doubt that using proprietary products involves conflicts of interest that must be addressed, there is also no doubt that prohibiting their use, either directly or indirectly by adding conditions that are overly burdensome, is likely to result in a very limited and potentially non-price competitive PEP marketplace.

<u>All PEP arrangements will involve conflicts of interest that must be addressed in order to avoid potential harm to plan participants. SECURE Act requirements and existing DOL rules offer solutions for resolving those conflicts.</u>

By their very nature, PEPs will involve conflicts of interest and potential prohibited transactions since the PPP will be hiring itself to provide services to participating employers. While only time will tell what business models will evolve around PEPs, we might expect to see additional conflicts arise as a result of a PPP offering services in addition to those required of a PPP (for example, a managed account service), hiring an affiliate to provide services to the PEP (for example, a recordkeeper hiring an affiliated investment manager), or the inclusion of proprietary products or investment products involving third-party payments.

The DOL has granted a number of class exemptions over the years that provide inherently conflicted business models a way to exist in the ERISA marketplace through conflict mitigation strategies. We believe the DOL has the ability to utilize the same strategies in situations where PPPs have inherent conflicts. To that end, the conflicts found in PEP relationships are not unique and can be addressed in the same manner as those conflicts addressed in other business models operating under statutory or class prohibited transaction exemptions.

The SECURE ACT addresses this issue in a variety of ways, including:

- Requiring PPPs to serve as plan fiduciaries.
- Placing responsibilities on participating employers to provide fiduciary oversight of the arrangement, including responsibility for:
    - Selection of the pooled plan provider and any other person designated as a named fiduciary of the plan.
    - Investment management of the portion of the plan's assets attributable to them unless delegated to another fiduciary by the PPP.
    - Serving as the plan sponsor of the portion of the PEP attributable to them other than administrative duties assigned to the PPP.
- Adding registration, disclosure and reporting requirements as described previously in this comment letter.

In addition to these PEP-specific controls on conflicts of interest and the ability of PPPs to impact their compensation, ERISA's pre-existing methods for addressing conflicts can operate effectively in a PEP. For example, the regulations under ERISA 408(b)(2) ensure that all participating employers will receive full disclosure of all fees and services and will be notified of any changes. Similarly, DOL advisory options offer solutions for addressing conflicts related to investment products by either requiring any third-party payments to be used to offset plan fees,[vi] or having an independent fiduciary approve of fees and fee changes using a notice, opportunity to act, and negative consent process.[vii]

There is nothing in either the SECURE Act or agency guidance to suggest that participating employers cannot provide the same independent fiduciary oversight in a PEP that they do in an individual plan, and, in fact, the SECURE Act allocates that responsibility to them in many respects. Existing DOL guidance has proven to be very successful in allowing otherwise conflicted party-in-interest service providers to disclose compensation for services provided to an ERISA-covered plan to the plan fiduciary. The plan fiduciary can then determine whether to enter into or extend the service arrangement and determine whether the total cost is reasonable based on the services provided.

<u>Additional exemptive guidance could contribute to creating a more robust PEP marketplace.</u>

The 408(b)(2) regime provides limited prohibited transaction exemption relief in certain instances where a PPP offers proprietary products. Based on market demand from plan fiduciaries and their advisers, service providers often bundle proprietary products and services to retirement plans as part of its total service offering. Revenue tied directly to those products and services will often provide expense efficiencies for plan recordkeeping services. In many cases, revenue associated with these products and services can dramatically reduce direct recordkeeping fees that the plan fiduciary has determined should be charged to participants. This pricing arrangement is often used in the smaller plan space. Those plans will contract with service providers not only for recordkeeping services but investment products like group annuity contracts, collective investment trusts or mutual funds. Plan sponsors will also contract to provide managed account services to participants. These products and services can be offered by the service provider itself or one of its affiliates.

In situations where the commercial entity also serves as a PPP, it is acting as a plan fiduciary. The offering of these products and services would presumably create a conflict of interest with the plan and participants. While the PPP, in its fiduciary capacity, may determine the offering of a proprietary product or service would ultimately benefit plan and participants, there is either unworkable, unclear or nonexistent prohibited transaction exemptions to allow a commercial entity to receive compensation in connection with these product offerings. We believe section 408(b)(8) of ERISA would clearly allow a commercial entity to offer collective investment trusts, and 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 and mutual funds in a balanced way that allows a commercial entity 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.

