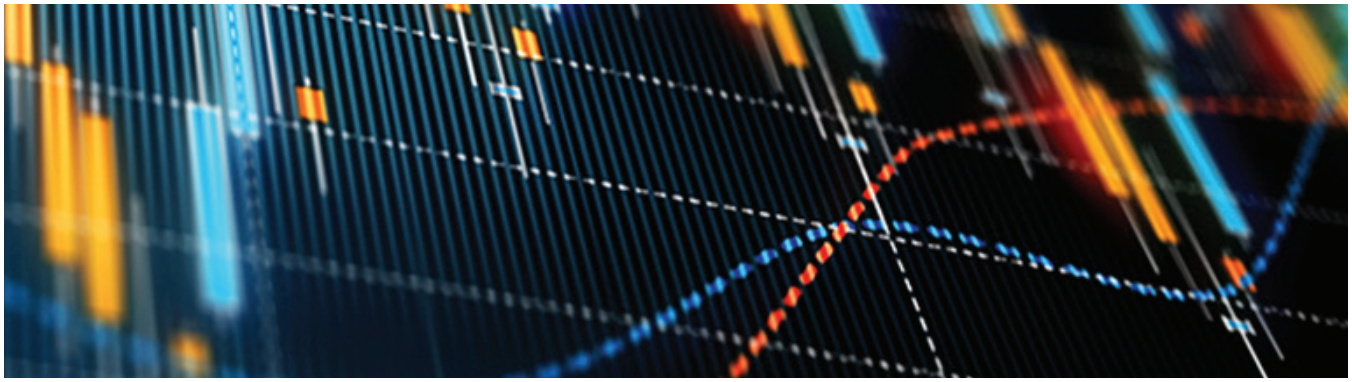
faegre drinker

Waypoint Fiduciary

Living with Your MEP or PEP: Mitigating Fiduciary Responsibility and Prohibited Transaction Issues

June 10, 2020 ▪ Webinar Q&A



We received a number of questions during our June 10 webcast discussing mitigating fiduciary responsibility and some of the prohibited transaction issues related to PEPs. Unfortunately, we did not have time to get to all of the questions, so we are providing written responses, which we hope will be helpful.

With the release of the DOL's RFI on PEPs, our next webcast, scheduled for July 15, will address our thoughts on the RFI in detail.

Please note that these responses to attendee questions do not constitute legal, fiduciary or tax advice and do not create an attorney-client relationship with Faegre Drinker Biddle & Reath LLP or a fiduciary relationship with Waypoint Fiduciary, Inc.

QUESTION: Can fiduciary responsibility for investment selection and monitoring be retained by the PPP or does the individual employer retain that responsibility unless it is delegated to a 3(38)? I'm thinking of RIA's with capacity to operate as a PPP.

RESPONSE: Yes, the PPP can take on the fiduciary responsibility for selecting and monitoring the investments but only if it serves as a 3(38). This means the PPP will have to satisfy the requirements of the definition. In the questioner's example, if the PPP is an RIA firm, it could serve as the PPP for administrative purposes and serve as the 3(38). However, if the PPP does not (or cannot) take on that responsibility or delegate it to a 3(38) selected at the PEP level, the law says that the individual employer retains responsibility for investment selection and monitoring for its portion of the plan.

QUESTION: (We received two similar questions.) Is the expectation that the PPP will also have to offer the PEP to its own employees? Do the regulations support that a PPP does not have to have their own employees in the PEP they are administering?

RESPONSE: No, nothing in the SECURE Act requires that the employees of the PPP must also be included in the PEP. In addition, this could not be required in any regulations that may be issued under the Act at some point in the future.

QUESTION: Did I hear you say that the PPP provider hires the advisor and investment manager? Each company participating in the PPP cannot hire their own Advisors and Investment manager?

RESPONSE: We think the more likely structure will be for the PPP to hire the investment manager for the PEP as a whole. However, keep in mind that the SECURE Act says that the participating employers retain the investment responsibility unless the PPP does engage a third party to manage the PEP investments. As a result, participating employers could hire their own advisor and/or investment manager for their own portions of the PEP.

QUESTION: Can a "special trustee" be designated under a PEP the same way that it is done now for prototype plans?

RESPONSE: We assume this question relates to the requirement that a trustee be responsible for collecting employer contributions, including participant deferrals and loan repayments. If such a trustee is appointed, it may be referred to as a limited trustee or special trustee that is appointed for a specific purpose but not for all trustee duties. Under the authority of ERISA §405(c) which permits the delegation of fiduciary responsibilities, it appears the PPP could designate another fiduciary to serve in this special trustee capacity. We think it likely that the special trustee would need to be a bank or trust company. Although the IRS can approve other entities to serve as non-bank trustees under the Internal Revenue Code, it is not clear that a non-bank could serve in the role required under the SECURE Act. Note too that a PPP could also appoint other fiduciaries to carry out functions for the PPP.

QUESTION: Anything barring PPP acting as 3(38) appointed by employer plan sponsors as independent fiduciaries?

RESPONSE: We think this question is asking whether the PPP can act as the 3(38) investment manager for the PEP — with the job of selecting the investment lineup for the PEP — and then also work with an individual participant plan to select from that lineup the investments that are offered to the participants of this participating plan. This is theoretically possible, though there are several issues that come to mind. First, there would be prohibited transaction issues depending on how the PPP was being paid. Second, this could also raise some fiduciary concerns for the PPP. This is because the PPP will be selecting prudent investments for the PEP lineup, but then winnowing the list down for a specific participating plan. The question might be asked, if the lineup is prudent for the PEP, why isn't it prudent for a specific participating employer's plan? There may be valid reasons for this, but it may put the PPP in an awkward position.

QUESTION: Do we expect that a PPP who has its own RIA arm can only compensate that RIA at cost (no profit?)

RESPONSE: We think the RIA affiliate can be compensated under one of two scenarios. The first is if the RIA and its compensation are part of the PEP structure that is offered to a participating plan. By electing to participate in the PEP, the participating employer is essentially approving all of the services and compensation being paid. The second is that the PPP pays the RIA out of the fee that it charges for serving in the PPP role. This second approach is more uncertain in the sense that it could be argued that the PPP's fee would be less if it weren't paying its affiliated RIA. But if the PPP fee is reasonable to begin with, we think this argument has less validity. We are providing both of these answers with the caveat that this is how we think it could work, but the DOL might disagree with us.

QUESTION: Do you see PEP's being more localized or national in nature?

RESPONSE: We think we will likely see both depending on who the PPP is. If it is already a national firm, it will likely form a "national" PEP. For example, if the PPP is an affiliate of a national broker-dealer firm, the PEP is likely to be intended for distribution to nationally. On the other hand, if the PPP is a regional or local third party administrator, it is likely the participating employers will be from its state or region.

QUESTION: Years ago I had an association plan that was a MEP. An ERISA attorney told this association that this plan could cause a fiduciary breech because it was the only option offered. What has changed since then?

RESPONSE: Based on these limited facts, we do not see that there would be a fiduciary breach. We have a difficult time understanding the attorney's concern if the PEP is prudently structured and managed or how there would be any damages if such a breach could be identified. Further, in our view, an association would not have an obligation to offer multiple plan alternatives, so we do not see how there could be a breach by the association either.

QUESTION: How does the Security Act effect the certified computer education model of advising vs. the RIA model of advising?

RESPONSE: We assume this refers to the prohibited transaction exemption under ERISA Section 408(b)(14) which addresses computer model fiduciary investment advice to participants. There is nothing in the SECURE Act that addresses or would affect that exemption.