
DOL requests input on 'pooled' 401(k)s

By Editorial Staff Thu, Jun 25, 2020

Are regulations needed to limit the potential for conflicts of interest and self-dealing among non-employer sponsors of "pooled employer" 401(k) plans, or PEPs? The Department of Labor seeks feedback.

Changes to U.S. labor laws by the SECURE Act of 2018 created the opportunity for a variety of 401(k) service providers—asset managers, recordkeepers, fiduciaries—to sponsor “pooled” 401(k) plans for a number of unrelated companies.

In the past, only employers could sponsor individual plans, and only related companies or businesses could create or join pooled employer plans, or PEPs. So the legal change represents a potential sea change in the way the U.S. does defined contribution.

On the one hand, the shift to provider-sponsorship could free employers from cumbersome and expensive pension-like responsibilities. On the other hand, sponsorship of plans by profit-seeking service providers creates obvious potential for self-dealing.

To explore that potential, and confront it, the DOL’s Employee Benefits Security Administration is “seeking information regarding the possible parties, business models, conflicts of interest, and prohibited transactions that might exist in connection with PEPs” to assess “the need for new prohibited transaction exemptions or amendments to existing exemptions.”

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to e-OED@dol.gov. You can also submit comments by clicking [here](#).

As [stated](#) in the June 18 issue of the Federal Register, the DOL would like feedback by July 20, 2020, on the following questions:

1. What types of entities are likely to act as pooled plan providers? For example, there are a variety of service providers to single employer plans that may have the ability and expertise to act as a pooled plan provider, such as banks, insurance companies, broker-dealers, and similar financial services firms (including pension recordkeepers and third-party administrators).

Are these types of entities likely to act as a pooled plan provider? Are some of these entities more likely to take on the role of the pooled plan provider than others? Why or why not?

How many entities are likely to act as pooled plan providers? Will a single entity establish multiple PEPs with different features?

2. What business models will pooled plan providers adopt in making a PEP available to employers? For example, will pooled plan providers rely on affiliates as service providers, and will they offer proprietary investment products?
3. What conflicts of interest, if any, would a pooled plan provider (along with its affiliates and related parties) likely have with respect to the PEP and its participants? Are there conflicts that some entities might have that others will not?
4. To what extent will a pooled plan provider be able to unilaterally affect its own compensation or the compensation of its affiliates or related parties through its actions establishing a PEP or acting as a fiduciary or service provider to the

PEP? What categories of fees and compensation, direct or indirect, will pooled plan providers and their affiliates and related parties be likely to receive as a result of operating a PEP, including through the offering of proprietary investment products? Are there likely to be any differences in types of fees and compensation associated with operation of a PEP as compared to a single employer plan?

5. Do respondents anticipate that the Department's existing prohibited transaction exemptions will be relied on by pooled plan providers, and if so, which exemptions are most relevant? Are any amendments needed to the Department's existing exemptions to address unique issues with respect to PEPs? Do respondents believe that there is a need for additional prohibited transaction exemptions? If so, please describe the specific transactions and the prohibited transactions provisions that would be violated in connection with the transactions.
6. If additional prohibited transaction relief is necessary, should the Department consider developing distinct exemptions for different categories of pooled plan providers (e.g., to specifically address the unique prohibited transactions involved for certain entities) or should the Department address pooled plan provider conflicts more generally, in a single exemption? What are advantages and disadvantages of either approach?
7. To the extent respondents do not believe additional prohibited transaction relief is necessary, why? How would the conflicts of interest be appropriately addressed to avoid prohibited transactions? Are different mitigating provisions appropriate for different entities? Why or why not?
8. Do employer groups, associations, and PEOs described in the Department's

MEP Final Rule face similar prohibited transactions to those of pooled plan providers, and do they have similar need for additional prohibited transaction relief? Are there prohibited transaction issues unique to employer groups or associations, or PEOs?

Plan Investments

1. What plan investment options do respondents anticipate will be offered in PEPs and MEPs? Are the investment options likely to be as varied as those offered by large single employer plans? Are the options likely to be more varied than those offered by small single employer plans?
2. What role will the entities serving as pooled plan providers or MEP sponsors, or their affiliates or related entities, serve with respect to the investment options offered in PEPs and MEPs?

Employers in the PEP or MEP

1. How many employers are likely to join a PEP or MEP? Will joining a PEP or MEP be more appealing to employers of a particular size? Are there any estimates of the total number of employers and participants likely to be covered by newly formed PEPs and MEPs? Are there any estimates of the number of employers and participants that will migrate from a single employer plan to a newly formed PEP or MEP?
2. Will larger employers also seek to join PEPs or MEPs in order to take advantage of additional economies of scale? Will any additional prohibited transactions exist as a result of substantial size differences between employers in the PEP or MEP (e.g., because a large employer has greater ability to influence decisions of a pooled plan provider or MEP sponsor as compared to a small employer)?
3. Will the existence of multiple employers in a PEP or MEP cause greater exposure to prohibited transactions in connection with investments in employer securities or employer real property? In what form will PEPs and MEPs hold employer securities or employer real property?
4. Do respondents anticipate that prohibited transactions will occur in connection with a decision to move assets from a PEP or MEP to another plan or IRA, in the case of a noncompliant employer? Do respondents anticipate that any other prohibited transactions will occur in connection with the execution of that decision?

Where to view comments

All comments received must include the agency name and Regulation Identifier Number (Z-RIN) for this request for information (1210-ZA28). In light of the COVID-19 pandemic, the DOL asks that all comments be submitted electronically and not followed with paper copies.

Comments will be available to the public, without charge, online at <http://www.regulations.gov> and <http://www.dol.gov/agencies/ebsa>, and at the

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Benefits Security Administration, Suite

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