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

Subject: Request for Information Regarding Prohibited Transactions Involving Pooled Employer Plans Under the SECURE Act and Other Multiple Employer Plans (Z-RIN 1210-ZA28)

Greetings:

On behalf of the American Council of Life Insurers (ACLI), we appreciate the opportunity to provide comments in response to the Request for Information (RFI) issued by the Department of Labor (the Department) seeking views on pooled employer plans (PEPs) and multiple employer defined contribution pension plans (MEPs) in light of the Setting Every Community Up for Retirement Enhancement (SECURE) Act. Specifically, the Department is considering whether to propose a class exemption on its own motion to cover prohibited transactions involving MEPs and PEPs. More Americans, especially those employed by small businesses, need an opportunity to save for retirement at work. PEPs and MEPs can help make that happen. We encourage the Department to take the necessary regulatory actions to help facilitate the formation and adoption of these plans.

A critical challenge in enhancing Americans' retirement security is expanding access to workplace retirement savings. Three-fifths of small employers (*those with 99 or fewer employees*) rely on life insurer products and services in their employment-based retirement plan. ACLI members see PEPs and MEPs as a major opportunity to enhance coverage under the private sector employee benefit plan system. These plans can help small business owners achieve economies of scale with respect to plan administration and advisory services, making plan sponsorship much more affordable and effectively managed, and thereby encouraging more small employers to offer their employees retirement plans.

Definition of Pooled Plan Provider

Under the SECURE Act, a pooled plan provider (PPP) is a person who is designated by the terms of a pooled employer plan as a named fiduciary, as the plan administrator, and as the person responsible for the performance of all administrative duties reasonably necessary to ensure that the plan meets all applicable requirements under ERISA and the Internal Revenue Code (IRC). A PPP must acknowledge in writing that such person is a named fiduciary, and the plan administrator with respect to the pooled employer plan, and is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the pooled employer plan are bonded in accordance with ERISA section 412. Further, a PPP is required to register as a pooled plan provider with the Secretary, and provide to the Secretary such other information as the Secretary may require, before beginning operations.

While the SECURE Act imposes specific duties on persons who are PPPs, it does not include any restrictions with regard to who can serve in such capacity. As such, consistent with SECURE, the Department should acknowledge that, for purposes of who may serve as a PPP, a "person" includes financial institutions, such as insurance companies, recordkeepers, banks and trust companies. Thus, any guidance or exemptive relief should facilitate and support these financial institutions who choose to serve as PPPs.

The marketing, by financial institutions, of retirement plan services has led to the dramatic level of plan sponsorship we see today. Employers learn of plan sponsorship opportunities from financial institutions and their representatives. Plan sponsors learn of innovations in plan design and services from their service providers. Americans without access to a workplace retirement plan predominately work for small businesses. Participation of financial services entities – from the outset –can serve to ensure a robust and competitive PEP marketplace. Financial institutions acting as PPPs can help PEPs avoid an additional and unnecessary level of cost, consistent with the overall PEP concept – a low cost, administratively efficient retirement alternative for small employers. Further, given their deep knowledge and experience in retirement plan administration, financial institutions are able to "hit the ground running" and immediately begin offering PEPs. A robust PEP marketplace presents a great opportunity to expand access to workplace retirement savings plans to more and more Americans.

Provide Targeted Exemptive Relief for Regulated Financial Institutions That Choose to Sponsor PEPs.

Financial services firms have substantial operational and administrative expertise associated with the establishment and maintenance of a retirement plan and accordingly are uniquely qualified to act as a PPP. While there may be some complexities associated with a financial services firm acting as a fiduciary PEP sponsor, such complexities are not insurmountable. In that regard, we agree with the Department there are potential conflicts of interest that may arise when commercial entities take on the role of a PPP. These issues primarily focus on the ability of a PPP to offer its own products and services, including recordkeeping and/or investment management, and be compensated for its services while acting as the PEP sponsor. Compensation to a plan fiduciary for services provided to a plan is not an issue of first impression. Indeed, Section 408(c) of ERISA specifically recognizes that a fiduciary may be "reasonably" compensated for providing services to a plan. Further, the Department has historically addressed the disclosure and mitigation of fiduciary compensation and potential conflict issues through the issuance of prohibited transaction exemptions and we encourage the Department to do so here.

