

October 1, 2020

Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Registration Requirements for Pooled Plan Providers
RIN 1210-AB94

Dear Mr. Canary:

Nova 401(k) Associates and our affiliate, Administrative Fiduciary Services Inc. (collectively “NOVA”), are writing to provide comments with respect to the Notice of Proposed Rulemaking (“Proposal”) to provide a registration process for pooled plan providers (“PPP”) who wish to sponsor a pooled employer plan (“PEP”). Nova expects to register as a PPP and is supportive of the Department of Labor’s (the “Department”) regulatory initiative.

Nova is a third-party administrator (a “TPA”) serving over 6,500 employers. Our current practice also includes Multiple Employer Plans (‘MEPs’). Nova’s primary focus is on employers with fewer than 2,000 employees. Our affiliate, Administrative Fiduciary Services Inc. (‘AFS’) serves as an independent administrative fiduciary (‘IFA’) and provides administrative fiduciary services and support. Neither Nova nor AFS offer investment products, investment advice or daily record-keeping as part of our services.

Recommendations

Nova recommends that the definition of “beginning operations as a pooled plan provider” be clarified in either the final regulation or its preamble to specifically exclude activities directed at other 401(k) professional providers.

Nova recommends that the proposal be modified to remove the requirement to list all administrative, investment, and fiduciary services that will be offered or provided in connection with the PEP.

Nova recommends that if the Department intends that a PPP must have a “primary compliance officer” that it provide guidance on the role and duties of such an office and allow for the use of the PPP’s regular business telephone and contact information rather than a separate number.

Nova recommends that the Proposal be modified to allow the reporting of a single person and address where legal notice may be sent rather than requiring the reporting of numerous agents registered under state law requirements.

Nova recommends that the proposal be modified to clarify that routine audits and examinations by a federal or state governmental agency or other regulatory authority are not required to be reported under Proposed Regulation Section 2510.3-14(b)(3)(iii).

Nova recommends that the disclosure of “ongoing criminal civil or administrative proceedings related to the provisions of services to, operation of, or investments of any employee benefit plan” not be expanded beyond what has been proposed.

Background

On December 20, 2019, the Setting Every Community for Retirement Enhancement Act of 2019 (“SECURE Act”) was signed into law by President Trump. Effective for plan years beginning after December 31, 2019, the SECURE Act provides for PEPs, a new type of multiple employer plan that may be sponsored by a PPP. As a condition of being a PPP, the person serving in that role must first register with the Department as well as with the Treasury Department.

On September 1, 2020, the Department issued proposed regulations to establish the registration requirements for PPPs. Among other requirements, the Proposal requires a PPP to register with the DOL by filing EBSA Form PR no earlier than 30 days and no more than 90 days “before beginning operations as a pooled plan provider.” “Beginning operations as a pooled plan provider is defined to mean “publicly marketing services as a pooled plan provider or publicly offering a pooled employer plan.”

The proposal requires the registration information include a description of the administrative services, investment, and fiduciary services that will be offered or provided in connection with the PEP.

Discussion

Definition of “beginning operations as a pooled plan provider.”

The proposal requires a PPP to register at least 30 days and no less than 90 days before “beginning operations as a pooled plan provider.” “Beginning operations as a pooled plan provider” is defined to mean “publicly marketing services as a pooled plan provider or publicly offering a pooled employer plan.” The preamble to the proposal explains that it is the Department’s view that an important purpose of this requirement “is to provide the Department, the Treasury Department, the IRS, prospective employer customers and the public with notice and relevant information about the pooled plan provider.” The preamble explains:

The Department does not intend to require registration as a result of preliminary business activities, such as establishing the business organization, creating a business plan, obtaining necessary licenses or entering into contracts with subcontractors or partners, obtaining an federal employer identification number, or actions and

communications designed to evaluate market demand in advance of publicly marketing pooled plan provider services or publicly offering one or more pooled employer plans.

Nova agrees with the Department's goal of making relevant information available to employer customers and other interested parties to assist in evaluating a PPP. However, we strongly recommend that the "carve-out" for preliminary business activities be clarified to also exclude marketing activities directed by the PPP at other 401(k) professional providers. For example, a potential PPP may need to negotiate with record-keepers and trustees now to offer a PEP in 2021. Some of this pre-work involves activities that could broadly be construed as marketing since it may include general outreach to these professionals.

Nova strongly believes that the policy considerations which underlie registration before beginning marketing activities do not apply to activities directed by the PPP at other professional providers.

Nova recommends that the definition of "beginning operations as a pooled plan provider" be clarified in either the final regulation or its preamble to specifically exclude marketing or other activities directed at other professional providers and should instead be triggered by marketing or other activities directed to prospective employer customers.

Description of Administrative, Investment and Fiduciary Services

The Proposal requires the PPP to provide a description of all administrative, investment and fiduciary service offered or provided in connection with the PEPs including a description of the role of any affiliates in such services. Although well intended, we believe this to be an unnecessary burden on the regulated community and redundant to information already available to prospective employer customers.

Under ERISA Section (3)(44) the PPP must:

- Serve as the named fiduciary
- Serve as the plan administrator
- 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:
 - the plan meets any requirement applicable under ERISA or the SECURE Act, and
 - provide disclosures necessary to administer the plan or to allow the plan to meet such requirements

The SECURE Act requires the Secretary to issue guidance to identify the administrative duties and other actions required to be performed by a pooled plan provider. We see no benefit to requiring the PPP to reiterate that information in EBSA Form PR. We believe that the registration statement will end up becoming a marketing tool where some providers describe their services in granular detail in an effort to show they do more than other providers while others may be so vague as to be meaningless.

