



Ferenczy Benefits Law Center
Ilene H. Ferenczy | Alison J. Cohen
(678) 399-6602 | (678) 399-6604

September 29, 2025

Via Portal at <https://www.regulations.gov>

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

Attention: Pooled Employer Plans: Big Plans for Small Business – RIN 1210-AC10

Re: Department of Labor – Employee Benefit Security Administration
Regulation RIN 1210-AC10: Guidance and Request for Information
Pooled Employer Plans: Big Plans for Small Business

To Whom it May Concern:

Ferenczy Benefits Law Center, LLC is a prominent law firm practicing exclusively in the area of employee benefit plans. Our client base ranges from solo plans to employers with 100,000 employees, to third party administrators and large institutions/recordkeepers that support all retirement plan types and sizes. The authors of this letter also provide professional education to other benefits practitioners, with more than 4,000 professionals regularly attending our free webcasts, and we have many subscribers and readers of our books on retirement plan law.

Our firm has provided services to multiple employer plans since before the 2012 guidance in Labor Advisory Opinion 2012-04A – which clarified the views of the Employee Benefits Security Administration (“EBSA”) as to multiple employer plans with a broad spectrum of unrelated employers – and have assisted sponsors and pooled plan providers to establish and maintain pooled employer plans (“PEPs”) since Section 101 of the Setting Every Community Up for Retirement Enhancement Act (“SECURE”) was enacted. This experience with multiple employer arrangements provides us with a unique perspective as to the impact of the issues raised in the Guidance and Request for Information referenced above (“RFI”) on PEP sponsors, PEP service providers, participating employers,¹ and PEP participants.

We appreciate the opportunity to give EBSA input on the various issues facing both individuals and organizations involved in PEPs, as well as EBSA and the government. We offer our input and thoughts in the hopes that they will be of assistance as EBSA structures a regulatory framework to enable PEPs to operate efficiently and effectively, while preserving the

¹ The employers that adopt into PEPs for the benefit of their employees are commonly referred to as “adopting employers” or “participating employers.” Throughout this comment letter, we will use “participating employers” to designate these organizations.

governmental structure that assists in ensuring the safety of retirement funds for the PEPs' participants. We also offer our time and availability to EBSA in the event that it seeks further discussion on any of the points contained herein, or on other relevant issues.

Introduction

As counsel primarily to third-party administrators, independent fiduciaries, and plan sponsors, our involvement with PEPs is mostly limited to administrative and contractual issues. As a result, we are refraining from commenting on questions that the RFI addresses that relate to investment fiduciary issues, particularly in relation to conflicts of interest. However, we are hopeful that our input on the administrative and contractual side of PEP formation and administration will provide insight to EBSA as it evaluates how best to regulate these programs.

We believe that, for PEPs to be a successful medium for retirement planning, the rules that govern them must take into account commercial practicality as well as the normal considerations as to participant protections. Therefore, on occasion, we ask that EBSA ensure that the rules it promulgates do not unduly complicate these programs so as to make them impractical to maintain.

I. General Comments

A. The Impact of the Regulatory Environment on PEP Development

Notwithstanding that SECURE enacted PEP availability effective in 2021, the current regulatory environment has created a significant delay in the issuance of needed guidance from both EBSA and the Department of the Treasury. The result is that many companies that would normally become Pooled Plan Providers ("PPPs") or investment managers and offer PEP services to the public have been slow to do so, not fully understanding what doing so entails. As demonstrated in the RFI, some of the open questions go to the heart of the relationship that a service provider may have to the PEP, the way it is compensated, and its ability to adjust the manner in which the PEP operates as laws and guidance change. We believe that this is part of the reason why the statistics quoted in Section III of the RFI reflect that the market in 2023 was dominated by 12 of 142 PEPs.

While no one wants to see PEPs overregulated, having the answers to some of the basic questions related to their operation would assist in opening up the PEP market beyond its current parameters. Smaller PEPs are likely to be more responsive to the needs of smaller employers, both in design of plans and in their servicing, and represent an important and currently underdeveloped portion of the PEP marketplace.

Our Recommendation: We would like to thank EBSA for asking the questions that it needs answered to move forward with regulatory assistance, and recommend that it to coordinate with its counterparts at the Department of the Treasury and the Internal Revenue Service to promptly provide the guidance and information needed for PEP sponsors, PPPs, and service providers to move forward to service this sector of the retirement community.

B. The Real “Cost” of Retirement Plans

The RFI notes that the Department of Labor (“DOL”) wants to “build on positive market developments to help small employers join high-quality, low-cost retirement plans called pooled employer plans.”

We would like to note at the outset that, while the economies of scale of PEPs may, indeed, represent cost savings to the participating employers and their employees, the value of PEPs goes far beyond that. Small employers face the challenges in the early years of their plans that are caused by having relatively little capital within the plan with which to leverage the provision of services. As a result, the cost of establishing and maintaining these plans, commonly paid for by the plan sponsors and not the participants, may be prohibitive. In addition, the volume of services that such plans can afford is significantly less than that obtained by their large employer counterparts. The result is that many of these smaller plans are not able to command the servicing attention they require, and that they also have relatively few service enhancements available to them.

Perhaps the most important value of PEPs to smaller companies and their employees is that they contain the collective assets of more than one employer’s plan, often combining more mature plans with new programs. This “critical mass” of assets produces a program large enough to support the professional services so needed by the smaller employers. Therefore, it is often not that the cost per-employer or per-employee of providing retirement vehicles is less expensive in a PEP, but that the PEP offers a more robust program than the employer could afford to provide on its own. In addition to PEPs providing greater 401(k) access to participants and employers in general, participants in PEPs generally have access to a wider range of investment options, investment education and advice, more enrollment support, and more plan features. Their employers benefit from the reduced administrative burden (particularly onerous for a small employer who is required to handle all aspects of human resources and the maintenance of the employing business) and the professional management of the plan that it would be unable to provide or afford to buy otherwise. Therefore, we believe it is important to examine PEPs from a value standpoint, as well as a cost standpoint, to truly understand their impact on the small plan world.

Our Recommendation: We recommend that EBSA consider that the dollar out-of-pocket cost for a PEP is not the only measurement of its economic value to employers and participants. Often, an employer must consider the availability of features provided to the participants through the PEP that would otherwise be out of reach of its single employer plan, and the impact of those features on the efficient accumulation of retirement benefits by the participants. Therefore, EBSA should not look upon the efficacy of PEPs only from a dollar-for-dollar comparison to the cost of a single employer plan.

