INVESTMENT COMPANY INSTITUTE®

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Office of Exemption Determinations
Employee Benefits Security Administration
US Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: *Z-RIN 1210-ZA28; Prohibited Transactions Involving Pooled Employer Plans Under the SECURE Act and Other Multiple Employer Plans*

Dear Sir or Madam:

The Investment Company Institute[1] is pleased to submit comments on the Department of Labor's (the Department's) Request for Information (RFI) on prohibited transactions involving Pooled Employer Plans (PEPs) under the SECURE Act[2] and other multiple employer plans (MEPs). The RFI seeks information on the possible parties, business models, and conflicts of interest that might be involved in the formation and ongoing operation of PEPs, and information on similar issues involving MEPs sponsored by employer groups or associations or professional employer organizations. The RFI indicates that the Department is considering whether to propose a class exemption on its own motion to cover prohibited transactions involving PEPs and MEPs.

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[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$24.8 trillion in the United States, serving more than 100 million US shareholders, and US$6.5 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

[2] The Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act") was enacted on December 20, 2019, as Division O of the Further Consolidated Appropriations Act, 2020 (H.R. 1865).

As we have stated in prior comments, the Institute supports expanding access to MEPs, particularly for small employers. Expanding access to MEPs has the potential to significantly increase retirement plan coverage and retirement savings adequacy. For its part, the Department has actively sought to increase access to MEPs through its regulation on association retirement plans (ARPs) and other MEPs (the "ARP regulation"),[3] and a contemporaneous 2019 RFI seeking additional views on how to expand MEPs beyond the ARP regulation. In response to that 2019 RFI, we recommended that the Department permit unrelated employers to participate in open MEPs sponsored by financial services firms.[4] Financial services firms have valuable expertise, necessary infrastructure, and other known capabilities relevant to MEP sponsorship and their involvement is crucial to ensure a robust competitive marketplace for MEPs.

Congress recognized that legislative changes would greatly enhance the utilization of MEPs and likely would be the key to meaningful coverage gains. Section 101 of the SECURE Act creates the PEP as a new type of MEP that would be open to a wider variety of unrelated employers and a wider universe of potential MEP sponsors. The expanded marketplace envisioned by the SECURE Act will be successful only if financial services firms are able to participate in the offering of PEPs. We commend the Department for initiating an examination of the guidance and exemptive relief needed to make this a reality.

In this letter, we reiterate and expand on our 2019 Letter provided in response to the Department's 2019 RFI. We urge the Department to provide guidance needed to implement the SECURE Act's PEP provision and to ensure that no barriers will stand in the way of financial services firms participating in the PEP market. Financial services firms are a logical choice to sponsor PEPs and other open MEPs, with deep expertise and existing infrastructural capacity in the retirement plan services and asset management areas. The Department has a history of serving retirement plans and their participants by issuing exemptive relief in order to allow their participation in the marketplace for financial services. Several of those existing class exemptions could be useful in facilitating PEP formation with the involvement of the financial services industry. Any attempt to exclude this group of potential PEP sponsors will cause the marketplace to suffer from a lack of competition by otherwise qualified—arguably the most qualified—plan providers. A robust competitive marketplace is crucial to the success of our retirement system, by promoting innovation and better service, reducing costs, and ultimately negating the effect of potential conflicts.

We believe that very basic regulatory guidance at the start would allow the PEP marketplace to take off and ultimately flourish.

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[3] Definition of "Employer" Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans, 84 Fed. Reg. 37508 (July 31, 2019) (final rule); Definition of "Employer" Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans, 83 Fed. Reg. 53534 (October 23, 2018) (proposed rule).

[4] See ICI Letter to the Department of Labor, October 29, 2019, available at https://www.ici.org/pdf/32030a.pdf ("2019 Letter"). See also ICI Letter to the Department of Labor, December 21, 2018, available at https://www.ici.org/pdf/31534a.pdf ("2018 Letter").

