July 20, 2020

U.S. Department of Labor
Employee Benefits Security Administration
Office of Exemption Determinations
200 Constitution Ave NW
Suite 400
Washington, DC 20210

http://www.regulations.gov
Docket ID number: EBSA-2020-0001

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

To whom this may concern:

Willis Towers Watson is a leading global advisory, broking and solutions company that helps clients around the world turn risk into a path for growth. With roots dating to 1828, Willis Towers Watson has more than 45,000 employees serving more than 140 countries and markets. We design and deliver solutions that manage risk, optimize benefits, cultivate talent, and expand the power of capital to protect and strengthen institutions and individuals. Our unique perspective allows us to see the critical intersections between talent, assets and ideas — the dynamic formula that drives business performance.

Background

We appreciate the opportunity to provide our input and recommendations as the DOL considers whether to issue new prohibited transaction class exemptions or amendments to existing exemptions to facilitate the formation and continuing operation of Pooled Employer Plans (PEPs) under the Setting Every Community Up for Retirement Enhancement (SECURE) Act and other Multiple Employer Plans (MEPs).

The DOL published a Request for Information (RFI) on June 18, 2020 (85 FR 36880). We have responded to some of the questions posed in the RFI, which are identified by number, below. We have also requested guidance on several other fiduciary issues that will influence the structure of PEPs and whether a company will decide to become a Pooled Plan Provider (PPP).

The undersigned have prepared these comments with input from others in the company.

A. Pooled Plan Providers and MEP Sponsors

A2. 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?

Willis Towers Watson (WTW) is considering establishing a PEP and becoming a PPP. We expect the business model will be one where:

- WTW as the PPP would serve as named fiduciary, 3(16) plan administrator, and (through an affiliate) as the 3(38) investment manager of the PEP responsible for selecting investments and making changes to the fund menu when appropriate. The fee for these services would be disclosed to and approved by the participating employers at the time they adopt the PEP. Participating employers would have the option to approve the availability of certain additional services for their employees, such as managed account services or financial wellbeing services, to be provided by WTW or an affiliate and/or a third-party service provider, for a fee that is disclosed to and approved by the participating employers at the time they adopt the PEP or add the discretionary service.

- The PPP would delegate some or all of the recurring administrative responsibilities to third parties, such as recordkeepers, trustees, custodians and plan auditors, whose fees would be separately charged on a pass-through basis to the plan participants and beneficiaries and paid out of plan assets. The PPP would be responsible as a fiduciary under ERISA for the selection and monitoring of all third-party service providers. To the extent WTW, as PPP, would retain responsibility for performing any of the recurring administrative services directly or through an affiliate (e.g., Form 5500 preparation, nondiscrimination testing or QDRO reviews), that information and the fees that would be charged would be disclosed to and approved by the participating employers at the time they adopt the PEP.

- The PPP may introduce new features or services from time to time to be provided by the PPP or an affiliate for an additional fee. Information about the offering and additional fees would be provided to participating employers who would be given the option to approve the availability of the feature or service for their employees.

- The PPP could increase its plan administrator, named fiduciary and 3(38) investment manager fees and/or it's fees for managed account, financial wellbeing or other services through a "deemed consent" process which would involve providing reasonable advance notice to the participating employers of the specific fee increase and implementing the change after that time if there is no objection. Participating employers that objected to the fee increase would be provided a reasonable period of time to withdraw from the PEP (or to stop using the discretionary service) without penalty before the change is implemented. Third-party service provider fee increases would be authorized by the PPP in its role as plan administrator and named fiduciary, since the PPP is independent of those service providers.

- Towers Watson Investment Services (TWIS), an affiliate of WTW, as the 3(38) investment manager, may create in-plan investment options by selecting third-party investment funds or third-party investment managers to manage the assets of the option and determining the asset allocation within the investment option among the third-party investment funds and managers. The effect would be to create an investment option that is more cost effective, provides greater asset manager diversification, and allows for more efficient oversight of the asset managers than would otherwise be available. WTW and its affiliates (including TWIS) would not be managing individual securities directly, rather allocating assets to third party managers, and would receive no additional fees. This service would be provided as part of its overall 3(38) fiduciary role in selecting and monitoring investment options.

- For PEP participants who use the managed account service, a third-party service provider would allocate the account assets among the available PEP investment options based on the participant's age, target retirement date, investment objectives and other personal information. TWIS would provide 3(38) management of the underlying assets. Additional investment options might be made available exclusively to managed accounts.

- PEP participants of a participating employer that has approved the availability of the financial wellbeing service would have access to a financial well-being tool that enables employees to determine the age at which they'll likely be able to retire comfortably, based on their health and financial resources, and to model different alternatives.

A3. 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?