Fiduciary Tips for Small Employers

We would like to thank EBSA for this section of the RFI, which provides significant educational materials for employers in their evaluation of PEPs. As this is a new “animal” in the retirement plan jungle, most employers obtain the information they need about a PEP from those who are marketing it, and may not know the best questions to ask. Your “Tips” offer a focused approach

to evaluate the efficacy of a PEP vs. a stand-alone single employer plan, as well as a comparison between different PEPs offered in the marketplace. Further, it discusses the ongoing monitoring obligations of the employer in relation to the PEP, an often overlooked responsibility. We believe that it would assist plan sponsors and participants to have these items more widely distributed and publicized, similar to the manner in which EBSA has provided similar resources to plan sponsors in the past. [See. e.g., <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/employee-benefit-plan-auditor-selection.pdf>]

Our Recommendation: We recommend that EBSA separately publish these tips and make them available on its website, so that they are more easily found by potential participating employers in a web search, and that they are more easily accessed on a recurring basis once found.

C. PEP Structural Issues: Who or What is the Plan Sponsor?

One of the significant areas of confusion in the PEP market has to do with the respective roles needed for the PEP and who is fulfilling those roles.

In particular, Sections 3(43) and 3(44) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) do not address who the plan sponsor is.² This distinct position is important, because it is the person or entity that is in charge of the program, determines who will hold the various positions of import, who will be service providers to the plan, will adopt the formation and governance documents for the PEP, and will determine when and how the plan will operate and terminate. It is possible that the PPP will be the plan sponsor. But, we have seen several situations in which an entity wishes to sponsor the PEP, but hire an outside fiduciary to act as the PPP.

As will be discussed further below, it is also critical to know how the appointment of an investment fiduciary for the PEP is handled, and who is responsible for that appointment,

It would be helpful if EBSA would recognize that there are different relationships maintained within PEPs, with some fiduciaries being embodied in the DNA of the PEP and impossible to extract from the PEP without its dissolution, while others may be retained by, responsible to, and removable by other fiduciaries.

Example 1: Company A is in the business of providing ministerial third party administration and administrative-based fiduciary services (i.e., so called “3(16) services”) to companies that sponsor retirement programs. Company A would like to formulate a PEP to service its clients. Company A would like to set up the PEP so that (a) it is the named sponsor and PPP; (b) in its position as PPP, it has the power to hire and fire the other service providers; (c) it may, in its discretion, delegate fiduciary duties to other qualified individuals or retain those duties for itself; and (d) it will decide which potential participating employers may adopt into the PEP.

²Internal Revenue Code (the “Code”) section 413(e)(1) discusses that a PEP is “(A) maintained by employers which have a common interest other than having adopted the plan, or (B) in the case of a plan not described in subparagraph (A), has a pooled plan provider.”

In this situation, Company A is integral to the PEP; no other company or individual may fire Company A from its position within the PEP. Company A, in turn, is ultimately responsible for all administrative and investment aspects of the PEP. If Company A delegates any fiduciary obligations, such as the investment management, to a third party, it is responsible to oversee that delegation, ensuring that the delegate is qualified for the task given to it and monitoring the ongoing operations of the delegate to ensure that the appointment of the delegate remains prudent.

Example 2: Company B is a registered investment advisor, with a significant clientele of retirement plans. Company B would like to establish a PEP for its clients. Company B is not involved in the third party administration of retirement plans. As such, it immediately retains the services of Company X to be the PPP for the PEP and delegates to Company X all administrative responsibilities (other than the investment management).

As the sponsor of the PEP, Company B may amend the Plan to name another entity as the PPP if it becomes dissatisfied with Company X. Despite that it is the PPP, Company X has no duty (except that of a co-fiduciary under ERISA Section 405) for the investment management performed by Company B, or for any other duties that Company B has assigned to other fiduciaries (assuming that such assignment is not contrary to the duties specifically allocated by statute to the PPP).

We believe that, as part of the regulation of PEPs, it is important that EBSA (and, not incidentally, the Department of the Treasury) recognize that the governance structure of the PEP is one of the areas where there is currently no guidance, and some is needed. Entities and individuals sponsoring PEPs need to know what powers and responsibilities are ingrained in that position. Furthermore, those appointed by the plan sponsor must understand their responsibilities, if any, to monitor the sponsor and take action if they believe that the sponsor is acting inappropriately.

Our Recommendation: We recommend that EBSA clarify in its guidance the existence of and the role of the PEP sponsor and that this is potentially a separate position from the PPP, as well as the obligations of those who adopt or provide services to the PEP in relation to the PEP sponsor.

II. Responses to RFI – General Questions

A. What Types of Entities Are Acting as PPPs in the Marketplace?

In our experience, the strong administrative fiduciary obligations of the PPP require that the entity taking the role of PPP be both willing to act as the primary PEP fiduciary and be positioned in a manner able to handle those administrative obligations.

While both financial institutions and recordkeepers are dominant players in the PEP community and are often primary initiators of PEP formation, very rarely do they act as PPPs for the PEPs

with which they are involved. In fact, it is much more common that recordkeepers specifically disclaim fiduciary responsibility for the PEP in favor of a third-party administrator (“TPA”) that will act as the PPP.

As entities that have been heavily involved in the past decade in the delegated 3(16)³ administrative market, TPAs are commonly well-positioned to act as the PPP for the PEP. They are accustomed to being the intermediary between the plan sponsors and the other service providers – particularly coordinating services with recordkeepers – and the services they provide as PPPs are not necessarily significantly different from those they provide to single employer plan clients.

Having said that, the level to which TPAs retain duties under the PEP is commonly dependent on the breadth of services offered by the TPA. In our experience, the investment management and recordkeeping duties are very often delegated to Registered Investment Advisors (“RIAs”) and institutional recordkeepers (“RKs”). However, there are some TPA firms that either broadly offer those additional services or are affiliated with other companies that do. In those circumstances, the TPA firm is likely to retain the duties that it is qualified to undertake (or to delegate them to an affiliate).

We have also seen the growth of fiduciary expert organizations that are selling their services as professional PPPs, despite the fact that they do not, themselves, provide TPA services. These entities have commonly operated in the single employer plan environment as high level delegated fiduciaries (often adopting the term “402(a) Fiduciary” to distinguish themselves from the less robust 3(16) TPA services). These entities, far from shying away from the fiduciary aspects of retirement plan services, have made taking on those responsibilities their stock in trade. As a result, they are well positioned to provide the PEP with professional fiduciary management. They, in turn, commonly hire the other service providers for the PEP (although the plan sponsor may retain the responsibility for appointing some or all of the other service providers), including the TPA.

