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## Bringing PEPs Into Perspective: DOL's Proposed Rule on Pooled Plan Provider Registration and Other Guidance

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When the Setting Every Community Up for Retirement Enhancement Act of 2019 (the "SECURE Act") was signed into law on December 20, 2019,<sup>1</sup> it brought forth a vision of a small retirement plan marketplace fundamentally altered by the advent of pooled employer plans (PEPs). This vision had small businesses banding together to use PEPs as a powerful tool to shrink the retirement savings gap and to provide inexpensive, and easily administered retirement benefits for their employees. The policy goals, potential market for pooled plan providers (PPPs), and the value added to adopting employers were clear, but the mechanics of designing, establishing, and operating PEPs remained blurry.

Under the SECURE Act, a PPP is required to register with the U.S. Department of Labor (the "DOL") and the Department of the Treasury (Treasury) "before beginning operations" as a PPP, and is further required to provide such information as the DOL and Treasury may require.<sup>2</sup> The DOL recently took a major step toward providing a process for PPPs to meet these statutory requirements.<sup>3</sup>

On September 1, 2020, the DOL published much-anticipated proposed regulations on the PPP registration process.<sup>4</sup> The proposed regulations: interpret the phrase "before beginning operations as a pooled plan provider" as used in the SECURE Act, enumerate the information that must be provided as part of the registration process, and provide a new Form PR (Regis-

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<sup>1</sup> The SECURE Act was enacted as part of the Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, 133 Stat. 2534 (2019).

<sup>2</sup> See SECURE Act, §101(a), §101(c).

<sup>3</sup> *DOL Proposes Rules on Pooled Plan Provider Registration Process*, Morgan Lewis: Lawflash (Sept. 4, 2020), <https://www.morganlewis.com/pubs/dol-proposes-rules-on-pooled-plan-provider-registration-process>.

<sup>4</sup> *Registration Requirements for Pooled Plan Providers*, DOL Prop. Reg. §2510.3-44, 85 Fed. Reg. 54,288 (Sept. 1, 2020).

tration for Pooled Plan Provider) that PPPs can use to register and to make subsequent disclosures. The proposed regulations provide that properly registering with the DOL would satisfy the SECURE Act's requirement to register with both the DOL and Treasury. Comments on the proposed regulations were due October 1, 2020.<sup>5</sup>

## WHAT DOES IT MEAN TO BEGIN OPERATIONS AS A PPP?

As noted above, the SECURE Act mandates that PPPs register "before beginning operations as a pooled plan provider." This language, however, may not provide potential providers with enough clarity to know when that registration process must begin. The proposed regulations interpret the phrase "before beginning operations as a pooled plan provider" to mean before "publicly marketing services as a pooled plan provider or publicly offering a pooled employer plan." The preamble to the proposed regulations adds that the DOL "does not intend to require registration as a result of preliminary business activities, such as establishing the business organization, creating a business plan, obtaining necessary licenses or entering into contracts with subcontractors or partners, obtaining an federal employer identification number, or actions and communications designed to evaluate market demand in advance of publicly marketing pooled plan provider services or publicly offering one or more pooled employer plans."<sup>6</sup>

We expect some commenters to oppose the treatment of "publicly marketing services as a [PPP]" as "beginning operations as a [PPP]" and to argue that this definition should be narrower (perhaps limited to beginning actual operation of the PEP, or when the PPP is first adopted by a participating employer). Commenters may also argue that it is not entirely clear when communications will constitute "publicly marketing services as a [PPP]" instead of "communications designed to evaluate market demand in advance of publicly marketing pooled plan provider services or publicly offering one or more pooled employer plans." These commenters may propose to the DOL methods to distinguish clearly public marketing materials from other pre-operation communications.

