

October 1, 2020

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave, NW, Room N-5655
Washington DC 20210
via Federal eRulemaking Portal at www.regulations.gov

Re: Proposed Registration Requirements for Pooled Plan Providers—RIN: 1210–AB94

Dear Department of Labor,

The American Retirement Association (ARA) is pleased to provide comments on the Department of Labor's (DOL's) proposed Registration Requirements for Pooled Plan Providers (Proposal) and to respond to the specific questions included in the Notice of Proposed Rulemaking (NPRM). ARA members have considerable practical experience with matters raised in the NPRM and we believe that we can provide meaningful assistance to the DOL.

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The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), the American Society of Enrolled Actuaries (ASEA), and the Plan Sponsor Council of America (PSCA). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored retirement plans. In addition, ARA has nearly 30,000 individual members who provide consulting and administrative services to the sponsors of retirement plans. ARA and its underlying affiliate organizations are diverse but united in their common dedication to the success of America's private retirement system.

The ARA appreciates the DOL's commitment to expanding access to workplace retirement savings plans for America's workers. The ARA shares this goal and looks forward to working with the DOL to make Pooled Employer Plans (PEPs) a viable and meaningful retirement savings vehicle.

Discussion

The Proposal is intended to implement the requirement in the Setting Every Community Up for Retirement Enhancement (SECURE) Act that Pooled Plan Providers (PPPs) register with the DOL and the Treasury Department, in connection with which Congress delegated to DOL the authority to registration requirements. As envisioned by DOL, when combined with the Form 5500 annual reporting requirements, the proposed new Form PR, which includes an initial filing, supplemental filings, and a final filing, will provide to DOL timely access to information needed to fulfill its monitoring and oversight responsibilities. Significantly, the information will also allow employers considering participating in PEPs, employees, and other interested stakeholders to conduct due diligence on the PPPs. The SECURE Act provides for operation of PEPs by PPPs beginning January 1, 2021. Under the Proposal, PPPs are required to register with the DOL and Treasury “before beginning operations.”

- The ARA shares the DOL’s view that timely information about PPPs will help to safeguard the interests of PEP participants and beneficiaries. **The ARA’s primary concern is that the Proposal underestimates the time needed to comply with the registration requirements in advance of January 1, 2021.** With this in mind, we appreciate the opportunity to provide these comments.

Specific Comments

Form and Filing. For filing the Form PR, the DOL intends to use the same system that is currently used to electronically file the Form 5500 for employee benefit plans. The ARA recognizes the DOL’s desire to be consistent with the trend toward electronic filing. We also appreciate that the most efficient approach for filing the Form PR may be to use the Form 5500 electronic filing system. But we have concerns regarding when that system will be available to accommodate the Form PR and how that might impact PPPs operating on or close in time with January 1, 2021. Moreover, we hope that the current DOL filing system is suitable for handling PPPs’ required ongoing filings to update information. Finally, the ARA supports a functionality in the registration process which would allow data to be uploaded by third-parties and flow directly from plan administration and reporting systems.

The Initial Registration Requirements include the following:

- PPPs are required to provide a business telephone number as a way for employers and participants to contact the PPP for information. The DOL solicits feedback on whether a call center number should satisfy this data element. Many service providers currently operate call centers designed to handle inquiries from employers as well as from participants. The ARA supports the use of a call center number because we believe that call centers typically present ready access to staff at service providers who are trained to field questions. That said, we also recognize that a general contact number for a PPP might be beneficial to employers and individuals.

- The name and contact information for the “primary compliance officer” of the PPP must be reported on the Form PR. The DOL proposes that the registration include an email address for the compliance officer and also solicits comments on whether alternative or additional means of contacting the compliance officer should be required. The ARA believes it is important for the DOL to have an effective means to communicate with a responsible person at a PPP regarding compliance and other concerns. Access to a compliance officer may be vital for reassuring plan participants and employers that issues with a PEP may be heard. But we recommend clarification of this requirement. Many service providers employ multiple compliance officers with responsibilities relating to varied federal, state, and international laws, as well as professional standards, accepted business practices, and internal standards. We suggest that DOL specify the type of compliance officer best suited for this purpose. We also suggest that in addition to compliance personnel’s phone number, this requirement include an email address dedicated to addressing concerns with a particular PEP, along with the requirement that responses be provided within a specific timeframe.
- The Proposal requires PPPs to disclose any federal or state criminal conviction and any ongoing criminal, civil, or administrative proceedings related to the provisions of services to, operation of, or investments of any employee benefit plan, against the PPP, or any officer, director, or employee of the PPP. For this purpose, the disclosure is required only if the conviction or related term of imprisonment served is within ten years of the date of registration. The ARA believes that:
 - The scope of this disclosure should not include all employees of a PPP but should be limited to the PPP itself and its officers and directors. Many PPPs will have hundreds if not thousands of employees and this data element would require multiple supplemental filings regarding matters that may have little or no impact on the PEP.
 - The term “administrative proceedings” is overly broad, and required disclosures should exclude routine audits or investigations or mere inquiries from governmental entities. We also believe that any such disclosures should be limited to general information about proceedings which have been adjudicated or closed.
 - Civil judgments should be included in this disclosure only if they involve claims of fraud or dishonesty.

