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September 29, 2025

Attn: Pooled Employer Plans: Big Plans for Small Businesses
Regulation RIN 1210-AC10.

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N–5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Comment submitted via the Federal eRulemaking Portal: www.regulations.gov

RE: Pooled Employer Plans: Big Plans for Small Businesses (RIN 1210-AC10)

Dear Assistant Secretary Aronowitz and Reviewing Staff of the Employee Benefits Security Administration ("EBSA"):

On July 29th, EBSA published a document providing interpretative guidance designed to assist small employers that are considering adopting a Pooled Employer Plan ("PEP"). The same document also indicated that the Department of Labor was considering developing one or more regulatory safe harbors aimed at stimulating interest in PEPs, at both the provider and the employer levels. The document seeks input from the public to assist it in the process of developing such a safe harbor and poses a number of specific questions. (The document will hereinafter be referred to as "Guidance/RFI" or "Guidance/RFI Notice".)

The Pension Rights Center is a national nonprofit consumer organization that provides direct assistance to retirement plan participants and beneficiaries and seeks common sense approaches to improve the retirement security of American workers and their families. Founded in 1976, two years after the passage of the Employee Retirement Income Security Act of 1974 ("ERISA"), the Center has worked with workers, employers, and service providers both to expand access to retirement plans and to increase the adequacy and security of benefits earned under those plans. We are pleased that EBSA is exploring how to expand coverage and reduce costs and these comments share our thoughts on the issues raised in the guidance and request for information.

We have divided our comments into four sections. The first section discusses basic issues related to PEPs, including their goals, and suggests some additional research questions for the

Department to consider in developing further guidance related to PEPs. The second section describes the centrality of the ERISA fiduciary to the statutory scheme and the difficulties that smaller employers have in ensuring that plans are administered for the exclusive purpose of providing benefits and defraying reasonable plan expenses. This section also discusses the Department's limited guidance for small employers to use if they are considering joining a PEP. The third section provides thoughts on the desirability of fiduciary safe harbors for the design and selection of PEPs and suggests how such safe harbors, if adopted, might be conceptualized. The fourth section responds to some of the 29 questions posed by the Department in its request for information and provides some additional information that we suggest the Department should consider in developing further guidance.

1. Basic Issues Related to PEPs

The Department's Guidance/RFI is principally focused on the small employer market and the potentially positive impacts of PEPs for small employers who either do not currently sponsor a retirement plan or currently sponsor a plan but want to ease the burdens of plan operations and fiduciary responsibility (by transferring much of those burdens to a third party—the Pooled Plan Provider and its designees) and to capture some of the economies of scale offered by PEPs.

The Pension Rights Center has long taken the position that expanding coverage—which of course includes expanding plan sponsorship—is one of the three primary measures of the quality of our nation's retirement policy (along with benefit adequacy and security). To the extent PEPs can expand the number of small employers who adopt plans, PEPs have a role in meeting that goal. And to the extent PEPs can offer small employers well-administered plans with low administrative costs and investments unburdened by high investment fees, PEPs can contribute to the goals of improving benefit adequacy. In our view, the Department is correct in focusing its regulatory attention on assisting smaller employers in evaluating PEPs for adoption and then monitoring their performance, for as we will discuss in the second section of these comments, such employers will sometimes lack the expertise and resources to competently carry out these duties without such assistance.

But the statistical data that the Department has analyzed to date suggests that there is, at least currently, greater interest in PEPs among larger than among small employers. More particularly, the Department noted that half of reporting PEPs served employers averaging at least 188 employees. The Department did note, however, that the second largest PEP served 33,773 employers with approximately 548,000 employees, for an average of 16 employees per employer. This suggests that there may be robust potential market for small employer PEPs, but we wonder whether there may be factors that make the demographics of that PEP atypical. One possible explanation is that the PEP was a pre-SECURE[1] Act multiple employer plan or a consolidation of several pre-SECURE Act multiple employer plans and thus began its life as a PEP with a substantial existing small employer base. It is also possible that the small employers in PEPs are primarily small employers that already were sponsoring a plan rather than small employers who have chosen to adopt a plan only because of the emergence of the PEP vehicle.