## THE PROPOSED REGISTRATION PROCESS AND SUPPLEMENTAL FILINGS

The DOL's proposed registration process requires the PPP to submit a Form PR electronically to (1) reg-

ister before beginning operations as a PPP, (2) disclose the occurrence of certain reportable events, (3) amend or correct previously submitted Forms PR, and (4) disclose that the PPP has ceased providing services to any and all PEPs.<sup>7</sup>

## Initial Filing

The initial filing must occur 30-90 days before the PPP begins operations as a PPP, as defined above. The Form PR reflecting the PPP's initial registration must include the following information:<sup>8</sup>

- PPP's legal business name, any trade name (d/b/a), and its EIN;
- PPP's business telephone number, business mailing address, and the web address of any website where the PPP or its affiliate markets the PPP to the public or provides the public information on the PPP's PEP;
- Name, mailing address, telephone number, and email address for the PPP's primary compliance officer, as well as the name of the PPP's agent for service of process, such agent's address, and a statement that service of legal process may be made upon the PPP;
- Approximate date when PEP operations are expected to commence, and a description of the administrative and investment services that will be provided by the PPP (including certain information regarding the PPP's affiliates that service the PEP); and
- Statements disclosing (1) certain federal or state criminal convictions against the PPP, or any officer, director, or employee of the PPP, if the conviction or related term of imprisonment served is within 10 years of the date of registration, and (2) certain ongoing criminal, civil, or administrative proceedings in any court or administrative tribunal by a regulatory authority against the PPP or any officer, director, or employee of the PPP.

We anticipate that the DOL will receive comments asking for clarification regarding who/what constitutes a "primary compliance officer" and comments arguing that the PPP's primary compliance officer may not actually be the best point of contact for PEP compliance issues. Additionally, we anticipate that the DOL will receive comments arguing that this information should not be required if it is duplicative of information previously reported to the DOL or another government agency (such as the Securities and Exchange Commission).

<sup>5</sup> As this article is being prepared in September, the authors do not have the benefit of having reviewed the submitted comments.

<sup>6</sup> 85 Fed. Reg. 54,288, 54,292.

<sup>7</sup> 85 Fed. Reg. 54,288, 54,292.

<sup>8</sup> 85 Fed. Reg. 54,288, 54,292-54,293.

## Supplemental Filings

Supplemental filings must be made within 30 days of the occurrence of a reportable event. Proposed reportable events include:<sup>9</sup>

- Changes in the information previously reported by the PPP on a Form PR;
- A significant change in the PPP's business structure;
- Initiation of bankruptcy or similar proceedings for the PPP or its affiliate;
- Receipt of written notice of the initiation of an administrative or enforcement action against the PPP or an officer, director, or employee of the PPP and related to the provision of services to, operation of, or investments of the PEP or another employee benefit plan;
- Receipt of written notice of a finding of fraud or dishonesty by a court or agency against the PPP or an officer, director, or employee of the PPP and related to the provision of services to, operation of, or investments of the PEP or another employee benefit plan;
- Receipt of written notice of the filing of criminal charges against the PPP or an officer, director, or employee of the PPP and related to the provision of services to, operation of, or investments of the PEP or another employee benefit plan; and
- Cessation of the PPP's operation of all PEPs.

We expect that the DOL will receive comments arguing that the proposed list of reportable events is too broad and specifically calling into question the breadth of "administrative . . . action[s] against the PPP," which could cover a variety of actions (ranging from routine exams audits or investigations to actions seeking to disqualify the PEP).

## Corrected, Amended, and Final Filings

The proposed regulations indicate that the DOL will allow PPPs to file corrected or amended versions of their initial registration and supplemental filings for reportable events. The proposed regulations do not include much detail on the correction process, but provide generally that the process for correcting or amending Forms PR will be similar to the process of correcting or amending Forms 5500.

The final Form PR filing must be made within 30 days of the PPP filing the final Form 5500 for its last PEP. This disclosure requirement is in addition to the supplemental filing that must be made under the pro-

posed regulations when the PPP ceases to operate its last PEP.

We anticipate that commenters may request additional detail regarding the process for filing corrected, amended, and final Forms PR.

