July 20, 2020

***Submitted Electronically***

Hon. Jeanne Klinefelter Wilson
Acting Assistant Secretary
Employee Benefits Security Administration
Office of Exemption Determinations
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

**Re: Response to a Request for Information "Prohibited Transactions Involving Pooled Employer Plans under the SECURE Act and Other Multiple Employer Plans" (Z-RIN 1210-ZA28)**

Dear Acting Assistant Secretary Klinefelter Wilson:

We write on behalf of a group of interested stakeholders (the "Group") in response to the Request for Information "Prohibited Transactions Involving Pooled Employer Plans under the SECURE Act and Other Multiple Employer Plans" (the "RFI") published by the Department of Labor (the "Department") in the Federal Register on June 18, 2020. The Group includes a diverse cross-section of stakeholders, including advisors, consultants, investment managers, multiple employer plan ("MEP") sponsors, likely pooled employer plan ("PEP") sponsors, recordkeepers, and trust companies.

This letter provides comments on key issues related to the establishment of PEPs pursuant to the Setting Every Community Up for Retirement Enhancement Act ("SECURE Act") as well as comments related to existing and future MEPs. Although this letter includes comments with respect to both types of plans, the Group urges the Department to consider the issues separately in light of the significant differences between PEPs and MEPs.

## IN GENERAL

Congress created PEPs with the goals of reducing the administrative costs of retirement plans, professionalizing plan administration, and increasing the number of Americans covered by employer-provided retirement programs. In creating PEPs, Congress designed the statutory language around PEPs in a manner intended to promote innovation and a competitive marketplace for retirement benefits through a combination of single-employer plans, MEPs, and PEPs. At the same time, the Group recognizes that the SECURE Act's PEP provisions were

specifically designed to work within the existing legal framework for defined contribution retirement plans.

Because of Congress's desire for innovation and competition within the existing legal framework, any potential Department guidance or decision not to issue guidance should be carefully considered so as not to have any unintended effects that undermine any of these core principles. Importantly, any legal uncertainty created by guidance could undercut Congress's policy goals. Likewise, guidance should be issued when necessary to resolve legal uncertainty.

## COMMENTS RELATED TO MEPS

Associations and other organizations have sponsored "closed" MEPs for decades and have a proven track record of providing cost-efficient retirement benefits. These organizations leverage the MEP structure to professionalize plan administration and achieve economies of scale for their members. Small businesses (and their employees) are the primary benefactors of this structure as small businesses often find offering a retirement plan challenging or cost prohibitive. Moreover, associations are accountable to, and under the control of, their members, which helps improve MEP governance and operation.

The Department has gone to great lengths to expand the availability of defined contribution plan MEPs. In particular, the Department recently finalized rules for Association Retirement Plans ("ARPs") intended to facilitate broader adoption. 29 C.F.R. § 2510.3-55. Those rules, based in part on decades of guidance from the Department, set standards and requirements for the *bona fide* groups or associations of employers eligible to sponsor ARPs. Even though ARPs enjoy fewer restrictions than typical closed MEPs, employers are required to remain involved to a degree not required in PEPs.

MEPs and PEPs are not the same and should not be treated as identical types of plans. For example, employers in a MEP are not sponsors of the plan, whereas employers in a PEP are considered plan sponsors. This distinction has a substantial impact on how the plan is administered, both legally and operationally.

Some well-established, *bona fide* association-sponsored MEPs have members whose membership purpose extends beyond the provision of benefits, a characteristic which satisfies the requirement of prior Departmental guidance. *See, e.g.*, Advisory Opinion 2012-04A (May 25, 2012) (explaining that there was "no employment based common nexus or other genuine organizational relationship that is unrelated to the provision of benefits"). These associations, and the MEPs they sponsor, are distinguishable from those organizations where membership is principally, if not solely, for the purpose of providing benefits. Moreover, the SECURE Act excludes existing MEPs meeting the longstanding Department commonality guidance from the definition of PEPs.

Any guidance or rule issued by the Department related to PEPs should be carefully tailored not to negatively impact the operation of existing MEPs or the establishment of MEPs in the future.

## COMMENTS RELATED TO PEPS

### I. Registration

The Department should prioritize creating a simple mechanism for Pooled Plan Provider ("PPP") registration. The SECURE Act provides that an entity "register[] as a [PPP] with the Secretary, and provide[] such other information to the Secretary as the Secretary may require, before beginning operations as a pooled plan provider." Employee Retirement Income Security Act of 1974 ("ERISA") § 3(44)(A)(ii); Internal Revenue Code of 1986 (the "Code") § 413(e)(3)(A)(ii). The registration requirement is intended to assist the Department in identifying and overseeing PPPs. Congress did not intend for the registration process to be burdensome or impose specific qualification requirements or other obligations on PPPs. In fact, prior versions of the legislative language explicitly required licensing and/or minimum qualification requirements, but those approaches were rejected by Congress.

PPPs should be permitted to register through a simplified form that requires disclosure of information sufficient to allow the Department to identify the PPP and its associated PEPs. For example, a PPP could be required to disclose its name, EIN, address, registered agent, and PEP affiliations. Form M-1 (Report for Multiple Employer Welfare Arrangements) could serve as the basis for a PPP registration form. Additionally, PPPs should not be required to register annually. Rather, a PPP should only be required to update its registration if there is a change to key identifying information (*e.g.*, name, address, point of contact).

