NOVA 401(k) ASSOCIATES

July 20, 2020

U.S. Department of Labor
Employee Benefits Security Administration
Office of Regulations and Interpretations
200 Constitution Avenue N.W.
Room N-5655
Washington, DC 20210

Via electronic submission

Subject: (Z-RIN 1210-ZA28) RFI Regarding Prohibited Transactions Involving Pooled Employer Plans Under the SECURE Act and Other MEPs

Dear DOL:

Thank you for the opportunity to provide comments on this RFI. We are responding on behalf of Nova 401(k) Associates and our affiliate Administrative Fiduciary Services Inc.

Nova 401(k) Associates ('Nova') is a third party administrator (a "TPA") serving over 6,500 employers. Our current practice also includes Multiple Employer Plans ('MEPs'). Nova's primary focus is on employers with fewer than 2,000 employees.

Our affiliate Administrative Fiduciary Services Inc. ('AFS') serves as an independent administrative fiduciary ('IFA') and provides administrative fiduciary services and support. Neither Nova nor AFS offer investment products, investment advice or daily record-keeping as part of our services.

ERISA Sections 406(a) and 408(b)(2)

ERISA Section 408(b)(2) provides a prohibited transaction exemption with respect to ERISA Section 406(a) provided that certain conditions are met including that the fees must be reasonable and that certain information must be provided before entering into the contract.

We recommend clarification of the 408(b)(2) requirements with respect to PEPs. Service providers other than the PPP should provide 408(b)(2) notices to the PPP and the PPP will act as the responsible plan fiduciary with respect to those notices. Additionally, we believe the PPP should provide a 408(b)(2) notice to potential adopting employers.

To assist adopting employers in evaluating the reasonableness of prospective PPPs' fees, **we recommend the DOL amplify its comments regarding allocation of discounts in the preamble to the July 2019 final MEP regulations and add the following clarifications to the 408(b)(2) regulations.**

- ***Clarification of whether the reasonableness of fees is measured at the PEP level, the adopting employer level or both.*** Given the variety of pricing structures likely to emerge, it is possible that a PEP's fees could be reasonable for adopting employers with certain characteristics and unreasonable for others. It is also possible that a PEP could appear to have unreasonable fees when compared to a single employer plan of the same size as the PEP, but the fees for each adopting employer could be reasonable.

  Consider a PEP that has two adopting employers: a plan with $100,000,000 in assets and a plan with $100,000 in assets. If the PEP's business model is that all adopting employers benefit from the aggregation of assets to the exact same extent, then fees for the $100,000 plan may be reasonable even if the fees for the total PEP are not. The $100,000 plan may receive better pricing from a PEP that appears to be unreasonably priced at the aggregate level than it can as a single employer plan.

  Conversely, if the PEP's business model is to attract only large adopting employers and thus has a higher minimum flat dollar fee, the fees at the PEP level may be reasonable while the fees are unreasonable for the $100,000 plan.

  As another example, many micro- and small-sized plans are exempt from the independent CPA audit requirement. If such a plan joins a PEP which is subject to the CPA requirement, the plan CPA audit expense will be an additional fee that was not previously incurred by the plan prior to joining a PEP. Thus, there may be a question of whether it is reasonable for such a plan to join a PEP and subject itself to such a fee.

  We request that the DOL clarify at what level the reasonableness of fees should be assessed for determining whether or not there is a prohibited transaction.

- ***Require the PPP in its initial 408(b)(2) notice to specify how expenses are allocated among adopting employers.*** Because adopting employers will have different numbers of participants, asset amounts and plan features, it is important for adopting employers to have information regarding how expenses will be allocated among different adopting employers.

To assess the reasonableness of the PPP fee, an adopting employer will need either a specific fee for the adopting employer or a description of the plan level fee and a description of how the fee will be charged to each adopting employer. An allocation method based completely on asset-size may lead to unreasonable allocation of PPP fees to adopting employers with large asset bases to the extent that the PPP fee itself is unrelated to asset size. Similarly, small employers could be allocated an unreasonable portion of the PPP fee to the extent the PPP fee is more appropriately asset-based.

We request the DOL require the PPP establish the allocation method impartially, that the allocation method be required to be reasonable and that the PPP disclose the allocation method in its initial 408(b)(2) notice.

