Law Office of Robert J. Toth, Jr.
110 West Berry Street
Suite 1809
Fort Wayne, IN 46802

O: 260.387.6827
F: 260.449.9771
rjt@rtothlaw.com

July 20, 2020

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5665 U.S. Department of Labor
200 Constitution Avenue, NW. Washington, DC 20210

Via electronic Delivery

Re: Prohibited Transaction Exemptions for Pooled Employer Plans, Z-RIN 1210-ZA28

Our firm's unique specialty is in the design, administration and distribution of financial products and services for defined contribution retirement plans- one which combines elements of ERISA, tax law, insurance law, securities law and investment law- as well as regularly advising on the prohibited transactions issues related to these retirement plan products and services and their distribution. We have served clients, large and small, in 45 states and five different countries, and continue to represent a number of different product innovators. We note that, in particular, this firm's staff has worked on the design and administration of defined contribution Multiple Employer Plans ("MEPs") since the late 1990s, even prior to the seminal IRS MEP ruling in Revenue Procedure 2002-21.

We appreciate the Department's inquiries into the practices and markets related to MEPs and Pooled Employer Plans ("PEPs"), and provide these comments in our private capacity, not on behalf of any client.

Summary of Comment

Multiple Employer Plans (MEPs), Pooled Employer Plans (PEPs), Groups of Plans (GOPs, as otherwise described under SECURE Act Section 202) or any other sort of similar arrangement under which identifiable plan services are aggregated for unrelated employers (MEPS, PEPS, GOPS and these other such arrangements are rereferred to herein as “Aggregation Arrangements”) are all (or will be) formed to enable unrelated employers take advantage the benefits of “scale” in the provision of investments, plan administration and professional fiduciary services. Their value stretches well beyond the mere costs of the administrative services: they each have the ability to provide favorable investment asset class pricing; wider availability of non-proprietary funds; and availability of sorely needed administrative and fiduciary expertise which may simply not otherwise be available to these participating employers.

The operation of any model of Aggregation Arrangement actually involves a “grab bag” collection of the discrete legal authorities which are necessary to the operation of the particular arrangement. This is particularly true in the growing market for the provision of professional fiduciary services (often labelled as “3(16)” services) to plans, either within or without an Aggregation Arrangement. For example, successful operation of Aggregation Arrangements requires recognition of the differences between the specific “plan administrator” functions imposed by ERISA Title 1; those “plan administrator” functions imposed by ERISA Title 2; those which may be imposed by the plan document under the authority of ERISA Section 3(21); those particular non-fiduciary administrative obligations imposed as a matter of state law contractual obligations; and those “agency” sort of duties which an employer may grant to a third party in the plan operations such as the ability (under state corporate law) to take the proper corporate action to spin off from a MEP or PEP. Under a pure commercial model, these obligations are identified and allocated between the parties in the arrangement by agreement between the parties.

This means that different Aggregation Arrangements are tailored for the markets they serve, each constituting a different allocation of the mixture of services from that “grab bag” which are best suited to the parties involved.

It is in the context of the proper “allocation of services” which form the conceptual basis to our comments below. It is our view that the new PEP rules do not add any new services to the marketplace. Rather, PEPs merely reorganize existing services to be provided in a different format, with the one exception is that it now permits unrelated employers to be able to file a consolidated Form 5500. Further, we believe the Department’s issuance of guidance as to the allocation of these different authorities (consistent with in ERISA Section 3(44)(C) which requires the Department to ‘‘(i) to identify the administrative duties and other actions required to be performed by a pooled plan provider…”) is a required condition precedent to the determination of whether any prohibited transaction exemptive relief is necessary in the operation of a PEP. Further, we encourage the Department to review the fiduciary allocation protocols under 29 CFR 2509.75-5 and 8 to specifically update them for the allocation of authority by a co-sponsor under a PEP.

Comments

A. Pooled Plan Providers and MEP Sponsors

A PEP's Pooled Plan Provider ("P3") is neither a co-sponsor of a plan under ERISA Section 3(16)(B), nor an employer under ERISA Section 3(5) (unless, of course, it covers its own employees under the plan)-or even a party acting directly or indirectly in the interests of any employer. It stands in distinctly different shoes than the lead employer in an Association MEP or the PEO in the PEO MEP. As such, our comments below are limited to the P3.

The P3 is merely a service provider to the plan, providing a particular assortment of fiduciary, non- fiduciary and corporate agency services similar to those being currently provided in the market. As such, the only restriction on any party acting as such will be whether and to what extent the P3 can be compensated for the services provided to the PEP under ERISA's existing prohibited transaction rules.