### II. Need for Flexibility in Defining Primary "Plan Sponsor" of a PEP

In PEPs, many of the responsibilities that typically fall on "plan sponsors" are the responsibility of the PPP (*e.g.*, fiduciary plan administration). At the same time, the SECURE Act provides that "Except with respect to the administrative duties of the pooled plan provider [], each employer in a pooled employer plan shall be treated as the plan sponsor with respect to the portion of the plan attributable to employees of such employer (or beneficiaries of such employees)." ERISA § 3(44)(D); Code § 413(e)(3)(D). Because of this division of "plan sponsor" responsibilities, the many PEP models being developed are taking a wide range of approaches with respect to the identification of who is the primary "plan sponsor" of a PEP (*e.g.*, the PPP that offers the PEP to participating employers; one specific participating employer, etc.).

Any requirement that would require a PPP to have its own employees in a PEP in order for the PPP to be the primary plan sponsor would significantly stifle the PEP marketplace. Any Department guidance on this topic should recognize that both (a) a PPP, even if the PPP has no

employees in a PEP or (b) a participating employer, can serve as the primary plan sponsor of a PEP.

## III. Need for Exemptive Relief

The Group recognizes that there are different schools of thought as to whether additional prohibited transaction relief is necessary for PEPs. The retirement plan market is vibrant and highly competitive. The PEP market is evolving and innovative in a similar manner. To avoid stifling this innovation, the Group strongly encourages the Department to focus on unintended consequences, from both a liability and responsibility perspective and from the perspective of inadvertently picking of "winners and losers", of any decision to or not to provide prohibited transaction relief.

Although the Group expects a wide range of proposals to be made to the Department, it would be helpful if the Department could clearly state that existing prohibited transaction exemptions are available in the PEP context. The Group sees no reason why existing prohibited transaction exemptions would not be available in the PEP context, but in order to reduce potential uncertainty, the Group asks that the Department confirm that fact.

One specific prohibited transaction exemption that is needed to ensure the sound functioning of PEPs is relief for actions taken by fiduciaries to address plan qualification issues. The SECURE Act contemplates that, in some cases, employers participating in a PEP may fail to take the necessary actions to ensure that the PEP maintains its tax qualification (*i.e.*, a bad apple). Specifically, the law allows the assets attributable to employees of an employer failing to meet certain obligations to be transferred to a plan maintained only by such employer.

That new plan will still have to be administered, and the provider will need to be compensated for those services. However, a PPP that removes an employer from a PEP to address qualification issues may be acting in a fiduciary capacity and would, therefore, be prohibited from setting its own compensation under the prohibited transaction rules. In order to foster the efficient administration of the PEP, the Department should provide exemptive relief for PPPs that establish a new plan for non-compliant employers so that the PPPs can continue to receive reasonable fees for the management of the plan. Any exemption should be notice and disclosure based and specify rules around the timing of removing the "bad apple" plan. The exemptive relief should not require that the Department provide approval to the PEP before the "bad apple" plan can be removed.

## IV. Trustee Duties

The statute requires that each PEP "designate one or more trustees… [required] to implement written contribution collection procedures that are reasonable, diligent, and systematic." The Department should clarify that it is reasonable for a trustee to adopt procedures

that do not require the trustee or other party to bring a lawsuit to seek late contributions. That is important because litigation can be extremely costly, and there are other less costly options available. Additionally, the Department could clarify that trustees can have procedures that provide a method for correcting late contributions akin to the processes and procedures permitted under the Internal Revenue Service's Employee Plans Compliance Resolution System.

## V. Investment Manager Appointment

In some cases, a fiduciary for a PEP may desire to hire, and delegate discretionary investment authority to, an investment manager (as defined in section 3(38) of ERISA). Such an investment manager would be the fiduciary responsible for managing the PEP's investments. The investment manager would receive a fee for this service, the amount of which would typically be determined with regards to the value of assets under management.

This approach is permitted - if not incentivized - by ERISA, which provides that each participating employer in a PEP "retains fiduciary responsibility for… the investment and management of the portion of the plan's assets attributable to the employees of the employer (or beneficiaries of such employees)" unless the PPP delegates the investment of the PEP's assets to "another fiduciary…and subject to the provisions of section 404(c)."

There is some confusion in the marketplace as to whether individual plan sponsors or the PPP has the authority and responsibility to appoint investment managers under the statute. Can a PEP provide the authority to appoint individual investment managers rests with the individual plan sponsors and not the PPP? Many PEP providers anticipate requiring individual plan sponsors select the investment manager of their choice. To not permit this structure could potentially stifle the options available in the PEP market that may make PEPs more attractive to employers. The Department should confirm that this practice is consistent with the statute.

## VI. Bonding Requirements

Section 412 of ERISA requires every person handling plan funds be bonded, unless the person falls under one of the exemptions from the bonding requirement. Bonding is an important protection against the risk that assets could be lost in the event of fraud or dishonesty by plan officials. However, plans do incur material expenses complying with the bonding requirements.

Because PEPs are intended to allow participating employers to outsource most plan-related responsibilities, the Group expects that employers participating in PEPs will generally not handle plans assets. That is particularly true where, for example, investment management responsibility has been delegated to an investment manager. Because of that, there is little risk of participating employers generally committing the types of misconduct intended to be addressed by the bonding requirements. Therefore, the Group requests that the Department

confirm that the ERISA bonding requirements are not applicable to participating employers. This will help reduce costs and complexity without creating any real risk for the plan.

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The Group appreciates the opportunity to provide these comments to the Department and would be happy to discuss the issues in more detail.

Sincerely,

David Levine Michael Kreps George Sepsakos Brigen Winters