



AMERICAN BENEFITS COUNCIL

February 6, 2020

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
Department of Labor
200 Constitution Avenue, NW
Room S-2524
Washington, DC 20210

Dear Preston,

Thank you for meeting with us on January 24, 2020 to discuss guidance priorities with respect to ensuring that pooled employer plans (PEPs, as defined in the SECURE Act) can be established effectively for the 2021 plan year when the PEP rules become effective. The meeting was very informative and we look forward to continued dialogue with you on these and other issues arising under the SECURE Act.

We thought that it might be helpful to provide our input in writing on the PEP issues discussed, as well as on certain supplemental PEP issues that we were not able to cover.

PEP GUIDANCE PRIORITIES ON A MACRO LEVEL

We have three key points regarding PEP guidance priorities.

- **E-delivery:** As discussed in detail in our comment letter, we strongly believe that the DOL's proposed e-delivery regulations were an important step toward more effective participant disclosures and lower fees that will benefit plans and participants across the country. In our view, finalization of those regulations should not be delayed by reason of the need to provide SECURE-related guidance.

- **Consolidated Form 5500:** As you know, SECURE provided two ways for small employers to pool their resources and achieve lower costs through economies of scale: PEPs and the ability to file a single consolidated Form 5500 for a group of structurally identical single employer plans (under section 202 of SECURE). Both approaches have great value and could be widely used. Accordingly, in our view, it is a very high priority for the new consolidated Form 5500 to be finished in time so that it can be used for the 2022 plan year, consistent with the effective date under SECURE. We recognize that modifying the Form 5500 takes time and will require significant coordination with the Treasury Department and we stand ready to assist in your efforts to complete this work.
 - **Clarification of audit issue:** One key point is in need of clarification in the consolidated Form 5500 guidance. Within the group of single employer plans subject to the consolidated Form 5500, there may be plans with under 100 participants and plans with 100 or more participants. Clearly, there is no requirement to require an audit with respect to the plans with under 100 participants. But it would be helpful for the guidance to provide that the plans with 100 or more participants may be audited in the aggregate, as an alternative to auditing them individually.

- **PEPs: expanding coverage:** As discussed at the meeting, we believe that certain guidance on PEPs is needed, such as guidance on registration of pooled plan providers (PPPs) and on mandatory Form 5500 changes for PEPs (separate from the consolidated Form 5500 discussed above). But the DOL was also given discretionary authority to impose a number of additional reporting and disclosure rules with respect to PEPs. We urge the DOL not to exercise that discretionary authority initially, and to affirmatively state this, as described below.
 - **Administrative cost issues:** The point of PEPs is to reduce administrative costs and thereby broaden coverage for small employers. If a number of new burdens are imposed on PEPs that do not apply to existing plan models used with small businesses, the cost savings of PEPs could be partially or fully eliminated, thereby defeating the purpose of the legislation and rendering PEPs partially or fully ineffective. We ask you to consider delaying any new burdens until the PEP market develops, in order to determine if any new burdens are needed or justified.
 - **Affirmative statement on the above approach:** It would be very helpful for the DOL to say officially that it will not be exercising its discretionary authority to impose new requirements on PEPs. The reason is that organizations are working now to determine whether to sponsor PEPs and, if so, how. If there is a strong possibility of new regulatory requirements that would undercut the cost savings of PEPs, some organizations may choose not to sponsor a PEP due to the uncertainty.

Others might delay implementation of PEPs for fear that they would need to revise their system later, which will prove to be expensive.

- **Registration process:** We do not see either a statutory basis or policy need for an elaborate registration process. Consistent with the objective of keeping administrative costs low, we would suggest simply requiring a submission with the name, address, phone number and EIN of the PPP.

IMPORTANT PEP ISSUES

- **Coverage of owner-employees:** We request that you confirm that owner-employees of unincorporated businesses without common law employees can participate in PEPs, consistent with the regulatory approach taken by the DOL in its Association Retirement Plan regulations issued last summer. SECURE did not address this issue, leaving the DOL's helpful past interpretations on this issue unaffected. As you know, this interpretation can help expand coverage in two ways. First, PEPs can be established to provide gig workers across many industries with access to the economies of scale and lower costs available to large employers. Second, on a related point, there is interest among some large employers in finding efficient and effective ways to provide retirement savings opportunities to gig workers performing services for them and PEPs could provide an important option for doing that.
- **Trustee duties:** SECURE requires the trustee of a PEP "to be responsible for collecting contributions" to the PEP. We have two sets of issues regarding this requirement.
 - **Compliance guidance:** We request that the DOL issue guidance that specifies the steps that would be required to discharge the trustee's duty. It would be helpful if the DOL would (1) clarify that the duty to collect contributions is synonymous with adherence to reasonable diligent contribution collection procedures and (2) list the steps that would be required under the procedures in a manner that is consistent with low-cost administration.
 - **Different business models**
 - **Description of two models:** Based on the input we have received, there are different business models that may be used with respect to the collection of contributions to the PEP. Under one business model, the trustee would be responsible for collecting contributions. Under a second business model, the PEP would use a directed trustee, which would not have any fiduciary expertise or any administrative system that could be used to enforce or oversee

the collection of contributions. If the trustee in this second business model were forced to take on this responsibility, it would have to establish new systems to perform a new function, which would trigger unnecessary costs.

