



4510-29-P

**DEPARTMENT OF LABOR**

**Employee Benefits Security Administration**

[Application No. D-12010]

**Z-RIN: 1210-ZA28**

**Prohibited Transactions involving Pooled Employer Plans  
under the SECURE Act and Other Multiple Employer Plans**

**AGENCY:** Employee Benefits Security Administration, U.S.  
Department of Labor.

**ACTION:** Request for information.

**SUMMARY:** The Setting Every Community Up for Retirement Enhancement Act (SECURE Act) amended the Employee Retirement Income Security Act of 1974 (ERISA) to allow for pooled employer plans (PEPs). PEPs are required to designate a pooled plan provider who is a named fiduciary of the PEP. As a fiduciary, the pooled plan provider is subject to standards and restrictions in ERISA and the Internal Revenue Code, including the prohibited transaction provisions restricting fiduciaries of plans from engaging in conflict of interest transactions. This document requests information on the possible parties, business models, and conflicts of interest that respondents anticipate will be involved in the formation and ongoing operation of PEPs. This document also requests information

on similar issues involving multiple employer plans sponsored by employer groups or associations or professional employer organizations (referred to herein as "MEPs"). The Department of Labor (the Department) is considering whether to propose a class exemption on its own motion to cover prohibited transactions involving PEPs and MEPs.

**DATES:** Comments should be submitted to the Department on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit written comments to the Office of Exemption Determinations by any of the following methods, identified by Z-RIN 1210-ZA28:

Federal eRulemaking Portal: <http://www.regulations.gov> at Docket ID number: EBSA-2020-0001. Follow the instructions for submitting comments.

Email to: e-OED@dol.gov.

See SUPPLEMENTARY INFORMATION below for additional information regarding comments.

**FOR FURTHER INFORMATION CONTACT:** Erin Hesse, telephone (202) 693-8546, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Comment Instructions:**

All comments received must include the agency name and Regulation Identifier Number (Z-RIN) for this request for information. In light of the current circumstances surrounding the COVID-19 pandemic caused by the novel coronavirus which may result in disruption to the receipt of comments by U.S. Mail or hand delivery/courier, persons are encouraged to submit all comments electronically and not to follow with paper copies. Comments will be available to the public, without charge, online at <http://www.regulations.gov> and <http://www.dol.gov/agencies/ebsa>, and at the Public Disclosure Room, Employee Benefits Security Administration, Suite N-1513, 200 Constitution Avenue NW, Washington, DC 20210.

Warning: All comments and hearing requests will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments and hearing requests may be posted on the Internet and can be retrieved by most Internet search engines.

The Department of Labor (the Department) is considering whether to propose a class exemption on its own motion to cover prohibited transactions involving PEPs and MEPS under the authority of section 408(a) of ERISA, and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended, and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, 66644, October 27, 2011).

## **I. Background**

### *A. Setting Every Community Up for Retirement Enhancement Act (SECURE Act)*

The SECURE Act was signed into law on December 20, 2019. It amended the Employee Retirement Income Security Act of 1974 (ERISA) to allow for a type of employee benefit plan called a pooled employer plan (PEP). A PEP is an individual account plan established or maintained for the purpose of providing benefits to the employees of two or more employers, that is treated as a single employee pension benefit plan or single pension plan for purposes of ERISA. A PEP does not include a plan maintained by employers that have a common interest other than having adopted the plan.

A PEP must have a pooled plan provider that is designated as a named fiduciary, plan administrator, and the person responsible for specified administrative duties. Additionally, the PEP's governing documents and operation must have and be operated pursuant to certain specified terms, including terms relating to the designation of trustees and terms providing that employers, participants, and beneficiaries may not be subject to unreasonable restrictions, fees, or penalties for ceasing participation, receiving distributions, or transferring assets to another plan. Further, the PEP's governing documents must provide that each employer in the plan retains fiduciary responsibility for: (1) the selection and monitoring of the pooled plan provider and any other named fiduciaries of the plan, and (2) to the extent not otherwise delegated to another fiduciary by the pooled plan provider and subject to the provisions of ERISA section 404(c), the investment and management of the portion of the plan's assets attributable to their own employees and the employees' beneficiaries.

