



Invested in America

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July 20, 2020

Assistant Secretary Jeanne Wilson
Employee Benefits Security Administration
Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Z-RIN 1210-ZA28

Dear Secretary Wilson:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to respond to the Department of Labor’s (the “Department”) request for information with regard to the expansion of retirement plan options through pooled employer plans (PEPs) and multiple employer plans (MEPs). We strongly support the Department moving this issue forward by working on a prohibited transaction exemption that would expand the availability of these plans for small employers, and provide a wide variety of providers from which to choose.

Our members are also very interested in the other guidance that the Department is required to provide with regard to PEPs/MEPs, including the Pooled Plan Provider (“PPP”) registration requirements, the Form 5500 requirements, PEP audit requirements and other important issues. Many potential providers are unwilling to commit to the resources required to offer these programs without that additional guidance in place. Accordingly, we urge the Department to propose guidance as soon as possible so that they can have an opportunity to review the proposals and comment on them before they become final.²

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² In addition, the Treasury/IRS should move forward with regard to its proposal with regard to MEPs and the Unified Plan Rule. A proposal was published July 3 2019, 84 FR 31777, with final comments submitted in October 2019.

PEPs and MEPs Represent a Critical Opportunity to Expand Coverage

Establishing a robust marketplace for PEPs and MEPs will provide a significant potential to expand coverage for individuals who work for small businesses. By allowing financial institutions that have substantial expertise in these types of retirement arrangements to participate in this market, the Department has an opportunity to significantly increase retirement plan coverage while bringing administrative and economic efficiencies to small businesses that wish to provide much-needed retirement benefits to their employees..

Small businesses indicate that offering their employees a retirement plan as second in importance only to offering them health insurance.³ However, too many businesses—and, in particular, small businesses—face significant barriers to establishing and maintaining retirement plans for their employees. According to a GAO report, 67% of individuals who worked for firms with 50 or fewer workers do not have access to an employer-sponsored retirement plan.⁴ Further, individuals in the lower income quartile were less likely to work for an employer that offered a retirement plan.⁵

Smaller employers often cite the following reasons for not establishing a retirement plan:

- the costs of setting up a plan;
- the confusing regulatory landscape, including the complicated and confusing compliance and administration requirements; and
- the legal risks inherent in sponsoring a plan, including the risk of expensive, disruptive and time-consuming litigation.

Allowing employers to join a pooled arrangement mitigates these issues by providing the benefits of economies of scale, while outsourcing many of the legal and compliance risks to experts. The administrative chores that small employers see as barriers to maintaining a plan will be shouldered by the pooled plan provider, as will navigation of the legal requirements, both under the Code and under ERISA. Accordingly, we urge the Department to expand the pool of potential providers to include a diverse field of entrants to make it easier for small business to engage.

A New Prohibited Transaction Exemption (“PTE”) Would Expand the Pool of Available Service Providers

ERISA already provides a number of statutory and class exemptions will make it possible for many financial institutions to offer these programs. However, we believe that the Department’s adding an appropriately broad MEP/PEP –specific class exemption that contains workable

³ Pew Charitable Trusts: <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/09/business-owners-perspectives-on-workplace-retirement-plans-and-state-proposals-to-boost-savings>

⁴ GAO Report to Congress: The Nation’s Retirement System, October 2017, GAO-18-111SP (Figure 2.2): <https://www.gao.gov/assets/690/687797.pdf>

⁵ Id, Figure 2.4

conditions can expand the number of providers able to offer these programs so that there will be a robust range of banks, recordkeepers, broker dealers, mutual fund providers, and insurers willing to offer these programs.⁶

In crafting a new MEP/PEP class exemption, we hope that the Department will recognize the range of services and helpful innovations that financial institutions and their affiliates provide in today's marketplace. These firms have substantial expertise in trust services, collective trust offerings, separately managed accounts, mutual fund offerings, annuity arrangements, cash management services, bank deposits, laddered bond arrangements, and other investment products. Therefore, we propose a class exemption that would allow MEP/PEP providers to use affiliated services and products in their MEP/PEP offerings (either exclusively or as part of an offering that also includes unaffiliated services and products) so that employers could select the offering with the most attractive total package. When the Department issued PTE 77-4 they recognized that it was not commercially reasonable for an employer who wants the products and services of Company X to find a provider other than Company X that offers that particular combination. Moreover, we believe granting a broad MEP/PEP exemption would be consistent with other exemptions issued by the Department and would serve the best interest of plan participants. If an employer selects a financial services company MEP/PEP, then it likely wants to use that financial services company's affiliated services and products. As the Department noted after ERISA was enacted, when a plan selects an investment manager to manage plan assets, it would defeat that choice if the plan could not select that manager's affiliated products or services.⁷ The ERISA Conference Report similarly suggests that plans selecting banks to provide retirement arrangements would seek to use bank products for those offerings.⁸

A class exemption that is not overly prescriptive, that avoids repeated written consents and other administrative burdens will encourage more providers to offer MEPS/PEPs. Accordingly, we urge the Department to fashion a class exemption which requires disclosure and, where appropriate, mitigation, of material conflicts, but reflects a common sense approach to allowing the use of proprietary services and products. In so doing, the Department would encourage a wide variety of creditworthy, well established and experienced financial institutions to offer these types of plans.

We would also encourage the Department to ensure that any new PTE incorporates the Department's recognition of the benefits of electronic delivery by permitting such delivery, as well as web-based disclosure, and administration that reflects the way plan participants access information and make investment selections in the 21st century.

⁶ Questions 5 and 6

⁷ See preamble to proposed and final PTE 77-4.

⁸ See ERISA section 408(b)(4), 408(b)(6) and 408(b)(8).

Any conditions in a MEP/PEP class exemption should prioritize efficiency in order to expand the availability of MEP/PEP options for small businesses to obtain the benefits of economies of scale. Exemption conditions that are efficient and cost-effective will lead to the offering of a large variety of potential options to employers (which will in turn lead to competition among providers in offering high quality, cost competitive options).

Addressing Conflicts of Interest

Section A, Question 3 of the RFI requests information about conflicts of interest that a PPP may have with respect to the PEP and its participants. Financial institutions regularly review their material conflicts of interest and adopt policies and procedures that require disclosure and/or mitigation as appropriate. In fact, under the Securities and Exchange Commission (“SEC”)’s Regulation Best Interest, broker-dealers that make recommendations are required to address their overall material conflicts of interest by mitigating or eliminate them. This would be an approach the Department could consider as well to address conflicts.

Addressing Need to Move Assets of a Non-Compliant Employer

As asked in Section C, Question 4, we would seek relief should a PEP provider need to move assets to another plan or IRA where there is a noncompliant employer, a spinoff, a termination or other qualification failure.

In particular, it is possible that a prohibited transaction could occur when a service provider moves assets from a PEP to a proprietary IRA product with proprietary investment products unless each joining employer agrees at the outset to the products that it will have if there is a qualification/compliance failure. We would suggest the DOL could create a safe harbor for such events, similar to DOL Regulation §2550.404a-2 and then provide a PTE for such transactions as well.

Please do not hesitate to contact me at bleier@sifma.org or 202-962-7329 if I can provide any further clarification.

Sincerely,

Lisa J. Bleier

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