Stephen M. Saxon
(202) 861-6609
sms@groom.com

July 20, 2020

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:

Thank 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. We believe that pooled employer plans ("PEPs") established by the Setting Every Community Up for Retirement Enhancement Act ("SECURE Act") will allow employers, particularly small businesses, an excellent opportunity to offer retirement plan coverage to their employees at a reasonable cost without assuming the day-to-day responsibilities of administering and managing such a plan.

We provide this RFI response to you on behalf of several financial institutions that provide recordkeeping and other services to thousands of retirement plans covered by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). These companies expect to make PEPs available to employers under two basic business models; one involving a recordkeeper serving as the Pooled Plan Provider ("PPP"), as defined by the SECURE Act, and one where an entity other than the recordkeeper, such as a registered investment adviser or third party administrator, serves as PPP. All of the models (and variations thereto) discussed below share the following common feature: the PPP will be designated by the terms of the PEP as a named fiduciary and will need to be paid for the services it renders to the PEP in a manner that does not give rise to a violation of ERISA. Similarly the SECURE Act requires that each PEP's plan document designate a trustee that will perform certain fiduciary functions and that will also require payment of compensation in a manner that complies with ERISA. Our comments include a suggested framework for the payment by PEPs of compensation to PPPs, trustees, and other service providers including allowances for changes in compensation schedules that are likely to occur from time to time.

Moving beyond the fundamental issue of solving for the payment of the PPP, trustee and other service provider fees by PEPs, we anticipate that certain business models involve the use by PEPs of investment options that are proprietary to the PPP or another PEP fiduciary or that generate revenue sharing, e.g. 12b-1 fees, sub-transfer agent fees, shareholder servicing fees. These models contain inherent conflicts that require either a prohibited transaction avoidance strategy or exemptive relief.

We also address below the issue of whether an additional prohibited transaction exemption is necessary to carry out the purposes of the PEP statute. In our view, there is no reason why the PEP provider community would be unable to draw upon 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, competitive and diverse PEP industry. For that reason, we do not believe that the Department necessarily needs to issue an exemption specific to PEPs in order for many PEP models to succeed. However, as we describe below, we believe that such an exemption or an amendment to Prohibited Transaction Exemption 77-4 could be helpful.

The members of our Group would appreciate the Department's confirmation of their views on how current Department guidance and prohibited transaction exemptions apply to the business models outlined in this submission. Our members would also be available to further discuss with the Department the development of any new exemptions that the Department might issue with respect to PEPs. Below we describe two types of business models, one involving the recordkeeper's service as the PPP and one where another type of entity, such as a registered investment adviser or third party administrator, would serve as the PPP.

I. Business Model - Recordkeeper as PPP

We anticipate that some recordkeepers will wish to serve as the PPP to one or more PEPs. In such instances, as required by the PEP statute, the recordkeeper will 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)…

Similarly, the PEP statute requires that the terms of the plan –

> (ii) designate one or more trustees meeting the requirements of section 408(a)(2) of the Internal Revenue Code of 1986 (other than an employer in the plan) to be

responsible for collecting contributions to, and holding the assets of, the plan and require such trustees to implement written contribution collection procedures that are reasonable, diligent, and systematic;

The providers of these two fundamental fiduciary services – PPPs and trustees – are designated by the terms of the PEP plan document and will be separately appointed by each employer that adopts the PEP with respect to the portion of the PEP attributable to an adopting employer's employees (and such employee's beneficiaries). We believe that it would be appropriate for each adopting employer to also approve, coincident with or as part of the adoption of the PEP itself, the schedules of compensation for both of these providers. 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 this fundamental issue in a manner that would not violate 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 foreseeable that, over time, a PPP or a trustee may wish to propose one or more changes to its schedule of compensation. 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 be effective. Accordingly, our client recordkeepers anticipate that the PEP plan document will contain provisions describing the availability of a "negative consent" process for obtaining adopting employer approval of fee changes. Consistent with the Department's guidance in Advisory Opinion 97-16A, the failure by an 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 employer to withdraw from the PEP in the event the employer objects.

