U.S. Department of Labor

Employee Benefits Security Administration
Washington, D.C. 20210

September 7, 2022

William E. Heinbokel
Director of Fidelity and Regulatory Compliance
The Surety & Fidelity Association of America
1140 19th Street NW, Suite 500
Washington, DC 20036

Dear Mr. Heinbokel:

This letter responds to your request on behalf of the Surety & Fidelity Association of America (SFAA) for information regarding the bonding requirements under the Employee Retirement Income Security Act of 1974, as amended (ERISA) applicable to a pooled employer plan (PEP). You asked about the application of ERISA's bonding requirements to employees of employers participating in a PEP who assist in collecting and transmitting participant contributions from their employers to the PEP.

The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) amended ERISA to include provisions in ERISA sections 3(43) and 3(44) authorizing PEPs sponsored by pooled plan providers as a type of multiple employer plan.[1] ERISA section 3(44)(A)(iv) provides that the pooled plan provider of a PEP is responsible for ensuring that "all persons who handle assets of, or who are fiduciaries of, the [PEP] are bonded in accordance with [section 412 of ERISA]."[2] The SECURE Act also amended ERISA section 412 to confirm that the bonding requirements of that section apply to PEPs, except that the SECURE Act establishes $1,000,000 as the maximum bond amount as compared to $500,000 for other types of plans that do not hold employer securities.

The Department does not view the SECURE Act as expanding the bonding requirements for PEPs to include persons who handle "assets" of the PEP or who are fiduciaries of the PEP, but do not "handle funds or other property" of the PEP. Rather, in the Department's view, the appropriate reading of the SECURE Act provision is that the normal section 412 rules that govern the bonding requirements under ERISA should apply to PEPs.[3] For example, under ERISA section 412 the required amount of bonding coverage is measured by the "amount of plan funds or other property" handled by a person. A person is required to be bonded in an amount equal to 10% of the plan funds or other property the person

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[1] The SECURE Act was enacted as Division O of the Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94) (December 20, 2019).

[2] This provision parallels ERISA section 412(b), which provides, among other things, that "it shall be unlawful for any plan official of such plan, or any other person having authority to direct the performance of such functions [receive, handle, disburse, or otherwise exercise custody or control of any of the funds or other property of any employee benefit plan], to permit such functions, or any of them, to be performed by any plan official, with respect to whom the requirements of subsection (a) [of ERISA section 412] have not been met."

[3] The Department expressed this conclusion in the preamble to the final rule establishing the Form PR for pooled plan providers to satisfy their SECURE Act registration requirements. *See* 85 *Fed. Reg.* 72934, 72936, n. 5 (Nov. 16, 2020).

handles, subject to applicable $500,000 or $1,000,000 maximums. Accordingly, requiring persons dealing with PEP assets and fiduciaries of PEPs to be bonded without regard to whether they "handle plan funds or other property" would result in a meaningless requirement to be bonded for a zero amount in cases in which the person did not handle plan funds or other property.

The Department's generally applicable bonding regulations address the point at which contributions to a plan become "funds or other property" of the plan for purposes of the bonding requirements. The regulations state:

> Where the plan administrator is a board of trustees, person or body other than the employer . . . establishing the plan, a contribution to the plan from any source shall become "funds or other property" of the plan at the time it is received by the plan administrator. Employee contributions collected by an employer and later turned over to the plan administrator would not become "funds or other property" of the plan until receipt by the plan administrator.

29 CFR 2580.412-5(a).[4] Under ERISA section 3(44)(A)(i), a pooled plan provider must be designated as the plan administrator of the pooled employer plan. As such, in the Department's view, employees of employers participating in a PEP who assist in collecting and transmitting participant contributions to the PEP would not by reason of such conduct be required to be bonded under section 412 because they would not be handling "plan funds or other property."