The SECURE Act also amended Internal Revenue Code (Code) section 413 to add a new subsection addressing qualification requirements for plans with pooled plan providers as well as plans maintained by employers with a

common interest other than having adopted the plan. Under Code section 413(e), these types of plans will not be treated as failing to meet certain requirements of the Code merely because one or more employers of employees covered by the plan fail to take actions required to meet the requirements. In order for Code section 413(e)(1) to apply, the plan must require that:

(1) the assets attributable to the noncompliant employer's employees and the employees' beneficiaries will be transferred to a plan maintained only by the noncompliant employer (or its successor), to an eligible retirement plan defined in Code section 402(c)(8)(B), or to any other arrangement that the Secretary of the Treasury determines is appropriate, unless the Secretary of the Treasury determines that it is in the best interest of the employees and beneficiaries to retain the assets in the plan; and

(2) the noncompliant employer (and not the plan or any other employer in the plan) shall be liable for any liabilities with respect to a plan attributable to the noncompliant employer's employees and the employees' beneficiaries, except to the extent provided by the Secretary of the Treasury.

The SECURE Act provides that the Secretary of the Treasury shall issue such guidance as the Secretary determines appropriate to carry out the new subsection.

*B. Department's MEP Final Rule and Previous Request for Information on Open MEPS*

The SECURE Act amendments furthered an existing regulatory initiative of the Department to expand access to affordable, quality retirement savings options. In 2019, the Department issued a final rule (MEP Final Rule) clarifying the circumstances under which an employer group or association or a professional employer organization (PEO) may sponsor a single pension plan under ERISA for the employees of multiple employer members or clients, respectively (referred to herein as a "MEP").<sup>1</sup> The Department's initiative responded to President Trump's Executive Order 13847, "Strengthening Retirement Security in America."

On the same day it issued the MEP Final Rule, the Department published an additional request for information which sought comments on whether to amend the regulations

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<sup>1</sup> Definition of "Employer" Under Section 3(5) of ERISA - Association Retirement Plans and Other Multiple-Employer Plans, 84 FR 37508 (July 31, 2019).

to facilitate the operation of "open MEPs" - i.e., by expressly permitting financial institutions or other persons/entities to maintain a single ERISA plan on behalf of employers with no relationship other than their joint participation in the plan.<sup>2</sup> The request for information included a series of questions directed at the conflicts of interest that might exist for the persons/entities that would operate "open MEPs" and the need for additional prohibited transaction exemptions if such arrangements were permitted. While the Department received valuable input on those issues, the request did not specifically address the structure of PEPs as established by the SECURE Act or the amendment to Code section 413.

### *C. Prohibited Transaction Exemptions*

ERISA and the Code prohibit fiduciaries with respect to plans, including PEPs and MEPs, from engaging in self-dealing transactions. Fiduciaries violate these prohibited transaction provisions if they use their authority to affect or increase their own compensation or the compensation of affiliates or related entities, or if they

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<sup>2</sup> "Open MEPs" and Other Issues Under Section 3(5) of the Employee Retirement Income Security Act, 84 FR 37545 (July 31, 2019).



receive payments from third parties in connection with transactions involving a plan.<sup>3</sup> Further, fiduciaries to plans may not act in their individual capacity or any other capacity, in any transaction involving the plan, on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants and beneficiaries.<sup>4</sup>

The Department has authority to grant administrative exemptions from the prohibited transaction provisions in ERISA and the Code.<sup>5</sup> Before granting an exemption, the Department must find that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries, and protective of the rights of participants and beneficiaries of plans.

As a result of the SECURE Act amendments to ERISA and the Code, a variety of service providers may decide to become pooled plan providers. The Department is seeking information regarding the possible parties, business

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<sup>3</sup> ERISA section 406(b) (1) and (3) and Code section 4975(c) (1) (E)-(F).

<sup>4</sup> ERISA section 406(b) (2).

<sup>5</sup> ERISA section 408(a) authorizes the Secretary of Labor to grant exemptions from the prohibited transaction provisions in ERISA. Code section 4975(c) (2) authorizes the Secretary of the Treasury to grant exemptions from the prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. App. (2018)) generally transferred the Secretary of the Treasury's authority to grant administrative exemptions under Code section 4975 to the Secretary of Labor.

models, conflicts of interest, and prohibited transactions that might exist in connection with PEPs, for the purpose of assessing the need for new prohibited transaction exemptions or amendments to existing exemptions. This document also requests information on similar issues involving MEPs.

## **II. Request for Information**

This document contains a number of questions. Respondents need not answer every question, but should identify, by number, each question addressed. Respondents also are encouraged to address any other matters they believe are germane to the general topic of the request for information.

### *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?

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?

*B. 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?

*C. 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?

Signed at Washington, DC, this 15<sup>th</sup> day of June, 2020.

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Jeanne Wilson,  
Acting Assistant Secretary,  
Employee Benefits Security  
Administration,  
U.S. Department of Labor.

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