Each PE, on the other hand, is classified as a co-sponsor of the plan, except as it relates to the provision of certain administrative responsibilities which are undertaken by the P3 "as otherwise identified by the DOL and Treasury." (Guidance will be necessary to explain this ambiguous requirement).

The P3 will necessarily be responsible for putting together a "package" of service providers to completely service the PEP, as it is highly unlikely that a single entity can do so. Any compensation received by the P3 will be subject to the disclosure and approval rules under the service provider exemption, 408(b)(2). This means that any number of PEP designs can be accommodated under existing ERISA rules, and the P3 will simply need to decide upon the type of operational design under it will be able to operate. The design chosen may provide a number of different compensation and service designs, for example:

- *Scenario 1.* A PEP structure may provide that all services related to the plan will be provided by the P3 for a set cost, which would be contracted with, disclosed to and approved by the PE. The P3 then could hire any service provider, including an affiliate, to provide any number of fiduciary and administrative services. There are a number of details which would otherwise apply, and this comment is provided only as a high-level example (for example, should a package include the provision of investment manager services, the P3 contract would likely include an investment management agreement), but this sort of arrangement would be possible under existing rules. Under it, the PE is the responsible plan fiduciary under 408(b)(2) for the entire package of service providers, as the PE is effectively hiring those parties-the P3 could is not "hiring itself." The P3 should be required to provide enhanced disclosures ours to the PE to enable their proper monitoring of those service providers. Note that none of the service providers retained under this arrangement could exercise their authority to increase the fiduciary's compensation.

- *Scenario 2.* The P3 could instead design the PEP so that it merely charges for its own specific responsibilities, while being delegated the authority under the arrangement to retain any other necessary service providers for which the PEP would pay. The PE would be the responsible plan fiduciary with regard to the hiring of the P3, but the P3 would then be delegated the authority of being the responsible plan fiduciary with regard to contracting with all other service providers. The PE's monitoring responsibilities under this arrangement would be significantly less than it would be under Scenario 1.

The P3 could not, in the exercise of this authority under this scenario, retain and compensate an affiliate to provide plan services, nor could it unilaterally decide to increase its services (or compensation for such services) to the plan without the disclosure to, and approval of, the PE.

The RFI requests information on whether any prohibited transaction exemption needs to be issued related to the P3's provision of services. We would recommend a modification of the regulations under 408(b)(2) to discuss the specific application of the service provider exemptions in the case of a P3 providing services to the PEs.

B. *Plan Investments*

The role the P3 will serve with regard to the plan's investments will be determined by the design of the PEP. So, for example, depending upon the manner in which the services are structured, the P3 can serve as the investment manager under a PEP as long as the PE is the responsible plan fiduciary and the manager cannot affect its own compensation by virtue of its investment decisions. On the other hand, a provider of certain pooled investment products (such as an insurance company providing variable separate accounts) could never serve as the investment fiduciary under a PEP because of the inherent nature of the separate accounts within an insurance contract under which varying compensation will likely be generated to the insurer regardless of separate account investments being chosen.

There also may be a number of securities laws complications related to the design and offering of investments under a PEP which may impact how investments are provided under the PEP.

As in any such matter, the specific facts of the investments, the manager and the nature of the investment vehicle will be determinative of whether there will be prohibited transactions.

C. Employers in the PEP

A PEP's dealing with potential prohibited transaction issues should be addressed in a manner similar to those used in investing in any other pooled investment arrangements, such as collective investment trusts. The P3, and its investment manager, will have the authority to limit the investments of the trusts in order to avoid these issues, and can be further dealt with directly in the arrangements between the P3 and the PEs.

Similarly, the same notion applies with regard to potential prohibited transaction issues related to the spin-off of non-compliant PE. Either the plan document or the arrangement between the P3 and the PE can be designed in a manner under which the PE authorizes the actions of the P3 during a spin-off in such a manner to avoid PTs.

Summary

The simple rule for PEPs and P3s is that they are capable of being designed to cover a wide range of markets and providers, limited only by the mandated services to be identified by the Department and the prohibited transaction rules. Therefore, any guidance should follow the approach taken under the Department's 408(b)(2) regulations, which are broadly structured to accommodate most any sort of allowable service. We recommend that that service provider exemption be amended to specifically address the provision of services by the P3 as a service provider, and its role as a responsible plan fiduciary.

P3s will also not be providing any service which is not being currently provided in the marketplace, and which are currently compliant with prohibited transaction exemptions. However, this circumstance may change, depending upon the rules the Department develops regarding the necessary services to be provide by a P3. It may be premature to currently provide any prohibited transaction exemption until that guidance is first developed.

Respectfully submitted,

Robert J. Toth, Jr.