Office of Regulations and Interpretations
Employee Benefits Security Administration
Office of Exemption Determinations
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Email: e-OED@dol.gov

Re: Response to Request for Information "Prohibited Transactions Involving Pooled Employer Plans under the SECURE Act and Other Multiple Employer Plans" (Z-RIN 1210-ZA28)

Dear Sir or Madam:

As a leading provider of retirement plan recordkeeping services, Paychex, Inc. ("Paychex") thanks you for the opportunity to respond to the Request for Information "Prohibited Transactions Involving Pooled Employer Plans under the SECURE Act and Other Multiple Employer Plans" ("RFI") published by the Department of Labor ("DOL" or "Department") in the Federal Register on June 18, 2020. Paychex believes that pooled employer plans ("PEPs") established by the Setting Every Community Up for Retirement Enhancement Act ("SECURE Act") will serve an important function in the retirement plan industry that will allow employers, particularly small and mid-sized businesses, an additional opportunity to offer a simplified retirement plan solution to their employees and make it possible for them to save for a meaningful and dignified retirement.

As a champion of small and mid-sized businesses, Paychex believes that there is no reason why the PEP provider community would be unable to draw upon the SECURE Act and already well-established principles for avoiding otherwise prohibited conflicts of interest in a manner that would allow for the successful growth and development of a vibrant and diverse PEP industry. For that reason, we do not believe that the Department needs to issue an exemption specific to PEPs in order for PEPs to succeed.

Pooled Plan Provider as Recordkeeper

The PEP provisions of the SECURE Act, state that a Pooled Plan Provider ("PPP") must be:

> …designated by the terms of the plan as a named fiduciary (within the meaning of section 402(a)(2) of the Employee Retirement Income Security Act of 1974), as

> the plan administrator, and as **the person responsible to perform *all* administrative duties** (including conducting proper testing with respect to the plan and the employees of each employer in the plan) which are reasonably necessary to ensure that…the plan meets any requirement applicable under the Employee Retirement Income Security Act of 1974 or this title to a plan described in section 401(a) . . . . (Emphasis added.)

As set forth above, the SECURE Act requires each PEP plan document to identify the PPP as a named fiduciary, as the plan administrator, and as the party responsible for the performance of *all* of the plan's administrative functions. Based on that text, PPPs that are recordkeepers may choose to perform all of the PEP's administrative services in-house or to engage third-party service providers to perform some or all of those duties.

Accordingly, the PPP/recordkeeper will be required to be designated by the terms of the PEP plan document and separately appointed by each employer that adopts the PEP with respect to the portion of the PEP attributable to the adopting employer's employees (and such employee's beneficiaries). We believe that it also would be appropriate for each adopting employer to approve coincident with, or as part of the adoption of the PEP itself, the schedules of compensation for the PPP as a provider of recordkeeping and other administrative services. So long as the adopting employer is independent of and unrelated to the PPP and the trustee, as would typically be the case, the adopting employer's authorization of the rates of compensation paid to the PPP and the trustee would solve for the fundamental issue of a PEP fiduciary not acting in a manner that violates ERISA. For purposes of the Department's 408b-2 fee disclosure regulations, each adopting employer would be the "responsible plan fiduciary" for the approval of PPP and trustee fees with respect to its portion of the PEP.

It is anticipated that the PPP will be permitted to receive compensation for performing services on behalf of the PEP at rates approved by adopting employers. As examples, the PPP could be compensated through a periodic, flat dollar amount charge to each adopting employer or participant account in the PEP (e.g., a per annum charge) for providing services to the PEP and/or a fee based upon a percentage of assets under administration (e.g., a basis point charge).

Additionally, with respect to fees, it is foreseeable over time that a PPP or a trustee may wish to propose one or more changes to its compensation schedule. It is equally foreseeable that where a PEP has been adopted by a large number of employers, it would be unworkable to require the affirmative written approval of each adopting employer in order for a proposed fee change to become effective. Accordingly, it seems reasonable that a PEP plan document could contain provisions describing the availability of a "negative consent" process for obtaining adopting employer approval for fee changes. Consistent with the Department's guidance in Advisory Opinion 97-16A, the failure by an adopting employer to affirmatively object to a proposed change in PPP or trustee fee schedules would constitute actual consent. The plan document would also provide a procedure for any dissenting adopting employers to withdraw from the PEP. We ask that the Department confirm our view that the negative consent process described in this paragraph would be available to the PEP provider community.

A. Third-Party Service Providers

It is our view that when a PPP determines to engage one or more third-party service providers to perform certain of the administrative functions for which the PPP is itself primarily responsible, and pays the fees of such third-party providers from its own resources (i.e., other than by causing the plan to pay an additional fee), any prohibited transaction issues would be avoided since those third-party providers would be serving in a sub-contractor role to the PPP and since the PPP's engagement of those sub-contractors by the PPP would not cause the PEP to pay an additional fee.

