The SPARK Institute, Inc.
SHAPING AMERICA'S RETIREMENT

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

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

Dear Sir or Madam:

The SPARK Institute, Inc. appreciates the opportunity to comment on the Department of Labor's ("the Department's") request for information on "Prohibited Transactions Involving Pooled Employer Plans Under the SECURE Act and Other Multiple Employer Plans" ("RFI"). The SPARK Institute has long supported the expansion of multiple employer plans ("MEPs") as a means to increase retirement plan coverage and reduce the costs associated with employment-based retirement savings options.

For this reason, the SPARK Institute was very pleased when, at the end of last year, Congress created a new type of MEP, called a pooled employer plan ("PEP"), as part of the Setting Every Community Up for Retirement Enhancement ("SECURE") Act. Further, we were glad to meet with the Department on January 24 to provide initial input on the PEP provision and offer our views on how the Department can effectively implement this important provision. In that meeting, we emphasized a number of points that will be repeated in this letter.

We are also pleased to see the Department is seeking formal input from various stakeholders through this RFI as it considers whether new or amended prohibited transaction class exemptions ("PTEs") are appropriate and necessary to facilitate a robust marketplace for PEPs and other types of MEPs. In reviewing this potential need, the SPARK Institute urges the Department to allow its efforts to be guided by the two goals that Congress sought to achieve when it created the PEP structure: increased retirement plan coverage and lower costs. At the same time, we also urge the Department to keep in mind that any exemptive relief should not favor one business model or investment product over any others. We believe that product and business neutrality will promote innovation in the PEP marketplace from all types of investment providers.
To assist the Department in its review, the SPARK Institute's comments: (1) discuss some general principles that should guide the Department in formulating guidance under the SECURE Act; (2) provide an overview of the business models that firms are currently considering to make PEPs available; (3) discuss the conflicts of interest and prohibited transaction issues that are

relevant to PEPs and MEPs; and (4) highlight a specific need for guidance on the SECURE Act's requirement for PEP trustees to be responsible for collecting PEP contributions.

I. General Principles

As we discussed in some detail in our January 24 meeting with the Department, we believe some general comments about the goals of the SECURE Act's PEP provision are worth keeping in mind. The SECURE Act's PEP provision was intended, in large part, to expand retirement plan coverage among Americans, especially those working for smaller employers that are less likely to offer a retirement plan to their employees. The new PEP plan structure is another option to supplement the variety of existing rules intended to entice smaller employers to offer retirement plans at a reasonable cost given their size, including SIMPLE IRAs, safe harbor contribution rules, pre-approved plan documents, and Form 5500-SF. We all share the goal of making this new option a viable and cost-effective option.

The SPARK Institute's members have different business models for delivering small plan services. Some offer proprietary investments that supplement the cost of administrative services; others do not have affiliated investments. All work hard to make retirement plan services available and affordable to their client base.

A key mission of the SPARK Institute is to support policies that make saving for retirement affordable for employers and participants. While we have and will continue to support rules that are necessary to protect participants and beneficiaries, we also believe that *unnecessary costs* should be avoided. Thus, if the Department decides to move forward with an exemption, we urge you to keep in mind that while ERISA requires that administrative exemptions are in the interests of and protective of the rights of participants and beneficiaries, ERISA also requires that any exemption is "administrative feasible."

II. Potential Business Models

Question 2 of the PEP RFI asks, "What business models will pooled plan providers adopt in making a PEP available to employers?"

In our discussions with SPARK Institute members and other key players in the retirement services industry, we have divided the potential PEP business models into four broad categories. These categories are largely based on which entity would serve as the Pooled Plan Provider ("PPP").

1. *Recordkeeper as PPP with Proprietary Investments.* First, a recordkeeper[1] could serve as the PPP and would make available a PEP that offers the recordkeeper's or an affiliate's

[1] In this letter, we use the word "recordkeeper" to mean the primary service provider for administrative services, including maintaining plan records; processing contributions, distributions, and investment reallocations; assisting in nondiscrimination testing; preparing signature ready Form 5500s; and preparing participant notices and disclosures.

proprietary funds.

2. *Recordkeeper as PPP without Proprietary Investments.* Second, a recordkeeper could serve as the PPP and offer a PEP that does not use its own proprietary funds. The funds in the plan may or may not provide the recordkeeper with third-party payments – e.g., 12b-1 fees.

3. *Third Party as PPP.* Third, the PPP could be a third party who engages other service providers. The PPP would then engage and aggregate a variety of other service providers to fill the different roles that are necessary to offer a PEP (e.g., trustee, investment management, recordkeeping, and other administrative services). This business model is the most common model for MEPs that already exist in today's marketplace. For example, trade associations that offer closed MEPs today use this model, although under the SECURE Act, the PPP no longer must be such an entity.