ERISA Section 406(b)

We believe that at least some PPP arrangements can be structured so as not to be a self-dealing prohibited transaction. The arrangements below reflect different approaches to evaluating reasonableness that we see in the marketplace. In both arrangements, the PPP is an IFA. ***We request that the DOL clarify that the following PEP/PPP arrangements are not a prohibited transaction under ERISA 406(b).***

PEP/PPP Arrangement 1

Arrangement 1 is designed for adopting employers who believe it is more reasonable for adopting employers to have certainty regarding the fees that may be charged to their portion of the PEP assets. In this arrangement, the adopting employer does not bear the risk of too few employers adopting the PEP or higher than expected fees from delegated service providers. Such an arrangement protects the adopting employer from higher, unexpected fees. In this arrangement, the PPP and other providers bear the down-side risk, but also financially benefit from a successfully run PEP.

- In arms-length transactions for reasonable fees charged as a percentage of assets, the PPP engages for the PEP the following service providers ('Asset-Fee Providers') all of whom are unrelated to the PPP:
    - A record-keeper and an investment line up.
    - A 3(38) Investment Manager.

  The Asset-Fee Providers' fees are based upon the asset size of the adopting employer and do not depend on the PEP's total asset base. The asset-based fees for each adopting employer reflect a reasonable discount compared to the single employer plan market. Additionally, the asset-based fees have been allocated impartially considering the competing interests of different parties. The fees have been allocated so that smaller plans receive some discounts, but so that larger plans are encouraged to join the PEP allowing for discounts to flow to all adopting employers.

- In arms-length transactions for reasonable fees charged as a combination of a flat dollar amount for the PEP, a flat dollar amount per adopting employer and a flat dollar amount per participant, the PPP engages the following service providers ('Dollar-Fee Providers') for the PEP all of whom are unrelated to the PPP:
    - A corporate trustee.
    - A TPA.
    - An independent CPA.
- The Asset-Fee Providers' fees are charged to the PEP with no mark-up by the PPP.
- The PPP receives no indirect compensation or gratuity from Asset-Fee Providers or Dollar-Fee Providers with respect to the PEP.
- The PPP receives no compensation which is related to the choice of any provider.
- The PPP charges each adopting employer a reasonable fee which includes its services as well as the corporate trustee, TPA, CPA and similar outside party fees. Thus, the PPP bears the risk of these fees being higher than anticipated and/or assumptions used to develop these fees not being realized such as too few adopters of the PEP.
- Prior to PEP adoption, the PPP provides each adopting employer with the following disclosures:
    - A complete and comprehensive disclosure of the PPP fees for the adopting employer consistent with the requirements of ERISA 408(b)(2).
    - A statement that by adopting the PEP the adopting employer is acting in a fiduciary capacity and is approving the PPP fees.
    - A statement that the adopting employer retains a fiduciary responsibility to monitor the PPP.
- The PPP's fees are reasonable and the fee structure precludes the PPP from having discretion with respect to its own compensation.
- Contractually, the PPP agrees that it will not choose itself to act in the role of any Asset-Fee Provider or Dollar-Fee Provider or to receive indirect compensation from an Asset-Fee Provider or Dollar-Fee Provider in the future with respect to the adopting employer's portion of the PEP without the adopting employer's informed, affirmative consent.

PEP/PPP Arrangement 2

Arrangement 2 is designed for adopting employers who believe it is more reasonable for an adopting employer to have the potential to achieve the maximum benefit from participating in a large, successful PEP and to give the adopting employer the greatest visibility into how the PPP is arriving at its fees. In such an arrangement, the adopting employer bears certain downside risk such as the PEP not reaching its target size and thus fees to each adopting employer being higher.

- In arms-length transactions for reasonable fees, the PPP engages the following service providers ('Other Providers') for the PEP all of whom are unrelated to the PPP:
    - A record-keeper and an investment line up.
    - A 3(38) Investment Manager.
    - A corporate trustee.

These fees are based on the PEP's overall size. Thus, all adopting employers pay the same percentage of assets.