As noted above, not all PPPs are the sponsors of the PEP. As a result, sponsors of PEPs who are not necessarily qualified to oversee the administrative aspects of the PEP commonly retain the service of the professional fiduciary organizations to act as PPP for the plans they sponsor.⁴

B. How Are PEPs Marketed and Distributed?

In our experience, the marketing and distribution of PEP products commonly are provided by the following:

³ The term, “3(16) TPA” has been adopted to identify services provided by third party administration firms in a fiduciary capacity. The breadth of the fiduciary services offered varies from TPA firm to TPA firm, ranging from “low service” 3(16) TPAs that offer mostly distribution-related services to “high service” TPAs that provide a wide panoply of fiduciary services, such as adjudicating claims, interpreting ambiguous plan document terms, and overseeing the plan’s other service providers. 3(16) TPAs most commonly offer nonfiduciary administrative services to either the same clientele as receive their fiduciary services, or to other clients who retain the plan administrator fiduciary obligations for themselves.

⁴ For example, a client of our firm’s is a nonprofit organization whose mission is to provide services and advice to other nonprofit organizations. This client is in the process of forming a 403(b) PEP for its clientele and other interested nonprofits, and has hired professional fiduciary representation to be the PPP for the PEP.

1. *The Plan Sponsor and/or PPP*. Most commonly, PEPs are intended to be a money-making enterprise for the sponsor and/or PPP. As a result, they often market and distribute the PEP to their clientele and referral pool as an alternative means of their providing their services to these entities as single employer plans.
2. *The Recordkeeper*. Similarly, both institutional financial organizations that provide recordkeeping and independent recordkeepers will market PEPs with which they are involved through their own sales processes and force. This is done commonly in conjunction with the PEP sponsor/PPP, who often has a pre-existing relationship with the RK in relation to its single employer plan clientele.
3. *The Investment Manager ("IM")*. IMs that act as investment fiduciaries will also market the PEPs with which they are affiliated to their clients.

The above three entities are already involved with the PEP and are usually compensated for the services they provide to the participating employers and the PEP itself. As they benefit when more entities adopt into the PEP, it is common that their compensation for "selling" the PEP is not separate from the compensation they receive as service providers to the PEP. In other words, they are not separately commissioned from the PEP for clients they direct to the PEP.

Having said that, these three entities commonly have employees that act as their sales force for the services they provide. It is likely that such employees are compensated for their acquisition of participating employers for the PEP. That compensation may be paid by the PEP directly or, more commonly in our experience, as part of their compensation as sales employees of their respective plan entities.

4. *Investment Advisors*. In the small plan market, investment advisors ("IAs") commonly manage the retirement plan relationship with small employers, often directing their clientele to the other retirement plan services providers (such as RKs and TPAs). IAs often assist their plan sponsor clients in the single employer plan arena in selecting the portfolio of investments into which participants will direct their accounts, and also often provide participant education and enrollment services. Less commonly, IAs will provide fiduciary investment advice to the participants.

Because of their referral role in the retirement plan community, IAs commonly operate as significant marketing and distribution actors for PEPs sponsored by the RKs and TPAs with whom they have a relationship. Because most PEPs with which we are familiar offer one platform of investments to all participants within the PEP,⁵ the IAs will not have a role in creating or advising on the formation of the portfolio. They may, however, service the participating employer by providing participants with general investment education, as well as information about the PEP portfolio, providing enrollment meetings, assisting the participating employers and their participants in understanding aspects of the PEP, and working with service providers to the PEP, including the PPP, to ensure that the

⁵In our experience, recordkeeping organizations are not in a position technologically to manage a PEP that offers a separate and distinct investment platform to each participating employer's participants. Therefore, almost universally, the investment manager for the PEP designates the platform and the designated investment alternatives for all employees in the PEP, and does not designate separate investments for each participating employer.

participating employer understands its duties and is taking actions as necessary (for example, adopting amendments and reviewing calculations).

It is common that the PEP, itself, does not directly compensate the IAs for their marketing of the program. However, the PEP may afford the participating employer the ability to retain the IA as a provider to it and its portion of the PEP, and direct the PPP to compensate the IA from plan assets for the plan-related services it provides. In such circumstances, the decision to hire the IA, the services provided by the IA, and the amount of the compensation paid are all in the purview of the participating employer and are not the responsibility of the PPP or any other PEP organization.⁶

C. Do PEP Vendors Offer Various Retirement Vehicles to their Clients?

1. *PEPs are a Tool in the Administrative Toolbelt.*

As noted earlier, our clientele of PEP providers is mostly comprised of companies that operate in the retirement industry in the single employer plan environment. Almost all of them offer PEPs as an alternative to single employer plans.

Many of the PEPs formed by our clientele have a targeted market, such as new plans or plans with relatively simple provisions, so as to make the administration easier for both the participating employers and the PEP providers and, as a result, may be less expensive. When the PEP providers have specialized PEPs, they commonly offer single employer plans as a broader option for clients that do not fit well into the PEP structure.

Similarly, PEP providers – particularly independent TPAs – may offer more complex plan structures to the clients, such as cash balance–401(k) combination arrangements or plans that cover only some of a controlled group of companies. Those types of plans may be harder to administer in a PEP environment, where the PPP may be less able to control who services the non-PEP plan and to obtain access to all information needed to properly coordinate the two disparate plans. In such circumstances, the provider may refuse to permit employers to adopt into the PEP if they have other plans or other groups of employees who are not participating in the PEP. Again, in such situations, the other single employer vehicles offered by the providers are often the available alternative to the PEP.

By its nature, even a PEP that is not targeted to a particular market or type of plan is a relatively mass-produced product, compared to a single employer plan. When a participating employer adopts into the program, it is very much a “take-it-or-leave-it” proposition, with few choices as to service providers and structure. If the participating employer has individualized needs or wants that cannot be met within the PEP, the service provider will commonly offer its other options.

⁶ In the PEP governing documents that we have developed for our clientele, the contracts specify that participating employers are able to hire additional plan service providers for their parts of the PEP and to direct the payment for those services from their participants’ plan assets. The contracts further provide that the only duty of the PPP in relation to those retained by the participating employer is to follow the employer’s direction as to payment.

2. Different PEPs Depending on Referral Source.

Larger TPA firms, RKs, or IMs may be involved in providing services to more than one PEP. For example, several of our clients offer multiple PEPs, each using the services of a different recordkeeper. In general, the participating employers will be directed to the PEP that most meets their needs or that is operated in coordination with the source of their business, such as the IA referral source. Other IAs and/or plan sponsors may select among several of the PEPs or single employer plan offerings of a single TPA, looking for the best “fit” with the personality and needs of the participating employer.