A. <u>PPP Engages Other Service Providers</u>

As noted, the PEP statute requires that the terms of the plan 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. PPPs that are recordkeepers may choose to perform all of the PEP's administrative services in-house. Others may choose to directly perform certain functions and to engage other service providers (affiliated and unaffiliated) to perform certain others.

As noted, the PPP will 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 participant account in the PEP, e.g., $100 per annum, for providing services to the PEP. Alternatively, each participant account could be charged a fee based upon a percentage, e.g., 0.25% (i.e., 25 basis points) of assets under administration.

Where a recordkeeper that is a PPP determines to engage one or more affiliated or unaffiliated service providers to perform certain of the administrative functions for which the PPP is itself primarily responsible, and pays the fees of such providers from its own resources (i.e., other than by causing the plan to pay an additional fee), our view is that any prohibited transaction issues may be addressed by relying on currently effective Department guidance and prohibited transaction exemptions.

ERISA section 406(a) prohibits certain transactions between a PEP and a "party in interest", which includes a provider of services to a plan and a fiduciary to the plan. As relevant here, ERISA section 406(a) prohibits (i) the furnishing of goods and services between a plan and a party in interest, and (ii) the transfer to, or use by, or for the benefit of a party in interest, of any assets of the plan. Therefore, the receipt by a party in interest service provider of compensation, direct or indirect, would give rise to a prohibited transaction absent an exemption.

Additionally, ERISA section 406(b) prohibits a fiduciary from, among other things, dealing with the plan in his own interest or his own account. In the absence of an exemption, the PPP will engage in prohibited self-dealing if it uses its fiduciary authority to change the amount or timing of its compensation or the compensation of a party in which it has an interest, e.g., an affiliate of the PPP. By regulation, DOL has provided some clarification of the transactions prohibited by section 406(b) of ERISA. In particular, DOL has stated that "a fiduciary may not use the authority, control, or responsibility which makes such a person a fiduciary to cause a plan to pay an additional fee to such fiduciary...."[1] Therefore, for example, the PPP engages in prohibited self-dealing if it pays additional compensation to an affiliated trustee, which is a party in which the PPP has an interest. Conversely, a violation will not occur where a fiduciary may possess the ability to affect the amount of the fees it receives but, in fact, the fiduciary does not use its authority to do so.[2]

ERISA section 408(b)(2) provides a statutory exemption for the provision of services to a plan by a party in interest and the plan's payment of related fees. The exemption is available only if (a) the services are helpful and appropriate in carrying out the plan's purposes; (b) the services are furnished under a reasonable contract or arrangement; and (c) no more than "reasonable compensation" is paid for the services.[3] Further, DOL regulations provide that section 408(b)(2) exempts only violations of section 406(a) that arise in connection with the payment of compensation by a plan to parties in interest for providing services to the plan. Any

[1] 29 C.F.R. § 2550.408b-2(e)(1).

[2] Id.; see also Acosta v. Pacific Enterprises, 950 F.2d 611, 619-21 (9th Cir. 1991) (no violation of section 406(b)(1) occurs unless the fiduciary "actually used its power . . . for its own benefit or account").

[3] 29 C.F.R. § 2550.408b-2(a). The regulation also requires substantial disclosure of plan certain plan and compensation information to the responsible plan fiduciary.

violations of ERISA section 406(b) are "separate transactions" not exempted by that section. 29 C.F.R. § 2550.408b-2(a) and (e).

Under the business model described above, so long as each adopting employer has approved the compensation paid by the PEP to the PPP, and the conditions of section 408(b)(2) have been met, non-exempt prohibited transaction under section 406(a) should not occur. And, 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 resources (i.e., not by causing the PEP to pay an additional charge), 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 and thus a transaction prohibited under section 406(b) should not occur.

B. Investment Options Available under the PEP

The administrative services required by a PEP include an "investment platform." Many of our recordkeeping services clients currently provide an "open architecture" platform or maintain one or more investment platforms consisting of a limited number of investment options. From the platform, the responsible investment fiduciaries of client plans may select, add, de-select or replace investments options on the plan's "menu" of designated investment alternatives made available to participants and beneficiaries. Similarly, we anticipate that where a recordkeeper serves as the PPP, the PEP instrument will allow an unlimited, "open architecture" investment option universe or may identify the investment platform made available to the PEP, and whether that platform contains a finite, or limited universe of investment options.

