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

Subject: Registration Requirements for Pooled Plan Providers (RIN 1210-AB94)

Greetings:

On behalf of the American Council of Life Insurers (ACLI)¹, we appreciate the opportunity to provide comments in response to the Proposed Rule (the Proposed Rule) issued by the Department of Labor (the Department) that would establish the requirements for registering with the Department as a “pooled plan provider” (PPP) for “pooled employer plans” (PEPs) under sections 3(43) and 3(44) of the Employee Retirement Income Security Act of 1974, as amended (ERISA).² The Proposed Rule would also establish a new form—EBSA Form PR (Pooled Plan Provider Registration)—as the required filing format for pooled plan provider registrations. The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) permits the establishment of “pooled employer plans” that designate a “pooled plan provider” beginning on January 1, 2021.

¹ The American Council of Life Insurers (ACLI) is the leading trade association driving public policy and advocacy on behalf of the life insurance industry. 90 million American families rely on the life insurance industry for financial protection and retirement security. ACLI’s member companies are dedicated to protecting consumers’ financial wellbeing through life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, reinsurance, and dental, vision and other supplemental benefits. ACLI’s 280 member companies represent 94 percent of industry assets in the United States.

² 85 Fed. Reg. 54288 (Sep. 1, 2020).

The SECURE Act requires a pooled plan provider to register with the Secretary of Labor before beginning operations.

ACLI applauds the Department's timely efforts to implement the SECURE Act's PEP provisions. A critical challenge in enhancing Americans' retirement security is expanding access to workplace retirement savings. Three-fifths of small employers (*those with 99 or fewer employees*) rely on life insurer products and services in their employment-based retirement plan. PEPs provide a major opportunity to enhance coverage under the private sector employee benefit plan system. ACLI agrees with the Department's conclusion that by allowing most of the administrative and fiduciary responsibilities of sponsoring a retirement plan to be transferred to a PPP, the pooled employer plan can offer employers, especially small employers, a way of offering their employees a workplace retirement savings option with reduced burdens and costs compared to sponsoring their own separate retirement plan.³

To further encourage the formation and operation of these important retirement savings programs, our comments detailed below focus on simplifying the Proposed Rule's registration requirements. We find several components of the registration requirements somewhat confusing while others rightly can be characterized as overly burdensome and unnecessary.

I. Initial Registration Statement Timing

Section 2510.3-44(b) would require a PPP to register with the Department "before beginning operations as a pooled plan provider."⁴ The provision further states, that for registration purposes, the term "beginning operations as a pooled plan provider" means publicly marketing services as a pooled plan provider or publicly offering a pooled employer plan. The Department maintains that a pooled plan provider is treated as beginning operations "when it is considered covered by Title I of ERISA within the meaning of section 4 of ERISA."⁵ The preamble provides further clarification, stating that the Department "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."⁶

We have several concerns with this provision. First, while ERISA section 4 details *which* plans are subject to ERISA (those established or maintained (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or (3) by both) it does not address *when* such plans are considered to be "established or maintained." Nevertheless, it seems inarguable that an employee benefit plan is established when an employer executes a document or documents that set forth the terms of the plan for its employees and that

³ See 85 Fed. Reg. 54289.

⁴ 85 Fed. Reg. 54303.

⁵ *Id.*

⁶ *Id.* at 54292.

the fiduciary obligations of ERISA begin when the first dollar is obligated to be held in trust. While the adoption of a plan by one employer, i.e., the first employer, precedes the establishment of a multiple employer plan, the very terms of a pooled employer plan make clear the intent that the plan be a multiple employer plan.

ACLI Recommendation: ACLI recommends that PPP registration be required before any employer adopts the plan, i.e., before the plan provider *begins operations* as a PPP.

The second or additional trigger regarding the "publicly marketing" of the plan is too subjective. The preamble asserts that market evaluation in advance of publicly marketing pooled plan services does not trigger registration. There may be, at times, little distinction between "market evaluation" and actual "public" marketing. Indeed, marketing may be used to assess market evaluation. The subjective nature of the term "publicly marketing services" deems it inappropriate as the trigger for a legally required registration requirement.