4. *Distributors.* Fourth, the PPP role might be filled by a "distributor" – e.g., a broker-dealer, registered investment adviser, or consulting firm. In other words, the PPP might be an entity that traditionally is the front-facing entity with employers. These entities could offer PEPs that use proprietary investments or the investments of an affiliate, or they might not. The thinking here is that client-facing firms might find it helpful to have a PEP offering available, even if the PPP largely offers plan sponsors consulting, securities recommendations, or investment advice and not the other services needed to administer a 401(k) plan.

We have found it helpful to use these categories as a simple way to think about the different approaches to PEPs. In the real world, of course, a particular business model might fall into multiple categories. For example, the PPP might be an entity that both traditionally serves as a distributor of small business plans and offers recordkeeping.

We believe that it would be helpful for future guidance and relief to expressly clarify that financial services firms can sponsor and provide other services to PEPs in the same way as any other type of business entity. This express clarification would be helpful in resolving any lingering uncertainty about the role that financial services firms can play in the PEP marketplace, given the prior reluctance of the Department to expand MEP treatment to plans that were sponsored by financial institutions.

III. Conflicts of Interest & Prohibited Transaction Relief

Each of the business models discussed above might involve potential conflicts of interest, not unlike the conflicts of interest that currently exist when distributing retirement plan services to the small employer market. Most notably, if a service provider is a fiduciary and uses its fiduciary authority to cause the plan to select investments or hire service providers that will generate additional compensation for the service provider (or an affiliate or other person in whom the provider has an interest that may affect its best judgment as a fiduciary), the prohibitions in ERISA section 406(b) may be implicated. Firms considering potential PEP and

MEP models understand that these conflicts will create issues when employers first join the arrangement and when investments and fees must necessarily change over time. As the SPARK Institute's response to the Department's 2019 RFI on "open MEPs" discussed, these conflicts are not new and they are not categorically prohibited by ERISA.

In the PEP context, firms believe that they can offer services through the above-described business models by either: (1) avoiding impermissible conflicts of interest, or (2) relying on an existing or new class exemption. Each of these approaches and their respective needs for guidance are discussed below.

Avoiding Impermissible Conflicts. Under longstanding interpretations of ERISA, service providers can generally avoid fiduciary status and the prohibited transactions described in section 406(b) of ERISA by acting only upon the direction of an employer plan sponsor or another third-party selected and overseen by the plan sponsor. Firms are currently considering the extent to which this approach can "cure" any conflicts of interest that might otherwise prevent them from offering a PEP.

In this regard, we request that the Department expressly clarify that an entity serving in the role of a PPP can avoid fiduciary status with respect to the selection of plan investments if such investments are selected, or prospectively approved, by an employer participating in a PEP or another third-party selected and overseen by the employer. Similarly, in connection with any changes in investments, the participating employer would be informed of the change and offered an opportunity to exit the PEP.[2] In such an arrangement, the PPP could serve as an ERISA fiduciary for the PEP, but would not be a fiduciary with respect to the selection of investments for a plan's lineup. Further, the Department should clarify that these principles are applicable in the context of PEPs that only make available a limited menu of investments.

In this regard, as amended by the SECURE Act, ERISA section 3(43)(B)(iii) states that each employer participating in a PEP "retains fiduciary responsibility for – <u>*to the extent not otherwise delegated to another fiduciary by the pooled plan provider*</u> and subject to the provisions of section 404(c), the investment and management of the portion of the plan's assets attributable to the employees of the employer (or beneficiaries of such employees)" (emphasis added). We believe this language supports the idea that service providers can avoid fiduciary status for the selection of PEP investments by acting at the direction of a sponsoring employer or another third-party fiduciary. But the intent and meaning of this provision of the SECURE Act is not 100% clear and would benefit from further elucidation by the Department.

Prohibited Transaction Exemptions. As we explained in our letter responding to the Department's 2019 RFI on "open MEPs," financial services firms are eager to design MEPs and PEPs that fit within existing prohibited transaction exemptions, and if necessary, request individual and class exemptions, which the Department has granted over the years if it finds an exemption to be administratively feasible, in the interests of the plan and its participants, and

[2] Advisory Opinion 97-16A.

protective of the rights of participants.[3] In reliance on those existing prohibited transaction exemptions, many firms believe that they can offer PEPs through the various business models discussed above.

Nevertheless, in order to promote a robust PEP marketplace, our members encourage the Department to explore whether additional relief is appropriate. In considering any additional exemptions, the Department should: (1) seek to make any new relief product and business model neutral; and (2) avoid overly prescriptive conditions that could unnecessarily increase costs, thereby thwarting the cost reductions that prompted Congress to create the PEP structure. In considering any new or amended exemptions to facilitate PEPs, we also encourage the Department to consider whether the product neutral and principles-based exemption recently proposed by the Department for investment advice fiduciaries might serve as a model for relief in the context of PEPs and other MEPs.[4] For example, a new exemption could provide relief for PPPs to the extent that they act in the best interest of participating employers and participants, receive no more than reasonable compensation, make no misleading statements, fully disclose all services and conflicts, and develop policies and procedures to satisfy these standards and mitigate conflicts.

