



AMERICAN BENEFITS COUNCIL

September 30, 2020

Submitted electronically via regulations.gov

U.S. Department of Labor
Employee Benefits Security Administration
Office of Regulations and Interpretations
Room N-5655
200 Constitution Avenue NW
Washington, DC 2021

Re: Proposed Registration Requirements for Pooled Plan Providers (RIN 1210-AB94)

Dear Sir or Madam:

The American Benefits Council (“the Council”) appreciates the opportunity to comment on the Department of Labor’s (DOL) proposal that would establish new registration requirements for pooled plan providers (PPPs) that operate pooled employer plans (PEPs). As discussed below, the Council offers three comments on the PPP registration proposal:

- (1) DOL should eliminate certain proposed reporting requirements that will create unnecessary costs for PPPs.
- (2) DOL should provide relief from the initial PPP registration deadline for PPPs that have already begun, or will soon begin, their operations.
- (3) DOL should remove “publicly marketing services” as a PPP from the types of activities that will cause a business to be treated as “beginning operations” as a PPP.

The American Benefits Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include

over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

I. PPP REGISTRATION REQUIREMENTS SHOULD NOT CREATE UNNECESSARY COSTS

Through Section 101 of the Setting Every Community Up for Retirement Enhancement (“SECURE”) Act, Congress sought to promote retirement plan coverage for American workers by creating a new type of multiple employer plan (MEP) called a PEP. By making it easier for more employers to join a MEP through a PEP, the SECURE Act’s PEP provision is intended to enable the employees of small employers to tap into the same economies of scale, efficiencies, and cost savings that already benefit the employees of large employers.

In recent years, the efficiencies and cost savings associated with MEPs have similarly been pursued by the White House and DOL under Democrat and Republican administrations. For example, in the summer of 2018, the White House Executive Order on Strengthening Retirement Security in America directed DOL to expand the circumstances under which small and mid-sized businesses could participate in a MEP, specifically noting that MEPs are an efficient way to reduce the administrative costs of establishing and maintaining retirement plans.¹ Again, in 2019, when DOL finalized its Association Retirement Plan rule in fulfillment of the president’s order, DOL supported its regulatory changes by pointing to the cost savings that can be achieved when small employers participate in a MEP.² These cost savings help everyone, but they most especially help the smallest businesses and the mobile gig workers who may not be able to afford a plan without the full economies of scale offered by a PEP.

It is with these intended efficiencies and cost savings in mind that the Council writes to express its concerns with the scope and breadth of the information that PPPs would be compelled to report under DOL’s proposed registration requirements. While the Council believes that it is appropriate for DOL to collect contact and identifying information on PPPs as part of the registration process, the Council believes that the other proposed reporting elements go beyond what is necessary. For example, the Council is concerned about the costs that will be incurred for a PPP to report, on an

¹ Executive Order 13847, 83 Fed. Reg. 45321 (September 6, 2018).

² See e.g., 84 Fed. Reg. 37508, 37510 (July 31, 2019) (“MEPs have the potential to broaden the availability of workplace retirement plans, especially among small employers, because they enable different businesses to band together and adopt a single retirement plan. Pooling resources in this way can reduce costs and encourage plan formation. For example, investment companies often charge lower fund fees for plans with greater asset accumulations. And because MEPs facilitate the pooling of plan participants and assets in one large plan, rather than many small plans, they enable small businesses to give their employees access to the same low-cost funds as large employers offer.”).

ongoing basis, significant changes in the corporate or business structure of the PPP or an affiliate. Any potential benefits that might result from this reporting requirement, and the proposed reporting elements that go beyond the PPP's basic identifying and contact information, are outweighed by the costs and administrative burdens that they will create.