3. Cost Differential

One of the questions asked in this section by EBSA is whether there are different structures within a given PEP, such as share classes. In our experience, there is one platform of investments for the entire PEP. However, PEP sponsors and service providers are interested in determining what cost differentials are permissible in a PEP. In short, can a PEP sponsor charge a given participating employer whatever the employer determines is reasonable?⁷

a. Cost differential for different services.

We assume that there is nothing that would prevent a PEP provider from having a fee schedule that charges based on the specific services provided to a given participating employer and its participants. Therefore, separate additional fees may be charged in relation to distributions processed, special nondiscrimination testing, correction of plan failures by the participating employer, design work, etc. Furthermore, we assume that the fees may vary based on time spent, so that a nondiscrimination test that reasonably takes 10 hours to do can be more expensive than if the same type of test can be done for a smaller or less complex portion of the plan within two hours.

b. Cost differential for geographic locations.

It is axiomatic that the cost of living in New York City and Los Angeles is higher than similar costs in Topeka, Kansas. Yet, in today’s internet environment, most service providers operate on a national scale. Is it reasonable to require that the fees for PEP services be consistent among all participating employers in the PEP, regardless of their geographic location? For example, a PEP provider in New York City may want to charge the “going rate” to its local clients, while understanding that its clientele outside the City would balk at those rates.

It is up to the participating employer to determine the reasonableness of the PEP for its employees, which, by its nature, includes the cost of participation. If a PEP sponsor is unable to accommodate economic realities caused by geographic location (among other factors), it may be unable to compete appropriately in all areas of the country.

⁷ Our question does not contemplate unconscionable fees. It is limited to whether fees need to be the same across the board, or whether different factors – including bargaining power – may permit the PEP provider to charge different rates to different participating employers.

c. Cost differential on an ad hoc basis.

It is said that “business is business.” If a PEP service provider is asked by a potential participating employer to provide services at a lower cost, is it prevented from acceding to this request – in other words, at the most basic level, is a PEP required to have one fee schedule that applies to all employers?

Is the permissible fee one that is based only on time and cost considerations, or can a PEP sponsor quote a different fee to a potential client for more individualized reasons, such as the difficult personality of the participating employer business owner or the expertise of the participating employer in adjusting to the technology required for the exchange of information between it and the various PEP service providers?

A PEP’s fees and charges are always subject to the oversight of the participating employer, who may choose not to join the PEP or to leave the PEP and go elsewhere if it finds the fees to be unacceptable. Is that the only real limitation on the fees charged by a PEP, or are there common parameters that must apply across the board?

D. Barriers to Small Employer Adoption of PEPs

1. *Interest/enthusiasm level of service providers in offering PEPs.*

Although PEPs came into being in 2021 (more than four years ago), they are only now starting to get some amount of momentum. As noted earlier, the incomplete regulatory environment has made creating a PEP something of an act of faith. As a result, many service providers that might otherwise want to offer PEPs to their clientele are prevented from doing so because of the open questions about how they work. If PEPs are not available, employers cannot adopt them.

These regulatory uncertainties make the cost of creating a PEP more expensive at the formation level. For example:

- Providers of preapproved plan documentation do not want to spend the time and resources creating PEP documents until EBSA and the IRS advise of the language and features that should be in the plan. Therefore, the level of plan documentation in relation to the PEP provisions varies widely in the industry. One extreme is where the plan drafter tries to deal with the unknowns contractually in the plan document and the service contracts. The other extreme is where the plan drafter decides to leave these items open until guidance about plan documentation is available. In the first, plan drafting is, by its nature, more complex and more expensive. In the latter, none of the PEP providers has documented protections that they may need if any lawsuits or government audits ensue.
- Administrative systems, both at the TPA firm and at the RK’s offices, are commonly “rejiggered” – presumably on a temporary basis until guidance is issued – to enable the PEP to be administered in the meantime. Again, the lack of guidance acts as a disincentive to those that program administrative systems to incur the cost of reprogramming until the rules are clear.

- Many, if not most, service providers of all types are waiting to create standardized service agreements to accommodate PEPs. As a result, contracting to enter into a PEP or to hire a PEP service provider requires more negotiation between the provider of services and the recipient (such as between the PPP and the RK, or between the Plan Sponsor and the IM) to make sure on an ad hoc basis that the service agreement and arrangement both accommodate special considerations of a PEP. If this negotiation does not take place, then the cost is in the allocation of risk, which may or may not align with the expectations of the parties.

In short, the lack of guidance has caused many service providers who do not have the financial wherewithal or the intestinal fortitude to take on the additional cost and risk of an under regulated environment to shy away from PEP involvement. If there is a lower number of service providers for PEPs, there is less competition to encourage possible participating employers to consider PEPs and fewer PEPs for them to select among.

2. Newness of PEPs, Mixed Industry Messages, and Retirement Industry Flux

As a new product, PEPs are less available, and there is a concern – sometimes not clearly expressed – that they may not “fly.”

PEPs are largely unproven. Further, joining a PEP is an act of faith, as the employer turns over to others all of the responsibility (and control of the plan funds) to third parties.⁸ Not all employers are willing to make that leap for an unproven product with little regulation.

Furthermore, there are service providers who are sending the message to their clients and prospects that PEPs are unreliable. This is not unusual in a “new” environment. In a situation where so much is still “up in the air,” even knowledgeable retirement plan service providers may reasonably be concerned that there is not sufficient structure for PEPs to be properly and safely administered.

It is important to note that the retirement plan industry is in a state of flux generally, as service providers are being purchased by other companies, technology and artificial intelligence is changing the way that the service providers obtain and manipulate data, and venture capitalists with little connection to the retirement industry are increasingly involved in these companies. All of this has made many service providers nervous about the performance of their partners and their competitors, again contributing to the potential limit on involvement by them and their clients in the PEP realm.

3. Loss of Control by Plan Sponsor

Small business owners are used to individually controlling their universe in a way diametrically opposite from the way larger businesses operate. Furthermore, it is not uncommon that the amount of the owner’s account in the retirement plan is a large portion of the plan. PEPs mean turning over everything to do with the plan to an outside organization. While some owners may

⁸ Of course, retirement plan funds are always in control of a trustee or custodian. However, in a single employer plan setting, the employer chooses the service provider to hold and account for the funds, and has significant direct access to those service providers. In a PEP, control is always a step removed from the employer.

find the retirement plan responsibility oppressive and welcome the relief that a PEP may offer, other owners are loath to become a small fish in a larger pond, with much less control and influence, particularly over what they perceive as their “own money.”

For small business owners to feel more comfortable with the PEP structure, PEPs need to become common enough so that they do not appear to be risky endeavors.