Under the business model contemplated in our response to A2 above, we do not believe the PPP would have any conflicts of interest with respect to the PEP and its participants. Although the PPP or an affiliate would be providing services that are in addition to serving as the overall plan administrator – namely, serving as the 3(38) investment manager, providing managed account and financial wellbeing services, providing certain administrative services and introducing new services from time to time – we believe those potential conflicts would be resolved by disclosing to and getting approval from the participating employers, who would be acting as independent fiduciaries. Any fee increases would also be approved by participating employers as independent fiduciaries through a negative consent process.

However, we do expect that a conflict will arise if WTW, as the PPP, selects itself or an affiliate to perform certain non-recurring ad hoc services to the PEP. This may occur, for example, due to changes in the law (e.g., the CARES Act) that necessitate plan amendments. It would be possible to avoid the conflict by building ad hoc service costs into the overall PPP fee structure, but given the uncertainty around the nature and frequency of such services, exemptive relief would be preferable.

As we noted in our response to A2, above, WTW, as the PPP, would be responsible as a fiduciary under ERISA for the selection and monitoring of all third-party service providers. In performance of that fiduciary role, WTW may decide it needs to require a third-party service provider to modify its standard plan administration policies or practices when providing services to the PEP. We request the DOL confirm our understanding that (i) this would not be considered direct or indirect "control" by the PPP over the third-party service provider within the meaning of DOL Reg. section 2550.408b-2 or Prop. DOL Reg. section 2570.31(a) and thus would not cause these third parties (i.e., providers completely unrelated from the WTW corporate family) to become "affiliates" of WTW and (ii) the nature of the third-party service provider's role (fiduciary vs. non-fiduciary) and the nature of the fee arrangement (e.g., sharing of fees) also do not impact on the analysis of direct or indirect "control".

A4. To what extent will a pooled plan provider be able to unilaterally affect its own compensation or the compensation of its affiliates or related parties through its actions establishing a PEP or acting as a fiduciary or service provider to the PEP? What categories of fees and compensation, direct or indirect, will pooled plan providers and their affiliates and related parties be likely to receive as a result of operating a PEP, including through the offering of proprietary investment products? Are there likely to be any differences in types of fees and compensation associated with operation of a PEP as compared to a single employer plan?

Under the business model contemplated in our response to A2 above, the PPP would not be able to unilaterally affect its own compensation or the compensation of its affiliates. All fees (including any fee increases) received by WTW or an affiliate for the various services discussed in our response to A2 would be approved by the participating employers, who are operating as independent fiduciaries. The only exception would be where the PPP engages itself to provide non-recurring ad hoc services as described in A3, above.

We expect fees would typically be structured as follows:

- Fees for services as the named fiduciary, the 3(16) plan administrator and as the 3(38) investment manager are likely to be charged on a combined basis and would likely be a percentage of plan assets.

- Fees for managed account services would typically be a percentage of assets paid by participants who use the service.

- Fees for financial wellbeing services may be a per-participant, per-year charge or may be charged on a fixed basis only to participants who use the service.

- Fees for administrative services performed by the recordkeeper or other third parties would be charged directly and paid from plan assets. The recordkeeper fees would likely be a per-participant, per-year charge, as well as a per-service charge for certain participant activity (e.g., loans, QDROs). The trustee and custodian fees would likely be a combination of a flat fee and an asset-based fee.

- Fees for administrative services performed by the PPP or an affiliate (e.g., Form 5500 preparation, nondiscrimination testing or QDRO review) would likely be based on a fixed schedule.

- Fees for ad hoc administrative services (e.g., updating the plan to reflect legislative changes) would likely be based on an hourly rate or a flat fee for service.

We do not believe that the fees involved for operating a PEP would be different in any material way from the fees involved in operating a single employer plan.

A5. Do respondents anticipate that the Department's existing prohibited transaction exemptions will be relied on by pooled plan providers, and if so, which exemptions are most relevant? Are any amendments needed to the Department's existing exemptions to address unique issues with respect to PEPs? Do respondents believe that there is a need for additional prohibited transaction exemptions? If so, please describe the specific transactions and the prohibited transactions provisions that would be violated in connection with the transactions.

We expect that the PPP and third-party service providers will rely on the prohibited transaction exemption under ERISA section 408(b)(2) for reasonable contracts and arrangements between plans and service providers. The exemption provides relief from the prohibited transaction rules in ERISA section 406(a) (but not ERISA section 406(b)), for service providers that disclose fee information to plan fiduciaries responsible for hiring and monitoring such providers and meet certain other requirements.

Where WTW, as the PPP, or an affiliate provides additional services – whether plan administrator services or 3(38) investment management services – to the PEP for a fee, there is a question as to whether such acts would constitute fiduciary self-dealing in violation of ERISA section 406(b) for which no exemptive relief is currently available.

However, we believe that where the fees for such services are disclosed to and approved by participating employers, there is no fiduciary self-dealing and no violation of ERISA section 406(b) because the participating employers are approving the service offering as independent fiduciaries. We request that the DOL confirm that this approach is permissible under the SECURE Act's PEP provisions and that it resolves the potential conflict of interest.

