

June 9, 2020

The Hon. Jeanne Klinefelter Wilson
Acting Assistant Secretary for Employee Benefits
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave, NW, Ste S-2524
Washington DC 20210

Re: Pooled Employer Plans – Relief from ERISA’s Prohibited Transaction Rules

Dear Acting Assistant Secretary Wilson:

The American Retirement Association (“ARA”) thanks you and members of your staff for meeting with us to discuss possible issues and considerations around the offering of Pooled Employer Plans (“PEPs”) and related services, and whether exemptive relief may be necessary in order to provide services to PEPs without violating ERISA’s prohibited transaction rules. Further to that conversation, we are writing to describe possible service arrangements and proposed fee structures as well as what the covered transactions would be under potential exemptive relief.

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America’s private retirement system, the American Society of Pension Professionals and Actuaries (“ASPPA”), the National Association of Plan Advisors (“NAPA”), the National Tax-Deferred Savings Association (“NTSA”), the American Society of Enrolled Actuaries (“ASEA”), and the Plan Sponsor Council of America (“PSCA”). ARA’s members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer sponsored plans. In addition, ARA has more than 26,000 individual members who provide consulting and administrative services to the sponsors of retirement plans. ARA and its underlying affiliate organizations are diverse but united in their common dedication to the success of America’s private retirement system.

We understand that the Department intends to publish a request for information (“RFI”) on PEP issues, which was recently under review at the Office of Management and Budget. While we intend to respond to the RFI, we believe that, in view of the effective date of the PEP rules being fewer than eight months away, it would be helpful for us to follow up on our meeting now rather than wait for publication of the RFI, so that the Department may begin its consideration of specific issues. We are therefore sending to you the attached outline of issues we have developed with input from ARA members. It may be that a number of these can be addressed through interpretive guidance or a regulation, whereas others may require exemptive relief. We are happy to discuss this further with you after you have had an opportunity for review.

The ARA very much appreciates the Department's commitment to expanding access to workplace retirement savings plans for America's workers. The ARA shares this goal and looks forward to working with the Department to make PEPs a viable and meaningful retirement savings vehicle. ARA would welcome the opportunity to discuss PEP issues further with you. Please feel free to contact Allison Wielobob, General Counsel, at AWielobob@USARetirement.org. Thank you for your time and consideration.

Sincerely,

/s/ Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/ Will Hansen, Esq.
Chief Government Affairs Officer
American Retirement Association

/s/ Allison Wielobob
General Counsel
American Retirement Association

Enclosure



OUTLINE OF RELIEF NEEDED FOR SERVICE PROVIDERS TO POOLED EMPLOYER PLANS

Background:

The SECURE Act, as passed in December 2019, authorizes the establishment of “Pooled Employer Plans” (“**PEPs**”), which are plans sponsored by “Pooled Plan Providers” (“**PPPs**”) that may be joined by multiple, unrelated adopting employers. These provisions take effect on January 1, 2021.

The law requires that the PPP be a named fiduciary and the plan administrator of the PEP, and be responsible for performing all administrative duties reasonably necessary to ensure that the PEP satisfies all applicable requirements of ERISA and Section 401(a) of the Internal Revenue Code of 1986, subject to Department of Labor guidance.

The SECURE Act also provides that each adopting employer retains fiduciary responsibility for the selection and monitoring of the PPP and of any other person designated as a named fiduciary of the PEP, as well as, “to the extent not delegated to another fiduciary by” the PPP and subject to ERISA Section 404(c), for the investment and management of the portion of the PEP’s assets attributable to the employees of such employer (and the beneficiaries of such employees). (See ERISA Section 3(43)(B)(iii), as amended by the SECURE Act.)

Description of Issue:

Potential PPPs and other providers of services to PEPs would like to confirm that they are able to provide services for compensation to a PEP under ERISA’s prohibited transaction rules and, to the extent there is a question, obtain exemptive relief to ensure their ability to do so. The objective would be to facilitate the provision of necessary services to the PEP, to permit the PEP to operate in a manner that best serves the interests of the PEP’s participants and beneficiaries.

Possible Service Scenarios:

Scenario 1 – PPP as Service Provider for a fee:

- The PPP serves as the plan administrator, for a fee disclosed to and approved by the adopting employer that is paid out of plan assets.
- The PPP can increase its fees through a negative consent process, with the PPP providing reasonable advance notice to the adopting employers and implementing

the change if there is no objection; otherwise, giving objecting employers a reasonable opportunity to withdraw from the plan without penalty before the change goes into effect.