Accordingly, we recommend that, for persons such as financial services firms that seek to act as a PPP and thus a named fiduciary, the Department should issue a class prohibited transaction exemption with the following parameters and compliance requirements:

1. Limit Availability to Certain Financial Services Entities. We recommend that prohibited exemption relief be available only to those entities that qualify as trustees for qualified trusts under section 401(f) of the Internal Revenue Code, *i.e.*, insurance companies, banks and other permitted persons (similar rules apply to IRAs). Doing so would limit exemptive relief to well-regulated financial services entities with retirement plan operational, administrative and compliance knowledge and expertise. We note that the Department imposed a similar limitation in Prohibited Transaction Exemption 2006-06, in its determination of entities that may act as a "qualified termination administrator" (QTA) and select itself or an affiliate to provide services to the plan, to pay itself or an affiliate fees for those services, and to pay fees for services provided prior to the plan's deemed termination, in connection with terminating the abandoned plan. In its abandoned plan rulemaking, the Department stated that "[I]n developing its criteria for QTAs, the Department limited QTA status to trustees or issuers of an individual retirement plan within the meaning of section 7701(a)(37) of the Code because the standards applicable to such trustees and issuers are well understood by the regulated community and the Department is unaware of any problems attributable to weaknesses in the existing Code and regulatory standards for such persons."[1] Given that here, as well, a PPP will also be acting as a fiduciary, providing services to the plan, and paying itself for such services, the Department should limit the universe of providers as it did in the abandoned plan regulation and PTE 2006-06.

2. Address the Use of Proprietary Services and Products. It is reasonable to anticipate that financial services firms that are PPPs will include proprietary services (such as recordkeeping) and/or products (such as investment alternatives). As such, class exemption relief should be conditioned on the necessity of such services and products and the reasonableness of the cost of such services and products when borne by the plan and its participants and beneficiaries. There is a strong basis for the Department's inclusion of these requirements in a PPP class exemption, as they are currently included within ERISA's section 408(b) statutory exemption, which addresses transactions between a plan and a party in interest to such plan.

3. Confirm the Applicability of Existing Employer and Participant Service and Fee Disclosure Requirements. The Department has already implemented a robust and meaningful service and fee disclosure regime under 404a-5 and 408(b)(2).[2] We recommend that the Department confirm that these disclosure requirements apply to financial services firms that act as a PPP and provide appropriate clarifications to these disclosure requirements as

[1] 71 Fed. Reg. 20820, 20821 (April 21, 2006).
[2] *See* 29 CFR 2550.404a-5, 2550.408b-2.

necessary to reflect the fact that the PPP is a financial institution. Thus, the Department should confirm that the PPP has the obligation of the plan administrator under the 404a-5 regulations to furnish participants with information regarding the plan, including information regarding the fees and expenses associated with all investment alternatives. This would allow participants to make informed choices about the management of their individual accounts. The Department should confirm or clarify that the PPP would have to provide its contact information as the plan administrator, pursuant to 29 CFR 2550.404a-5(d)(2)(i)(A). The Department should also confirm that the PPP must disclose to each participating employer all compensation, both direct and indirect, that is or is reasonably anticipated to be received by the PPP for recordkeeping and/or investment management services. Further, the Department may wish to consider including in a class exemption an additional requirement that the PPP must disclose any limitations the PPP has implemented with respect to the plan's investment alternatives. These disclosures will serve to assist both participants and participating employers in understanding the existence and nature of any potential conflicts associated with the provision of services or investment products to the PEP and enable continuous monitoring by participating employers. We recommend that employer disclosure be provided prior to execution of a participation agreement or other contractual agreement between the participating employer and the PEP, consistent with the existing requirements of the 408(b)(2) regulation.

4. Independent Audit Requirement. In order to further mitigate any concerns the Department may have regarding conflicts of interest associated with a financial services firm's service as a PPP, we recommend that exemptive relief be conditioned on compliance with an annual independent audit requirement, separate and apart from any financial audit of the PEP required in accordance with applicable ERISA reporting requirements.

   The annual audit would be required to be conducted by an auditor independent of the PPP, with appropriate technical training or expertise, and would include an audit of the PPP's compliance with ERISA's requirements, including, but not limited to (1) whether the services and products provided are necessary for the operation of the plan (2) whether fees and expenses paid to the PPP are reasonable, and (3) whether the PPP is compliant with all applicable participant and employer disclosure requirements. Development of this type of audit requirement will not require the Department to recreate the wheel. Indeed, in developing this audit requirement, we recommend that the Department consider and use as a guide the independent audit requirements contained in section (b)(6) of the final participant and beneficiary investment advice regulation.[3] As such, the audit requirement should include a report to the PPP with findings, an opportunity for the PPP to correct any non-compliance issues, and, in the absence of correction, notification to the Department. A copy of the compliance audit would also be provided to participating employers of the PEP.

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[3] *See* 29 CRF 2550,408g-1.

On behalf of the ACLI member companies, thank you for your consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department.

Respectfully,

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