



July 20, 2020

Ms. Jeanne Wilson
Acting Assistant Secretary
Employee Benefits Security Administration
US Department of Labor
200 Constitution Avenue, NW
Washington DC 20210

Re: Z-RIN 1210-ZA28

Dear Acting Secretary Wilson:

AARP, on behalf of its 38 million members and older Americans nationwide, is pleased to submit comments in response to the Department's Request for Information on Pooled Employer Plans and other Multiple Employer Plans. We look forward to working with the Department to assist in the development of a viable pooled plan retirement savings system to increase coverage and improve retirement security.

AARP supported the SECURE Act's creation of a new type of pooled pension plan for unrelated employers and their employees. We did so after working to ensure that pooled plans would operate in an unbiased manner with strong fiduciary protections to protect participants and minimize conflicts of interest. In order for this potential new market to be successful, it is critical that plans be easy for employers and participants to understand and have clear rules and responsibilities for all parties. AARP played a leading role to ensure that the SECURE Act required pooled plans to mainly perform an "administrative" role and that other non-conflicted entities -- either employers or separate fiduciaries -- be responsible for the selection and monitoring of investment products and services.

The following are AARP's responses to selected questions from the Department:

A. Pooled Plan Providers and MEP Sponsors

1. What types of entities are likely to act as pooled plan providers? For example, there are a variety of service providers to single employer plans that may have the ability and expertise to act as a pooled plan provider, such as banks, insurance companies, broker-dealers, and similar financial services firms (including pension recordkeepers and third-party administrators). Are these types of entities likely to act as a pooled plan provider? Are some of these entities more likely to take on the role of the pooled plan provider than others? Why or why not? How many entities are likely to act as pooled plan providers? Will a single entity establish multiple PEPs with different features?

The types of entities likely to act as pooled employer plans/providers (PEPs/PPPs) will vary greatly according to the rules that DOL issues. PEPs should provide two types of services – 1) plan administrative services (recordkeeping, payroll deduction, information disclosure), and 2) unbiased retirement investment selection and monitoring. If PEPs also seek to provide proprietary investment products or services, then under the SECURE Act, either the participating employer must actively oversee the investment selection and monitoring process --and become legally liable as a fiduciary -- or the PEP must hire a separate fiduciary to oversee the investment selection and monitoring process to prevent and minimize conflicts of interest. In the first scenario, DOL must establish clear rules requiring PEPs to clearly and simply explain employer duties to small employers with limited retirement law expertise. DOL should also provide guidance on independent fiduciary retention, based on longstanding guidance in this area.

The Department should closely track the SECURE Act's definitions and requirements for PPPs, PEPs and employers, as highlighted in the statute below, with emphasis bolded:

POOLED PLAN PROVIDER.— “(A) IN GENERAL.—For purposes of this subsection, **the term ‘pooled plan provider’ means, with respect to any plan, a person who— “(i) is designated by the terms of the plan as a named fiduciary (within the meaning of section 402(a)(2) of the Employee Retirement Income Security Act of 1974), as the plan administrator, and as the person responsible to perform all administrative duties** (including conducting proper testing with respect to the plan and the employees of each employer in the plan) which are reasonably necessary to ensure that— “(I) the plan meets any requirement applicable under the Employee Retirement Income Security Act of 1974 or this title to a plan described in section 401(a) or to a plan that consists of individual retirement accounts described in section 408 (including by reason of subsection (c) thereof), whichever is applicable, and “(II) each employer in the plan takes such actions as the Secretary or such person determines are necessary for the plan to meet the requirements described in subclause (I), including providing to such person any disclosures or other information which the Secretary may require or which such person otherwise determines are necessary to administer the plan or to allow the plan to meet such requirements, “(ii) registers as a pooled plan provider with the Secretary, and provides such other information to the Secretary as the Secretary may require, before beginning operations as a pooled plan provider, “(iii) acknowledges in writing that such person is a named fiduciary (within the meaning of section 402(a)(2) of the Employee Retirement Income Security Act of 1974), and the plan administrator, with respect to the plan, and “(iv) is responsible for ensuring that all persons who handle assets of, or who are fiduciaries of, the plan are bonded in accordance with section 412 of the Employee Retirement Income Security Act of 1974.

AGGREGATION RULES.—For purposes of this paragraph, in determining whether a person meets the requirements of this paragraph to be a pooled plan provider with respect to any plan, all persons who perform services for the plan and who are treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as one person.

GUIDANCE.— “(A) IN GENERAL.—The Secretary shall issue such guidance as the Secretary determines appropriate to carry out this subsection, including guidance— “(i) **to identify the administrative duties and other actions required to be performed by a pooled plan provider** under this subsection...