Scenario 2 – PPP as Service Provider for a fee, with delegation of the provision of the services to third parties; no additional fee charged:

- The PPP serves as the plan administrator, for a fee disclosed to and approved by the adopting employers that is paid out of plan assets.
- The PPP delegates the provision of the administrative services (or certain of the administrative services) to third parties, such as recordkeeping firms, in a non-discretionary role, for no additional fee – those services are covered out of the PPP’s fees. The PPP is responsible as a fiduciary under ERISA for the selection and monitoring of these third-party service providers.
- The PPP can increase its fees through a negative consent process, providing reasonable advance notice to the adopting employers and implementing the change if there is no objection; otherwise, giving objecting employers a reasonable opportunity to withdraw from the plan without penalty before the change goes into effect. No such notice or negative consent is necessary for changes to the fees paid to the third party providers, as those fees are not paid out of plan assets.

Scenario 3 – PPP as Service Provider for a fee, with delegation of the provision of services to third parties; pass-through of third party fees:

- Same as Scenario 2, except that the fees of the third party firms are passed through to the plan participants and beneficiaries and paid out of plan assets. The PPP is responsible as a fiduciary under ERISA for the selection and monitoring of these third-party service providers and for negotiating their fees.
- Increases in the third-party service providers’ fees can be authorized by the PPP in its role as plan administrator/named fiduciary, given that it is independent of, and unrelated to, those service providers.
- The PPP can increase its fees through a negative consent process, as described in Scenarios 1 and 2.

Scenario 4 – PPP as Service Provider and 3(38) Investment Manager

- The PPP serves as the plan administrator, for a fee disclosed to and approved by the adopting employers.

- The PPP, as named fiduciary of the PEP, retains itself as the 3(38) investment manager of the PEP responsible for fund selection. It is compensated for the 3(38) investment management services through an additional fee paid out of plan assets, which is disclosed to and approved by the adopting employers.
- The PPP can increase its plan administrative and/or 3(38) investment manager fees through a negative consent process, providing reasonable advance notice to the adopting employers and implementing the change if there is no objection; otherwise, giving objecting employers a reasonable opportunity to withdraw from the plan without penalty before the change goes into effect.

Scenario 5 – PPP as Service Provider, 3(38) Investment Manager, and provider of Managed Account Services

- Same as Scenario 4, with the added feature that either the PPP, or an affiliate of the PPP, provides managed account services. For a PEP participant who selects to use the service, the provider would allocate the participant’s account assets among the investment options available for investment under the PEP based on the participant’s age, target retirement date, investment objectives and other personal information, analogous to the “investment management services” described in the Qualified Default Investment Alternatives regulation (29 C.F.R. 2550.404c-5(e)(4)(iii)).
- The adopting employers would approve the availability to their employees of the managed account services, and the fees to be charged for those services, at the time they adopt the PEP or otherwise approve the PPP’s services and fees.
- The managed account service provider would only be paid to the extent that the PEP participants whose employers approved the service choose to use the service.
- The PPP or managed account service provider can increase its managed account services fees through a negative consent process, providing reasonable advance notice to the adopting employers and implementing the change if there is no objection; otherwise, giving objecting employers a reasonable opportunity to terminate the managed account service without penalty for their employees before the change goes into effect.

Additional Note About 3(38) Investment Manager Services

- The PEP may give adopting employers the ability to select the investment options to be made available to their employees from a larger fund menu available under the plan, rather than impose a “one size fits all” fund list on all adopting employers.

- The 3(38) Investment Manager would be responsible for selecting and monitoring the larger fund menu, and making changes to that menu when appropriate.
- The adopting employers may make their investment option selections with advice from the 3(38) Investment Manager (assuming no proprietary investment options of the 3(38) Investment Manager are being used or, if they are, that such advice is being provided under the terms of an available exemption, such as PTE 77-4), or may rely on advice from independent investment consultants or other advice providers outside the PEP.
- The 3(38) Investment Manager may create investment options under the plan through selecting third-party investment managers to manage the assets of the option, or investing the assets of the option in third-party investment funds, determining the allocation within the investment option among the third-party managers or funds. The effect would be to create in-plan diversified investment funds. The Manager would not receive any additional fee for these services, as this service would be provided as part of its fiduciary role of establishing a line-up of PEP investments.