The PPP or the PEP'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"). We describe below several models that we anticipate may be made available by financial services companies and whether prohibited transactions issues under section 406(b) will arise, where, for example, investment options offered by an affiliate of the PPP are included in a plan's investment line-up.

1) Investment Manager Selects Investment Options not Proprietary to PPP & No Revenue Sharing

A curious aspect of the PEP statute is its requirement that the plan document provides 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)."

It would seem 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. Yet the PEP statute contemplates that an adopting employer may only be relieved of investment responsibility if someone other than itself – the PPP – "delegates" investment responsibility to another fiduciary, thereby suggesting that PPP is the primary holder of investment power and authority (query how the PPP could "delegate" to another investment power and authority that it does not itself have).

We believe it would be appropriate for the Department to clarify how the regulated community is to reconcile the question of who, in the first instance, is the holder of PEP investment management power and authority in the first instance. In our view, the provisions would best be reconciled under an 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 (how else could the adopting employer potentially "retain" such responsibility?) subject to a power by the PPP to delegate investment power to another fiduciary on the adopting employers' behalf. Under such a construction, the PPP would not have any independent investment management power or authority in its own right 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 either to an affiliated or 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").

Where the appointed Investment Manager is unaffiliated with and otherwise independent of the PPP, 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 section 408(b)(2) of ERISA. Where the Investment Manager is either affiliated with the PPP or is otherwise a party in whom the PPP holds an interest, the PPP would have an impermissible self-interest in the Investment Manager's fees. In order to avoid a violation of ERISA section

406(b)(1), we would suggest that the same mechanism set forth at the outset of this letter for obtaining the approval of PPP and other service provider fees by adopting employers be available to obtain independent authorization of the Investment Manager's fees.

Under this first model, we assume that neither the PPP nor its affiliates are sub-advisers to, managers of, or issuers of the investment options. Also, none of the investment options or parties related thereto pay revenue sharing in connection with the purchase or sale of the investment options. Therefore, the selection of the investment options by the Investment Manager does not have any effect on the compensation paid to the PPP or any party in which it has an interest and thus a prohibited transaction under section 406(b) does not arise.

2) Unaffiliated Investment Manager Selects Investment Options Proprietary to PPP or that Pay Revenue Sharing

An unaffiliated and otherwise independent Investment Manager engaged by the PPP selects the investment options made available under the PEP. The recordkeeping platform consists of a limited number of investment options, e.g., 200, from which the Investment Manager can select. An affiliate of the PPP is a sub-adviser to, manager of, or issuer of one or more of the investment options ("Proprietary Options"). One or more of the other investment options or parties related thereto pay the PPP or its affiliate revenue sharing based upon the amount of PEP assets invested in the investment options.

The PPP receives the above-described flat dollar fee or percentage of assets under administration fee. If the Investment Manager selects one or more of the Proprietary Options, the PPP's affiliate receives additional compensation in connection with the PEP's investment in that Proprietary Option. Additionally, if the Investment Manager selects one or more of the investment options that pay revenue sharing, the PPP or its affiliate will also receive the revenue sharing as compensation. When joining the PEP, the participating employer approves the platform of investments from which the Investment Manager can select after receiving disclosure from the PPP regarding the Proprietary Options and the revenue sharing arrangements.

So long as its conditions are met by the PPP, section 408(b)(2) should exempt prohibited transactions that arise under section 406(a) in connection with the payment of the compensation to the PPP, the PPP's affiliates, the Trustee, and the Investment Manager including the payment of any fees by the Proprietary Options to the PPP's affiliates and any revenue sharing paid to the PPP or its affiliate in connection with the other investment options.