4. Administrative and Financial Costs of Entry and Exit

Starting up a new plan may be time-consuming and expensive. In a single employer plan, the plan sponsor must determine the type of plan it will sponsor, identify the features it wants to adopt, and then retain the services of the providers that will help set up the plan and enable the plan to operate. This process may be daunting, particularly when one remembers that it is ancillary to the actual operations of the business that is to sponsor the plan and that small companies likely lack human resource professionals with expertise in employee benefit plans.

PEPs may reduce that cost by providing the potential participating employer with an already curated menu of plan provisions and an established set of service providers. “One signature does it all!” Therefore, the cost of entry for a new plan – in terms of both fees and time spent by the employer adopting the plan – may be less in a PEP than with a small employer plan. However, the process of seeking out the proper PEP for the small employer to adopt, and then the determination of proper plan provisions and such will parallel the process of a single-employer plan sponsor that is outlined above.

This is less true in a takeover situation, where the plan sponsor is moving from its single employer plan to the PEP. Anytime that service providers change in relation to a plan, the transition is time-consuming and may be costly. In addition to the time needed to identify what changes the plan sponsor is seeking by making the change, there will be a significant transfer of information from the current service providers to the new ones, and from the plan sponsor to the new service providers, that will be complex and fraught with danger of errors. There are a lot of “moving parts” and, if not properly managed, the transition may be distressing.

In short, moving to a PEP is not a slam dunk exercise, and inertia may be a powerful force in keeping plan sponsors where they are in their single employer plans.

As it stands currently, exiting a PEP is an even more significant challenge. The termination of participation in a multiple employer plan by a given employer does not represent a plan termination or other distributable event in a 401(k) plan. Therefore, participants may not receive payouts of their accounts when the participating employer leaves. In addition, even if it did constitute a plan termination, the adoption of a successor 401(k) plan in the aftermath of terminating the PEP-involved plan and paying out the participants is prohibited by Code sections 401(k)(2)(B)(i)(II) and 401(k)(10). Therefore, it is not possible for the participating employer to just terminate the PEP involvement and pay the participants their benefits or even to start fresh with a successor plan.

As a result, the participating employer must initiate a spin-off of the portion of the PEP that represents the benefits for its employees, and either merge that portion into an existing plan or

use the spun-off portion of the plan to be the basis for a new plan adoption. At that point, the spun-off plan may be terminated and distributed or the employer may continue to operate the spun-off plan as its ongoing retirement program.

The costs for these processes vary from PEP to PEP and from plan to plan, based on the details of the plan and the number of participants and other factors. However, the costs are sufficient to be a reasonable factor for an employer to consider in deciding whether a multiple employer plan is a good idea for their program.

Uncertainty makes things more costly, particularly for clients that are relatively risk averse. Therefore, the costs of both entry and exit would likely be reduced if:

- Questions regarding documentation of PEPs in general, and of PEP relationships, would be answered; and
- The DOL and IRS would provide guidance permitting the streamlining of the entry and exit process, particularly permitting plans to avoid having to go through spin-off process, especially when the employer has no desire to adopt a successor plan.

E. Challenges in Context of Corporate Transaction

Perhaps the most significant issues with regard to a 401(k) plan of a company that has undergone a recent transaction are the same for those companies that sponsor a single employer plan and those that participate in a MEP or PEP. These relate mostly to Code compliance during and after the transaction, such as plan coverage and nondiscrimination considerations after the transition period under Code section 410(b)(6)(C) has expired.

It is common that companies involved in corporate transactions (i.e., mergers and acquisitions or “M&A”) will want to transition to have one comprehensive plan within a few years of the transaction. This may be more complex with PEPs, where constraints within the PEP require faster or specific actions. For example:

- The PEP could require that any related companies of the participating employer also participate in the PEP if they offer retirement benefits (i.e., no outside plans are permitted for controlled groups with members participating in the plan). This type of provision usually simplifies the coverage and nondiscrimination testing for the PEP, as well as access to the information needed to perform such testing. However, the employer may not want to have the acquired company adopt into the PEP, or may want to delay this process for some period. During that period, it could be out of compliance with the PEP’s rules (as outlined either in the plan document or in the contractual paperwork for the PEP).
- The plan of the acquired company may have provisions or asset types that are not supported by the PEP, such as self-directed brokerage accounts or transferred accounts with previously money purchase plan funds (requiring qualified joint and survivor annuity availability).

- In an asset transaction, it is common that the plan of the acquired entity is to be terminated and all accounts distributed. As noted in the prior Section D, the termination process when a PEP is involved is more complex, expensive, and time-consuming than a normal plan termination.

Many times, the decision of what to do with a plan acquired as part of an M&A transaction has more to do with the desire of the buyer to centralize all plan benefits than to the features of the acquired plan. In particular, it may be that the termination or merger of the acquired plan will result in the loss of plan opportunities and investments by the participants that were in the plan of the seller. Alternatively, there may be costs involved with the plan mergers, such as market value adjustments or the charging of back-end or termination fees that would not have occurred had the merger not taken place.

It would be helpful in the context of M&A generally, but particularly in relation to PEPs, if the DOL could confirm that decisions to merge or terminate plans in the wake of an M&A transaction are settlor decisions and are not, in and of themselves, fiduciary in nature. The decision to integrate the benefit of all employees (including those who join the company as part of an M&A transaction) into one program or set of programs most commonly follows a corporate philosophy as to centralization, and is not based on the individual characteristics of the acquired plan. It may be that the merger of the acquired plan will cause substantial changes to the services or benefits provided to the employees in the acquired plan. Assuming that all benefits of the acquired plan that are protected under ERISA section 206 and Internal Revenue Code section 411(d)(6) are retained by the PEP after the plans merge, this process should not be considered to be fiduciary in nature just as a consequence of the fact that the change eliminates features in the prior plan that the participants favored over the new plan.

F. Percentage of PEPs Using Independent 3(38)s

1. *Are the Investment Managers Independent, in General?*

In the PEPs to which we have provided services, the investment managers (“IMs”) are generally independent of the financial institution offering the investments. Even when a financial institution is acting as recordkeeper, the plan’s IM has been an independent registered investment advisor.

2. *Appointing and Monitoring the IM.*

You ask a related question, however, that is very relevant to the PEPs to which we provide services. That question relates to who chooses the IM.

ERISA section 3(43) anticipates that the individual participating employers will be responsible for the investment management for their part of the PEP. [See, Section 3(43)(B)(iii)(II), which provides “to the extent not otherwise delegated to another fiduciary by the pooled plan provider and subject to the provisions of section 404(c), [the provisions of the PEP provide that each employer retains the responsibility for] the investment and management of the portion of the plan's assets attributable to the employees of the employer (or beneficiaries of such employees).”] However, the current structure of recordkeeping systems available within the

industry almost always requires that the PEP offer one platform and portfolio of investments to all participants within the PEP. As such, only one IM will be selecting and monitoring the investment options within the PEP.