The Department cautions that there may be circumstances in which participant contributions are not timely transmitted to the PEP and become "plan assets" in the hands of the employer.[5] The section 412 bonding provisions do not relieve plan sponsors and fiduciaries of their obligations when dealing with plan assets to ensure that participant contributions are transmitted to the plan in a timely manner and applied only to the payment of benefits and reasonable expenses of administering the plan. Use of participant contributions for any other purpose may result in civil sanctions under Title I of ERISA and criminal sanctions under 18 U.S.C. 664. *See U.S. v. Grizzle*, 933 F.2d 943 (11th Cir. 1991), *cert. denied,* 502 U.S. 897 (1991).

Your letter included a statement that under your "interpretation of the SECURE Act, SFAA believes the PEP Sponsor would need to purchase an ERISA Dishonesty Bond protecting the plan against Fraud

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[4] In situations in which the employer establishing the plan is the plan administrator, the regulations under ERISA section 412 provide that "contributions made by withholding from employees' salaries shall not be considered 'funds or other property' of the plan for purposes of the bonding provisions so long as they are retained in and not segregated in any way from the general assets of the withholding employer." 29 CFR 2580.412-5(b)(1). The regulations further explain that in such cases "[c]ontributions made to a plan by such employer or employee organization and contributions made by withholdings from employees' salaries would normally become 'funds or other property' of the plan if and when they are taken out of the general assets of the employer or employee organization and placed in a special bank account or investment account; or identified on a separate set of books and records; or paid over to a corporate trustee or used to purchase benefits from an insurance carrier or service or other organization; or otherwise segregated, paid out or used for plan purposes, whichever shall occur first. Thus, if a plan is operated by a corporate trustee and no segregation from general assets is made of monies to be turned over to the corporate trustee prior to the actual transmittal of such monies, the contribution represented in the transmission becomes 'funds or other property' of the plan at the time of receipt by the corporate trustee." 29 CFR 2580.412-5(b)(2).

[5] *See* 29 CFR 2510.3-102.

and Dishonesty committed by a trustee, officer, administrator, or manager (except an independent contractor administrator or manager) of the plan or of the sponsor organization to satisfy the ERISA bonding requirement." Section 412(a) of ERISA provides, subject to certain exceptions, that "every fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan (hereinafter in this section referred to as 'plan official') shall be bonded as provided in this section . . . ."[6] The bonding requirements under section 412 of ERISA are not limited to "trustees, officers, administrators or managers" of a plan and there is no general exception for independent contractor administrators or managers. Every person who "*handles funds or other property*" of an employee benefit plan within the meaning of 29 CFR 2580.412-6 (i.e., a plan official) is required to be covered by a bond meeting the requirements of ERISA section 412 and the Department's regulations unless the person is eligible for one of the exemptions in section 412 for certain banks, insurance companies, and registered brokers and dealers, or one of the exemptions granted by the Department in its regulations. Plan officials required to be bonded "will usually include the plan administrator and those officers and employees of the plan or plan sponsor who handle plan funds by virtue of their duties relating to the receipt, safekeeping and disbursement of funds." FAB 2008–04, Q-5. However, "plan officials may also include other persons, such as service providers, whose duties and functions involve access to plan funds or decision-making authority that can give rise to a risk of loss through fraud or dishonesty." *Id.* Accordingly, the pooled plan provider would be required to ensure that an independent contractor administrator or manager who handles plan funds or other property is properly bonded, which could include being covered by the bond of the PEP or by a separate bond obtained by the independent contractor administrator or manager that names the plan as an insured and meets the other requirements for bonds under ERISA section 412.

We hope this information is of assistance to you.

Sincerely,

Eric Berger
Chief, Division of Coverage, Reporting and Disclosure
Office of Regulations and Interpretations

[6] *See* Field Assistance Bulletin (FAB) 2008-04 for a general description of statutory and regulatory requirements for bonding under ERISA section 412, including: Q12 through Q15 on "Exemptions from the Bonding Requirements;" Q17 on "Funds or other Property;" and Q18 through Q21 for "Handling Funds or other Property."