

MEMO# 32622

July 20, 2020

ICI Letter Responding to DOL Request for Information on Pooled Employer Plans

[32622]

July 20, 2020 TO: ICI Members
Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: ICI Letter Responding to DOL Request for Information on Pooled Employer Plans

The Institute sent the attached comment letter to the Department of Labor (DOL), in response to its Request for Information (RFI) on “Prohibited Transactions Involving Pooled Employer Plans under the SECURE Act and Other Multiple Employer Plans.”^[1] As you know, section 101 of the SECURE Act allows otherwise unrelated employers to band together and participate in open multiple employer plan (MEP) arrangements (referred to as “pooled employer plans” or “PEPs”).^[2] 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.

Our comment letter reiterates and expands on our previous letter to DOL from October 2019, responding to DOL’s earlier RFI.^[3] In this letter, we urge DOL to provide guidance needed to implement the SECURE Act’s PEP provision and to ensure that no barriers will stand in the way of financial services firms participating in the PEP market. We explain that financial services firms are a logical choice to sponsor PEPs and other open MEPs, with deep expertise and existing infrastructural capacity in the retirement plan services and asset management areas.

The letter makes the following key points:

- DOL should provide guidance for firms interested in offering PEPs with respect to registration requirements, disclosure and reporting obligations, and the scope of DOL audits/examinations. These are threshold issues that could impact a firm’s decision on whether to sponsor a PEP. Guidance on these issues must carefully weigh the costs and benefits of imposing additional regulatory obligations on prospective PEP providers.

- PEPs offer several advantages for employers, especially smaller to mid-sized employers (and their employees) that will have a mitigating effect on potential conflicts of PEP sponsors. Employers will be able to make “apples to apples” comparisons between PEP sponsors, allowing them to significantly minimize their exposure to conflicts.
- DOL has a long history of dealing with conflicts of interest and there are several existing class exemptions that could be relevant in the open MEP context.
- For firms that decide to offer proprietary investment products within a PEP arrangement, the type of relief provided in Prohibited Transaction Exemption 77-4 would be relevant. That exemption could be improved for this context by modernizing it to ensure that changes requiring employer approval could be satisfied through the use of electronic delivery and negative consent.
- Additionally, DOL could consider a broad, principles-based exemption covering a wide range of products and services offered to PEPs, that would be flexible enough to accommodate different business models and future innovation in this developing space.

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[Attachment](#)

endnotes

[1] See ICI Memorandum No. 32539, dated June 18, 2020. Available here: https://www.ici.org/my_ici/memorandum/memo32539. 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] DOL previously published an RFI on open MEPs in July 2019, prior to the SECURE Act's passage. See ICI Memorandum No. 31881, dated August 1, 2019. Available here: https://www.ici.org/my_ici/memorandum/memo31881. The RFI was issued in connection with a final rule expanding access to MEPs sponsored by employer associations and professional employer organizations. 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. For our comment letter responding to DOL's 2019 RFI, see ICI Memorandum No. 32030, dated October 29, 2019. Available here: https://www.ici.org/my_ici/memorandum/memo32030. 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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