



Submitted Electronically

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

**RE: Proposed Rule for Registration Requirements for Pooled Plan Providers
U.S. Department of Labor - Employee Benefits Security Administration (RIN 1210-AB94)**

Dear Sir or Madam:

TAG Resources, LLC (“TAG”) is one of the country’s leading providers of “aggregated plan services,” under which we offer programs which provide the start-up and small plan markets the advantages of scale which is otherwise unavailable to them. These programs include Multiple Employer Plans, for those organizations meeting the definition of “Employer” Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans, 84 FR 37508 (July 31, 2019), programs we refer to as “Multiple Employer Aggregation Programs,” (or “MEAPs”), which are designed to mimic the most favorable aspects of multiple employer plans (“MEPs”) and, Pooled Employer Plans following enactment of The Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019, Pub.L. 116–94, (“the Act”).

Jodi L. Green, Esq. is an ERISA attorney and partner at Tatum Hillman & Powell, LLP. She worked at the Employee Benefits Security Administration (EBSA) of the U.S. Department of Labor (the “Department”) from 2007 to 2018, where she led investigations of qualified ERISA plans, including “open” and “closed” multiple employer plans.

Pursuant to the Notice of Proposed Rulemaking (NPRM) on Pooled Plan Provider Registration by the Department appearing in 85 FR 54288 (September 1, 2020), we appreciate the opportunity to contribute commentary on the Department’s request for feedback about the information required from pooled plan provider (“PPP”) registrants and their pooled employer plans (“PEPs”) in the proposed Form PR.

Background

While the SECURE Act requires PPPs to register as PEP providers, the SECURE Act left discretion to the Department to establish content requirements for the registrations. The Department states that it developed the registration form, the Form PR, to focus “on information needed by the agencies to identify, contact, and engage in timely oversight of pooled plan providers, as well as on the information that the Department could post on its website that would provide employers considering participating in a pooled employer plan, participating employers, covered employees, and other interested stakeholders the ability to identify, contact, and do some due diligence on pooled plan providers.”

The Department predicts that there will be over 3,200 new registered providers. New providers recognize the robust marketplace for small employers who would like to reduce administrative costs and increase investment opportunities as can be offered by PEPs. The high number of estimated registrants creates a competitive marketplace with more affordable opportunities for all participating employers and their participants.

We appreciate that the Department developed a quick registration process, the Form PR, that also meets the registration requirements under both the IRC and Title I of ERISA. The Department proposes publishing information entered in the Form PR on the Department’s website as a tool for participating employers and participants to monitor PPPs or survey and select new providers. In addition to alerting employers and participants about new PPPs and PEP opportunities, this public information could be used as data in marketing research. The proposed Form PR is a database of information about competing PPPs’ business practices, ongoing or past legal proceedings, fraud and dishonesty claims, and corporate insolvencies and restructurings. The Form PR will also be a tool for service providers to assess and compare one another’s business practices to improve their competitive products.

The Department anticipates that most initial PPP registrants will comprise of recordkeepers, plan administrators, and financial service companies. The SECURE Act does not restrict who can act as a PPP. As the registration process itself serves as the sole requirement for persons who choose to enter the PEP market as a PPP, the anticipation is that enrollment will be high and oversight from the Department, the Treasury and the IRS, will be necessary.

We agree with the Department’s initial and supplemental Form PR registration requirements that examine each PPPs structure, marketing strategies, and civil and criminal legal history prior to the PPPs’ start of operations. The SECURE Act specifies that the Secretary will perform audits, examinations, and investigations of PPPs to carry out the Act’s provisions, and the Act contemplates that the Form PR will become an additional source for regulatory agencies to create targeting tools to identify high-risk PPPs.

Without hindering the Department’s oversight of PPPs, and without stifling the PEP’s participating employers and participants’ due diligence research, we request that the Department re-evaluate the scope of information in the Form PR made available to the public (“Concern 1”). We also ask that the Department provides additional guidance for interested and participating employers, participants, and providers who use the Form PR to conduct their fiduciary responsibilities (“Concern 2”).