...REQUIREMENTS FOR PLAN TERMS.— The requirements of this subparagraph are met with respect to any plan if the terms of the plan— “(i) designate a pooled plan provider and provide that the pooled plan provider is a named fiduciary of the plan; “(ii) designate one or more trustees meeting the requirements of section 408(a)(2) of the Internal Revenue Code of 1986 (other than an employer in the plan) to be responsible for collecting contributions to, and holding the assets of, the plan and require such trustees to implement written contribution collection procedures that are reasonable, diligent, and systematic; “(iii) **provide that each employer in the plan retains fiduciary responsibility for— “(I) the selection and monitoring in accordance with section 404(a) of the person designated as the pooled plan provider and any other person who, in addition to the pooled plan provider, is designated as a named fiduciary of the plan; and “(II) to the extent not otherwise delegated to another fiduciary by the pooled plan provider and subject to the provisions of section 404(c), the investment and management of the portion of the plan’s assets attributable to the employees of the employer (or beneficiaries of such employees)...**”

Fortunately, the US has many established firms with successful practices in each of these retirement plan and investment markets. With clear rules, it will be more manageable for small employers to evaluate and select among area PEPs. Clear rules also will enable PEP operators to provide valued and needed administrative services for smaller employers and employees. Investment firms will readily compete to offer products and services to PEPs. Finally, participants and beneficiaries will be able to determine the savings contribution levels and investment products that best meet their needs. The Department should not permit or encourage service providers to undertake multiple conflicting roles that will reduce retirement savings returns, increase fees, and increase assessment and oversight responsibilities for employers and participants. While it may be possible for a single firm to provide a variety of services more cheaply than multiple separate firms, decades of demonstrated experience in the retirement savings market have shown that conflicts of interest lead to excessive lower performing products and services, higher total fees, and lower retirement savings.

2. What business models will pooled plan providers adopt in making a PEP available to employers? For example, will pooled plan providers rely on affiliates as service providers, and will they offer proprietary investment products?

Again, DOL’s rules will greatly affect how the PEP market emerges and evolves. If DOL permits investment firms to operate a PEP and offer its proprietary investment products and services, in whole or in part, then DOL should assume they will do so. However, under the SECURE Act, either the employer must prudently select and monitor investments, or a plan selected independent fiduciary must do so. DOL should assume that smaller employers will not be automatically knowledgeable about fiduciary duties and should require PEPs to have clear

and fulsome investment selection and monitoring guidance in order for employer members to understand and carry out their legal responsibilities.

3. What conflicts of interest, if any, would a pooled plan provider (along with its affiliates and related parties) likely have with respect to the PEP and its participants? Are there conflicts that some entities might have that others will not?

As noted above, firms that seek to both select investment products or services and also provide investment products or services have an inherent conflict of interest. The SECURE Act generally prohibits an entity from providing both. The participating employer or an independent fiduciary must prudently select and monitor PEP investment products and services. There are hundreds of potential retirement savings investments. Given that neither small employers nor participants have the time or expertise to evaluate so large a market, an outside expert is needed to recommend a manageable number of appropriate retirement investment choices. This system works generally well for large employers, and also is proving effective for the growing number of State Work and Save programs.¹

7. To the extent respondents do not believe additional prohibited transaction relief is necessary, why? How would the conflicts of interest be appropriately addressed to avoid prohibited transactions? Are different mitigating provisions appropriate for different entities? Why or why not?

For firms that seek to serve as PEPs that both select and provide investment products or services, the SECURE Act requires employers to prudently select and monitor the PEP and prudently select and monitor the investments or the PEP must hire an independent fiduciary to do so. The SECURE Act's PEP/PPP provision was painstakingly negotiated and DOL should carefully follow both the language and intent of the statute. DOL should focus its regulatory guidance on clearly detailing the administrative duties of the PEP, permitting the two types of investment selection (by employers or an independent fiduciary), and encouraging employers to understand and fulfill their fiduciary responsibilities in selecting and monitoring PEPs and providers. DOL should ensure there is a transparent and public PEP marketplace. DOL rules should enable employers and participants to easily understand what a PEP is, what the PEP and employers' key functions are, who is operating the PEP, what products and services are provided and who is providing them, and who is paying how much for each product and service, among other guidance.

B. Plan Investments

2. What role will the entities serving as pooled plan providers or MEP sponsors, or their affiliates or related entities, serve with respect to the investment options offered in PEPs and MEPs?

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https://illinoistreasurergovprod.blob.core.usgovcloudapi.net/twocms/media/doc/il%20secure%20choice%20ipc_july%202018.pdf; <https://www.treasurer.ca.gov/calsavers/regulations/investment-policy-statement.pdf>; and <https://cri.georgetown.edu/wp-content/uploads/2016/12/Policy-Brief-16-3.pdf>

In addition to the comments provided above, DOL should review the experience of the developing State Work and Save programs. Notably, several States have engaged in requests for proposals processes to separately provide administrative and investment services to each State program. The States have generally held open competitions and received multiple proposals, from which they have negotiated for prudent products and services. Many States, including CA, IL, MA, and OR, are successfully operating MEP/PEP type programs that are transparent, publicly bid, offering reasonably priced appropriate retirement investment choices, and successfully providing retirement savings programs to tens of thousands of workers and families.

C. Employers in the PEP or MEP

4. Do respondents anticipate that prohibited transactions will occur in connection with a decision to move assets from a PEP or MEP to another plan or IRA, in the case of a noncompliant employer? Do respondents anticipate that any other prohibited transactions will occur in connection with the execution of that decision?

AARP encourages the Department to propose rules for a prudent process for PEPs to determine when an employer is non-compliant and when and how to transfer any employer or participant contributions out of a PEP. As required under ERISA, the responsible fiduciaries should prudently protect participants' and beneficiaries' accounts for long-term retirement savings

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner", with a long horizontal flourish extending to the right.

David Certner
Legislative Counsel and Policy Director
Government Affairs