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July 20, 2020

Office of Exemption Interpretations
Employee Benefits Security Administration
Attn: Z-RIN 1210-ZA28
e-OED@dol.gov

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

Ladies and Gentleman:

The ABA Retirement Funds (“ABA RF”) respectfully submits this letter in response to the request for information by the Department of Labor (the “Department”) relating to the possible parties, business models, and conflicts of interest that respondents anticipate will be involved in the formation and ongoing operation of pooled employer plans (“PEPs”) and multiple employer organizations (“MEPs”).

As explained below, ABA RF has provided a retirement program to adopting employers for over fifty-five years and is considering establishing a PEP. The Department has requested information regarding several questions and ABA RF provides this letter to assist the Department with understanding a business model that could be applicable to ABA RF if it became a pooled plan provider. ABA RF believes its proposed model is unique in the industry because of the absence of conflicts of interest. Accordingly, ABA RF hopes that its

responses to the questions identified below will assist the Department with understanding possible PEP arrangements that may be offered in the market.

BACKGROUND

I. ABA RF's Relationship to the American Bar Association

The American Bar Association (the "ABA") formed ABA RF, an Illinois not-for-profit corporation, for the purpose of providing a retirement solution for the legal community. This retirement solution is provided through the ABA Retirement Funds Program (the "Program"), described below. ABA RF operates as an affiliate of the ABA with the sole focus of providing the Program.

ABA RF is governed by ABA RF Board of Directors ("Board") that currently consists of thirteen lawyers elected by the ABA's Board of Governors. The members of the Board are volunteers who receive no compensation for their services. The ABA's Board of Governors elects Directors who have different areas of expertise so that ABA RF can be operated effectively. For example, several Directors practice, or previously practiced, in the area of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), some are experts in securities laws, some are experts in contracts and some are litigators.

II. The ABA Retirement Funds Program

ABA RF provides the Program, which is a comprehensive retirement solution that provides adopting eligible employers, acting as plan sponsors ("Employers"), administrative, investment and fiduciary services, including the provision and maintenance of tax-qualified retirement plan documents, a fixed menu of diversified investment options, a brokerage window and related

recordkeeping and administrative services. Currently, different types of plans are available under the Program (“Plans”). Most Plans are self-directed 401(k) plans or profit sharing plans but certain Employers maintain defined benefit plans or other types of plans with respect to which the Employer directs investment of the Plan assets. Currently, all of the Plans maintained by Employers are single employer plans; ABA RF does not offer a MEP. ABA RF expects many small Employers, if given the opportunity, may choose to participate in a PEP in order to take advantage of the streamlined administrative simplicity of the PEP, however, other Employers would likely choose to continue to maintain their own single employer plans.

Employers that are eligible to adopt the Program are defined in the applicable Program documents as (a) any sole practitioner, partnership, corporation, limited liability partnership, limited liability company or association engaged in the practice of law, provided that the sole practitioner or at least one partner of the partnership, one shareholder of the corporation or one member of the LLP or company, or in each case, an employee thereof, is a member of associate of the ABA or any organization of lawyers represented in the House of Delegates of the ABA, (b) the ABA, (c) any organization of lawyers represented in the House of Delegates of the ABA, (d) any organization that does not engage in the practice of law but is closely associated with the legal profession, that receives the approval of ABA RF, and that has as an owner or a member of its governing board a member or associate of the ABA or any organization of lawyers represented in the House of Delegates of the ABA or the ABA and (e)

any other person, association, organization or other entity that is permitted under ABA RF's Articles of Incorporation to maintain a plan. Many of the plans currently participating in the Program are maintained by sole practitioners with no employees and, as a result, those plans are not subject to ERISA. In addition, most of the plans have less than 100 participants and many have less than 10 participants.

ABA RF is both a fiduciary and a service provider to each Plan after a sponsoring Employer adopts the Program. Pursuant to the terms of the Program documents, ABA RF has the authority to engage, monitor and terminate the various other service providers to the Program. Those service providers are a trustee, that acts as both (a) a discretionary trustee of the Plan's assets held in the Program's collective trust (the "Program's Collective Trust"), and (b) the directed trustee of the Plan assets invested through the brokerage window; a recordkeeper, that provides ministerial administrative/recordkeeping services to the Plans; and a brokerage window provider, that provides the Program's brokerage window. Each of the service providers, including ABA RF, receives compensation from the Program's Collective Trust that is fully disclosed to eligible employers prior to the time they adopt the Program. All of the service providers are independent of ABA RF and ABA RF has no financial interest in any of the fees earned by these service providers.

Prior to the adoption of the Program, an Employer receives materials containing detailed information regarding the services provided by ABA RF and other Program service providers to a Plan. If, at any time, an Employer desires to

stop participating in the Program for any reason, it may terminate its participation in and withdraw its Plan from the Program without advance notice to, or penalty imposed by the Program.

Because of the fiduciary responsibility undertaken by ABA RF, the Program is unique in the marketplace and already generally follows the model of a PEP. As stated above, ABA RF takes fiduciary responsibility for selecting and monitoring the service providers to the Program and provides a comprehensive program for eligible employers to provide retirement benefits. An Employer that adopts the Program does not have the burden of selecting or monitoring the service providers to the Program; instead the adopting Employers are responsible for determining that the Program is an appropriate choice for the Employer's provision of a retirement program. This is similar to the responsibility of an adopting employer of a PEP – to be responsible for the selection and monitoring of the pooled plan provider in accordance with ERISA.

The only role required for a pooled plan provider that is not currently the responsibility of ABA RF is to act as the “administrator” under Section 3(16) of ERISA. Because ABA RF does not have the resources to perform the tasks of plan administrator, if ABA RF were to become a pooled plan provider, ABA RF contemplates that it would hire an unrelated third party to perform those tasks.