If an Investment Manager that was affiliated with the PPP or that otherwise held an interest in the PPP that could affect its judgment were to use its fiduciary authority to select one or more of the of the Proprietary Options or the investment options that pay revenue sharing, a prohibited transaction under section 406(b)(1) would occur because the Investment Manager would have used its fiduciary authority to increase the compensation paid by the PEP to the PPP or a related party. Additionally, a prohibited transaction under section 406(b)(3) could occur by causing the PEP to engage in a transaction with PEP assets that resulted in a third-party's transacting with the plan to pay compensation to the PPP or a related party. However, here, where the Investment Manager is unaffiliated with the PPP and neither the PPP nor its affiliates exercise any discretionary authority, control, or responsibility as a fiduciary with respect to the investment options made available under the PEP, a prohibited transaction under section 406(b) does not occur.[4]

3) Proprietary Target Date Funds and Fixed Annuity Required under PEP

Under this model, an unaffiliated, independent Investment Manager is engaged by the PPP to select the investment options made available under the PEP. The recordkeeping platform consists of a limited number of investment options, e.g., 200, from which the Investment Manager can select subject to the following exceptions: (1) the PEP investment platform makes available a suite of target date investment options (Funds, CITs, or Separate Accounts) proprietary to the recordkeeper ("Proprietary Target Date Funds") that are the only investment options on the platform qualifying as QDIAs and; and (2) the PEP investment platform makes available a Fixed Annuity ("Proprietary Fixed Annuity") as the sole capital preservation investment option. The PPP's affiliated insurance company is the issuer of the Proprietary Fixed Annuity. Each adopting employer approves the platform of investments from which the Investment Manager can select and is informed of the platform's Proprietary Target Date Funds and Proprietary Fixed Annuity limitations.

As noted above, the PEP statute provides that each adopting employer is responsible for selecting the investment options made available to its employees participating in the PEP unless the PPP delegates this responsibility to another fiduciary (e.g. to an investment manager). In our view, the PEP statute provides that a PPP may delegate to the investment manager only some of the investment authority to an investment manager. Thus, the participating employer may remain responsible for selecting PEP investment options to the extent the PPP does not so delegate.

Further, so long as its conditions are met, section 408(b)(2) should exempt prohibited transactions that arise under section 406(a) in connection with the payment of the compensation to the PPP, its affiliates, the Trustee, and Investment Manager including the payment of any fees by the Proprietary Target Date Funds to the PPP's affiliate. Section 408(b)(2) should exempt any prohibited transactions that arise under section 406(a) by reason of the insurance company affiliate receiving compensation or another economic benefit in connection with the Proprietary Fixed Annuity. A prohibited transaction under section 406(b) should not occur because the

[4] See DOL Adv. Op. 2001-09A (Dec. 14, 2001) ("SunAmerica Opinion"). We assume for purposes of this submission that the unaffiliated Investment Manager is "independent" from the PPP as required under the SunAmerica Opinion. If this were not the case, exemptive relief from the prohibitions of ERISA section 406(b) may be necessary.

participating employer (not the PPP or a party in which it has an interest) selects the Proprietary Target Date Funds and the Proprietary Fixed Annuity.

C. Marketing the PEP

Once the PPP constructs the PEP and the PEP's service relationships, the PPP will market the plan to potential participating employers. One possible method of doing so is where the PPP's employees or the employees of the PPP's affiliates, such as a broker-dealer affiliate, market the PEP. If the PPP or its affiliate successfully sells the PEP to the employer, the PPP and its affiliates consequently will receive compensation in the form of the above-discussed flat dollar fee or assets under administration fee paid from each new participant account. Additionally, to the extent Proprietary Options are available under the PEP or investment options that pay revenue sharing, the PPP's affiliate likely will receive compensation from or in connection with the participants choosing to invest their contributions and account balances in such investment options. In some cases, the PPP may pay its affiliate to market the PEP.

In our view, section 408(b)(2) should exempt any prohibited transactions that arise under section 406(a) of ERISA by reason of the payment of such compensation as a consequence of the marketing and subsequent sale of the PEP. Further, we do not believe any transactions prohibited under section 406(b) would occur merely by reason of the PPP or its affiliate marketing and selling the PEP. A typical sales conversation would not involve the PPP or its affiliate "…render[ing] advice to a plan as to the value of securities or other property, or mak[ing] recommendations as to the advisability of investing in, purchasing, or selling securities or other property…" as required in the Department's regulation defining the term "investment advice" under section 3(21)(A)(ii).[5] Rather, such conversation would involve a description of the benefits and rights and features of the PEP including the investment line up. Such conversations would be in the nature of investment education as defined under the Department's Interpretive Bulletin.[6] Furthermore, the decision to sponsor an employee benefit plan is not a fiduciary decision for purposes of ERISA. Therefore, the employer's decision to participate in the PEP (or any recommendation that the employer should participate) should also not be viewed as a fiduciary decision by the participating employer.[7]