If the DOL does not agree that the potential fiduciary self-dealing issues described above can be resolved through participating employer approval of the services and fees, we request that the DOL issue a prohibited transaction class exemption that would provide relief where that process is followed. More specifically, the relief would be available where:

- The PPP discloses to participating employers the services that will be provided to the PEP by the PPP and its affiliates and the fees charged, including 3(38) investment manager services, managed account services, financial wellbeing services, certain administrative services, and new services that may be introduced from time to time, in a manner that is consistent with the requirements of the exemption under ERISA section 408(b)(2),

- Participating employers approve of the services and fees at the time they adopt the PEP (or when a discretionary service is added), and

- The PPP provides advance notice to participating employers of any increases in fees a reasonable amount of time before such fee increases would go into effect, and allows any participating employers that object to the increase a reasonable period of time to withdraw from the PEP (or to stop using the discretionary service) without penalty before the change is implemented.

We also request exemptive relief that would enable the PPP to provide ad hoc services to the plan for a fee for certain limited non-recurring administrative services, such as plan amendments to address legislative changes.

B. Plan Investments

B1. 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?

WTW and TWIS expect to use a series of multi-manager funds across a spectrum of investment objectives, risks and diversification requirements. The following would potentially be the structure of investment options available to PEP participants:

- Target date strategy
- Target risk strategy

Active and passive components for the following asset class strategies:

- US Equity - Large cap
- US Equity - Small and Mid cap
- Non-US Equity
- Core Plus fixed income
- Inflation strategy
- Capital preservation (stable value)

Because of the benefit of scale, the PEP offering may also include:

- Investment strategies to support post-retirement income generation with potential guarantee components, and
- Diversifiers, which may include liquid, semi-liquid and illiquid investments where illiquid assets such as private equity would be a component of a multi-asset investment option such as a target date or target risk investment option.

B2. 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?

See our response to A2 above.

C. Employers in the PEP or MEP

C3. Will the existence of multiple employers in a PEP or MEP cause greater exposure to prohibited transactions in connection with investments in employer securities or employer real property? In what form will PEPs and MEPs hold employer securities or employer real property?

Assuming it is possible for a PEP to include employer securities or employer real property as an investment, we expect that WTW, as PPP, would allow such investments only if the participating employer retained fiduciary responsibility for that investment, and perhaps only if the services of an independent fiduciary are also retained by the participating employer with respect to that investment.

C4. 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?

Under the business model contemplated in our response to A2 above, we do not anticipate that prohibited transactions would occur when a noncompliant sponsor's assets are moved to a single employer plan or to IRAs. WTW does not offer IRAs and would not record-keep or trustee the assets so would have no financial interest regardless of where the assets are transferred. However, assuming the decision is fiduciary in nature, guidance should be provided on how to execute on the requirement to move the assets out of the PEP, as discussed below.

Other guidance requested

We recognize that the RFI focuses on potential prohibited transactions, however, there are a few critical fiduciary issues that will influence the structure of PEPs, who enters the market and what services they will provide. We request that the DOL address these issues in connection with any exemptive relief that is provided or in other guidance. Specifically, we request the DOL provide:

- Confirmation that a PPP may delegate fiduciary responsibility for plan administrator activities to third parties, such as recordkeepers, under ERISA section 3(16) and ERISA section 405(c).
- Guidance on how fiduciary rules apply where there is more than one PEP recordkeeper. For example:
    - Confirmation that the PPP, as a fiduciary, may prudently select multiple recordkeepers following a review of qualifications, quality of services, reasonableness of fees, and other factors.
    - Assuming efficiencies of scale (and fee levels) can be maintained, would the use of multiple recordkeepers otherwise increase the PPP's fiduciary risk?
    - Confirmation that WTW as the PPP could, in a settlor capacity, determine which recordkeeper would provide services to each participating employer.
- Guidance on when and how to execute on the requirement to move the assets of a noncompliant participating employer out of the PEP. The guidance should indicate whether this is a fiduciary act, and if so, it should include a safe harbor for the fiduciary's selection of a recordkeeper or IRA provider and initial choice of investment for account balances (similar to the safe harbors in DOL Reg. § 2550.404a-2 for automatic rollover of a mandatory distribution and DOL Reg. § 2550.404a-3 for distributions from terminating DC plans).
- Guidance on how the trustee responsible for collecting and remitting contributions for the PEP should carry out this function.
- Guidance on how/if a participant with account balances in the same PEP with both a former employer and their current employer might consolidate those balances with current employer. Could this be done using a negative consent or automatic provision, for example?

Conclusion

We appreciate the DOL considering these comments. Please contact any of the undersigned if you have any questions or would like to discuss our comments in more detail.

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