## WHAT'S NEXT?

Now that the deadline for comments has passed, the DOL will review the comments and prepare a final or interim final rule. The final or interim final rule will need to be cleared by the Office of Management and Budget before it is published in the Federal Register. Ordinarily, final and interim final regulations will be effective no fewer than 30 days after their publication in the Federal Register. However, the DOL may make the final or interim final regulations on PPP registration effective sooner if they can show good cause for the earlier effective date. Here, the DOL may argue that there is good cause for the final or interim final regulations to be effective sooner (ideally by December 1, 2020) so that PEPs can be rolled out to the market as soon as possible (ideally on January 1, 2021, the effective date for the PEP rules under the SECURE Act).

In addition to finalizing the regulation on the PPP registration process, the DOL will need to prepare the portal through which PPPs submit Forms PR electronically. We anticipate that the portal will be made available to the public shortly after the publication of the final regulations, so that PPPs may file their initial registration promptly.

The SECURE Act directs both the DOL and Treasury to issue additional guidance regarding PEPs,<sup>10</sup> but it seems increasingly unlikely that this guidance will be issued in 2020. This guidance, including guidance addressing the administrative responsibilities of PPPs, will help those entities on the fence about whether to sponsor a PEP better evaluate the marketplace. Critically, the SECURE Act directs the IRS to issue model PEP language.<sup>11</sup> While it is not clear how extensive this language will be, potential providers are anxiously awaiting model language and some are holding off on making decisions until this language is issued. In the meantime, PPPs and adopting employers can rely on good faith interpretations of the SECURE Act's provisions.<sup>12</sup>

With the registration process coming into focus, PPPs can turn their attention to the nuts and bolts of PEP design. While the technical and practical plan design questions confronting aspiring PPPs are outside

<sup>9</sup> 85 Fed. Reg. 54,288, 54,293-54,294.

<sup>10</sup> SECURE Act, §101(a).

<sup>11</sup> SECURE Act, §101(a).

<sup>12</sup> SECURE Act, §101(c).

of the scope of this article, we have written extensively on these issues.<sup>13</sup> We anticipate that as the DOL and IRS continue to issue guidance — especially in the form of model PEP language — the marketplace will start to come better into focus and allow PPPs to begin marketing PEPs to smaller employers.

## **AN ASIDE: IRS NOTICE 2020-68**

While PEP stakeholders have rightly been focused on the DOL’s proposed regulations on the PPP registration process, they should also be aware of IRS Notice 2020-68. This notice makes clear that certain small employers participating in a PEP with an eligible automatic contribution arrangement (EACA) may be eligible for the SECURE Act’s tax credit for small employers (up to \$1,500 over three years).

More specifically, the SECURE Act provides that “eligible employers” — employers that have had no more than 100 employees who received \$5,000 or more of compensation from the employer for the pre-

ceding year — that adopt a plan with EACA provisions for the first time, are eligible for a \$500 annual credit during each year in the initial three-year period beginning with the first post-2019 plan year after the employer first adopts such a plan.

Notice 2020-68, Q&A 3 clarifies that this tax credit “applies to an eligible employer that participates in a [multiple employer plan (MEP)] in the same way that the credit would apply if each employer participating in the MEP were the sponsor of a single-employer plan maintained by the eligible employer.” When the SECURE Act amended the I.R.C. to introduce PEPs, it technically refers to MEPs with PPPs (instead of PEPs as a distinct entity). Therefore, the \$500 annual tax credit (up to a maximum of \$1,500 over three years) may be available to eligible employers that adopt a PEP with an EACA feature, provided that the other qualifications are met.

Assuming that PPPs can handle the logistical and developing issues of implementing an EACA for adopting employers, this tax credit provides an attractive incentive that could put a significant dent in the cost to participating employers of choosing to adopt a PEP.

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<sup>13</sup> See Michael B. Richman, Gregory L. Needles, & Michael J. Gorman, *PEP Rally! Explaining the Excitement for Pooled Employer Plans*, N.Y.U. Rev. Emp. Ben. at Chapter 12 (forthcoming 2020).