

LIVING WITH YOUR MEP OR PEP

GUIDANCE, PROHIBITED TRANSACTIONS,
COMPLIANCE AND CONTRACTS



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Agenda

- **Where are we now? Timeline**
- **Guidance**
- **Prohibited transactions**
- **Compliance**
- **Contracts**
- **Questions**

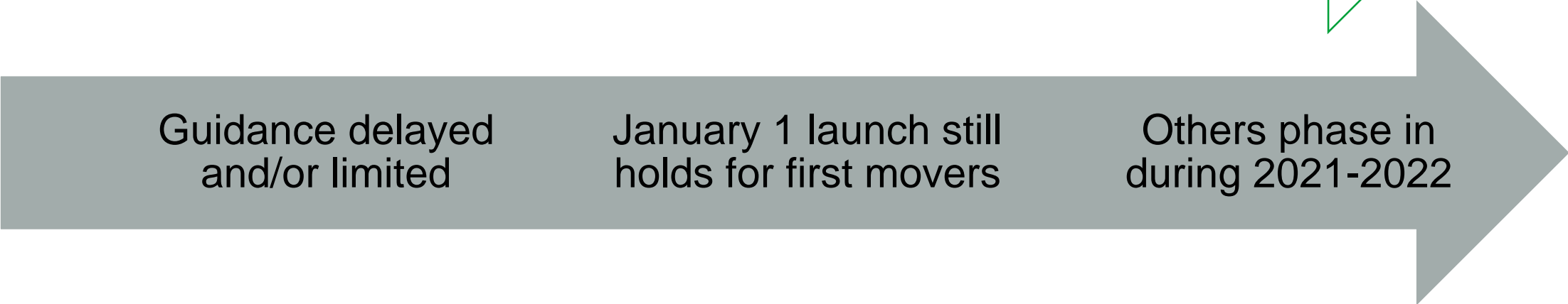
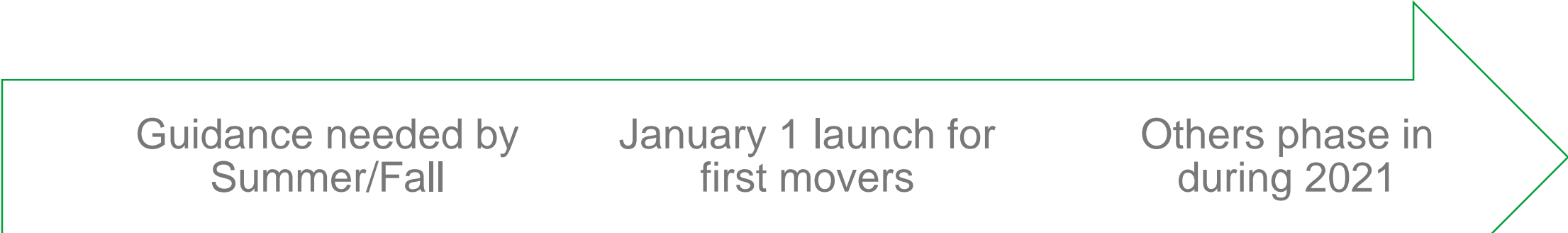
Recap of Terminology

- **MEP:** Multiple employer plan – any retirement plan in which two or more unaffiliated employers participate
- **Open MEP:** MEP that is open to any employer who wishes to join – no “nexus” requirement
- **ARP:** An Association MEP
- **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

Pre-COVID-19 Timeline



Adjusted Timeline



Prohibited Transactions

Contracts and Arrangements

- ERISA 408(b)(2) – reasonable contract terms; reasonable compensation
 - “Reasonableness” is an industry, not legal, standard
 - Depends on plan size – pricing by size of adopting employer?
 - Also, how to define early on in PEP market?
- Key structure/governance question: Who is the responsible plan fiduciary in a particular case?

Remember. 408(b)(2) does not exempt fiduciary self-dealing PTs

Prohibited Transactions (cont.)

Avoiding Fiduciary Self-Dealing

- Approval of compensation by independent fiduciary is required – this is another key structure/governance question for all MEPs and PEPs
- Pricing of MEP/PEP services – account charges; revenue sharing?
- Very likely that DOL will issue new PT exemptions in light of SECURE Act and PEP model
- In the meantime...

Prohibited Transactions (cont.)

Avoiding Fiduciary Self-Dealing (cont.)

- 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]

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...

Responsibilities of the PPP:

Key Questions

- What is the scope of the “administrative duties” to which the PPP is the “person responsible to perform”?
- Can the PPP hire a professional 3(16) Plan Administrator and/or Named Fiduciary?
- Can the PPP hire non-fiduciary service providers?
 - Assuming the answer is yes, are there limits?

PEP Trustee Responsibilities and Issues

- Two general areas of responsibility:
 - Collecting contributions – must have “written contribution collection procedures that are reasonable, diligent, and systematic”
 - Holding plan assets (“normal” ERISA exceptions – *e.g.*, for insured/group annuity arrangements)?
- Trustee must meet requirements of Code Section 408(a)(2) (bank or IRS-approved non-bank trustee)
- Trustee(s) cannot be adopting employers

Investment Responsibilities and Issues

- Selection and monitoring of investment options
 - Use of 3(38) Investment Manager
 - Possible just to utilize general platform of investment options?
 - PPP or affiliate as 3(38)?
 - Need to maintain compliance with PT exemptions, or avoid PTs
- Special issues for managed accounts

Responsibilities of Adopting Employer

Administrative Responsibilities

The SECURE Act says:

Except with respect to the administrative duties of the pooled plan provider...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).

Responsibilities of Adopting Employer (cont.)

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)...*

Needed Guidance

- Special Form 5500 reporting rules for PEPs/MEPs
 - 1,000/100 participant rule
 - Scope of audit requirement
- Model PEP plan language
- Specific registration/information filing requirements for PPPs

Needed Guidance (cont.)

- Required information and disclosures from PPP to adopting employers
- In connection with removing assets from PEP, scope of prohibited “**unreasonable** restrictions, fees, or penalties”
- Processes for “spinning off” employer portions of PEPs/MEPs when violations occur
- Circumstances in which it would be in the “best interest” of plan participants not to spin off

Contract Issues



QUESTIONS