ACLI Recommendation: A simple rule is preferred, *i.e.*, registration is required before the plan provider begins operations as a PPP which is before an employer agrees to participate in what is intended to be a pooled employer plan.

II. Disclosure of Ongoing Criminal, Civil, or Administrative Proceedings

Section 2510.3-44(b)(1) would require the PPP include in the new Form PR a statement disclosing "any ongoing criminal, civil, or administrative proceedings related to the provisions of services to, operation of, or investments of any employee benefit plan, in any court or administrative tribunal by the federal or state government or other regulatory authority against the pooled plan provider, or any officer, director, or employee of the pooled plan provider."⁷

The Department's view that "the statutory purpose of the registration requirement is to provide the Department with sufficient information regarding persons acting as pooled plan providers to engage in effective monitoring and oversight of this new type of ERISA retirement plan,"⁸ is reasonable. However, we believe this provision is unnecessarily overbroad. The term "administrative proceeding" with respect to the "operation" of an employee benefit plan can be broadly interpreted. For example, with respect to an insurance company acting as a PPP, such disclosure could include a routine inquiry or examination from a state insurance department – or even an ERISA benefit claims appeal. We question whether such information is necessary to provide the Department with information needed to engage in effective monitoring and oversight.

Further, we question the necessity of expanding this disclosure to "employees" of the PPP – especially with respect to all civil or administrative proceedings. As the Department notes in the preamble, those entities currently administering retirement plans would "likely have little trouble taking on the role of pooled plan provider."⁹ Financial services firms currently acting as recordkeepers, including insurance companies, may have thousands – or tens of thousands - of employees, making this requirement unduly burdensome.

ACLI Recommendation: ACLI recommends that the Department narrow this disclosure provision to (1) clarify that "administrative proceedings" does not include routine audits, examinations, inquiries or benefit claims inquiries or appeals, and (2) limit disclosure with

⁷ *Id.* at 54303.

⁸ *Id.* at 54291.

⁹ *Id.* at 54296.

respect to PPP employees to those criminal proceedings and civil/administrative proceedings involving fraud or dishonestly.

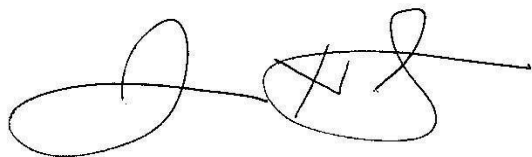
Finally, we note that the Department seeks comment on whether the disclosure of “ongoing criminal, civil, or administrative proceedings related to the provisions of services to, operation of, or investments of any employee benefit plan by the pooled plan provider” should be expanded to include settlements of fiduciary liability claims against pooled plan providers with the Department or PBGC. We caution against such additional disclosure. With respect to settlement agreements, in today’s litigious environment, many lawsuits are settled without admission of fault, rendering disclosure meaningless. Further we are concerned that additional and unnecessary disclosure will have a chilling effect on PPP establishment – inconsistent with Congressional intent to expand retirement coverage through PEPs. Disclosure should be limited to the information the Department needs to effectively monitor and oversee PEPs. In this regard, we encourage the Department to consider the scope and type of disclosures it currently requires from single and multiple-employer plans for monitoring and oversight of such plans.

ACLI Recommendation: ACLI recommends against the expansion of the Proposal’s required disclosure of ongoing criminal, civil, or administrative Proceedings

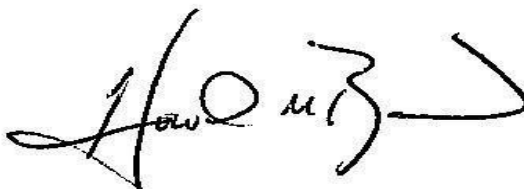
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On behalf of the ACLI member companies, thank you for your consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department.

Respectfully,



James H. Szostek



Howard M. Bard