[5] 29 C.F.R. § 2510-3.21(c)(1)(ii)(B). However, to the extent a sale involves the provision of investment advice, the PPP's payment of a separate commission to the brokerage representative could involve a prohibited use of plan assets under sections 406(a)(1)(D), (b)(1) and (2) for which exemptive relief would be available under various exemptions, including PTE 84-24, PTE 75-1 and section 408(b)(8).

[6] 29 C.F.R. § 2509.96-1(d)(3)

[7] Indeed, the PEP statute provides that "…each employer in a pooled employer plan shall be treated as the plan sponsor with respect to the portion of the plan attributable to employees of such employer."

II. Business Model – Recordkeeper Does Not Act as PPP

Under this model, a registered investment, third party administrator or another party unaffiliated with a recordkeeper will be designated by the terms of the PEP as the PPP, i.e., a named fiduciary, the plan administrator and the person responsible for performing all administrative duties of the PEP. At that point, the PPP will decide (i) what service providers it may need to engage to administer and manage the PEP (including a recordkeeper and trustee) and (ii) how investment options will be made available under the PEP. The following includes some examples of how these relationships may be structured and how any prohibited transactions that arise under sections 406(a) or 406(b) of ERISA may be addressed.

A. Service Relationships

In order to provide recordkeeping, administration, trustee and investment services to the PEP, the PPP may choose to provide those services itself or hire affiliated or unaffiliated companies to provide those services. The PPP and these companies will receive compensation for performing services on behalf of the PEP. We anticipate a common fee structure will be that the PEP will pay to the PPP a flat dollar amount, e.g., $100, or a percentage, e.g., 0.25% per annum (i.e., 25 basis points) of assets under administration from each participant account for providing services to the PEP. The PPP will pay a portion of its fee to the affiliated or unaffiliated service providers it uses to provide services to the PEP.

Under this business model, provided that the participating employer approves the compensation arrangement and the conditions of section 408(b)(2) are met, a non-exempt prohibited transaction under section 406(a) should not occur. Furthermore, consistent with our prior analysis regarding approval of the fee arrangement, a transaction prohibited under section 406(b) should not occur because the participating employer approves the compensation arrangement. Finally, so long as the participating employers approve any changes to the compensation arrangement (including approval in accordance with Advisory Opinion 97-16A), section 408(b)(2) should exempt any prohibited transactions that arise by reason of the PEP paying the compensation pursuant to the modified compensation arrangement.

B. Investment Options Available under the PEP

We anticipate a variety of investment options will be made available under the PEP. The participants in the PEP will then direct the investment of their contributions and their account balances in the investment options in accordance with ERISA section 404(c)(1) or, in the absence of a direction, by default in a "qualified default investment alternative" under ERISA section 404(c)(5). The investment options may be Funds, CITs, Separate Accounts, or a combination thereof. The investment options may also include one or more Fixed Annuities. These investment options will be available on the recordkeeper's platform. We describe below two models that we anticipate will be made available by PEPs and how to address prohibited transactions that may arise.

1) PPP or Investment Manager Selects Investment Options not Proprietary to Recordkeeper & No Revenue Sharing to Recordkeeper

Under this model, the PEP's recordkeeper may allow for an "open architecture" platform or a limited number of investment options as described above. The PPP or an affiliated or unaffiliated Investment Manager designated in the PEP instrument selects the investment options (Funds, CITs, Separate Accounts, and/or Fixed Annuities) made available under the PEP from the recordkeeper's platform. The advisers to and managers of the investment options are not affiliated with and are otherwise independent of the recordkeeper and its affiliates. The issuer of any Fixed Annuities is not affiliated with the recordkeeper. None of the investment options pay revenue sharing to the recordkeeper.