Additional Note About PPP Fees

- The intent is that the fees would not exceed reasonable compensation for the particular services, and would not permit the PPP to use its discretion or factors under its control to unilaterally increase the rates of its fees without going through the negative consent process described above. For example, the fees for plan administrative services may be a percentage of plan assets or a per-participant charge, or a combination of the two; the fees for 3(38) Investment Manager services are likely to be a percentage of plan assets.

Analysis

The provision of services by the PPP, and by any third-party service providers, should be exempt from the prohibited transaction provisions of ERISA Section 406(a) through the exemption for services under ERISA Section 408(b)(2).

According to Department of Labor regulations, ERISA Section 408(b)(2) does not provide exemptive relief from the fiduciary self-dealing and conflict of interest prohibitions of ERISA Section 406(b).

The question is whether a PPP's decision to offer its services for fees it sets itself, or to select itself to provide additional services to the PEP for additional fees, would constitute fiduciary self-dealing in violation of ERISA Section 406(b)(1) for which no exemptive relief is currently available. Specifically:

- Does the fact that the PPP is a named fiduciary and plan administrator affect its ability to avoid potential ERISA Section 406(b) issues in charging fees for its services to the PEP, by causing all (or most of) the activities it performs in connection with the PEP to be treated as acts in a fiduciary capacity under ERISA? Are there any activities of the PPP that could be treated as “settlor” in nature?
- Does the role of the adopting employers in approving the PPP’s fees following disclosure address the fiduciary self-dealing issue with regard to the PPP’s compensation (including the compensation of any affiliates of the PPP) and, if so, can it do so only for the PPP’s compensation for plan administrator services, or can it also do so for the PPP’s compensation for its 3(38) Investment Manager and managed account services? Is there an argument that, because the employers retain fiduciary oversight responsibility of the PPP and other service providers for the plan under the statute, the fees are being approved by a group of independent fiduciaries where each fiduciary has its own responsibility to make sure the fees are reasonable?
- Is the answer to the question about the ability of the adopting employers to alleviate the PPP’s potential conflicts affected by the PPP’s role in marketing the PEP to potential adopting employers, such that, if the PPP is potentially considered an “investment advice” fiduciary in marketing the PEP (given that the PEP would include a selection of investment options), it would be more difficult to view approval by the adopting employers as sufficient to avoid an ERISA Section 406(b) issue?
- What is the impact of the language in the SECURE Act providing that each adopting employer retains fiduciary responsibility, “to the extent not otherwise delegated to another fiduciary by the pooled plan provider and subject to the provisions of section 404(c),” for the investment and management of the portion of the PEP’s assets attributable to the employees of such employer and their beneficiaries? Does this mean that if the PPP delegates investment option selection and monitoring responsibility to a third party (or possibly to an affiliate), including as a 3(38) Investment Manager, the adopting employers are no longer responsible? Or would they (as the SECURE Act seems to imply) retain oversight responsibility of the 3(38) Investment Manager? Does this depend on the structure of the particular PEP?
- If a participant leaves his/her employer, is the 3(38) Investment Manager (whether or not affiliated with the PPP) able to give advice on rollover alternatives? Should this be addressed in separate exemptive relief?

Assuming there are potential fiduciary self-dealing issues, can these be addressed by exemptive relief that requires:

- Full disclosure to the adopting employers of the fees charged by the PPP and its affiliates for services to the PEP, including (to the extent applicable) 3(38) Investment Manager services and managed account services, consistent with the disclosure requirements under the ERISA Section 408(b)(2) regulations;
- Approval of those fees at the time an adopting employer adopts the PEP; and
- Advance notice to each adopting employer of any increases in fees that may go into effect by “negative consent,” with the effective date of the increase not sooner than 30 days after such notice has been provided; provided that, if an adopting employer objects to the fee increase, the adopting employer must be given at least 60 days to terminate its participation in the plan (unless it is possible to immediately terminate particular service, if that can be done without terminating plan participation) without penalty and without being charged the increased fees, and the PPP must cooperate in good faith to facilitate the adopting employer’s termination.

Ultimately, the goal would be to ensure that the PPP – through itself, its affiliates and/or third parties – is able to provide the services necessary for the PEP to meet its objective of offering a meaningful retirement savings vehicle to the employees of the adopting employers, for reasonable compensation to the PPP and other service providers, without undue limitations that could affect the viability of the PEP alternative or, even if the PEP is still viable, the scope and quality of the services and investment options available to and through the PEP.