Commonly, the PPP for the PEP is someone who does not specialize in plan investments, and would prefer not to take responsibility – even as a delegator – in relation to the plan investments. This is even more true in situations where a financial institution endeavors to “matchmake” PEP relationships among service providers with which it commonly contracts. In such circumstances, the service providers for the PEP come together as part of the PEP’s formation, with the TPA acting as the PPP once the plan is created, and after the service providers have been decided upon. The recordkeeper almost always disclaims fiduciary status, leaving the TPA as the nominal appointer of the other service providers for the PEP.

It is common in this situation that the PEP documentation requires the participating employer to independently determine the qualifications and acceptability the IM as part of deciding to participate in the PEP. Appointing the IM for its portion of the PEP is a prerequisite to the employer becoming a participating employer under the PEP. As such, the participating employer is required to delegate the fiduciary responsibility for investments to the IM as part of its adoption of the PEP.

This practice is explicitly questioned in the RFI whether it is appropriate for this type of structure to be permitted:

In the Department’s view, the risk to participating employers of fiduciary liability could be minimized greatly if the pooled plan provider, as named fiduciary, expressly assumed full responsibility for, and exercised sole discretion and judgment in selecting and retaining the manager and did not attempt to reduce its responsibility by relying on authorization or ratification from the participating employers for the selection and retention, such as through an adhesive participation agreement. [RFI, Section IV]

The characterization of this paragraph is contrary to the language of the statute, which places that responsibility on the participating employer unless it is explicitly taken on by the PPP. Further it ignores the reality of the state of the industry, which is not yet prepared systematically to permit individual designations of IMs by each participating employer under the PEP. And, finally, it disregards the reality that the service provider that is generally best suited to oversee the noninvestment aspects of the PEP – a TPA – is often not comfortable with taking on the responsibility for selecting the IM. It also fails to recognize the role of the recordkeeper as match-maker for many PEPs, under which the various service providers come together without actually “choosing” each other.

Having the participating employer affirmatively contract with the IM recognizes its co-fiduciary role under ERISA section 3(43), and reflects the reality that PEPs do not eliminate the fiduciary liability for participating employers. Whether they are separately contracting with the IM or retaining the IM as part of the PEP itself, the participating employer has a responsibility to reassure itself and its participants that the provider is appropriate.

As co-fiduciaries, neither the PEP sponsor nor the PPP is able to ignore an actual fiduciary breach by an IM in the ongoing operations of the PEP. Therefore, they will always exercise some level of oversight on the IM as part of its duties. In its administration of the PEP, as well as its role as primary contact for the participating employers, the PPP is well-placed to become aware of problems with the IM and to report such problems to the PEP sponsor. By taking advantage of the provisions of ERISA section 3(43)(B)(iii)(II), the PEP will require the participating employer to fulfill its responsibilities to oversee the investment management for its participants' accounts, in the same manner as it would in a single employer plan. This level of oversight provides more fiduciary protections to the participants, not less.

There is one more practical reason why contracting with the individual participating employers is so common. In our experience, the compliance departments of several RIAs are not prepared at this time to develop a special engagement contract for PEP-related services. Therefore, on a practical basis, it is very time-consuming and expensive, if not impossible, for the plan sponsor or PPP to negotiate an appropriate contract with IRAs for the PEP services being performed. By using the individual-engagement method, it is much easier to modify the agreement appropriately in cooperation with the IM's compliance team.

Therefore, we encourage EBSA to understand that a PEP is able to operate efficiently because of the cooperation between all the responsible parties, and it is appropriate that those responsible parties include the participating employer. Its obligation to prudently consider joining the PEP and to prudently monitor the PEP for whether ongoing participation is appropriate is part of the strength of the structure of the PEP and the protection of plan participants. Furthermore, this process recognizes the reality of the available options under the recordkeeping systems that are currently used for PEPs.

3. Other Relationships with IMs.

It is possible that the PPP is able to provide services in addition to the fiduciary administration activities. Some TPA firms also offer recordkeeping services. Others have affiliated trust companies and/or registered investment advisory firms.

There is nothing in ERISA section 3(43) that requires that the sponsor of the PEP delegate certain duties to other service providers. It may retain such duties for itself or for its affiliates. It is possible that one of those duties will be that of fiduciary investment management. In such circumstance, the participating employer is required to evaluate the appropriateness of the PEP in the context of the PPP or sponsor providing a wide range of services to the PEP. The participating employer again oversees the IM role within the PEP in its decision to join the PEP and to continue participating in the PEP. This is consistent with the above discussion regarding when the IM is unrelated to the PPP or plan sponsor.

G. Other Services Provided by the IM

In our experience with PEPs, the IMs most commonly provide the IM services only on the PEP level. The exception is when the IM is affiliated with another service provider, in which case its services are provided in addition to the services provided by its related organizations, such as recordkeeping, trust services, and/or administration.

Some of the IMs involved in the PEPs to whom we provide legal services also offer investment-related services, such as participant education and/or advice in relation to the plan and its investments.

H. Use of Revenue Sharing

Some of the PEPs to which we have offered legal services are set up to provide for revenue sharing, particularly when financial institutions act as the recordkeeper for the program. In such circumstances, in our experience, the revenue sharing reduces the cost of administrative services to the participating employers and the participants.

As noted above, the IM in these cases will commonly evaluate the appropriateness of the use of proprietary funds as part of their formation of the portfolio. We have no PEPs to which we offer services that, to our knowledge, retain a substantial portion of the portfolio in funds proprietary to the recordkeeper/financial institution.

I. Management of Investment-Related Conflicts of Interest in Regard to Investments in which the IM has a Financial Interest

We offer no comments on the financial interests of the IM in the PEP investment. However, we agree that there are reasonable concerns about the appropriateness of PEPs with conflicted financial interests.

J. Potential Conflicts of Interest in PEP Distribution Models

The most significant manner in which conflicts of interest may arise in the PEPs to which we provide services has to do with operational issues and the potential for self-dealing by the PPP.

In particular, there are two issues with which our clients have struggled.

1. *Fee Changes*

When a third party service provider or delegated fiduciary wants to modify its fee schedule to a single employer plan, it generally provides notice of modified fees to the fiduciary of the single employer plan, and that fiduciary decides whether to approve such fee change. This relationship provides for an independent oversight of the provider's fees by another fiduciary, and that client makes the choice of whether to pay the increased fee (i.e., finding the fee reasonable), to try to negotiate a lower fee, or to change service providers or fiduciaries (i.e., finding the fee unreasonable).

