

MEMO# 32539

June 18, 2020

DOL Request for Information on Pooled Employer Plans and other MEPs

[32539]

June 18, 2020 TO: ICI Members
Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Request for Information on Pooled Employer Plans and other MEPs

The Department of Labor (DOL) has published a Request for Information (RFI) on “Prohibited Transactions Involving Pooled Employer Plans under the SECURE Act and Other Multiple Employer Plans.”^[1] Section 101 of the SECURE Act allows otherwise unrelated employers (of any size) to band together and participate in open multiple employer plan (MEP) arrangements (referred to as “pooled employer plans” or “PEPs”).^[2] Only individual account plans that are tax-qualified or IRA-based could qualify as a PEP.

The RFI indicates that DOL is considering whether to propose a class exemption on its own motion to cover prohibited transactions involving PEPs and MEPs. It asks questions about the possible parties, business models, conflicts of interest, and prohibited transactions that might exist in connection with PEPs (or other MEPs that are not PEPs), for purposes of assessing the need for new prohibited transaction exemptions or amendments to existing exemptions. Questions are organized into three topics and are listed below.

Responses to the RFI are due no later than July 20, 2020. ICI will work with a member working group to develop a comment letter. For information about our MEP working group, please contact the undersigned at elena.chism@ici.org.

RFI Questions

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?

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?
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?
4. To what extent will a pooled plan provider be able to unilaterally affect its own compensation or the compensation of its affiliates or related parties through its actions establishing a PEP or acting as a fiduciary or service provider to the PEP? What categories of fees and compensation, direct or indirect, will pooled plan providers and their affiliates and related parties be likely to receive as a result of operating a PEP, including through the offering of proprietary investment products? Are there likely to be any differences in types of fees and compensation associated with operation of a PEP as compared to a single employer plan?
5. Do respondents anticipate that the Department's existing prohibited transaction exemptions will be relied on by pooled plan providers, and if so, which exemptions are most relevant? Are any amendments needed to the Department's existing exemptions to address unique issues with respect to PEPs? Do respondents believe that there is a need for additional prohibited transaction exemptions? If so, please describe the specific transactions and the prohibited transactions provisions that would be violated in connection with the transactions.
6. If additional prohibited transaction relief is necessary, should the Department consider developing distinct exemptions for different categories of pooled plan providers (e.g., to specifically address the unique prohibited transactions involved for certain entities) or should the Department address pooled plan provider conflicts more generally, in a single exemption? What are advantages and disadvantages of either approach?
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?
8. Do employer groups, associations, and PEOs described in the Department's MEP Final Rule face similar prohibited transactions to those of pooled plan providers, and do they have similar need for additional prohibited transaction relief? Are there prohibited transaction issues unique to employer groups or associations, or PEOs?

Plan Investments

1. What plan investment options do respondents anticipate will be offered in PEPs and MEPs? Are the investment options likely to be as varied as those offered by large single employer plans? Are the options likely to be more varied than those offered by small single employer plans?
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?

Employers in the PEP or MEP

1. How many employers are likely to join a PEP or MEP? Will joining a PEP or MEP be more appealing to employers of a particular size? Are there any estimates of the total number of employers and participants likely to be covered by newly formed PEPs and MEPs? Are there any estimates of the number of employers and participants that will migrate from a single employer plan to a newly formed PEP or MEP?
2. Will larger employers also seek to join PEPs or MEPs in order to take advantage of additional economies of scale? Will any additional prohibited transactions exist as a result of substantial size differences between employers in the PEP or MEP (e.g., because a large employer has greater ability to influence decisions of a pooled plan provider or MEP sponsor as compared to a small employer)?
3. Will the existence of multiple employers in a PEP or MEP cause greater exposure to prohibited transactions in connection with investments in employer securities or employer real property? In what form will PEPs and MEPs hold employer securities or employer real property?
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?

Prior RFI on Open MEPS

As a reminder, DOL previously published an RFI on open MEPs in July 2019, prior to the SECURE Act's passage. The RFI was issued in connection with a final rule expanding access to MEPs sponsored by employer associations and professional employer organizations.^[3] The RFI asked about the potential conflicts of interest raised if a commercial entity, such as a financial services firm, could sponsor an open MEP and how to mitigate those conflicts.^[4] In the new RFI, DOL indicates that it received valuable input on those issues, but the 2019 RFI did not specifically address the structure of PEPs as established by the SECURE Act.

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endnotes

[1] The RFI is available here: <https://www.govinfo.gov/content/pkg/FR-2020-06-18/pdf/2020-13142.pdf> and a corresponding news release is available here: <https://www.dol.gov/newsroom/releases/ebsa/ebsa20200617>.

[2] For more background on the SECURE Act, see ICI Memorandum No. 32118, dated December 20, 2019. Available here: https://www.ici.org/my_ici/memorandum/memo32118.

[3] See ICI Memorandum No. 31881, dated August 1, 2019. Available here: https://www.ici.org/my_ici/memorandum/memo31881.

[4] For our comment letter responding to DOL's 2019 RFI on open MEPs, see ICI

Memorandum No. 32030, dated October 29, 2019. *Available here:*
https://www.ici.org/my_ici/memorandum/memo32030.

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