

MITIGATING FIDUCIARY RESPONSIBILITY AND PROHIBITED TRANSACTION ISSUES

JUNE 10, 2020



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Recap of Terminology

- **Open MEP:** MEP that is open to any employer who wishes to join – no “nexus” requirement
- **PEP:** Special type of Open MEP that is authorized by the SECURE Act; must be operated by a PPP
- **PPP:** Pooled Plan Provider, which must act as the Administrator and a Named Fiduciary of a PEP

Responsibilities of the PPP

The SECURE Act says:

(The PPP is) ***the person responsible to perform all administrative duties (including conducting proper testing with respect to the plan and the employees of each employer in the plan) which are reasonably necessary to ensure that—***

(I) the plan meets any compliance requirement applicable under ERISA or the Code, and

(II) each employer in the plan fulfills its own portion of the compliance obligations...

PEP Fiduciary Requirements

The terms of the Plan must:

(v) require—

(1) the pooled plan provider to provide to employers in the plan any disclosures or other information which the Secretary may require, including any disclosures or other information to facilitate the selection or any monitoring of the pooled plan provider by employers in the plan; and

The PPP is the Plan Sponsor

ERISA Sec. 3(16)(B), the “plan sponsor” is:

- (i) the **employer** in the case of an employee benefit plan established or maintained by a single employer,
- (ii) the **employee organization** in the case of a plan established or maintained by an employee organization, or
- (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the **association, committee, joint board of trustees**, or other similar group of representatives of the parties who establish or maintain the plan.

New Addition:

“or (iv) in the case of a pooled employer plan, the pooled plan provider.”

Responsibilities of Adopting Employer

Selection and Monitoring

The SECURE Act says:

Each employer in the plan retains fiduciary responsibility for—

(1) the selection and monitoring in accordance with section 404(a) of the person designated as the pooled plan provider and any other person who, in addition to the pooled plan provider, is designated as a named fiduciary of the plan; and...

Responsibilities of Adopting Employer (cont.)

Investment Responsibilities

The SECURE Act says:

*. . . (II) to the extent not otherwise delegated to another fiduciary by the pooled plan provider and subject to the provisions of section 404(c), **the investment and management of the portion of the plan's assets attributable to the employees of the employer (or beneficiaries of such employees)** . . .*

. . . is the fiduciary responsibility of the adopting employers.

Adopting Employers are also Sponsors

The SECURE Act says:

Except with respect to the administrative duties of the pooled plan provider described in subparagraph (A)(i), each employer in a plan which has a pooled plan provider shall be treated as the plan sponsor with respect to the portion of the plan attributable to employees of such employer (or beneficiaries of such employees).

PEP Fiduciary Requirements

The SECURE Act requires that the terms of the PEP:

(ii) designate one or more trustees meeting the requirements of section 408(a)(2) of the Internal Revenue Code of 1986 (other than an employer in the plan) to be responsible for collecting contributions to, and holding the assets of, the plan and require such trustees to implement written contribution collection procedures that are reasonable, diligent, and systematic; . . .

ERISA Fiduciary Prohibited Transactions

ERISA Section 406(b) provides:

(b) Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2)

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

How Does the PPP Get Paid?

Avoid conflicts of interest (self-dealing PTs) when acting in fiduciary capacity:

- Revenue sharing and other third-party payments – rely on “offset” model from DOL Advisory Opinions?
- Fund changes/fee changes – rely on Aetna “deemed consent” concept?
- Proprietary products – rely on existing PT exemptions for proprietary mutual funds (*e.g.*, PTE 77-4)
- Other conflicts?

Prohibited Transactions

Avoiding Fiduciary Self-Dealing

- Existing guidance on avoiding self-dealing PTs:
 - PPP or other MEP operator cannot hire itself (for portion of MEP/PEP covering its own employees)
 - PPP or other operator cannot hire affiliates for additional pay
 - Where fees would change, need to get independent fiduciary consent or rely on “deemed consent” model from Aetna Advisory Opinion [1997-16A]
 - Revenue sharing and other third-party payments – reliance on “offset/credit” model from DOL Advisory Opinions [1997-15A and 2005-10A]

QUESTIONS

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