These issues and potential opportunities for additional clarity are highlighted below.

- Group Annuity General Account Products: Establish a Prohibited Transaction Exemption

Many plans, particularly smaller plans, will either exclusively offer all or some portion of plan investments through group annuity contracts. Group annuities can provide variable annuity and other separate account insurance investments but also beneficiary general account stable value vehicles. The stable value products provide participants with a safer investment during periods of market volatility as well as a guarantee of principal. Often the credited interest rate exceeds the guaranteed minimum rate of the product making these products very competitive to collective investment trust stable value and money market funds.

We do not believe there is an existing prohibited transaction exemption that would allow a PPP or an open MEP sponsor, acting with investment manager under ERISA Section 3(38), to retain compensation associated with general account group annuity contracts. Therefore, we recommend the DOL engage with the industry in discussions about a workable prohibited transaction exemption to allow insurance company commercial entities operating as PEP or open MEP sponsors to offer proprietary general account products.

- Mutual Funds: Modify Existing PTE 77-4 to incorporate a deemed consent process

Commercial entities can also offer mutual funds. In this case, we believe prohibited transaction exemption 77-4 would be available to a PPP or open MEP sponsor. However, modifications to it are essential to ease the administrative burden currently found in its requirements. Section II(e) establishes that an independent fiduciary approves the “investment advisory and other fees paid by the mutual fund in relation to the fees paid by the plan…”. We believe this is reasonable and can be acknowledged by the proper plan fiduciary before entering the PEP or open MEP arrangement. Section II(f) then requires the independent fiduciary to be notified of any changes in the rates and fees and approve those in writing. We believe this is unworkable. PEPs and open MEPs are designed to reduce administrative burdens on smaller plans by allowing them to join the MEP arrangement. It is unreasonable to believe that all independent plan fiduciaries of the underlying employers will authorize these fee changes in writing. However, we agree that a conflicted plan fiduciary, such as a commercial entity open MEP sponsor, cannot exercise its fiduciary powers to increase fees absent approval of the plan fiduciaries of the underlying employers. Therefore, we propose modifying Section II(f) of PTE 77-4 to establish a negative consent process for any plan fiduciary of the underlying participating employer.

We are cognizant of the Department’s concerns about potential conflicts of interest and the potential harm they can have on participants trying to save for a successful retirement. We also are aware that the DOL may be concerned that the oversight role of the participating employer fiduciary will provide less protection to plan participants in a PEP with very small employers than it does in other scenarios. As discussed previously in this letter, we believe adoption of the additional oversight requirements found in the SECURE Act addresses this concern. To the extent the Department concludes that additional protections or exemption conditions are necessary in the context of a PEP, we urge it to act in a manner that will not effectively prohibit financial service providers from acting as PPPs or the use of conflicted investment products in PEPs. We would also urge the department, in creating any new exemptive relief, to follow the same principle-based, flexible approach it took in its recently proposed rule on Improving Investment Advice for Workers and Retirees.

We appreciate the DOL’s efforts to gather information to assist it in supporting Congress’s intent to create a robust PEP marketplace that can offer many American workers the opportunity to save for retirement in an employer sponsored plan. We also appreciate the

DOL's essential role in protecting the interests of retirement savers. Thank you for the opportunity to provide comment, and we would welcome any opportunity to provide further information.

Sincerely,

Edmund F. Murphy III, President & CEO
Empower Retirement | Great-West Life & Annuity

8515 E. Orchard Rd. | Greenwood Village, CO 80111
empower-retirement.com

For important disclosures and product information, click here.

---

[i] SECURE Act Sect. 101

[ii] DOL Rul. 2510.3-55

[iii] Empower Institute, "Open MEPs: A promising way to narrow the coverage gap", December, 2018

[iv] Pew Charitable Trust, "Small Business Views on Retirement Savings Plans: Topline Results of Employer Survey" (2017; Transamerica 19th Annual Retirement Survey (2019)

[v] 2018 Cerulli Associates/SPARK Institute DC Recordkeeper Survey

[vi] DOL Adv. Op. Ltr. 97-15A

[vii] DOL Adv. Op. Ltr. 97-16A