

CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA

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**VIA ELECTRONIC DELIVERY**

July 22, 2020

Office of Regulations and Interpretations,  
Employee Benefit Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20201

**Re: Prohibited Transactions Involving Pooled Employer Plans Under the SECURE Act and Other Multiple Employer Plans—RIN: 1210–ZA28**

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce (“the Chamber”), this letter responds to the Department of Labor’s (“DOL”) request for information regarding Prohibited Transactions Involving Pooled Employer Plans. We appreciate the DOL’s work in this area and the opportunity to comment. Our response is directly below each request, and our comments respond solely with respect to issues relating to Association Retirement Plans.

**A. Pooled Plan Providers and MEP Sponsors**

**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?**

On July 31, 2019, the DOL published its final regulations entitled “Definition of “Employer” Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans.” We believe that this is a comprehensive regulation that addresses the unique needs of Association Retirement Plans (ARP), and the DOL does not need to issue further guidance related to ARPs, including any prohibited transaction guidance or exemptions with respect to employer groups or associations.

**B. Plan Investments**

**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?**

Under the final ARP regulations, the association of employers is considered to act on behalf of

the employers, and, therefore, is the employer for purposes of establishing an employee pension benefit plan.<sup>1</sup> ERISA specifically provides that the association will be the plan sponsor of the ARP.<sup>2</sup> As plan sponsor, the association has the duty to determine the named fiduciary, appoint an investment manager as defined under ERISA Section 3(38)<sup>3</sup>, if necessary, and delegate any other functions, including investment functions. With respect to selecting plan investment options, an ARP is no different than a single employer plan in that as the plan sponsor, unless otherwise delegated, is responsible for the selection of investment options and monitoring of any delegated duties.

### **C. Employers in the 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)?**

The Chamber does not believe that any additional prohibited transaction would exist as a result of a substantial size difference between employers in a MEP. The association, as plan sponsor, and any delegated entities, have the same fiduciary responsibilities to all participating employers regardless of size.

**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?**

**Generally speaking, from a practical aspect, MEPs will not include employer securities or real property as an investment option.**

As provided in the ARP regulation, a MEP may only be an individual account plan. The vast majority of individual account plans are participant directed accounts under ERISA Section 404(c).<sup>4</sup> To make the economies of scales work, MEP plans sponsors may decide to offer the same investment lineups to all participants. From a practical matter, it may be challenging to allow some participants to invest in employer securities or real property but not others. As such, it is highly unlikely an ARP would offer employer securities or real property as an investment options.

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<sup>1</sup> See 29 C.F.R. § 2510.3-5(a).

<sup>2</sup> 29 U.S.C. § 1002(16)(B)(iii).

<sup>3</sup> 29 U.S.C. § 1002(38).

<sup>4</sup> 29 U.S.C. § 1104(c). According to the DOL, in 2017, there were 662,829 defined contribution plans. Of that, 565969 plans allowed participants to either direct some or all of their account. See “Private Pension Plan Bulletin,” Abstract of 2017 Form 5500 Annual Reports Data Extracted on 7/19/2019 available at <https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2017.pdf>

**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?**

It does not appear that there would be prohibited transaction issues with respect to either the decision to or the execution of moving assets from an ARP to another plan or IRA because an association that sponsors an ARP would not be an individual account plan service provider so there would not be an issue under ERISA 406(a) or (b).<sup>5</sup> To the extent that there could be an issue under ERISA Section 406(a), the selection of a service provider to take the assets from an ARP because of an employer's non-compliance should be exempt under ERISA Section 408(b)(2).<sup>6</sup>

The DOL may wish to consider a "safe harbor" for plans that must move assets from a MEP to another plan or IRA similar to the current safe harbor under 29 C.F.R. Section 404a-2 with respect to automatic rollovers to individual retirement accounts.

**Conclusion**

We thank you for your consideration of these comments, and we look forward to working with the DOL on these issues in the future.

Sincerely,

*Chantel L. Sheaks*

Chantel L. Sheaks  
Executive Director, Retirement Policy

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<sup>5</sup> 29 U.S.C. § 1106(a) and (b).

<sup>6</sup> 29 U.S.C. § 1108(b)(2).