In a PEP situation, the PPP is generally a service provider in relation to the participating employers and their participants. The PPP maintains primary responsibility for the fiduciary duties within the plan, including the hiring, monitoring, and firing of the service providers. The PPP is responsible in its fiduciary capacity to review the fees of the service providers it retains and to make a decision as to whether they are reasonable for the PEP. The individual participating employers also have a responsibility to monitor the fees of the PEP to ensure that they remain reasonable for their participants. If the other service providers raise their fees, the

PPP will be an independent fiduciary determining whether the fee changes result in a reasonable or unreasonable fee schedule.

However, when the PPP, itself, would like to modify its own fee schedule, this delicate balance does not operate as easily. The main question that requires an answer is: how can the PPP, in its capacity as a fiduciary to the PEP, modify its fee schedule without engaging in self-dealing under ERISA section 406(b)?

The goal is to structure the fee oversight in such a way that the PPP is not deemed to be raising its own compensation in its own discretion. We have been able to articulate three possible answers as to how this can be done:

- a. The PEP may provide for automatic cost of living increases.

If the PEP agreements provide that the PPP's fees will increase periodically by a specified percentage (or the increase of a specified index), the increase is part of the contract approved by the participating employer and the raise is not discretionary. This takes the fee increase out of the discretion of the fiduciary, and avoids self-dealing. However, this does not permit the fiduciary to adjust fees as to changes in the services it provides or as to changes in the market that are not necessarily related directly to the cost of living or the index chosen. In addition, this assumes that the market fees for PEPs follow the set percentage or the index chosen, and that may not be true. This could result in unmarketably high or low fees, with no mechanism for adjustment other than a modification of the service contract.

- b. The PEP may retain the services of an independent fiduciary to evaluate fees charged by the PPP.

While this method also eliminates the self-dealing potential, it is an expensive option for the plan to bear, particularly if it is a smaller PEP.

- c. The PPP may adjust its fees with appropriate notice to the participating employers, and the participating employers may choose to remain in the PEP with the fee increase or to exit the PEP

This is the most commercially reasonable alternative, and recognizes the reality of the relationship between fees and the participating employers. The PPP will be required to follow the notice and timing rules embodied in the regulations under ERISA section 408(b)(2), and the fiduciary participating employers will decide the reasonableness of PEP fees for their own portion of the plan. This review by the participating employers of the PPP's fees, coupled with its ability to remain or leave the PEP, represents the independent fiduciary oversight required to avoid self-dealing by the PPP.

Because of the workability of this alternative, as well as the commercial reasonableness, we believe that EBSA should permit this method of fee increase by PEP fiduciaries.

Our Recommendation: We recommend that EBSA adopt guidance that permits PPPs and other PEP fiduciaries to set their own fees, with proper notice and disclosure to the participating employers and the participants. The market will assist the participating employers in

determining whether these fees are reasonable; if they are not, the participating employer may decide to exit the PEP in favor of another retirement vehicle.

2. Service Changes

Many PEPs are sponsored by service providers, and the PPPs are most commonly service providers. At the time that the PEP is formed, the sponsor/PPP will determine the services it will provide to the PEP. To the extent that there are services it does not want to or cannot provide, the PPP will generally delegate such duties to other service providers or fiduciaries.

It is possible that the sponsor or PPP may determine later that it wants to take back the responsibility for additional services. This may occur because the sponsor or PPP has expanded its business model to include those other services, either organically or through acquisition of entities that provide services previously not offered by the company.

In general, when a fiduciary hires itself or a related organization to perform services for a plan and is to receive additional compensation in connection with these new services, such appointment is considered to be self-dealing.

However, PEPs are unique in that it is anticipated in the authorizing legislation for PEPs that these plans will be sponsored and administered by service providers, and not necessarily by the participants' employers. Therefore, there is a commercial relationship between the PEP providers and the participating employers that is more analogous to that of a service provider and a single employer plan, rather than of co-fiduciaries.

We believe that the essence of the relationship between the PPP or sponsor and the PEP is that, at the initiation of the PEP, all responsibilities for the plan, other than being a trustee to the trust, are obligations of the plan sponsor. The plan sponsor then determines which duties to retain for itself, and which to delegate to outside parties. If the sponsor is not the PPP, the PPP goes through the same process: what administrative responsibilities will be retained, and which will be delegated to others? It is reasonable to enable the PPP and sponsor to revisit those decisions and to cease having the plan pay third parties for those services, without being considered to engage in self-dealing.

Again, the commercial realities of PEPs is that, with proper notice, participating employers may determine whether to remain in the PEP in light of service and fee changes by the sponsor or PPP, and then may decide whether to remain in or exit the PEP. This process represents the independent fiduciary oversight anticipated by ERISA.

Our Recommendation: We recommend that EBSA determine that a decision by a PEP sponsor or PPP to cease delegating responsibilities to third parties and to provide those services for additional reasonable compensation is not self-dealing, as it is subject to oversight by the participating employer in its capacity as a fiduciary for its participants.

3. Coverage of Sponsor or PPP Employees by the PEP

There are situations in which the sponsor of the PEP wants to be a participating employer in the PEP and have its own employees participate in the PEP. This is particularly true when the

sponsor of the PEP is not a service provider per se. For example, a client of ours is a nonprofit organization that is sponsoring a 403(b) PEP and would like to cover its employees in that plan.

The coverage of the employees is not, in and of itself, problematic. The problem arises in relation to the fact that the sponsor and PPP are commonly service providers to the plan and are charging fees for what they do. The question this raises is: what fees are applied to the employees of the sponsor/PPP?

ERISA and Labor regulations prohibit the receipt of compensation by employees of the sponsor for services provided to the plan. [ERISA § 408(c)(2); DOL Reg. § 2550.408c-2(b)(2)] Furthermore, Labor regulations prohibit the employer of employees covered by the plan from receiving payment by the plan that exceeds the reimbursement of direct expenses (i.e., making a profit). [DOL Reg. § 2550.408c-2(b)(3)]

The result of these rules may be that the plan sponsor or PPP refrains from charging fees to its own employee/participants. However, that could be interpreted as taking fees from the other PEP participants to pay for the costs of its own participants – i.e., the company is providing services for which it normally charges the employer to its own employees for free. Finally, the rule could be that the sponsor or PPP must pay the expenses for its own employees to themselves directly, i.e., that the fees for those services must be paid by the sponsor/PPP to the PEP. However, can the sponsor/PPP then collect the fees from the PEP for those services, or is it simply a windfall to the PEP?

