

Congress of the United States  
Washington, DC 20515

September 23, 2021

The Honorable Martin J. Walsh  
Secretary  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

Dear Secretary Walsh:

In 2019, Congress passed the Setting Every Community Up for Retirement Enhancement Act of 2019 (the SECURE Act), which ensured that millions of hard-working Americans will have access to retirement plans at work. One of the key provisions of the SECURE Act allows unrelated small employers to participate in a single retirement plan, such as a 401(k), called a pooled employer plan (PEP). This provision, which went into effect this year, enables small employers to achieve the economies of scale available to large employers, thus reducing costs and expanding coverage among small employers.

We are concerned about reports that PEPs are being implemented in a way that is inconsistent with our intent and inconsistent with foundational principles of ERISA. PEPs are being set up without any effective fiduciary oversight of the investments or services being provided to the PEP by financial institutions. Fiduciary oversight of plan investments and services is a foundation of ERISA. When Congress established PEPs, it was with the intent that these core aspects of ERISA would remain in place.

Specifically, our concern is that some PEPs are being set up such that the plan's main fiduciary – the pooled plan provider (PPP) – also provides other services to the plan, such as providing funds to the plan, including proprietary funds, and/or recordkeeping services. ERISA prohibits a plan fiduciary from overseeing itself since that would be a conflict of interest and a prohibited transaction. Congress never intended that there be any exemption from these prohibited transaction rules for PEPs.

In these cases where the PPP is performing other services for the PEP, it falls upon the participating employers to oversee such services. However, the primary goal in enacting the PEP provision was to make it easier for businesses, especially small businesses, to sponsor retirement plans; thus, adding these oversight responsibilities on participating employers does just the opposite.

According to an official Ways & Means summary of the SECURE Act upon House floor consideration in describing the PEPs' provision, "[t]he SECURE Act would make it easier for small businesses to offer retirement plans to their employees by eliminating outdated barriers to the use of MEPs and improving the quality of MEP service providers." Furthermore, on May 23, 2019, during debate of the SECURE Act on the House floor, Representative Mike Kelly requested without objection for a letter from AARP to be inserted into the record. The letter in support of the SECURE Act states in reference to the PPP provision that, "[t]he legislation would also make it easier for small businesses to offer employees an automatic savings option through a multiple employer pension plan – a single plan in which a *pooled provider assumes the primary fiduciary duties*, making it easier for smaller employers to join together to offer a retirement plan to their workers." (emphasis added)

Furthermore, it can be difficult to achieve effective oversight of a PEP's service providers and investment options by the participating employers. For example, a PEP might have 1,000 participating employers from all across the country, in different industries, and with no relationship to each other. We do not know how those 1,000 different employers can effectively oversee and negotiate with service providers for better services and investment options at lower prices.

Congress' intent in establishing PEPs was to give small employers the same economies of scale as large employers. Large employers have the ability to negotiate with service providers for better services and lower costs. PEPs need to have that same ability. We had intended that the PPP, in its sole role as a fiduciary, would handle those negotiations with all service providers.

We are concerned that in the absence of guidance from the Department consistent with this letter, the troubling trend of PPPs performing other duties that create potential conflicts of interest will continue. Additionally, PEP service providers will not be subject to effective fiduciary oversight, which is a foundation of ERISA and an essential component of PEPs. We therefore ask you to clarify the role of PPPs in order to implement the law as intended.

Thank you for your consideration to this matter. If you have any questions, please contact:

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Sincerely,



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