I. SECURE Act PEPs Will Be a Valuable Tool if Implemented Properly

We appreciate the Department's interest in exploring what exemptive relief might be needed to facilitate PEP formation, which we discuss later in Section III. As an initial matter, it is worth noting that there are other important aspects of offering and running a PEP in need of guidance. As explained below, these involve threshold issues that could impact a firm's decision on whether to sponsor a PEP. Guidance on these issues must carefully weigh the costs and benefits of imposing additional regulatory obligations on prospective PEP providers.

Section 101 of the SECURE Act introduces the PEP[5] and outlines the legal framework for running such a plan. The terms of the PEP must designate the "pooled plan provider" (PPP) as a named fiduciary of the plan, the plan administrator, and the person responsible for performing all administrative duties necessary to ensure that the plan meets applicable tax qualification requirements and that the participating employers fulfill their duties.[6] The PPP must register with the Departments of Labor and Treasury (providing any information that the agencies require) and acknowledge in writing its status as a named fiduciary and plan administrator.[7] The PPP is also subject to audits, examinations and investigations by the Department to enforce compliance with the requirements for PPPs. The many safeguards built into the statutory framework will help ensure the legitimacy of the PPP and that ERISA fiduciary and other standards are met.[8]

While it is clear that becoming a PPP will involve significant administrative responsibility and fiduciary liability, there remains substantial uncertainty with respect to the extent of a PPP's responsibilities. The Department has not yet issued guidance on the administrative duties and other actions required of PPPs, including details of the registration requirements, any disclosure requirements beyond those

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[5] A PEP is an individual account plan established to provide benefits to the employees of two or more unrelated employers and treated as a single pension benefit plan. PEPs must be either qualified plans under section 401(a) of the Internal Revenue Code ("Code") or IRA-based plans.

[6] Section 101 provides that participating employers will have various administrative responsibilities in connection with the PEP, including forwarding participant elective deferrals to the plan and providing any information needed to ensure the plan meets applicable tax qualification requirements. A participating employer in the PEP is treated as the plan sponsor with respect to the portion of the plan attributable to its employees. Employers retain fiduciary responsibility for the selection and monitoring of the PPP, but employers could transfer fiduciary responsibility for selecting and monitoring investment options made available through the PEP.

[7] Other responsibilities include providing to employers any disclosures required by the Department and ensuring compliance with ERISA's bonding requirements.

[8] Other safeguards include that the terms of the plan must designate a trustee responsible for collecting contributions to and holding assets of the plan and the plan must require that participating employers (and participants and beneficiaries) are not subject to unreasonable restrictions, fees, or penalties with regard to ceasing participation or taking a distribution from the plan.

already applicable under ERISA and the Code, and the scope of annual reporting requirements[9] and audits/examinations by the Department. It is likely that many firms considering becoming PPPs prefer to wait until some or all of these details are fleshed out by the Labor and Treasury Departments, before they begin to develop a PEP product.

We understand the Department is working on this guidance and we urge the Department to expedite its issuance so that PEPs will be available soon after the 2021 effective date. We also urge the Department to avoid imposing significant new responsibilities and burdens on PPPs beyond the comprehensive safeguards built into Section 101 of the SECURE Act. Failure to do so risks deterring PEP formation on a large scale.

II. Expanded Use of MEPs through PEPs Would Provide Significant Benefits to Smaller Employers

As this Administration recognized even before the SECURE Act's passage, MEPs are an efficient way to reduce administrative costs of running a retirement plan and have the potential to increase workplace plan coverage, especially among small employers.[10] We agree that MEPs could play a key role in increasing coverage for workers at small businesses—i.e., those with fewer than 100 employees—the employer segment most in need of additional solutions to encourage retirement plan sponsorship.[11]

RFI Question C.1 – Employers Likely to Join a PEP

Small businesses often face particular challenges in establishing and maintaining retirement plans. Studies have found that concern about administrative costs and burdens are a significant reason that more small businesses do not offer retirement plans. Small employers maintaining their own plan are required to prepare their own plan documents, summary plan descriptions and other participant disclosures, file individual Form 5500s, obtain a separate financial audit, and establish a single trust. Because of the fixed administrative costs of sponsoring a plan, small plans may not qualify for lower-cost investment options or lower recordkeeping fees. In addition to administrative and compliance burdens,

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[9] Section 101 authorizes the Department to prescribe simplified annual reports (Form 5500) for MEPs (including PEPs) covering fewer than 1,000 participants (as long as no single participating employer has 100 or more participants covered by the plan).