In any event, the Department's future regulatory consideration of PEPs may benefit from further analysis of existing data on the question of whether the PEP form will meaningfully increase the

[1] Setting Every Community Up for Retirement Enhancement Act, Pub. L. 116–94, 133 Stat. 2534 (2019).

number of employers who sponsor plans rather than simply shifting the form of their already-existing plan.

The Department's guidance/RFI observes that many "PEPs appeared to be delivering on Congressional intent by offering diversified investment lineups at a lower cost than small plans could likely negotiate on their own behalf." The basis for this observation is Morningstar data showing "that the median cost for each participant in a small retirement plan is 84 basis points" while the estimated "total costs to participate and invest through one of the three largest PEPs reviewed were between 23 and 42 basis points for a typical participant." It is, however, our understanding that PEP fees and charges may vary based on the size of the employer, which suggests that there may be reason to look more closely into whether and how fees in PEPs may vary between small, mid-sized and larger employers and whether cross-subsidization of employer plans participating in any single PEP may be occurring. There may also be reason to expand research into fees (and the related issue of satisfaction with plan services) beyond the three largest plans.

We also add that we have heard anecdotally that fees for small employers in PEPs do not necessarily reflect low fees and other costs. In addition, a 2020 empirical study found that fees in multiple employer plans were "significantly higher than the fees for single-employer plans of comparable size." Natalya Shnitser, *Are Two Employers Better than One? An Empirical Assessment of Multiple-Employer Retirement Plans,* 45 THE J. CORP. LAW 743 (2020). The study's conclusions conflict with the Department's analysis and suggest that further study is needed before concluding that the economies of scale of a PEP generally pass through to plan participants, particularly participants in plans of smaller employers. (Professor Shnitser did note that future competition within an expanded pooled plan market might result in lower fees.)

With respect to mid-sized and large employers, the PEP market, the inevitable innovation and variation among PEPs in that market, and the fiduciary judgment required by ERISA should negate any need for special rules or safe harbors to encourage adoption of a PEP for such employers. The fiduciary process of selecting and monitoring PEPs for such employers is not appreciably different in form or substance from the process of selecting and monitoring performance in a single employer plan and larger and mid-size employers have the skills and resources to decide whether a PEP or a single employer plan best suits their and their employee's needs.

We do, however, agree with the Department that one of the benefits of using a pooled arrangement for an employer, regardless of its size, is the transfer of some fiduciary functions to third party professionals. And we also agree with the Department that it is desirable for the Pooled Plan Provider to accept the fiduciary responsibility to select and monitor a PEP investment manager. In this regard, the Department may want to further emphasize in future "tips" guidance and educational materials the benefits of choosing a PEP in which the Pooled Plan Provider ("PPP") choses an investment manager.

We also encourage the Department to clarify that the responsible employer fiduciary's duty to monitor the performance of the PPP includes review of the investment performance of a PPP-selected investment manager.

2. The Department's "Tip" Guidance for Small Employers and Fiduciary Responsibility

A central goal of Title I of ERISA was the creation of standards of care and loyalty required of individuals charged with administration and management of an employee plan. For employers, these duties include the prudent selection and monitoring of fiduciary and non-fiduciary third parties who provide services to the plan. As the Guidance/RFI document notes, the competent performance of ERISA's core fiduciary duties is central to the value plan participants receive from their plan. In the real world, however, smaller employers often are neither trained in their ERISA responsibilities nor have the resources to engage experts to help them perform those responsibilities. Thus, the Department's "tips' guidance can be a helpful and straightforward approach to assisting smaller employers in deciding whether to adopt a PEP and is also evidence of the difficulties that small employers, even with the tips, may have in evaluating a PEP and in comparing it to other PEPs and single employer plans.

For example, Question 3 tells the small employer that "it is crucial that you ask the pooled plan provider about its experience with employee plans and to ask specific questions about customer satisfaction, prior litigation and government enforcement, quality of services, and whether the PEP will offer economies of scale. Question 4 suggests several queries related to fees and question 5 about plan investment options. Question 9 informs the employer to inquire about the implications of leaving a PEP.