If the PEP pays the above-described flat dollar fee ($100 per account) or assets under administration fee (.50%) and the PPP pays a portion of that to the recordkeeper and other service providers, section 408(b)(2) should exempt any prohibited transactions that arise under section 406(a) by reason of the payment of the compensation by the PEP to the PPP (and indirectly to any other service providers) because the participating employers approve the compensation arrangement. The selection of the investment options by the PPP or the Investment Manager does not affect the amount or timing of the compensation paid to them or any parties in which they have an interest and thus a prohibited transaction under section 406(b) does not arise.

2) PPP or Affiliated Investment Manager Selects Investment Options Proprietary to Recordkeeper & Pay Revenue Sharing to Recordkeeper

Under this model, the PPP or an affiliated registered investment adviser (Investment Manager) selects the investment options (Funds, CITs, Separate Accounts, and/or Fixed Annuities) that will be made available under the PEP from the recordkeeper's platform, which for purposes of this example includes a limited number of investment options, e.g., 200. The platform includes a single suite of Target Date Funds (established as Funds, CITs, or Separate Accounts) that can serve as the PEP's only QDIA. They are advised or managed by the recordkeeper's affiliate. In addition, the platform includes a single Fixed Annuity that will serve as the PEP's only "principal protection" investment option. An affiliate of the recordkeeper is the issuer of the Fixed Annuity. Finally, some of the other investment options available on the platform pay the recordkeeper or its affiliates revenue sharing based upon the amount of PEP assets invested in the options.

PEP pays the above-described flat dollar fee ($100 per account) or assets under administration fee (.50% to the PPP) and the PPP pays a portion of that to the recordkeeper and other service providers. The recordkeeper's affiliates also receive compensation from the Target Date Funds and compensation or other financial benefits in connection with the Fixed Annuity. The recordkeeper or its affiliate also receives revenue sharing from some of the investment options.

So long as its conditions are met, section 408(b)(2) should exempt prohibited transactions that arise under section 406(a) in connection with the payment of the flat dollar or assets under administration fee to the PPP and the PPP's subsequent payment of a portion of that fee to the registered investment adviser, recordkeeper, and other service providers. Section 408(b)(2) should exempt any section 406(a) prohibited transactions caused by the indirect compensation paid to the recordkeeper or its affiliate by reason of the PEP's investment in the Target Date Funds, Fixed Annuity or investment options that pay revenue sharing. Further, a prohibited transaction under section 406(b) should not occur because the participating employer approves the flat dollar or percentage of assets under administration fee. Additionally, a prohibited transaction under section 406(b) should not occur by reason of the payment of the indirect compensation in connection with the Target Date Funds, Fixed Annuity or investment options that pay revenue sharing so long as the party (e.g., the PPP or Investment Manager) that makes the decisions to include these investment options in the PEP does not have an interest in the recordkeeper or its affiliates.

C. Marketing the PEP

Once the PPP constructs the PEP, the PEP's service relationships, and the PEP's investment offering, the PPP will market the plan to potential participating employers. One possible method of doing so is that the PPP's employees or the employees of the PPP's affiliates market the PEP. If the PPP or its affiliate successfully sells the PEP to the employer, the PPP and its affiliates consequently will receive compensation in the form of the above-discussed flat dollar fee or assets under administration fee paid from each new participant account. In some cases, the PPP may pay its affiliate to market the PEP.

In our view, section 408(b)(2) should exempt any prohibited transactions that arise under section 406(a) of ERISA by reason of the payment of such compensation as a consequence of the marketing and subsequent sale of the PEP. Further, we do not believe any transactions prohibited under section 406(b) would occur merely by reason of the PPP or its affiliate marketing and selling the PEP. As discussed, a typical sales conversation would not involve the rendering of advice as to the value of securities or the advisability of purchasing or selling securities and, more likely, would be in the nature of investment education as defined by the Department.[8] Furthermore, the decision to sponsor an employee benefit plan is not a fiduciary

[8] As noted, to the extent a sale involves the provision of investment advice, the payment of a separate commission may involve a prohibited transaction under ERISA Section 406 for which exemptive relief may be necessary. See footnote 5 above.

decision for purposes of ERISA. Therefore, the employer's decision to participate in the PEP (or any recommendation that the employer should participate) should also not be viewed as a fiduciary decision by the participating employer.