Our Recommendation: We recommend that the DOL either: (a) provide a Prohibited Transaction Exemption (“PTE”) that enable the sponsor/PPP to charge its own employees fees equal to those charged to the other participants in the PEP; or (b) provide guidance under which the failure of the sponsor/PPP to charge fees for its services to its employees is not deemed to be tantamount to the employees benefitting from amounts paid by other employers or participant accounts.

K. Existing PTEs on Which PEP Providers Rely

While other PTEs may be at play in the PEP world, our experiences highlight two pieces of DOL guidance that are relied upon.

Of course, all PEP service providers rely on the statutory prohibited transaction exemption PTE of ERISA section 408(b)(2) that permits service providers to engage in reasonable contracts for their services.

In addition, to the extent that the PPP or other service providers are recipients of revenue sharing, they rely on DOL Adv. Opn. 97-15 that permits the offset of fees by revenue sharing.

L. Additional PTEs.

The above description of possible self-dealing transactions outlines the need for additional guidance and/or PTEs.

III. Responses to RFI – Safe Harbor

There are two possible safe harbors that may be valuable in the PEP context:

- A safe harbor for small participating employers that provides parameters for their initial review of the PEP for the purposes of adoption and for the monitoring and maintenance of the PEP on an ongoing basis.
- A safe harbor for the PPP of a PEP catering to small employers that provides parameters for the PPP's selection of service providers and the monitoring and maintenance of such providers on an ongoing basis.

A. Safe Harbor for Participating Employers

As discussed in the RFI, it is important for employers to take appropriate fiduciary actions to ensure that the PEP is an appropriate vehicle for retirement planning for its employees. For businesses that are not large enough to support professional human resources, benefits, and/or finance departments, this process may be overwhelming. Therefore, a safe harbor should give the employer sufficient direction and information to enable it to make a reasoned decision about PEPs in general, and about the specific PEPs it considers and selects for its employees.

The guidance provided by EBSA in Section V of the RFI is very helpful in directing the potential participating employer to the questions that need to be asked. It would be helpful if the safe harbor would compel the sponsor/PPP of the PEP to provide the disclosures discussed in Section V in a structured fashion that would enable the employers to easily compare multiple PEPs and providers. If the employer (perhaps with advisors) reviews and analyzes that information and can reasonably articulate the reasons why it selected a given PEP over other options, that may go a significant way in easing concern by employers as to dealing with what they do not know about retirement plans.

Furthermore, for existing plans that are to merge into a PEP, it would be helpful if the PPP of the PEP and the investment fiduciary for the prior plan were required to provide standardized disclosures as to the costs and the plan changes involved in replacing or merging its plan into the PEP, including such issues as:

- One-time fees charged by the PEP or the PEP service providers in relation to establishing the participation in the PEP and effecting the merger of the plan and its assets into the PEP, and which of those fees may be paid by the participant accounts;
- Expected costs involved in the transfer of assets, including any market value adjustments or back-end loads that would be charged in relation to the removal of the plan assets from the current plan vehicle; and
- A listing of the provisions and benefits, rights, and features that are in the existing plan that are required to be eliminated or modified due to the structure of the PEP (i.e., features that the PEP does not support that are present in the existing plan).

As both the existing plan and the PEP are required to provide fee disclosures under ERISA section 408(b)(2) and the regulations thereunder, as well as participant-level fee disclosures, as required under Labor Reg. section 2550.404a-5, review of these disclosures and analysis of the respective fees would be another requirement under the safe harbor.

On an ongoing basis, participating employers should be required to evaluate both the costs and the services experienced during the prior year(s). In particular, the participating employer should be required to retain information about any variances from the predicted costs for the plan (not counting investment gains or losses), as well as areas of dissatisfaction of the participating employer or the employees (as evidenced by complaints received and/or events requiring resolution).

We express no opinion as to the appropriateness of proprietary funds or other investments in which the fiduciaries of the PEPs may have an interest.

We do not believe that EBSA should designate appropriate fee ranges. The features of PEPs vary widely, as may the costs related to those features, and placing limitations on the fees that can be charged will act as a disincentive to PPPs offering wide flexibility to the participating employers.

B. Safe Harbor for PEP Sponsors and PPPs

As discussed earlier, the breadth of responsibilities of PPPs within PEPs represents significant potential liabilities. These liabilities can act as a disincentive for a service provider to enter into the PEP market.

Further, as noted above in Section II.F.2, it is likely that the type of entity that acts as a sponsor or PPP for a PEP may have limited expertise in one or more of the service areas, particularly in the realm of investments. To encourage formation of PEPs, it would be helpful for EBSA to provide parameters that, if followed, constitute appropriate fiduciary activities of the sponsor and/or PPP in selecting the investment manager.

We disagree with EBSA's expressed preference for the PPP to take full responsibility for hiring the IM for the PEP. This responsibility was delegated primarily by Congress to the participating employers, and a PPP should not be considered to be derelict in any way by requiring the participating employer to retain that obligation. As technology advances, it may be possible for recordkeepers to enable each participating employer to select its own IM and its own investment menu for its employees. At that time, the PPP will be able to concentrate on providing the services within its area of expertise, without being forced to endeavor into the investment realm for the PEP. Therefore, we recommend that the safe harbor not exclude the ability of the PPP to require that the individual participating employers approve the appointment of the IM for the program.

One of the practical aspects of having service providers sponsor these plans is that they commonly have pre-existing relationships with colleagues that perform other types of plan services. Therefore, TPAs commonly work with certain recordkeepers, various investment managers, and a selection of investment advisors. It is not uncommon for these organizations

with pre-existing relationships to decide jointly to coordinate to provide one or more PEPs for their clients.

EBSA should consider whether historic and existing relationships with others in the retirement community are a sufficient basis to prudently select the PEP team, or if the sponsor/PPP needs to engage in an arms-length, open-ended search for the PEP's other service providers. It would be counterproductive for EBSA to require formal procedures, such as requests for proposals ("RFPs"), as the only means of demonstrating fiduciary prudence in selecting PEP providers, and to discount the sponsor's/PPP's practical experiences with providers as a criterion for selection.

Therefore, we recommend that EBSA not include in the safe harbor that a PPP/sponsor must engage in a formal RFP procedure to be considered to have appropriately exercised its fiduciary responsibilities in provider selection. On the contrary, a PPP/sponsor who, through its experience in the industry, has gained knowledge of the capabilities of another service provider should be able to prudently rely on that experience in making its provider selections.

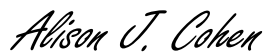
* * * * *

We thank you again for requesting input from the benefits community on these issues. We look forward to augmented guidance in the future.

Very truly yours,



Ilene H. Ferenczy



Alison J. Cohen



Adrienne I. Moore