The level of reporting that would be required under DOL's proposed registration requirements is also concerning because some of the proposed reporting elements are duplicative of other ERISA-required reporting and disclosure regimes, such as the Form 5500 and disclosures under ERISA Section 408(b)(2). Further, these additional disclosures are being proposed without specifically identifying how this additional reporting would help DOL and participating employers monitor and evaluate PPPs. The proposal does not, for example, explain why a PEP service provider with 1,000 participating employers should be required to report this information, when a similarly situated service provider administering 1,000 single-employer plans is not required to report the same information. In fact, the scope of the information that would be collected under the proposed PPP registration rules is surprising given recent DOL statements indicating that it "is not aware of direct information indicating that the risk for fraud and abuse is greater for MEPs than for other defined contribution pension plans."³

Recommendation No. 1

At this stage in the development of the PEP marketplace, DOL should not be requiring PPP registration statements to report any information other than the PPP's basic contact and identifying information. The level of detail contemplated by the elements that would be required under DOL's registration proposal would unnecessarily create administrative burdens and costs that would not be justified by the potential benefits of their collection. Additionally, to the extent that some of that additional information will be relevant to DOL and employer oversight, some of the proposed registration reporting requirements duplicate information that will already be disclosed in the Form 5500, the PPP's 408(b)(2) disclosure, and filings made with other regulators - *e.g.*, the Securities and Exchange Commission's Forms BD, IA, and TA. Given the additional costs associated DOL's proposed reporting requirements, DOL should not create new reporting obligations for information that can be collected from other publicly available filings. Accordingly, in order to prevent any new registration requirements from eroding the efficiencies and cost savings that Congress intended when it passed the SECURE Act's PEP provision, DOL should remove all administrative and reporting obligations that go beyond the PPP's basic identifying and contact information from its final PPP registration rules.

³ 84 Fed. Reg. 37508, 37527 (July 31, 2019).

II. DEADLINE FOR INITIAL PPP REGISTRATION

Under the proposal, a PPP would be required to file an initial registration “no earlier than 90 days and no later than 30 days before beginning operations as a pooled plan provider.” Further, according to the proposal, a PPP begins operations when it publicly markets its services or publicly offers a PEP.

While the Council believes that this initial PPP registration deadline will be workable for PPPs that begin operations after DOL finalizes its PPP registration requirements, this proposed deadline for the initial PPP registration is simply unworkable for firms that have already begun, or will soon begin, operations. For some of those firms, which began their marketing efforts before DOL published its proposal, it will be impossible to register as a PPP at least 30 days before they began operations. Additionally, even if the rule finalization process moves forward with extreme speed, the timing rules would preclude PEP marketing until at least mid-November or more likely mid-December. For business operations due to begin on January 1, 2021, that type of restriction on marketing would effectively delay the statutory effective date by making full implementation on January 1, 2021 unrealistic.

Recommendation No. 2

To address this unworkable registration deadline, the Council recommends that DOL clarify that a PPP will not fail to timely file its initial registration statement if it is filed not later than 180 days after the final rule is published in the Federal Register. Firms have already committed to making PEPs available to employers beginning on January 1, 2021. To meet other regulatory obligations relevant to these plans, PPPs will soon be required to deliver annual notices, such as the notices relevant to a plan’s automatic enrollment feature and qualified default investment alternative, to future PEP participants. DOL’s proposed registration deadline should not unnecessarily disrupt these plans. Further, if the unworkable registration deadline described in the proposal is not corrected, in the case of employers that already offer a plan but intend to join a PEP as of January 1, 2021, any delays created by DOL’s registration deadline could unnecessarily require these employers’ existing plans to file a Form 5500 for the short period that such single-employer plans would exist at the beginning of 2021.

Recommendation No. 3

We also recommend that DOL remove “publicly marketing services” as a PPP from the types of activities that will cause a business to be treated as “beginning operations”

as a PPP. Because a PPP does not exist, under the relevant statutes, separate from the PEPs it serves, DOL should only require PPP registration in advance of the actual operation of a PEP. Further, the proposal does not adequately define what it means for a firm to publicly market its services, as opposed to other related activities that typically occur in advance of a plan's establishment and operation. Accordingly, DOL should not tie its registration deadlines to an ambiguous notion of what constitutes "public marketing." Instead, registration should only be tied to the PPP's offering of a PEP - i.e., when the PEP actually begins operations.

Thank you for considering our views.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jan Jacobson
Senior Counsel, Retirement Policy