These questions are appropriate, but how is a typical small employer going to evaluate answers to the suggested questions, particularly since the relevant conversations are likely to be with salespersons for the PEP? The small employer, for example, is often not knowledgeable about the reasonableness of a PEP's fees or the impact of an employee or the employer exiting the PEP. And the tips note that an employer should explore and compare several PEPs in its selection process, but how many PEPs should an employer consider? The points we are raising are not easily addressed, but the tips might be augmented with DOL material to evaluate the PEP's response to the questions embodied in the tips. And the tips should note that an employer might want to consult an independent, non-conflicted adviser to assist them in deciding whether to join a PEP and if so, deciding which PEP will best serve the interests of its employees.

We also note the possibility that the tips advice—by clearly delineating employer responsibilities for selecting and monitoring PEPs to employers who may not be equipped with the relevant training and experience—might actually discourage some employers from joining a PEP. Notwithstanding this possibility, and in part perhaps because of it, we believe the tips, if modified, can be a valuable resource for small employers. We also believe that the tips might be improved by establishing an advisory committee composed of experts with a variety of perspectives to improve the guidance and through the use of focus groups.

Some additional thoughts:

- Tip 1 might also note that employers can sponsor other types of plans, including Simplified Employee Pensions and preapproved plans. In addition, question 1 has the potential to mislead employers when it says that "PEPs can offer a turnkey retirement solution, managed completely by professionals." As several of the other tips make plain, PEPs do not and should not relieve the employer of the fiduciary responsibility of prudently selecting the PEP (which requires some review of the service providers selected by the PPP) or of monitoring. (Indeed, the definition of a PEP explicitly imposes on the employer these fiduciary responsibilities. See ERISA § 3(43).) Perhaps Question 1 should explain that some employer duties with respect to a PEP are non-delegable.

- Tip 2 notes that there are different types of PEPs and that some offer customization while others do not. The utility of the tip might be improved by providing more information on the types of features that might be customized under different PEP structures. For example, the tip might make clear that some PEP structures make the employer the primary fiduciary to monitor investment performance while others transfer much of this responsibility to the PPP.
- The tips should emphasize the importance of answers to the recommended questions in writing and to retain the material for documentation and to assist in future monitoring of the PEP. It would also be helpful for the Department to develop a check list of key information and to encourage or require each PEP to provide its answers to each item on the list.
- The Department may want to set a standard for PEPs to report in a uniform manner the various fees, offsets and other expenses paid directly or indirectly by the employer and participating employees. The subject of fees may be especially difficult for a small employer to negotiate.[2]
- It is important that small employers are aware of their potential co-fiduciary liability in certain situations and the tips should provide some explanation of what this might mean to a small employer.
- The tips should include questions and issues dealing with participant benefit claims and appeals.
- The tips guidance states that the tips are "to assist small business owners in picking a PEP." Tip 8, however, considers the post-adoption issues of monitoring. It might be that separate and more detailed guidance should be developed to assist small employers in identifying and carrying out their monitoring obligations. For example, guidance might indicate how often an employer should engage in periodic monitoring. And guidance should emphasize that the employer should document and help to resolve participant complaints, concerns and questions when they arise and be able to raise the pertinent issues with the PPP.

3. Thoughts on Potential Safe Harbors

The Pension Rights Center is strongly opposed to safe harbors that have the effect of reducing the scope of fiduciary responsibility under ERISA. In enacting ERISA, Congress intended for the plan sponsor to play a critical role in the administration and management of their employee plans and although the PEP facilitates the transfer of some fiduciary functions to the PPP, it does not exempt employers who adopt PEPs from the important role they continue to play in selecting and monitoring a PPP and a PEP. Congress, in enacting ERISA, recognized that in many situations, the employer—regardless of size—acts as their employees' agent and

[2] A small employer may not have good points of comparison on fees or understand the myriad types of fees that might be assessed against participants. An important concern here is the possibility of conflicts of interest and the ways in which they can arise.

accordingly should be governed by strict standards of fiduciary conduct. A safe harbor, if diluting any of the employer's responsibilities under ERISA, would upset the statute's fundamental structure. We also believe there are serious issues under the Supreme Court's *Loper Bright* decision as to the Department's ability to provide safe harbors from fiduciary responsibility without explicit Congressional authorization, which the SECURE Act did not grant the Department.[3]

In lieu of safe harbors, we believe that the Department's regulatory efforts should be focused on developing additional informational and educational materials (in part, to facilitate employer comparisons of different PEPs and PPPs and to assist small employers in their monitoring responsibilities, see ERISA § 3(43)(B)(v)(I)), creating robust reporting and disclosure standards, and taking appropriate regulatory and enforcement measures to ensure that PEPs and PPPs meet the standards set by Congress in ERISA §§ 3(43) and 3(44).

