

Filed electronically at regulations.gov

September 29, 2025

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Comments on Pooled Employer Plans: Big Plans for Small Businesses (RIN 1210-AC10)

Dear Sir or Madam:

The SPARK Institute, Inc. appreciates the opportunity to comment on the Department of Labor's ("DOL's") interpretive guidance and requests for information ("RFIs") on pooled employer plans ("PEPs"). As described in more detail below, our comments primarily focus on the importance of allowing the PEP marketplace to continue to develop based on market demand and without overly burdensome regulatory and administrative requirements. In this regard, SPARK strongly recommends that any future guidance that DOL issues with respect to PEPs not encourage or discourage one type of PEP model over another.

As the PEP marketplace continues to develop and evolve, the SPARK Institute will continue to facilitate conversations with our members and advocate for actions that will foster an environment where PEPs can continue to increase coverage, lower costs, and promote retirement security for all American workers. The SPARK Institute welcomes future opportunities to discuss these issues directly with DOL and may submit additional feedback, as appropriate.

The SPARK Institute represents retirement plan recordkeepers, mutual fund companies, brokerage firms, insurance companies, banks, consultants, trade clearing firms, and investment managers. Collectively, our member firms administer the retirement plans for over 110 million American workers.

I. BACKGROUND

Authorized by the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE 1.0"), PEPs permit unrelated employers to participate in a type of multiple employer plan ("MEP") which is treated as a single plan for purposes of ERISA. As a condition of being treated as a PEP, the plan must use a pooled plan provider ("PPP"), which is a named fiduciary and the plan administrator.

The SPARK Institute has long supported efforts to expand retirement plan coverage and reduce the costs associated with employment-based retirement savings options, and has supported PEPs as a means of achieving these goals. PEPs allow employers to offer their employees retirement savings opportunities that may not otherwise be feasible due to the cost and administrative burdens associated with sponsoring a single-employer plan. PEPs are able to take advantage of economies of scale by pooling plan participants and their assets, thereby reducing administrative costs and offering access to professionally managed and professionally administered plans.

In the years since SECURE 1.0 was enacted, PEPs have had undeniably positive impacts on retirement plan formation and coverage. As reported by DOL based on its review of 2022 and 2023 Form 5500 data, there were approximately 190 PEPs in operation, which reported about 618,000 participants and nearly $5 billion in assets.[1] PEPs are also succeeding at offering diversified investment lineups at lower costs than small plans could likely negotiate on their own. DOL reported that the median total cost for each participant in a small retirement plan is around 84 basis points, while the total cost for each participant in one of the three largest PEPs reviewed by DOL was between 23 and 42 basis points.[2] PEPs are clearly having the effect Congress intended of expanding retirement plan coverage among American workers, especially those working for smaller employers that are less likely to offer a retirement plan. This success is, in part, due to DOL's willingness to let the PEP marketplace develop organically in response to market demands.

II. INTERPRETIVE GUIDANCE ON PEPS

As noted in DOL's recent guidance, within this environment, various PEP models have emerged, including "bundled" models where an entity may serve as the PPP, while that same entity or a related entity serves as the investment manager or provides investments offered on the plan's menu. Other PEPs, in contrast, have adopted "unbundled" models, where the PPP aggregates a variety of unaffiliated service providers to fill the roles necessary to offer a PEP. A range of different models have also developed in between fully bundled and fully unbundled PEPs. These models have developed organically based on demand from employers, rather than any standards prescribed by DOL.

A. *DOL Guidance Should Not Favor Specific PEP Models.*

As we have previously expressed on this topic, SPARK strongly believes that any future guidance DOL issues with respect to PEPs should not favor any particular PEP model over other permissible models, as this would threaten to disrupt the positive trends in the PEP marketplace. In this regard, we are concerned that DOL's Interpretive Guidance for Investment Selection and Management (the "Interpretive Guidance") is, in effect, expressing DOL's preference for one model over others.

[1] It should also be noted that this data is a few years old and PEP participation is even greater today.

[2] 90 Fed. Reg. 35646, 35648 (July 29, 2025).