III. Need for a PEP Prohibited Transaction Exemption

While we believe that an exemption specific to PEPs is not required to operate a PEP, we believe that such an exemption, if appropriately designed, could be helpful in encouraging the establishments of and participation in PEPs. Such an exemption likely would be helpful in promoting a broader array of business models. In addition, we ask that the Department consider issuing an exemption that would address any prohibited transactions that might occur as a result of the transfer of PEP assets to an IRA in accordance with the "one bad apple rule."

We expect that some PPPs may be interested in establishing business models under which the PPP or a party in which it has an interest selects investment options that are proprietary to the PPP or its affiliate. We believe that Prohibited Transaction Exemption 77-4 ("PTE 77-4") and the statutory exemption under section 408(b)(8) should exempt prohibited transactions that arise under section 406(b) in connection with purchases or sales of interests Funds, CITs and Separate Accounts proprietary to the PPP or its affiliate. However, we ask that the Department amend PTE 77-4 to allow participating employers to consent to the use of proprietary mutual funds (and changes thereto) using a consent process like that found in Advisory Opinion 97-16A. We believe that permitting the inclusion of proprietary mutual funds in a PEP would be beneficial to the participants. However, it is not realistic to assume that the PPP will be able to get a "wet signature" for hundreds or even thousands of participating employers.

If the Department is inclined to propose a new exemption specific to PEPs, such exemption should be similar to Prohibited Transaction Exemption 84-24 or the recently issued Notice of Proposed Class Exemption "Improving Investment Advice for Workers & Retirees." We think an exemption using a principle-based approach to assure compliance with ERISA's fiduciary duty and prohibited transaction provisions may make the most sense. The conditions of the exemption could include the following:

- Compliance with ERISA's fiduciary duty provisions (i.e., the PPP and other PEP fiduciaries act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the PEP, and does not place the financial or other interests of the PPP, other PEP fiduciary or any affiliate, related entity, or other party ahead of the interests of the PEP, or subordinate the PEP's interests to the interests of the PPP or other PEP fiduciary);

- Implement policies and procedures designed to verify compliance with ERISA's fiduciary duty provisions;

- All of the compensation paid directly or indirectly by the PEP to the PPP and other services providers does not exceed reasonable compensation; and

- Disclosure to the participating employer of –

  - the direct and indirect compensation paid to the PPP and other providers of services to the PEP;

  - the fiduciary responsibilities of the participating employer versus the fiduciary and non-fiduciary responsibilities of the PPP and other providers of services to the PEP; and

  - any material conflicts of interest.

Furthermore, we believe that exemptive relief would be welcome in the event a non-compliant participating employer must be removed from the PEP as required by the "bad apple" rule and the related PEP assets transferred to individual retirement accounts ("IRAs") established on behalf of the affected participants. Such an exemption would be necessary if the IRA and/or the investment option(s) established under the IRA are provided by the PPP or its affiliate and, therefore, will receive compensation in connection with the IRA and its investment option(s). Any such exemptive relief could be similar to that provided under the DOL's rollover safe harbor regulation, 29 C.F.R. section 2550.404a-3, and the related exemption issued by the Department, Prohibited Transaction Exemption 2019-02. However, the Department should consider broadening the investment options that may be made available under the IRA to include investments like those described in the definition of "qualified default investment alternative" under 29 C.F.R. § 2550.404c–5(e). Under these circumstances, the account balances transferred from the PEP to the IRA would likely be more substantial than the smaller "cash out" distributions intended to be addresses by the Department's safe harbor rollover regulation and it would be in the interest of the former PEP participants to be invested in an option that may result in the accumulation of more retirement savings than a "principal protection" option.

* * *

We again would like to thank the Department for asking the regulated community to address the important questions raised in the RFI. We look forward to further interaction with the Department on how PEPs may be administered and operated in accordance with the fiduciary responsibility and prohibited transaction provisions of ERISA. If you have any questions, please contact Steve Saxon, Tom Roberts or David Kaleda.

Very truly yours,

Stephen M. Saxon

Stephen M. Saxon

Cc: Thomas Roberts
David C. Kaleda