If the Department does issue a safe harbor, however, the safe harbor should include at least the following requirements and features:

- A safe harbor should be limited to small employers.
- A safe harbor should be focused on the idea of certification of a PEP by either the Department of Labor or independent outside fiduciaries unaffiliated with any PEP or PPP. We would suggest reviewing the experiences of other countries in establishing licensing and certification requirements for retirement savings vehicles.
- A safe harbor should require the PPP to select and monitor an investment manager.
- A safe harbor should ensure that important administrative responsibilities—recordkeeping, preparation of disclosures, and communications with the participant and employer—are performed by fiduciaries, either the PPP or any entity with whom the PPP contracts to provide such services, and that such entities acknowledge in writing their fiduciary status.
- A safe harbor should require the employer to be responsible for paying PEP administrative costs rather than having those costs pass through to the participants.

- A safe harbor should prohibit the PEP from requiring arbitration, limiting venues, or imposing plan-specific periods for a participant to bring a fiduciary claim or claim for benefits under the plan.
- A safe harbor might include an advisory committee composed of elected plan sponsors and plan participants.
- A safe harbor should include rules designed to prohibit revenue sharing and other arrangements that raise conflicts of interest.
- A safe harbor might include a requirement that a PEP (or at least a PEP of a certain size) appoint an independent ombudsman, with authority to communicate directly with the Department and other relevant parties. In addition to helping resolve complaints, the

[3] We note that Congress already provided a limited, statutory safe harbor for employers who comply in good faith before DOL issues guidance with respect to PEPs and PPPs. See ERISA § 3(44)(D)("an employer or pooled plan provider shall not be treated as failing to meet a requirement of guidance issued by the Secretary under subparagraph (C) if, before the issuance of such guidance, the employer or pooled plan provider complies in good faith with a reasonable interpretation of the provisions of this paragraph, or paragraph (43), to which such guidance relates").

ombudsmen could be tasked with periodic reviews of the PEP, with suggestions for improvement.

4. Response to RFI Queries

The Pension Rights Center is not itself an industry participant and lacks the industry-specific data needed to respond to a majority of the questions.[4] Some of the questions, such as those concerning a possible safe harbor (questions 15-24) and those involving barriers to small employers understanding PEPs (question 4), are answered at length above. Answers and comments to some addition questions follow.

- Questions 13 and 14: We do not believe that the Department should, at this time, create new class exemptions that apply exclusively to PEPs. Many of the issues with PEPs are not new, having arisen with other types of plans, including multiple-employer plans. And the industry has already produced a variety of PEP models without the need to rely on class exemptions. Any exemption relief at this point should be confined to individual exemption requests; class exemptions should be built upon a greater body of knowledge and experience with PEPs than we currently have.
- Question 25: We do not believe the Department should be creating safe harbors for PPPs and PEPs. Aside from diluting participant and plan sponsor protections, such safe harbors might constrict useful innovation on the part of market participants who seek to have their products and services comply with safe harbor conditions. We also do not believe it is appropriate for the Department to either discourage or encourage the creation of PEPs. Indeed, the Guidance/RFI Notice suggests that the market has already produced numerous PEP offerings without a safe harbor.
- Question 29: The disclosures provided to PEP participants should include all disclosures made in other ERISA plans. We also believe that default to electronic disclosure is often not appropriate for participants in plans for small employers and that this is an issue that should be studied by the Department.

We very much appreciate the work you are doing to help expand retirement plan sponsorship and coverage. If you have questions about any of our comments or if we could provide any additional assistance, please contact us.

Sincerely,

Norman Stein
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[4] We look forward to reviewing and learning from the responses to the Department's questions by industry participants.