In the Interpretive Guidance, DOL expresses the view that "the risk to participating employers of fiduciary liability could be minimized greatly if the [PPP], as named fiduciary, expressly assumed full responsibility for, and exercised sole discretion and judgment in selecting and retaining the manager and did not attempt to reduce its responsibility by relying on authorization or ratification from the participating employers for the selection and retention, such as through an adhesive participation agreement. In these circumstances, fiduciary liability of participating employers would be minimized because the [PPP] assumed full responsibility for selecting and retaining the investment manager."[3]

SPARK is very concerned that this language has the effect of discouraging employers from participating in certain types of PEP models because it suggests that a PEP where the participating employers must directly approve and oversee the plan's investment manager are inherently more risky than other models. This is particularly concerning in light of the fact that this type of model is permitted by ERISA, and the recent guidance makes no suggestion that this model would violate ERISA's strict fiduciary standards or prohibited transaction rules. In addition, in cases where a PPP does not select an investment manager directly, the participating employer does not necessarily automatically retain responsibility for managing the plan's investments; the participating employer, just as an employer of a single-employer plan, has the authority to delegate its investment duties to an investment manager, thereby significantly reducing its liability for investment decisions. In light of this concern, SPARK believes that DOL should clarify that it does not view any permitted PEP models as superior or inferior to others. Otherwise, these statements may have the undesirable effect of distorting the market by tipping the scales in favor of one model over others.

In addition, SPARK also questions the notion that it is always more desirable for participating employers to only select the PPP, thereby delegating fiduciary oversight for any investment manager exclusively to the PPP. Some employers may, for example, find it appropriate and beneficial to participate in PEPs in which they are directly responsible for selecting and monitoring the plan's investment manager. This may be the case even in circumstances in which the investment manager is related to the PPP.

B. *Future Guidance Should Be Issued Using Notice and Comment.*

To the extent DOL issues additional future guidance on PEPs, SPARK urges DOL to issue such guidance using a formal notice and comment process, rather than issuing interpretive guidance as part of an RFI or other forms of guidance that do not require public comment. In recent years, SPARK has been concerned about the use of informal DOL guidance that has been published outside of the notice and comment process, and that has discouraged plan fiduciaries from adopting features and investments that are not prohibited by ERISA.[4] SPARK believes that plan fiduciaries are in the best position to determine which investments are best suited for their plans

[3] *Id.* at 35649.

[4] *See, e.g.*, Compliance Assistance Release 2022-01 (Mar. 10, 2022); and U.S. Dep't of Labor Supplemental Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives (Dec. 21, 2021).

and which plan designs best meet their needs. Accordingly, DOL should not attempt to issue guidance that would discourage permissible investments or plan designs, and should especially not pursue such guidance outside of a formal notice and comment rulemaking.

III. REQUEST FOR INFORMATION

As part of its RFI on PEPs, DOL asks several questions related to potentially issuing a regulatory safe harbor for employers to satisfy their fiduciary responsibilities as they relate to PEPs. Specifically, Question 15 of the RFI asks whether DOL should "codify a regulatory safe harbor based on the guidance and tips in [the Interpretive Guidance] and [the Fiduciary Tips for Small Employers Selecting a PEP] . . . for small employers to satisfy their fiduciary responsibilities for selection and monitoring [PPPs] and other named fiduciaries referenced in section 3(43)(B)(iii)(I) and their fiduciary responsibilities for the investment and management of the portion of the PEP's assets attributable to their employees referenced in section 3(43)(B)(iii)(II)."[5]

A. *Future Safe Harbors Should Apply to All Employers and Plan Types.*

The SPARK Institute strongly supports the development of regulatory safe harbors for employers to satisfy their fiduciary responsibilities with respect to the selection and monitoring of plan service providers. We believe, however, that any such guidance should not be limited to PEPs and should instead apply more broadly to all employers selecting and monitoring service providers for all plan types.

ERISA's fiduciary regime applies broadly to a variety of plan types, including single-employer plans, multiemployer plans, and multiple employer plans such as PEPs. We do not see a reason to develop a narrow safe harbor that applies solely to PEPs when the selection and monitoring of service providers is a universal responsibility of plan fiduciaries. A broadly applicable safe harbor would be particularly useful in light of the current avalanche of ERISA litigation against plans. The Supreme Court's recent decision in *Cunningham v. Cornell University*,[6] for example, makes plans especially vulnerable to frivolous litigation involving the selection of service providers.

B. *Future Guidance Should Not Encourage or Discourage Particular Plan Models or Features.*

As noted above, SPARK supports the development of regulatory guidance, including potential safe harbors, that would encourage employers to join all types of plans. However, we believe strongly that any such guidance should be careful not to encourage or discourage employers from joining any particular types of plans, nor should it favor specific plan models or features.

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[5] 90 Fed. Reg. 35646, 35651.

[6] 604 U.S. 693 (2025) (holding that a plaintiff's mere allegation that a plan hired a service provider is generally enough to state a claim for a prohibited transaction and survive a motion to dismiss).