Concern 1: Form PR Information that is Accessible to the Public

The Proposed Rule intends to make all of the Form PR’s information available to the public and certain information accessible on the Department’s website. We support the Department’s objective to provide regulatory agencies, fiduciaries, and other interested parties with “sufficient information” on persons acting as PPPs, including the PPPs’ officers, directors, employees, and advisors to the PEPs’ investments. Creating full transparency of business operations and employees’ criminal and civil legal history, while generally advantageous, can cause unintended consequences.

I. Disclosing Ongoing Legal Proceedings

The proposed Form PR’s questions 5a¹, 8e², and 8g³ require information about “ongoing” legal proceedings, “the initiation” of administrative or enforcement actions, and “filings” of criminal “charges,” respectively.⁴ We support the Department’s access to this information in its oversight activities. Still, we are concerned that responses to these questions will be misleading to the general public, who has limited access to learning more about the particular events reported in the Form PR.

A. Burdens to Participating Employers and Interested Employers

A publicly accessible ERISA reporting and disclosure form, like the Form PR, is an additional source and tool for fiduciaries to monitor their providers and plan investments. An additional fiduciary tool can create an additional compliance expectation, analogous to adding another checkbox in the prudent fiduciary’s checklist. This, in turn, adds another checkbox in the plaintiff attorney’s checklist for plan asset mismanagement.

¹ Question 5a states in pertinent part: “Are there any ongoing criminal, civil, or administrative proceedings in any court or administrative tribunal by the federal or state government or other regulatory authority against the pool plan provider, or any officer, director, or employee of the pool plan provider related to the provisions of services to, operation of, or investments of any employee benefit plan?”

² Question 8e states in pertinent part: “Received written notice of the initiation of any administrative or enforcement action in any court or administrative tribunal by any federal or state governmental agency or other regulatory authority, related to the provision of services to, operation of, or investments of any pooled employer plan or other employee benefit plan, against the pool plan provider, or any officer, director, or employee of the pooled plan provider.”

³ Question 8g states in pertinent part: “Received written notice of a finding by a federal or state court or governmental agency of fraud or dishonesty related to the provision of services to, operation of, or investments of any pooled employer plan or other employee benefit plan against the pooled plan provider, or any officer, director, or employee of the pooled plan provider.”

⁴ For purposes of this letter and without further guidance, we assume that questions 8e and 8g require information about legal proceedings prior to their binding rulings.

Participating employers who utilize the Form PR for their fiduciary research can be deterred from engaging with PPPs who disclose their involvement in a legal action or a bankruptcy application. While it is not unreasonable for employers to use this information in their decision-making process, the Form PR does not clarify its expectations for how participating employers should interpret and monitor the “ongoing” legal proceedings or “initiation of bankruptcies,” of which information about these reportable events might only be accessible in supplemental Form PR filings or search engines requiring a fee.

B. Burdens to Participating Pooled Providers

Burdens associated with the proposed Form PR include increased reporting responsibilities and heightened monitoring duties for PPPs. A registrant must supplement the Form PR promptly after they receive notice of any pending legal actions listed in questions 5a, 8e, and 8g. The registrant must submit an additional supplemental Form PR if there are any changes to the legal action’s parties or the court or tribunal’s location. Then, the registrant must file a third or fourth supplemental filing once the “ongoing” proceeding results in a “conviction” or another binding ruling.

Additionally, the robust PEP marketplace creates competitors and other information seekers who will quote and publish their own viewpoints about PPPs’ responses in the Form PR. Once made public, misleading information about legal proceedings, bankruptcies, or fiduciary liability settlements breed negative marketing campaigns most injurious to start-ups and small firms with little liquid cash or fewer resources to respond. We are concerned that these PPPs will accept the penalties of late or incomplete Form PR filings to prevent third-party reporting of misleading information and negative marketing campaigns that might stigmatize the PEPs or expose them to irreparable harm.