[10] "Strengthening Retirement Security in America," Executive Order 13847, 83 Fed. Reg. 45321 (September 6, 2018).

[11] According to the National Compensation Survey (March 2018), 55 percent of workers at employers with fewer than 100 workers are covered by a pension plan (DB, DC, or both), while 86 percent of workers at employers with 100 workers or more are covered by a pension plan (DB, DC, or both). The survey is available at: www.bls.gov/ncs/ebs/benefits/2018/ownership/civilian/table02a.htm. For a discussion of how pension coverage varies by plan size, see Brady and Bogdan, "Who Gets Retirement Plans and Why, 2013," *ICI Research Perspective* 20, no. 6 (October 2014), available at www.ici.org/pdf/per20-06.pdf.

smaller employers may be challenged by the fiduciary responsibility and liability of selecting and monitoring service providers and plan investment options.

By joining a MEP (including a PEP), many small employers could band together to offer their employees access to a 401(k) plan. These plans would spare smaller employers from shouldering all the administrative costs associated with setting up and maintaining a 401(k) plan and give small plans banding together the leverage of a larger asset base to reduce investment fees for their participants. They may even encourage some small employers to offer plans because doing so would be easier (for example, the MEP provider could handle preparation and maintenance of plan documents, participant notices and disclosures, annual report filing and audit requirements on behalf of the group, rather than each employer doing these things on its own). Fiduciary responsibility for selecting and monitoring investment options and other service providers could be allocated to the MEP sponsor or a third party as well. The SECURE Act makes this concept into a tangible option for a large swath of employers who were precluded from participating in a MEP under prior guidance.[12]

III. Involvement of Financial Services Firms in the Offering of PEPs is Crucial

We are aware of the view by some that financial services firms should not be permitted to act as PPPs due to potential conflicts of interest. We strongly disagree with this view and note that any PPP, even one without affiliated investment management services, most likely will have potential conflicts of interest associated with its PEP product. As explained earlier, a PPP is required to act in a fiduciary capacity and, by practical necessity, will receive compensation for any services it offers as part of the PEP product. A PPP that does not offer proprietary investment options or select itself to provide additional services to the PEP, will be a fiduciary service provider to the PEP able to set its own compensation and negotiate arrangements with other service providers. It would be extremely rare for any PEP arrangement to be completely "conflict-free." Indeed, due to the fundamental framework of ERISA, all service providers to a plan must use prohibited transaction relief in order to be compensated. It is likely for this reason that Section 101 expressly states that participating employers retain fiduciary responsibility for the selection and monitoring of the PPP.

Moreover, a PEP offers several advantages for employers, especially smaller to mid-sized employers, and their employees that will have a mitigating effect on potential conflicts of PEP sponsors. First, as the Department acknowledges, it is widely anticipated that, by commingling assets, a PEP will have the economic heft to obtain lower investment and administrative fees, more sophisticated investment opportunities and top-shelf service providers. By expanding the number and types of service providers who can sponsor PEPs, employers will have greater choice and PEP sponsors will need to compete to differentiate themselves in the marketplace, resulting in more diversity of investment options, more transparency of sales efforts and more ubiquity in "best practices" offerings such as the inclusion of automatic features, default asset-allocation investments and a focus on retirement income. Ultimately, a

[12] The Department's guidance to date generally has precluded unrelated employers from pooling assets and participants under a single plan. See, e.g., the ARP Regulation and DOL Advisory Opinions 2012-03A and 2012-04A (guidance analyzing when an entity may establish a single ERISA plan that covers multiple employers).

competitive and innovative marketplace will make PEPs models for an end-to-end retirement plan for US workers—all to the benefit of participants, who will be the primary beneficiaries of the lower fees, enhanced features and a more wholistic approach to retirement planning that PEPs portend.