- *Future guidance should not condition relief on the use of an unbundled PEP model.* Question 17 of the RFI asks whether a potential safe harbor should "require the PEP to use a 3(38) investment manager that is not affiliated with" the PPP. Question 20 asks whether a safe harbor should "exclude PEPs that offer investments in which the [PPP] has a financial interest."

  In response, SPARK believes that any DOL guidance should not (1) condition relief on a PEP using a 3(38) investment manager that is unaffiliated with the PPP or (2) exclude PEPs that offer investments that are affiliated with the PPP. As described above in our discussion of the Interpretive Guidance, we are concerned that DOL favoring one PEP model over another will have an adverse effect on the PEP marketplace and undermine the expansion of retirement plan formation and coverage through PEPs.

- *Future guidance should not include additional disclosure requirements.* Question 18 of the RFI asks what "disclosures should be provided to participating employers as part of" a potential safe harbor.

  In response, SPARK urges DOL to refrain from creating additional disclosure requirements as part of any future guidance beyond what PEPs are already required to provide under existing law. PEPs are already subject to the extensive disclosure regime under ERISA section 408(b)(2), which requires that service providers disclose, among other items, the services to be provided to the plan, the direct and indirect compensation that the service provider and its affiliates expect to receive in connection with the services, and the manner in which the compensation or fees paid to the service provider will be received.[7] PEPs are already complying with these robust disclosure requirements on services and fees. This approach has proven to be successful, and adding more disclosures would produce redundancy.

  Creating additional disclosures specifically applicable to PEPs also directly conflicts with PEPs' purpose of reducing retirement plan costs and streamlining administrative burdens. This would undermine the efforts of Congress in SECURE 1.0 and the SECURE 2.0 Act of 2022 ("SECURE 2.0") to reduce unnecessary regulatory burdens for employer-sponsored plans.

- *Future guidance should not require written representations or certifications.* Question 24 of the RFI asks whether a safe harbor should "require the use of written representations or certifications by the [PPP] about the PEP and the [PPP's] diligence in meeting the requirements of ERISA."

  In response, SPARK strongly recommends that future guidance not include any such requirements. The statutory language that created PEPs already directs the PPP to

[7] DOL Reg. § 2550.408b-2(c)(1).

register with DOL and describe information that DOL may require.[8] In response to this requirement, DOL has developed filing obligations for PPPs that include an initial registration requirement of basic identifying information and pending legal or administrative proceedings; a supplemental filing requirement when the PPP starts operations, if there are changes to the information reported in the initial filing, and when there is a significant new financial or operational event related to the PPP; and a final filing when the PEP terminates. PPPs must file this information with DOL using the Form PR, which is publicly available.[9] There is no need to add to these requirements.

- *Future guidance should not include specific fee-related conditions.* Question 19 and 22 of the RFI ask, respectively, whether a safe harbor should "include conditions designed to ensure that the PPP gives all participating employers and plan participants the same . . . fee structures on the same terms" and whether a safe harbor should "designate a permissible range of total fees for participants in the PEP," such as defining total fees as an average percent of assets.

  In response, SPARK believes that any future DOL guidance should not include fee-related conditions. Private sector market forces, not the federal government, are in the best position to set the appropriate fee structures for PEPs. As discussed above, PEPs are required to provide robust disclosures under ERISA section 408(b)(2); through these disclosures, participating employers have access to detailed information about fees and can make informed decisions about whether those fees are reasonable.

  Additionally, while fees are an important part of any fiduciary selections, ensuring that fees fall within a specific range or are the lowest they can possibly be is not the single decisive factor in determining whether a plan fiduciary is acting prudently. The lowest possible fees may not always be in the best of interest of participants. A service provider charging higher fees may mean that participants have access to more services or that those services are more individualized or higher quality. Guidance that conditions relief on fees that are within a specific range or that requires that the PPP give all employers the same fees would interfere with innovation in the PEP marketplace and limit the services and investment options offered to participants.

- *Future guidance should not include requirements to offer any specific type of investments.* Question 19 of the RFI asks whether a potential safe harbor should include "conditions designed to ensure that the PPP gives all participating employers and plan participants the same investment options . . . on the same terms." Question 21 of the RFI asks whether a safe harbor should "create any specific requirements regarding the offer of [target date funds ("TDFs")], the offer of managed accounts, the acceptable number of pooled investments offered as designated investment alternatives, or the asset class coverage of designated investment alternatives available to participating employers in a

[8] ERISA § 3(44)(A)(ii).

[9] *See* Registration Requirements for Pooled Plan Providers, 85 Fed. Reg. 72934 (Nov. 16, 2020).