PTE 77-4. Some firms considering PEP offerings have determined that PTE 77-4 provides the prohibited transaction relief that will be necessary to allow them to enter the PEP marketplace. PTE 77-4 provides an exemption from the prohibited transactions that arise when an employee benefit plan purchases or sells shares of an open-end investment company registered under the Investment Company Act of 1940, and the investment adviser for such investment company is also a fiduciary with respect to the plan. Subject to other various conditions and restrictions, the exemption can generally be satisfied if: (1) the plan does not pay a plan-level investment management or advisory fee; and (2) a second fiduciary approves any fees after receiving a current prospectus and other specified disclosures regarding the fees that will be paid by the plan. If there is a change in any of the fees, the second fiduciary must, in writing, approve such change in advance.

The condition requiring written consent in advance of any fee change creates practical challenges that will make it difficult to obtain affirmative consent for every fee change that applies to a MEP or PEP. We understand that oversight from a second fiduciary is a critical condition for the relief granted by PTE 77-4, but in the interest of facilitating broader MEP and PEP participation, we request that the Department provide generally applicable relief permitting PTE 77-4 to be used when the second fiduciary provides negative consent for any fee changes. This clarification would be consistent with the individual exemptions that the Department has already granted with conditions that are nearly identical to PTE 77-4, except that the individual exemptions permit negative consent.

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[3] ERISA section 408(a).

[4] 85 Fed. Reg. 40834 (July 7, 2020).

IV. TRUSTEE RESPONSIBILITIES FOR COLLECTING CONTRIBUTIONS

In order to be treated as a PEP, the SECURE Act requires the plan's terms to "designate one or more trustees meeting the requirements of section 408(a)(2) of the Internal Revenue Code of 1986 (other than an employer in the plan) to be responsible for collecting contributions to, and holding the assets of, the plan and require such trustees to implement written contribution collection procedures that are reasonable, diligent, and systematic." This condition has created considerable uncertainty for firms that are attempting to create worthwhile business models for the anticipated PEP marketplace. In most cases, as the Department knows, trustees act solely as directed trustees as described in ERISA section 403(a)(1).

General Guidance. To promote efficiencies and lower costs, we request that the Department provide additional guidance on the requirement for one or more trustees to "be responsible for collecting contributions to, and holding the assets of, the plan and require such trustees to implement written contribution collection procedures that are reasonable, diligent, and systematic." For example, the Department should clarify that, even in a MEP or PEP, one trustee can be responsible for holding plan assets, while another trustee can be responsible for collecting contributions and implementing "written contribution collection procedures that are reasonable, diligent, and systematic." Some service providers are considering whether a co-trustee approach to this statutory condition can be incorporated into a competitive plan offering. Some directed trustees, however, do not believe that this approach will be workable.

We further encourage the Department to develop workable and clear guidance that will give trustees certainty on how they can fulfill the specific contribution collection duties prescribed by the SECURE Act. For example, a reasonable and flexible safe harbor may be appropriate for this requirement. Because a PEP necessarily contemplates multiple unrelated employers that will have their own separate payroll systems, payroll schedules, and payroll vendors, the Department's interpretation of this trustee responsibility could significantly increase the cost and complexity of operating a PEP if it does not provide flexibility and clarity for service providers. In this regard, the Department's guidance should clearly identify the point at which a PPP or recordkeeper must notify the trustee of any delinquent contributions. Although some service providers may be able to make the SECURE Act's contribution collection requirements work in a cost-effective manner, vague standards for this requirement may be unworkable for some firms, and the potential exposure to liability for directed trustees may result either in their unwillingness to serve as trustee or create costs that would make the entire service model less appealing.

Directed Trustees. In the case of a MEP or PEP with a directed trustee who is not also acting as the plan's recordkeeper, the directed trustee would generally not have access to any of the payroll information that would be necessary to monitor contributions. Furthermore, the costs that would be necessary to design systems that would allow directed trustees to adequately monitor employer payroll systems would make PEPs too costly to be competitive with other retirement solutions currently available to small businesses. Accordingly, we request that the Department expressly clarify that a trustee can engage a third-party, such as a PPP or recordkeeper, to accept this role and perform this routine monitoring on its behalf.

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The SPARK Institute appreciates the opportunity to provide comments on the Department's RFI on prohibited transactions involving PEPs and MEPs. If you have any questions or would like more information regarding this letter, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com).

Sincerely,

Tim Rouse
Executive Director