Second, a PEP offers employers a simplified, turnkey process for plan participation. By outsourcing most of the heavy lifting to the PEP sponsor and its team of outside experts who will need to differentiate the fees, features and performance of their PEP in a competitive marketplace, employers will be able to make "apples to apples" comparisons between PEP sponsors, allowing them to significantly minimize their exposure to conflicts.[13] Simply put, a PEP structure not only makes it easier and less costly to join a plan, but it makes it easier for employers to consider whether to remain in an existing relationship, or leave for the PEP of a competitor.

The SECURE Act does not contain any restriction on the type of entity permitted to serve as a PPP. As long as the would-be PPP complies with Section 101 of the SECURE Act and the other requirements of ERISA, any type of retirement plan service provider could participate in this marketplace. Several of the Department's existing class exemptions could be useful in facilitating PEP formation with the involvement of the financial services industry. Any attempt to exclude this group of potential PEP sponsors will cause the marketplace to suffer from a lack of competition by otherwise qualified—arguably the most qualified—plan providers. A robust competitive marketplace is crucial to the success of our retirement system, by promoting innovation and better service, reducing costs, and ultimately negating the effect of potential conflicts.

A. Financial services firms offer unique qualifications that make them ideal candidates to serve as PEP sponsors

As we explained in our 2019 Letter, financial institutions have the expertise necessary to establish and maintain a retirement plan. In this regard, it is crucial that a PPP understand the laws and regulations applicable to retirement plans and be prepared to act in accordance with those principles. Financial services firms are well acquainted with—and used to acting in accordance with—fiduciary principles.[14]

RFI Question A.1 - Types of Entities

In addition to our member companies, we anticipate that the following types of entities may be interested in serving as PPPs:

- Investment advisers (the broader category that includes ICI member firms): An investment adviser registered under the Investment Advisers Act of 1940 or registered as an investment adviser under the laws of the state in which it maintains its principal office and place of business;

[13] Because PEPs will file a single Form 5500, information about the PEP's fees, costs and investments will be widely available in the marketplace.

[14] With respect to mutual funds in particular, all investment advisers to registered investment companies must be registered with the SEC under the Investment Advisers Act of 1940.

- Banks: A bank as defined in section 202 of the Investment Advisers Act of 1940 or similar institution that is regulated and supervised and subject to periodic examination by a state or federal agency;
- Insurers: An insurance carrier which is qualified under the laws of more than one state to perform the services of managing, acquiring or disposing of assets of a plan;
- Broker-dealers: A broker-dealer registered under the Securities Exchange Act of 1934; and
- Other similar financial services firms, including pension recordkeepers and third-party administrators.

In developing any registration or qualification requirements for PPPs, the Department should take into account whether the entity is (or is affiliated with) a licensed and regulated financial services firm subject to oversight by another prudential regulator.

B. Any conflicts of interest can be mitigated through appropriate prohibited transaction exemptive relief

The RFI seeks information on the possible parties, business models, and conflicts of interest that might be involved in the formation and ongoing operation of PEPs, and information on similar issues involving MEPs sponsored by employer groups or associations or professional employer organizations. The RFI indicates that the Department is considering whether to propose a class exemption on its own motion to cover prohibited transactions involving PEPs and MEPs. In particular, questions A.3 – A.8 ask about a variety of issues related to conflicts and prohibited transaction relief. We focus our comments in this letter on PEPs, as we have provided similar comments in the past regarding open MEP arrangements generally.

RFI Question A.2 – Business Models

Any conflicts of interest and associated need for prohibited transaction relief will depend on the exact structure of the PEP arrangement. Because our members have different business models and potential approaches to entering the PEP marketplace, and in many cases have not yet determined how they will participate, we cannot provide detailed or definitive answers to many of the RFI questions at this time. It is likely that some financial institutions interested in becoming PPPs will offer proprietary investment products and services (such as recordkeeping) within the PEP arrangement. These firms may end up using different approaches to address conflicts and any needed exemptive relief.