RFI QUESTIONS

A. Pooled Plan Providers and MEP

Sponsors

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). Are these types of entities likely to act as a pooled plan provider? Are some of these entities more likely to take on the role of the pooled plan provider than others? Why or why not? How many entities are likely to act as pooled plan providers? Will a single entity establish multiple PEPs with different features?

RESPONSE: ABA RF believes that many different types of entities may act as a pooled plan provider, including financial services firms, third-party plan administrators, and others such as ABA RF. If ABA RF were to maintain a PEP, it is likely that ABA RF would maintain only a single type of PEP that permits some limited flexibility in plan terms (such as level of matching or other Employer contributions).

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?

RESPONSE: In the case of ABA RF, if it were to maintain a PEP, no affiliated service providers would be used for the PEP and no proprietary funds would be offered. Instead, consistent with the current Program, unrelated parties would provide recordkeeping services and provide the investment options and a new independent third party would be selected for the PEP to assist with fulfilling the tasks required by a plan administrator. This type of structure avoids potential conflicts of interest.

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?

RESPONSE: ABA RF believes that some pooled plan providers and their affiliates will have conflicts of interest with respect to the PEP's participants. Where the pooled plan provider offers proprietary funds or proprietary funds of an affiliate, the pooled plan provider has a financial interest in the continued use of those funds by the employers adopting the plan. This may prevent the pooled plan provider from offering the lowest cost, highest performing investment options. Similarly, where an affiliate of the pooled plan provider is selected to act as recordkeeper, issues may arise as to whether the affiliate is the best choice to provide recordkeeping services. These conflicts would not exist in the case of a PEP sponsored by ABA RF because ABA RF would not have a financial interest in any of the fees that would be paid to the service providers to the PEP.

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?

RESPONSE: ABA RF, if it were to maintain a PEP, contemplates that the PEP would offer the same menu of investment options that are available to Employers sponsoring a single employer plan under the Program. These investment options (a) provide a broad range of investment alternatives, including a suite of target date retirement funds that can serve as a qualified default investment alternative, (b) permit participants to provide daily investment instructions and (c) are intended to satisfy the requirements of Section 404(c) of ERISA.

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?

RESPONSE: The SECURE Act does not require the pooled plan provider to undertake responsibility for investments offered by the PEP so it's possible that some pooled plan providers will not accept any fiduciary responsibility for the investments offered by a PEP. For those who do offer investment options, they may specifically disclaim fiduciary status for a plan sponsor's selection of investment options. Another model, which is one that ABA RF anticipates it would use if it maintained a PEP, is where the pooled plan provider acts as a

fiduciary of the PEP with respect to the selection of an unrelated third party to select and manage the investment options and the third party acts as fiduciary in establishing and managing the investment options. Transferring this fiduciary responsibility to the pooled plan provider and an unrelated third party would help reduce the burden that employers otherwise would have if they had to select and monitor the investment options provided by their plans. Where neither the pooled plan provider or its affiliates offer investments, the pooled plan provider would be able to act in the best interest of participants in hiring a third party to select and manage investments for the PEP, without having any financial conflict. Moreover, if the third party that is hired to select and manage investments does not maintain its own proprietary funds, the third party also would have no financial interest in the fees paid to the managers of the investments and can act in the best interest of plan participants. This structure is consistent with the structure currently used by the Program.

C. Employers in the PEP or MEP

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?

RESPONSE: It is possible that prohibited transactions could occur in connection with a decision to move assets from a PEP to another plan or IRA in the case of a noncompliant employer. First, a pooled plan provider that is a

financial institution with proprietary investment funds could decide to transfer the assets to another plan or IRA that includes, or even requires, an investment in a proprietary fund, with investment management fees paid to the financial institution. Second, a pooled plan provider that acts as a recordkeeper may select itself as the recordkeeper or IRA provider for the transferred assets, with fees set by that recordkeeper. In both of these situations, there is a conflict of interest that may result in a prohibited transaction, unless a prohibited transaction exemption applies. Where the pooled plan provider is independent of financial institutions and recordkeepers, as would be the case if ABA RF acted as a pooled plan provider, the possible conflicts described above are eliminated. A pooled plan provider that does not itself maintain transferee plans or IRAs nor their respective investment options would not have conflicts in determining where assets of a plan maintained by a noncompliant employer should be transferred, the investment options available with respect to those transferred assets and the appropriate fees to be charged. Although these items could be approved by an employer when it adopts a PEP, many years may pass before an employer becomes noncompliant, with changes to the services and fees applicable to the party identified as receiving a transfer of plan assets or providing the investment options.

D. Other Matters


Below is one additional item that ABA RF recommends that the Department consider in providing guidance with respect to PEPs. Although this item may be for the Department's Office of Regulations and Interpretations to address, the ABA RF believes that guidance below will facilitate the expansion of

workplace retirement plans to help more American workers be financially prepared to retire and may be relevant to the Department's consideration of whether to propose a class exemption.

1. Participation by Working Owners with no Employees. As stated above, many of the employers participating in the Program are sole practitioners with no employees. ABA RF believes that working owners with no employees should be permitted to participate in a PEP. Accordingly, the ABA RF requests that the Department provide guidance similar to the guidance provided in the Department's regulation relating to association retirement plans that working owners with no employees are eligible to adopt a PEP. This would help business owners have access to low-cost plans with administrative functions assumed by the pooled plan provider.

On behalf of the ABA Retirement Funds, we thank you for considering our responses. If you have any questions, please let us know.

Sincerely,


Scarlett Ungurean, CFA, CPA CA
Executive Director