Under the hypothetical business model described above, each adopting employer will have approved the compensation paid by the PEP to the PPP/recordkeeper, and the conditions of ERISA section 408(b)(2) will have been met with respect to the engagement of the PPP. Consequently, the engagement of the PPP by each adopting employer would be exempted from the prohibited transaction restrictions otherwise applicable under ERISA section 406(a)(1)(C). And, as noted, where the PPP engages one or more third-parties to perform certain of the administrative services for which it is primarily responsible, and pays those service providers from its own revenue (i.e., not by causing the PEP to pay an additional charge), the PPP should not be viewed as using the authority or discretion that makes it a fiduciary to affect the amount or timing of its own compensation or the compensation paid by the plan to a party in which it has an interest. Thus, a transaction prohibited under ERISA section 406(b) should not occur.

B. Investment Options Available under the PEP

The administrative services required by a PEP include an "investment platform." We anticipate that the PEP plan instrument, which will designate the PPP as the party primarily responsible for the performance of all administrative functions, will also identify, with or without the assistance of the PEP's investment manager, the investment platform made available to the PEP (e.g., whether that platform will contain a finite, or limited universe of investment options, or make an unlimited, "open architecture" investment option universe available).

The PEP's responsible investment fiduciary or each adopting employer's responsible investment fiduciary, as further discussed below, may select from the universe of investment options made available on the recordkeeper's designated platform to choose the menu of investment options made available under the PEP. The participants in the PEP will then direct the investment of their contributions and their account balances among the investment options in accordance with ERISA section 404(c)(1) or, in the absence of affirmative direction, by default investment in an investment option qualifying as a "qualified default investment alternative" under ERISA section 404(c)(5). The investment options may be mutual funds ("Funds"), collective investment trusts ("CITs"), insurance company pooled separate accounts or separate accounts under an annuity contract ("Separate Accounts"), or a combination thereof. The investment options may also include one or more fixed rate, general account annuity contracts issued by an insurance company that will serve as "principal-protection" investment options ("Fixed Annuities").

C. Investment Matters

An interesting and potentially conflicting aspect of the PEP provisions of the SECURE Act relates to the requirement that the terms of the plan document state that each participating employer in a PEP:

> "*retains* fiduciary responsibility for… the investment and management of the portion of the plan's assets attributable to the employees of the employer (or beneficiaries of such employees) [*unless the PPP delegates* investment responsibility to] another fiduciary…and subject to the provisions of section 404(c)." (Emphasis added.)

It logically follows that in order for an adopting employer to "retain fiduciary responsibility" for the investment of plan assets, it would need to be responsible as an investment fiduciary in the first instance.

We respectfully request that the Department clarify how the regulated community should reconcile the question of who, in the first instance, is the holder of PEP investment management power and authority. We submit that the SECURE Act lends itself to the interpretation that the adopting employer is the first (i.e., primary) holder of investment power and authority with respect to the portion of the plan's assets attributable to its employees. Otherwise, the adopting employer could not "retain" such responsibility. We also submit, based on the PEP provisions of the SECURE Act, that an adopting employer's authority can be delegated by the PPP to another fiduciary on the adopting employers' behalf with the result that, following such delegation, the adopting employer is longer responsible as an investment fiduciary. Under such a construction, the PPP would not have any independent investment management power or authority, in and of itself, but would merely have the authority, on behalf of adopting employers, to delegate the investment power and authority of the adopting employers.

Where the PPP so delegates discretionary investment authority, it could delegate such role to an unaffiliated investment adviser registered under the Investment Advisers Act of 1940, as amended ("Advisers Act") to act as an "investment manager" as defined in section 3(38) of ERISA ("Investment Manager") without triggering a prohibited transaction.

Moreover, where the appointed Investment Manager is unaffiliated with and otherwise independent of the PPP, we believe that it would be appropriate for the PPP to authorize the payment of the Investment Manager's fees by the PEP, subject to compliance with the statutory exemption under ERISA section 408(b)(2). [1]

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[1] Under the model discussed herein, neither the PPP nor its affiliates would be sub-advisers to, managers of, or issuers of the investment options. None of the investment options or parties related thereto pay revenue sharing in connection with the purchase or sale of the investment options**.** The PPP only receives the above-described flat dollar amount and/or percentage of assets under administration fee. The Investment Manager also receives a fee -- either one that has been approved by the PPP or one that has been approved by the adopting employers. So long as its conditions are met, ERISA section 408(b)(2) should exempt prohibited transactions that arise under ERISA section 406(a) in connection with the payment of the compensation to the PPP, trustee, and Investment Manager. The selection of the investment options by the Investment Manager does not have any effect on the compensation.

Once again, we thank the Department for the opportunity to respond to the RFI. We would appreciate the Department's confirmation of its views on how current Department guidance apply to the anticipated models outlined in this submission. We would also welcome the opportunity to answer questions regarding the content of this letter.

Sincerely,

Paul Davidson

Director of Product Management

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paid to the PPP (or any party in which it has an interest) and thus a prohibited transaction under ERISA section 406(b) does not arise.