Although the goal of the listing is to provide prospective employer customers and the Department with information necessary to evaluate the PPP, the actual result could be confusion. This is because the initial registration requires a listing of all services for all PEPs that it sponsors. It is quite likely that there will be a different suite of services offered for different PEPs.

Far more valuable to a prospective employer customer are materials specific to the PEP it will be joining, and the services it will actually be using. For many years, the Department's regulations have required covered service providers to provide to a responsible plan fiduciary a list of services and the compensation it will receive a reasonable time before entering into a contract for services. The PPP's disclosure to prospective employer customers for this purpose would provide them with the information necessary to evaluate the arrangement specific to its participation in the PEP. The Department should build on the disclosure regiment already in place rather than imposing new and redundant standards.

Having to describe all services offered by the PPP and affiliates will also lead to unnecessary costs and burdens. This is because a supplemental filing will need to be made whenever there is a change to the information provided in the initial filing. This will be a more frequent occurrence during the start-up of PEPs as providers adjust operations to meet customer and business needs.

Nova recommends that the proposal be modified to remove the requirement to list all administrative, investment, and fiduciary services that will be offered or provided in connection with the PEP.

Primary Compliance Officer

The Proposal requires the name of the primary compliance officer of the PPP. Since ERISA Sections 3(43) and 3(44) do not contain any reference to such a position, it is unclear what this person's responsibilities may entail. We believe guidance from the Department would be helpful to better understand what this officer's duties and obligations may be.

The Proposal also requires the name, mailing address, telephone number, and email address for the primary compliance officer. The inference is that this contact information would be separate and distinct from the PPP's business telephone number and other contact information. The stated goal is to provide the Department, participating employers, and participating employees with an "effective means of communicating with a responsible person at a pooled plan provider regarding compliance questions or concerns."

We strongly disagree with the assertion that separate contact information would be a better and more effective means of communication, particularly with regard to participating employers and employees. When an employee or participating employer has a question about the services they are receiving or other concerns, it would be quite unlikely they would be able to distinguish between a "compliance" question and any other type of question. Having a separate contact number for the primary compliance officer will only cause confusion as to who at the PPP should be called, particularly for participating employees. A more effective approach is to have the inquiry begin with the primary business telephone number of the PPP. In that way, a representative of the PPP can interact with the caller and determine the best person to address

the question. If it is a compliance question it could then be routed to the primary compliance officer.

Nova recommends that if the Department intends that a PPP must have a “primary compliance officer” that it provide guidance on the role and duties of such an office and allow for the use of the PPP’s regular business telephone and contact information rather than a separate number.

Listing of Agent for Service of Legal Process

The Proposal requires the name of the agent for service of legal process and the address at which process may be served (as well as a statement that legal process may be served on the PPP). The preamble to the Proposal indicates that either a person or process service company may be listed for this purpose. This would seemingly indicate that a single person may serve as the agent irrespective of whether that person is listed as the PPP’s registered agent under state law for the states in which it does business. This interpretation would be consistent with the instructions to Line 4a of EBSA Form M-1 which indicate an agent for service of process is a person appointed by the MEWA or ECE to receive legal notices on behalf of the MEWA. A similar interpretation should be applied when an agent is appointed by the PPP.

Nova recommends that EBSA Form PR line 1i be modified to allow the reporting of a single person and address where legal notice may be sent rather than requiring the reporting of numerous agents registered under state law requirements.

Exclusion of Routine Audits and Examinations from Supplemental Reporting

The proposal requires a supplemental filing be made to report receipt of written notice of the initiation of any administrative or enforcement action related to the provision of services to, the operation of, or investments of any employee benefit plan in any court or administrative tribunal by any federal or state governmental agency or other regulatory authority against the PPP or any officer, director, or employee of the PPP.¹ It is unclear whether this would apply to routine examinations and audits conducted by the Department and the Internal Revenue Service. A fair reading is that it would not apply until action is taken in a court or administrative tribunal. Which is consistent with the instructions to EBSA Form PR included in the proposal.

Nova recommends that the Department clarify in the final regulation or preamble that routine audits and examinations by a federal or state governmental agency or other regulatory authority are not required to be reported under Proposed Regulation Section 2510.3-14(b)(3)(iii).

Disclosure of Settlements

The Department has requested comment on whether disclosing settlements of fiduciary liability claims against PPPs with the Department or PBGC would be of assistance to prospective in

¹ Proposed Regulation Section 2510.3-14(b)(3)(iii).

performing due diligence? A claim may be settled for many reasons. A settlement is often less expensive than costs associated with contesting the claim and its settled as a business decision. Nova believe it could have the unintended effect of discouraging plan fiduciaries from being willing to settle such a claim. This will lead to longer and more contested examinations.

Nova recommends that the disclosure of “ongoing criminal civil or administrative proceedings related to the provisions of services to, operation of, or investments of any employee benefit plan” not be expanded beyond what has been proposed.

Conclusion

Nova very much appreciates the work done by the Department to expand access to workplace savings arrangements. We look forward to working with the Department on this and other regulatory initiatives related to PEPs. The primary contributors to this letter were Karen N. Smith, J.K. Nowiejski, and Craig P. Hoffman. Should you have any questions, please feel free to contact Craig Hoffman at choffman@nova401k.com.

Sincerely,

/s/ _____
Karen N. Smith
President