PEP."

SPARK believes that TDFs offer plan participants who are uncomfortable managing their own investments an excellent opportunity to invest in a broadly diversified group of investment options that adjusts over time in accordance with a glidepath that aligns with the participant's intended retirement date. SPARK believes, however, that future DOL guidance should refrain from creating any requirements regarding the use of TDFs or other specific types of investments. Similarly, future DOL guidance should not uniformly require PPPs to offer all employers and participants the same investment options.

The PEP marketplace is best positioned to determine what investments PEPs should offer, and employers are capable of surveying the marketplace and determining which plan best suits their needs. SPARK believes that preserving flexibility is critical in this regard, because PEPs may create customized investment lineups for specific employers and participants. Additional restrictions or conditions on this issue would have chilling effects on innovation in the PEP marketplace.

IV. DOL REPORT TO CONGRESS ON THE PEP INDUSTRY

Section 344 of SECURE 2.0 directs DOL to submit a report to Congress every five years regarding its findings on the PEP industry, including recommendations on how PEPs can be improved, through legislation, to serve and protect retirement plan participants. DOL's RFI includes a number of questions relating to the development of this report.

As part of its ongoing reporting to Congress, SPARK requests that DOL advocate for legislation that would modify the ERISA plan audit rules for PEPs to exempt participating employers with fewer than 100 participants. ERISA requires the annual Form 5500 for a defined contribution plan to contain an audit from a qualified public accountant; however, there is no audit requirement for plans that cover less than 100 participants.[10] In the case of PEPs, if an employer with fewer than 100 participants joins a PEP with 100 or more participants, the small employer loses its exemption to the audit requirement. Exempting employers with fewer than 100 participants in the PEP from the audit requirement would encourage PEP formation and adoption, particularly among smaller employers. It would also be consistent with changes to the plan audit rules enacted by Congress in section 345 of SECURE 2.0, which eliminates the trust-level audit requirement for Groups of Plans.

In addition, SPARK requests that, as part of its ongoing reporting to Congress, DOL advocate for legislation to modify the service crediting rules under Internal Revenue Code ("Code") section 413(c) for PEPs, which have been interpreted by the Internal Revenue Service ("IRS") as requiring participating employers in PEPs to credit employees with service from another unrelated employer(s). These rules also serve to constrain PEP adoption among small employers.

[10] DOL Reg. § 2520.104-46.

V. REQUEST FOR GUIDANCE ON PEP TERMINATIONS

Section V of the PEP guidance, Fiduciary Tips for Small Employers Selecting a PEP, includes several tips designed to assist small business owners in selecting a PEP. As part of DOL's recommendation to "[m]ake sure [the employer] fully inquire[s] about the implications of exiting the PEP," DOL notes that employers may want to ask "if, as the participating employer, you cease participating in the PEP and terminate your company's involvement with the PEP altogether, whether the accounts of your current and former employees remain in the PEP." To date, however, DOL has not issued guidance on what, if any, procedural requirements exist for a participating employer that wishes to terminate its involvement in a PEP. This has created uncertainty for both PPPs and participating employers.

SPARK requests that DOL consider issuing guidance addressing an employer terminating its involvement with a PEP. Specifically, we request guidance expressly stating that it is permitted for an employer to terminate its plan with the PPP without spinning off to a single-employer plan. It would also be helpful if such guidance addressed the fiduciary obligations of PPPs and participating employers during the employer's withdrawal and if there are reporting requirements for the withdrawing employer.

In addition, SPARK requests guidance expressly permitting PEP participants whose employer is terminating its involvement with the PEP to keep their assets in the PEP and on the process for distributing benefits to participants following a termination. This would address concerns from participants who are uncertain about the status of their assets following their employer's withdrawal from a PEP. While our requested guidance is apparently consistent with the principles incorporated into the IRS's 2022 proposed regulations providing relief from the Code's unified plan rule, SPARK believes that express guidance from DOL, especially guidance addressing participating employers who are actively engaged with the plan, would be helpful in promoting PEP participation more broadly.[11]

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The SPARK Institute appreciates the opportunity to provide comments on this matter. If you have any questions or would like more information regarding this letter, please contact the SPARK Institute's outside counsel, Michael Hadley (mlhadley@davis-harman.com) or Adam McMahon (armcmahon@davis-harman.com), Davis & Harman LLP.

Sincerely,



[11] *See* Notice of Proposed Rulemaking and Notice of Public Hearing: Multiple Employer Plans, 87 Fed. Reg. 17225, 17231 (Mar. 28, 2022).

Tim Rouse
Executive Director