II. Disclosing Fiduciary Liability Settlements

The Proposed Rule asks for commentary on expanding the disclosure of “ongoing criminal, civil, or administrative proceedings,” for instance to include, “fiduciary liability settlements against the Department or the PBGC [Pension Benefit Guaranty Corporation].” We are concerned that requiring PPPs to report information about settlements or other in progress legal proceedings may be misleading and injurious to providers and participating employers for the same reasons described in section I of this letter.

Moreover, a Department or PBGC targeted case, an ERISA or an IRC correction, or a settlement should not be interpreted as a finding or an admission of guilt. The circumstances surrounding why the Department opens investigations are based on varied and often unique circumstances, and a case opening does not imply wrongdoing. Likewise, the closing of a case with corrected ERISA issues is not an absolute conviction of misconduct. Subjects of investigations often settle or “correct” an alleged fiduciary violation to avoid high costs of litigation. Formally publishing these settlements, especially as it concerns individuals or small start-up businesses whose reputations and earnings are still growing, can be devastating when the information published can unduly scare and mislead employers and their participants who are not well versed in the Department’s enforcement actions and the relevant law. Moreover, the costs associated with a question 8e “bankruptcy” or “insolvency” stigma can deter PEP providers from timely seeking financial aid or cooperating with the Department’s REACT program.

Concern 2: Additional Guidance is Necessary

The Secure Act grants the Department with discretion to issue guidance. The Department states that the Form PR offers “immediate access to information for monitoring purposes and enables the agencies to monitor how this new market develops and assesses whether further guidance is needed.”

We request the following guidance from the Department to assist participating employers and PPPs in meeting their compliance expectations and reducing their fiduciary liability.

- **Guidance for participating employers about using the Form PR to conduct due diligence reviews.** The proposed Form PR’s instructions appear to have been developed primarily for ERISA industry practitioners. We encourage the Department to prepare additional instructions and disclaimers specific to participating employers who will be reviewing the Form PR as a primary tool to make fiduciary decisions. For example, the instructions could define an “ongoing” proceeding, and the disclaimer may reference the due process right of “innocent until proven guilty.” We believe that if the Department provides this

guidance, then participating employers will be less likely to make incorrect assumptions or feel burdened to act quickly upon reviewing possibly unfavorable information.

- **Guidance for PPPs to monitor civil cases, criminal cases, and fraud and dishonesty claims relevant to the Form PR's proposed questions.** We request that the Department offer procedural "safe harbors," or a non-discretionary method to monitor for past, in progress, or potentially reportable events. We also request guidance that describes the Form PR's reporting expectations as the "charges" develop to "convictions" or other conclusions.
- **Guidance in preparation for the Departments' PEP-related investigations.** The regulated industry would benefit from additional advice about the Department's compliance objectives and what information the Department would request in an investigation of a PEP. Without the Department's guidance, investigations are challenging and costly for new businesses that are developing procedures to record and store data (that the Department may expect to be immediately accessible during its investigations as evidence of compliance).
- **Guidance for PPPs on documenting and proving compliance when submitting truthful and timely Form PR disclosures.** The reporting requirements in the Form PR require background information about employees' criminal and civil legal history. As such, providers may institute an employee monitoring process that could include information on employment history, civil and criminal activity, and background searches. We feel that the Department must issue guidance on how often this information should be updated to meet the Form PR's reporting requirements. This guidance would provide clarity to the types of employment agreements or release forms necessary to collect information on their employees' criminal backgrounds.

In Conclusion

In the evolving PEP marketplace, we urge the Department to consider the burdens, costs, and unintended consequences of providing information in the Form PR to the public and to consider whether the Department should share *all* the disclosed information with the public to accomplish the objectives of the SECURE Act.

We request that the Department provides guidance that (1) describes acceptable procedures for fiduciaries to conduct their due diligence and monitoring responsibilities using the Form PR, and (2) describes how the regulated industry should maintain and keep current the information reported on the Form PR.

We thank the Department for the opportunity to respond to the NPRM. We welcome the opportunity to answer questions regarding the content of this letter.

Sincerely,



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