- **Flexibility would expand coverage:** We believe that it is important to accommodate both business models, so that coverage can be expanded to the greatest extent. Accordingly, we ask that guidance permit trustees to “transfer” this responsibility to another entity. This would be a transfer, not a delegation, because under a delegation, the trustee would retain oversight responsibility. (Of course, delegation should also be permitted.)
 - **Implementation of the transfer:** We believe the mechanics and scope of the transfer should be left to the trustee and the transferee, which would be required to reflect the terms of the transfer in a written agreement.
- **Audit issue regarding MEPs:** SECURE authorizes the DOL to prescribe simplified annual reports for MEPs (including PEPs) that cover fewer than 1,000 participants but only if no single employer has 100 or more participants covered by the MEP (the “1,000/100 rule”). We ask for guidance on three aspects of this provision:
 - **Audit issue:** We ask that the DOL exercise this authority to provide that an audit would not be required with respect to such a MEP in connection with its Form 5500. Since none of the single employers would have to have an individual plan audited, the employers should not be penalized with extra costs for joining together in a MEP. This conclusion is consistent with both the statutory purpose of expanding coverage through MEPs and with the statutory structure. Under the statutory structure, the DOL’s authority to provide simplified reporting for MEPs is provided in the same manner as the DOL’s authority to provide simplified reporting for employers with less than 100 participants. Since the latter are not required to have an audit, the statute strongly suggests that the same treatment should apply to MEPs that satisfy the 1,000/100 rule.
 - **All MEPs:** We ask that the DOL confirm that this relief applies to all MEPs, not just PEPs, consistent with the statutory language.
 - **1,000-participant rule:** We acknowledge that the statute limits this treatment to MEPs with fewer than 1,000 participants, but we ask the DOL to consider using its general regulatory authority to increase or eliminate that limit. The 1,000-participant rule simply penalizes MEPs for being successful and undercuts potential cost savings.

- PTE 77-4:** We believe that a change to an existing prohibited transaction exemption would help with respect to the formation of PEPs and is also more broadly needed outside the PEP area. Very generally, Prohibited Transaction Exemption 77-4 applies to the purchase or sale by an employee benefit plan of shares of an open-end investment company registered under the Investment Company Act of 1940, the investment adviser for which is also a fiduciary with respect to the plan (or an affiliate of such fiduciary). We ask that the Exemption be modified to permit negative consent to changes in the investment advisory and other fees charged to or paid by the plan and the investment company. Under the Exemption, an independent fiduciary must be notified of any change in any of the fees referred to above and must approve in writing the continuation of such purchases or sales and the continued holding of any investment company shares acquired by the plan, prior to such change and still held by the plan. The requirement of an express written approval is burdensome and unnecessary and DOL has allowed negative consent in numerous private exemptions modeled on PTE 77-4. If the independent fiduciary is notified of any such changes and takes no adverse action, the approval requirement should be treated as satisfied.
- 403(b) PEPs:** We request that the DOL permit 403(b) PEPs, including both ERISA and non-ERISA 403(b) plans. SECURE technically only references section 401(a) and IRA-based plans, but there is no principled basis on which to distinguish 401(a) plans from 403(b) plans for purposes of the PEP rules. Moreover, the DOL has expressly recognized that it has the authority to issue open MEP regulations. In the RFI issued on July 29, 2019, the DOL asked whether to amend its “regulations to facilitate the sponsorship of ‘open MEPs’”. In the RFI, the DOL states that it has broad authority:

The DOL has broad authority to craft regulations under section 505 of ERISA. This section provides, in relevant part, that “the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter.” This authority extends to situations where, as here, the [statutory basis for MEPs] is ambiguous on its face.

- Closed MEPs versus PEPs: where is the line?** Because certain requirements (such as having a PPP) apply to PEPs but not to closed MEPs, DOL guidance will need to address how to determine if an arrangement qualifies as a closed MEP. In our view, this determination should be based on whether an arrangement satisfies the requirements to be a MEP under the Association Retirement Plan regulations issued last summer. If so, the arrangement should be treated as a closed MEP. If not, the arrangement would need to qualify as a PEP in order to be considered a MEP. For example, if an arrangement includes a group of employers that could maintain a closed MEP but also includes one or more employers that cause the arrangement to fail to be a closed MEP, the

arrangement would not be a closed MEP but could qualify as a PEP if it meets the PEP requirements.

- **Confirmation that a closed MEP may be converted into a PEP by including “unrelated” employers:** This seems clear, but confirmation would be helpful.

We very much appreciated the opportunity to meet and discuss these issues with you. If you have any questions regarding this letter, please contact me at 202-289-6700 or at jjacobson@abcstaff.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jan Jacobson
Senior Counsel, Retirement Policy

cc: Jeanne Klinefelter Wilson
Timothy Hauser
Joe Canary
Lyssa Hall
Jeffrey Turner
Karen Lloyd
Joseph Piacentini