- In addition to its fiduciary PPP services, the PPP (directly or through its affiliates) provides services typically provided by a TPA.
- The Other Providers' fees are charged to the plan with no mark-up by the PPP.
- The PPP receives no indirect compensation or gratuity from Other Providers with respect to the PEP.
- The PPP receives no compensation which is related to the choice of the investment lineup, the (3)(38) Investment Manager or corporate trustee.
- Prior to PEP adoption, the PPP provides each adopting employer with the following disclosures:
    - A complete and comprehensive disclosure of the PPP fees consistent with the requirements of ERISA 408(b)(2).
    - A complete and comprehensive disclosure of service provider expenses (including Other Providers' and additional service providers like CPAs) that may be charged to the plan. Such disclosures include information about anticipated plan level expenses and a description of the method to allocate fees to the adopting employer level. The allocation method will be specific enough to preclude discretion by the PPP.
    - A statement that by adopting the PEP the adopting employer is acting in a fiduciary capacity and is approving the PPP fees.
    - A statement that the adopting employer retains a fiduciary responsibility to monitor the PPP.
- The PPP's fees are reasonable and the fee structure precludes the PPP from having discretion with respect to its own compensation.
- Contractually, the PPP agrees that it will not choose itself to act in the role of an Other Provider or to receive indirect compensation from an Other Provider in the future with respect to the adopting employer's portion of the PEP without the adopting employer's informed, affirmative consent.

We note that some potential adopting employers may find it more reasonable to have elements of both of these arrangements. For example, some potential adopting employers may believe it is more reasonable to structure fess as described in Arrangement 1 with respect to asset-based fees and Arrangement 2 with respect to other fees. Additionally, the PPP marketplace may evolve so that PPPs offer hybrid arrangements so that both parties share upside benefits and downside risk.

If the DOL disagrees and believes the either of the above arrangements are a prohibited transaction, ***we request that the DOL issue a prohibited transaction exemption for the above arrangements.***

PTEs and Affiliates

The SECURE Act explicitly provides that affiliates may be aggregated to serve as PPP. Thus, Congress recognized that some PPP business models would involve services being provided by related companies. If the regulatory framework makes it too cumbersome for PPPs to use its affiliates to provide services, a less competitive PPP marketplace will develop because it will not be economically feasible for as many parties to provide PPP services. Employers and participants are best served by a robust marketplace. ***We recommend that the DOL structure PTEs to facilitate PPPs using affiliates to provide appropriate services.***

PTEs and Broad Service Providers

TPAs and IFAs are extremely well-qualified to serve as PPPs. TPAs traditionally assist clients to remain compliant with plan-related IRS and DOL requirements. IFAs assist employers who lack the expertise or resources to fully meet administrative fiduciary requirements without assistance. Both TPAs and IFAs are unencumbered by potential conflicts of interest that arise when parties serve as a fiduciary while offering proprietary investments.

Having a requirement that a PPP must be qualified to serve as an IRA custodian or Qualified Termination Administrator ('QTA') would stifle innovation and cost efficiency in the marketplace, while also creating an undue barrier to entry for otherwise qualified service providers. The vast majority of TPAs and IFAs do not qualify to serve as an IRA custodian or QTA. Thus, the broad imposition of those requirements to serve as PPP would prevent qualified non-financial institutions from serving as PPPs. While we expect TPAs and IFAs to serve as PPPs on a broad variety of PEPs, the inclusion of these parties is extremely important for providing PEPs to micro- and small-sized plans. TPAs and IFAs are already extremely involved in the micro- and small- sized market segment and its distribution channels and have expertise in serving plans of this size.

If the DOL concludes that certain PTEs should be limited to organizations that meet the requirements to serve as an IRA custodian or QTA, we recommend that the DOL apply those requirements narrowly to PTE exemptions where the IRA custodian and/or QTA requirement addresses specific concerns and/or offer additional PTEs where those requirements does not apply.

We recommend that the DOL offer PTEs that would allow TPAs and IFAs to serve as PPPs.

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The primary contributors to this letter are Nathan Cooley, Russell Hooker, John Nowiejski, Anthony Sapio, and Arasely Valdez. We appreciate the opportunity to provide comments and are available to provide additional information or further explain our comments. We can be reached at SECUREAct@nova401k.com.

Sincerely,

DocuSigned by:
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Karen Smith

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