The Supplemental Registration Requirements include changes in information included in the initial filing and other specified events. These are events affecting either the PPP or a plan it sponsors “that may signal financial problems or other circumstances that could potentially put the pensions of covered employees at risk” (Reportable Events). PPPs must also report (1) notice of the initiation of any administrative or enforcement action in any court or administrative tribunal by a governmental

entity against the PPP or any officer, director, or employee of the PPP, related to the provision of services to, operation of, or investments of any PPP or a finding of fraud or dishonesty in such an action and (2) the filing of any federal or state criminal charges related to the provision of services to, operation of, or investments of any PEP or other employee benefit plan against the PPP or any officer, director, or employee of the PPP provider.

- The ARA believes that the Form 5500 is more appropriate for disclosing Reportable Events to the DOL.
- As with similar information required in the initial registration, the ARA is concerned that the term “administrative proceedings” is overly broad. We believe that the types of administrative proceedings subject to disclosure on the Form PR should be limited and should, at the very least, exclude routine audits or investigations or mere inquiries from governmental entities. We also do not believe that mere filings of criminal charges should be required disclosures. Moreover, the ARA believes any such disclosures should be limited to matters which have been adjudicated or closed.

The Final Registration Filing Requirements apply when a PPP ceases to operate all PEPs and has submitted a Reportable Event filing to indicate that the last PEP for which it served as the PPP has been terminated and ceased operating. The final Form PR filing would be due within 30 days of the filing of the last final Form 5500 for the last PEP the provider operates. The preamble to the Proposal says a “single combined filing may be used both to report that the last PEP operated by the provider has been terminated and ceased operating and to serve as the final Form PR filing by the pooled plan provider.”

- The ARA believes that having timely information available online regarding a PEP could be valuable, making a final Form PR helpful. We are concerned, however, that some of the data elements of final Form PR filings may be redundant to the final Form 5500. On the other hand, we also recognize that if only a final Form 5500 were required, modifications and attachments might be needed, such that any efficiencies of a single final filing would be negated. In addition, having to connect a PEP’s status to the Form 5500 information may provide less reliable information.

Responses to Specific Questions

The ARA has the following responses to select specific questions put forth by the DOL, as indicated:

- 1. Is the definition of “beginning operations as a PPP,” which determines whether initial registration is required, appropriate in scope? Should the definition exclude marketing and solicitation efforts so that the initial registration is tied solely to beginning operation of a PPP? Should the deadlines for filing an initial registration be nearer to the date of actual public marketing activities if the PPP intends only to engage in marketing and**

solicitation efforts, and will not enroll any employer or employee in a PEP until at least 30 days after initial registration?

The ARA does not believe that all marketing activities should be treated as “beginning operations as a PPP.” In particular, activities related to marketing to service providers should be excluded. These solicitation activities are distinct from marketing to employers. Furthermore, we believe that transition relief should be available to certain operations begun prior to January 1, 2021, considering the apparent timeline for the availability of a Form PR. In other words, we do not think that the “beginning of operations” standard should be strictly applied and we believe that there should be an exception to allow PEPs to market and operate so long as the PPP registers with the DOL within a specified number of days after the Form PR is finalized and the filing system is operational.

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3. Is there a more efficient or effective way of collecting reportable event information that would reduce administrative burdens and expenses?

As discussed in our preceding comments, the ARA believes that the Form 5500 is more appropriate for disclosing Reportable Events to the DOL.

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- 5. Are there other federal or state filings for insurance companies, banks, and other financial institutions, such as the Form ADV (or similar Securities and Exchange Commission (SEC) or State registration forms) for financial advisors, on which the Department could rely as an alternative source of information about PPPs and the plans they operate?**
- 6. Are there particular forms or numbers (e.g., Form ADV, SEC registration number, Central Registration Depository number, or National Association of Insurance Commissioners Code) that could be referenced in the registration that would, with nominal burden, help employers find more information about PPPs and compare providers across platforms of available information?**

Responding to questions 5 and 6, the ARA’s view is that the information sought by DOL in the Form PR may be valuable to employers and participants but generally is not found in federal or state filings, nor could it be readily accessed through such other filings. We believe that it would be most useful for employers and participants scrutinizing PPPs and PEPs to be able to obtain all insurance, banking, and financial data in a single location.

- 7. Should the disclosure of “ongoing criminal, civil, or administrative proceedings related to the provisions of services to, operation of, or investments of any employee benefit plan by the PPP” be expanded? For example, would disclosing settlements of fiduciary liability claims against PPPs with the Department or PBGC, including settlements under ERISA**

§ 206(d)(4)(A)(iii), assist employers performing due diligence in selecting and monitoring PEPs?

The ARA believes that any required disclosures regarding criminal, civil, or administrative proceedings should be limited to matters which are adjudicated or closed. Further, because a settlement generally is not an admission of wrongdoing, we do not think that information about settlements of any such proceedings or of lawsuits should be among the required data. We do recognize, however, value in making PPP performance information available to employers engaged in due diligence. As such, we suggest that an alternate metric be used for this purpose.

Conclusion

The ARA appreciates the DOL's commitment to expanding access to workplace retirement savings plans for America's workers. We share this goal and look forward to working with the DOL to make PEPs a meaningful retirement savings vehicle. We would welcome the opportunity to discuss these issues further with you. Please feel free to contact Allison Wielobob, General Counsel, at AWielobob@USARetirement.org. Thank you for your time and consideration.

Sincerely,

/s/ Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/ Will Hansen, Esq.
Chief Government Affairs Officer
American Retirement Association

/s/ Allison Wielobob
General Counsel
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