



Federal Legislative & Regulatory Report

October 2018

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DOL Releases Association Retirement Plan Rules

On October 22, the Department of Labor released its [proposed rules](#) for Association Retirement Plans intended to enhance the ability of employers to join together to offer retirement plans. The proposal was issued pursuant to the Executive Order issued at the end of August.

As expected, the proposed rules are narrow. The proposal does not permit open multiple employer plans (MEPs), but rather maintains material restrictions on the ability of small employers to join together in a MEP. Thus, there remains a great need for the Retirement Enhancement and Savings Act of 2018 (“RESA”) and the House-passed Family Savings Act of 2018. Comments on the proposal are due December 22.

Below are highlights of the rules:

- [Retention of the nexus requirement.](#) The proposal does not eliminate the requirement that all employers in a MEP must have a nexus other than maintaining the same plan; the proposal simply makes the nexus requirement easier to meet. Specifically, the group of employers “must have at least one substantial business purpose unrelated to offering and providing MEP coverage or other employee benefits.”
- [Retention of current-law control rule.](#) The proposal does not eliminate the rule that the participating employers must “control” the MEP. This control test can make the maintenance of a truly open MEP more difficult.
- [Far greater limits on employer eligibility than in legislative proposals.](#) The proposal requires all employers participating in a MEP either:
 - Be in the same line or business, or
 - Have a principal place of business in the same region that does not exceed the boundaries of a single state or metropolitan area.

- [Defined contribution plans only](#). Like the legislative proposals, the DOL proposal only addresses defined contribution MEPs, leaving the law unchanged regarding the circumstances under which employers can maintain a defined benefit MEP.
- [Gig workers](#). Independent contractors may, as their own employer, generally participate in the type of MEP permitted by the proposal, but subject to all of the above restrictions.
- [Special rule for Professional Employer Organizations \(“PEOs”\)](#). Under a special rule in the proposal, a bona fide PEO may sponsor a MEP, without regard to whether it satisfies the above standards. Very generally, a PEO is an entity that performs “substantial employment functions” for its client employers that participate in the MEP. “Substantial employment functions” may include, for example, responsibility for the payment of wages and for payroll taxes.

OMB 2019 Regulatory Agenda Includes SEC/DOL Action on ‘Best Interest’

The OMB Office of Information and Regulatory Affairs (OIRA) released its [Fall 2018 regulatory agenda](#), which lists the status of agency rulemaking activities. All federal agencies are required by law to submit their list to OIRA for a “Unified Agenda” twice per year, and though the published timelines are always subject to change, the update is a good indication of where agencies plan to focus their attention through year-end and beyond. Important dates of note include:

- [SEC Best Interest, September 2019](#) – The SEC projected that its three proposals – regulation best interest, Form CRS, and the standard of conduct for investment advisers – would be finalized in September of 2019. That is later than many were speculating. These projected dates are notoriously unreliable, but they almost always predict that a project will be completed before it is actually completed. However, it is not usual for a project to be completed earlier than projected. In this context, the projection of completion in September of 2019 is somewhat troubling, since some additional delay could potentially jeopardize the ability of the SEC to get this done before the 2020 general election (and raise Congressional Review Act issues).
- [DOL Best Interest, September 2019](#) – In the same document, the DOL stated the “Department is considering regulatory options in light of the Fifth Circuit opinion” that invalidated the 2016 DOL Fiduciary rule. The DOL suggested completion of a revised regulation by September 2019. [This timeline](#) appears highly unlikely as the DOL has not yet issued a proposed regulation nor engaged in the public notice and comment process. Based on the September 2019 deadline, it is possible the DOL’s approach to the regulation will be more limited in scope and simply seek to clarify certain prohibited transaction exemptions (PTEs) that were called into question by the court decision to invalidate the Fiduciary rule.

New Jersey Securities Department Issues Notice of New Fiduciary Standards

On October 15, the Bureau of Securities issued a [pre-proposal](#) for a securities fiduciary duty rule. The notice provides that the bureau is soliciting comments regarding amendments to Rule N.J.A.C. 13:47A-6.3 requiring that broker-dealers, agents, investment advisors and investment advisor representatives be subject to a fiduciary rule.

Specifically, the bureau is considering making it a dishonest or unethical business practice for failing to act in accordance with a fiduciary duty when recommending to a customer an investment strategy, or the purchase, sale, or exchange of any security or securities, or providing investment advisory services to a customer.

The notice does not provide specific language to be included in the rule, but invites comments on the legal and factual basis for applying a fiduciary standard to all financial services professionals; the scope of the duty in terms of duration and when it arises; the types of recommendations that would trigger the duty; and the scope of the duty in terms of to whom it is owed.

The notice is in response to Governor Phil Murphy's September 17 press release announcing plans to issue a uniform fiduciary standard through a rule initiated by the Bureau of Securities. Comments are due to the bureau by December 14.

In New Jersey, the Securities Bureau reports to the Attorney General's office, and is a separate agency from the Department of Banking and Insurance. The Securities Code excludes all insurance, endowment and annuity contracts (both fixed and variable) from the definition of security and thus the scope of the securities code. Also, the Insurance Code provides the insurance commissioner exclusive authority to regulate the issuance and sale of insurance and annuities. Under this formulation, the securities commissioner would lack authority to regulate all insurance and annuities contracts.

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References and source material used in this publication

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DOL Webpage on Association Retirement Plans (includes information on proposed rules)
<https://www.dol.gov/general/topic/association-retirement-plans>

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Fall 2018 Unified Agenda of Regulatory and Deregulatory Actions
<https://www.reginfo.gov/public/do/eAgendaMain>

DOL likely to address fiduciary rule again next year
<https://www.investmentnews.com/article/20181018/FREE/181019915/dol-likely-to-address-fiduciary-rule-again-next-year>

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NJ Would Be Among First States to Adopt “Uniform Fiduciary Standard”
<https://nj.gov/governor/news/news/562018/approved/20180917c.shtml>

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Keeping watch

You can find the most recent information on issues affecting governmental defined contribution plans, plan sponsors and plan participants in the Employer page of our plan website, NRSforu.com. In addition, we report guidance on legislative and regulatory activity relevant to government sector plans through:

- *Federal Legislative and Regulatory Report* – distributed monthly and posted in the Plan Sponsor section of NRSforu.com. It's available online and for download.
- *Plan Sponsor Alerts* – published as needed to announce breaking news.
- *Governmental 457(b) Guidebook*

About this report

BOB BEASLEY, CRC, Communications Consultant, edits this report. Beasley brings nearly 30 years of financial services communications experience to your plan. He has contributed to past editions of the *457(b) Governmental Guidebook*, edits countless newsletters and plan sponsor communications, and in 2001 authored “What you should know about the Economic Growth and Tax Relief Reconciliation Act of 2001.” He often voices Nationwide’s online presentations and telephone greetings.

Beasley has served on the Education and Communication Committee for the Plan Sponsor Council of America and as a member of the National Association of Government Defined Contribution Administrators.

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NRM-17220AO (11/18)

