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Attorneys Offer Closer Reading of DOL's Open MEP RFI

Advisers and broker/dealers hoping to work with open multiple employer plans now have a short window to offer their perspectives to the Department of Labor and the Internal Revenue Service.

By John Manganaro

The Wagner Law Group has published a new client alert that examines in detail the recent request for information (RFI) circulated by Department of Labor (DOL) on the topic of financial services providers' potential conflicts of interest in the operation of open multiple employer plans (MEPs).

Acting Assistant Secretary of Labor for the DOL's Employee Benefits Security Administration (EBSA) Jeanne Klinefelter Wilson says the RFI—available online here—is an opportunity for the public to provide data and information that may be used to evaluate whether the EBSA should propose a new prohibited transaction class exemption.

Information is requested on the possible parties, business models and conflicts of interest that respondents anticipate will be involved in the formation and ongoing operation of PEPs.

By way of background, the Setting Every Community Up for Retirement Enhancement (SECURE) Act, beginning in 2021, will allow for the creation of PEPs, which are a close analog to open MEPs. Importantly, a PEP is treated as a single plan under the Employee Retirement Income Security Act (ERISA) and the PEP need file only one Form 5500 and receive only one annual audit by an independent certified public accountant. Under the SECURE Act, there need not be a "commonality of interests" among the employers that participate, and the PEP's sole purpose is to provide employee retirement benefits.

In the new client alert, attorneys with the Wagner Law Group note that the RFI also requests information on issues facing two other types of multiple employer plans for which the DOL provided guidance in 2019—multiple employer plans sponsored by employer groups or associations with "commonality of interest," dubbed "association

plans," and those sponsored by professional employer organizations, dubbed "PEO MEPs." Together, the DOL refers to these two plan types as "MEPs."

"Entities interested in becoming pooled plan providers may be banks, insurance companies, broker/dealers [B/Ds] and similar financial services firms, including pension recordkeepers and third-party administrators [TPAs]," the Wagner attorneys explain in the alert. "These entities, with their complex financial arrangements with employee benefit plans, have in the past needed and been given exemptive relief by the DOL through its statutory authority under ERISA and the Code [Internal Revenue Code], in order to avoid prohibited transactions and conflicts of interest."

The attorneys note that, before granting an exemption, the DOL must find that the exemption is administratively feasible, in the interests of plans, their participants and beneficiaries, and protective of the rights of participants and beneficiaries of plans.

"The RFI requests information on the types of potential pooled plan providers, the possible business models, conflicts of interest and prohibited transactions that might exist in connection with PEPs, for the purpose of assessing the need for new prohibited transaction exemptions or amendments to existing exemptions," the attorneys say. "The requests focus on several aspects of potential operations—whether pooled plan providers are likely to rely on affiliates as service providers; whether they will offer proprietary investment products; and to what extent a pooled plan provider would be able to set or increase its own fees for the services it provides, or to influence its compensation, through the investment options offered to the participating employers."

As the attorneys point out, the RFI asks whether respondents anticipate that the DOL's existing prohibited transaction exemptions will be relied on by pooled plan providers and, if so, which exemptions are most relevant, and whether any amendments are needed to address unique issues with respect to PEPs.

"On the other hand, the RFI asks, to the extent respondents do not believe additional prohibited transaction relief is necessary, why that is so and how would the conflicts of interest be appropriately addressed to avoid prohibited transactions," the attorneys say in the alert.

The client alert goes on to note that open MEPs currently are treated as a single plan under Section 413(c) of the Code, but not under Title I of ERISA. According to the RFI,

the DOL received valuable information in response to previous requests last year concerning potential conflicts of interest of "open" MEP operators and the possible need for additional prohibited transaction relief. However, the client alert notes, the 2019 request for information was issued prior to the passage of the SECURE Act and therefore the comments did not specifically address the structure of PEPs as created by the SECURE Act or its amendment to Code Section 413.

"Thus, the RFI raises another important aspect of the SECURE Act amendments to ERISA and the Code necessary for MEPs to move forward, and gives interested parties a chance to weigh in on this as well," the Wagner attorneys explain. "The Code amendment provides the Secretary of the Treasury with the authority to define the terms under which PEPs, and MEPs maintained by employers with a common interest other than adopting the MEP for their employees, may remain single plans even if one or more employers of employees covered by the plan fail to take actions required for the MEP or PEP to meet the tax qualification requirements."

The Wagner attorneys conclude that any employer considering whether, and what type, of MEP to join, will want to monitor the progress of the DOL and IRS as the agencies prepare and provide more formal guidance on these questions and more.

"If you are already a MEP entity, you may want to join the process now, and comments are due on this RFI by July 30," the client alert says. "However, there will be later opportunities: If and when DOL issues a proposed class exemption, and if and when the agencies determine that they need to republish their final—or in the case of the IRS, proposed—rules on MEPs, to conform to the SECURE Act. In addition, you will have opportunities to make your views known when the DOL and the IRS propose guidance on the issues the SECURE Act requires them to address, such as the scope of the permitted or required duties of a pooled plan provider, and the circumstances under which a pooled employer plan should retain the assets of a noncompliant participating employer."

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