RFI Question A.5 – Prohibited Transaction Relief

In our 2019 Letter, we noted the Department's long history of dealing with conflicts of interest and outlined several existing class exemptions that could be relevant in the open MEP context. The Department has issued numerous class exemptions that allow the marketplace to benefit from diverse and varied product offerings. For example, the Department dealt with similar conflicts in Prohibited

Transaction Exemptions (PTEs) 77-3 (for in-house plans of mutual fund complexes),[15] 77-4 (for a plan fiduciary's selection of proprietary mutual funds for client plans),[16] 84-24 (for receipt of commissions by a service provider to the plan),[17] and 2006-06 (for QTAs).[18] These PTEs include conditions—designed to protect the interests of participants and beneficiaries—that the Department could consider importing to a new class exemption (or multiple new exemptions) for financial services firms sponsoring PEPs.

Different firms may have different views on the extent to which new prohibited transaction relief is necessary for PEP arrangements. That said, PTE 77-4 is particularly relevant for companies that may want to offer a PEP. PTE 77-4 provides relief for the purchase or sale by an employee benefit plan of shares of a mutual fund, the investment adviser for which is also a fiduciary with respect to the plan (or an affiliate of such fiduciary) and is not an employer of employees covered by the plan. The exemption requires, in relevant part, that:

- The plan must not pay a sales commission in connection with the purchase or sale;
- The plan must not pay a redemption fee when selling its shares, unless the fee is paid only to the mutual fund and the fee is disclosed in the prospectus;
- The plan must pay no "investment management, investment advisory or similar fee" with respect to the plan assets invested, except in the form of investment advisory fees paid by the fund under a duly authorized investment advisory agreement;
- An independent fiduciary receives a current prospectus and full and detailed disclosure of fees paid by the plan and the mutual fund and it approves the purchases or sales; and
- The independent fiduciary is notified of any change in the fees and it approves the continued purchases or sales.

For firms that decide to offer proprietary investment products within a PEP arrangement, the type of relief provided in PTE 77-4 would be relevant. We note that some firms would find it helpful for the scope of such exemptive relief to cover other proprietary products beyond mutual funds, to the extent a comparable exemption is not already available. In addition, certain modifications to the conditions of PTE 77-4 requiring independent fiduciary (i.e., plan sponsor) review and approval of investment and fee changes would make the exemption more workable—both in the context of PEPs and, more generally, for arrangements where the exemption is already used. For example, the Department could modernize the exemption to ensure that changes requiring employer approval could be satisfied through the use of electronic delivery and negative consent. Such modernization would facilitate approval of changes to investments and fees (which are an ordinary and necessary occurrence in the

[15] PTE 77-3, 42 Fed. Reg. 18,734 (April 8, 1977).

[16] PTE 77-4, 42 Fed. Reg. 18732 (April 8, 1977).

[17] PTE 84-24 (as amended), 71 Fed. Reg. 5887 (February 3, 2006).

[18] PTE 2006-06, 71 Fed. Reg. 20856 (April 21, 2006).

ongoing maintenance of a plan) in an efficient manner, particularly under arrangements that contemplate multiple participating employers.

We believe that participating employers in a PEP will be able to serve the same role as other employer plan sponsors in terms of reviewing and approving changes, with approval through negative consent as a practical necessity. There is no reason to believe these employers are less capable of performing the oversight role than employers sponsoring a single employer plan.[19] In fact, the SECURE Act dictates that each employer in the PEP retains fiduciary responsibility for the selection and monitoring of the PPP and any other named fiduciaries of the plan.

Furthermore, the SECURE Act requires that employers, participants, and beneficiaries in a PEP may not be subject to unreasonable restrictions, fees, or penalties for ceasing participation, receiving distributions, or transferring assets to another plan. Participating employers will be free to exit the arrangement if unsatisfied with its operation or product features. PEP arrangements will be marketed heavily and with significant transparency. This transparency and the ability to easily compare different PEP arrangements will provide smaller employers with more confidence in making determinations—including the decision to transfer out if not being well-served by the PEP.

If the Department determines to propose new exemptive relief for PEPs, the Department should consider providing a principles-based exemption that is broad enough to cover a wide range of products and services and flexible enough to accommodate different business models. This approach has the advantages noted by the Department in its newly proposed class exemption for fiduciary investment advice (Improving Investment Advice for Workers & Retirees), which the Department acknowledges to be a broad, principles-based approach intended to accommodate a wide variety of business models.[20]

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[19] The alternative of requiring an independent third-party to review and approve the arrangement and any fee changes, on behalf of participating employers, would be problematic. It would add complexity, administrative burdens, and costs, thereby discouraging providers from using such an exemption. This is evidenced by the underutilization of the statutory exemption for eligible investment advice arrangements set forth in sections 408(b)(14) and 408(g) of ERISA, enacted under the Pension Protection Act of 2006. Under section 408(g), advice must be provided by a fiduciary adviser under an "eligible investment advice arrangement," which includes level-fee arrangements and computer model advice programs meeting certain requirements. For computer model advice arrangements in particular, the exemption requires that, prior to using the model, an eligible investment expert (unaffiliated with the investment adviser) certifies in writing that the computer model meets the other applicable requirements of the exemption, such as those relating to the use of generally accepted investment theories, taking into account relevant information about the participant, not being biased in favor of proprietary investments, and taking into account all investment options available under the plan. Additionally, for both types of advice arrangements, the exemption requires that the fiduciary adviser engage an independent auditor to conduct an annual audit of the advice arrangement for compliance with the exemption. These requirements related to independent third-party review and approval have resulted in very few advice providers using the exemption, and likely would generate a similar result in this context.

[20] "Improving Investment Advice for Workers & Retirees," Notice of Proposed Class Exemption, 85 Fed. Reg. 40834 (July 7, 2020). In the proposal, the Department explains: "The approach taken in the proposal is principles-based and meant to provide the flexibility necessary to apply to a wide variety of business models and practices." 85 Fed. Reg. 40844. "The Department recognizes that different types of Financial Institutions have different business models, and the proposal is

The marketplace for PEPs is likely to include diverse and varied product and service offerings, with ongoing innovation as the market develops. A broad, principles-based exemption could be helpful in ensuring the proliferation of PEPs.

In conclusion, the type of relief provided in PTE 77-4 could be helpful for some service providers interested in offering PEPs. That exemption could be improved for this context by expanding its scope to cover other proprietary products and by allowing the use of negative consent to approve changes. Additionally, the Department could consider a broad, principles-based exemption covering a wide range of products and services offered to PEPs, that would be flexible enough to accommodate different business models and future innovation in this developing space.

RFI Question C.4 – Prohibited Transactions in Connection with Non-compliant Employers

The RFI asks whether any prohibited transactions are anticipated to occur in connection with a decision to move assets from a PEP or MEP to another plan or IRA, in the case of a non-compliant employer. We do anticipate the need for exemptive relief in connection with spinning off the assets attributable to a non-compliant employer, particularly in situations where the assets are spun off to the provider's proprietary IRA product using proprietary investment products. In addition to exemptive relief for this situation, it would be helpful to provide a fiduciary safe harbor similar to the safe harbor for automatic rollovers under 29 C.F.R. §2550.404a-2.

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drafted to apply flexibly to these institutions." 85 Fed. Reg. 40837. "This new proposed exemption would provide relief that is broader and more flexible than the Department's existing prohibited transaction exemptions for investment advice fiduciaries. The Department's existing exemptions generally provide relief for discrete, specifically identified transactions, and they were not amended to clearly provide relief for the compensation arrangements that developed over time . . . The exemption would provide additional certainty regarding covered compensation arrangements and would avoid the complexity associated with a financial institution relying on multiple exemptions when providing investment advice." 85 Fed. Reg. 40835.

The Institute appreciates the opportunity to comment on the RFI. The creation of PEPs under the SECURE Act has the potential to significantly increase coverage under workplace retirement plans and improve overall retirement savings adequacy. Our members will play a crucial role in ensuring the success of this new option. If you have any questions about our comment letter, please feel free to contact David Abbey (202-326-5920 or david.abbey@ici.org) or Elena Barone Chism (202-326-5821 or elena.chism@ici.org).

Sincerely,

/s/ David Abbey

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