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**BILLING CODE 4510–29–P**

## **DEPARTMENT OF LABOR**

### **Employee Benefits Security Administration**

#### **29 CFR Part 2510**

#### **RIN 1210–AB94**

### **Registration Requirements for Pooled Plan Providers**

**AGENCY:** Employee Benefits Security Administration, Labor

**ACTION:** Final rule.

**SUMMARY:** This final regulation establishes the requirements for registering with the Department of Labor as a “pooled plan provider” for “pooled employer plans” under the Employee Retirement Income Security Act of 1974, as amended (ERISA). The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) provides that newly permitted pooled plan providers can begin offering pooled employer plans on January 1, 2021, but requires such persons to register with the Secretary of Labor before beginning operations. This final regulation also establishes a new form—EBSA Form PR (Pooled Plan Provider Registration)—as the required filing format for pooled plan provider registrations. The Form PR must be filed electronically with the Department of Labor. Filing the Form PR with the Department of Labor also satisfies the SECURE Act requirement to register with the Department of the Treasury. This final regulation affects persons wishing to serve as pooled plan providers,

defined contribution pension benefit plans that are operated as pooled employer plans, employers participating in such plans, and participants and beneficiaries covered by such plans.

**DATES:** This final regulation is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Form PR and the accompanying instructions are the required filing format for pooled plan provider registrations and the Form PR must be filed electronically with the Department of Labor at <https://www.efast.dol.gov/>.

**FOR FURTHER INFORMATION CONTACT:** Colleen Brisport Sequeda, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693–8500 (this is not a toll-free number), for questions related to pooled plan provider reporting requirements under Title I of ERISA.

*Customer service information:* Individuals interested in obtaining general information from the Department of Labor concerning Title I of ERISA may call the EBSA Toll-Free Hotline at 1–866–444–EBSA (3272) or visit the Department’s website ([www.dol.gov/agencies/ebsa](http://www.dol.gov/agencies/ebsa)).

## **SUPPLEMENTARY INFORMATION:**

### **I. Legal Framework**

Under ERISA, an employee benefit plan (whether a pension plan or a welfare plan) must be sponsored by an employer, by an employee organization, or by both. Section 3(5) of ERISA defines the term “employer” for this purpose as “any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan, and includes a group or association of employers acting for an employer in such capacity.” These definitional provisions of ERISA have been interpreted as permitting a multiple employer plan (MEP) to be

established or maintained by a bona fide group or association of employers that is controlled by the employer members and that acts in the interests of its employer members to provide benefits to their employees.<sup>1</sup> This approach is based on the premise that the person or group that maintains the plan is tied to the employers and employees that participate in the plan by some common economic or representational interest or genuine organizational relationship unrelated to the provision of benefits. The Department of Labor (Department) has taken steps, through a final rule on “association retirement plans” at 29 CFR 2510.3-55, to clarify and expand the types of arrangements that can be treated as multiple employer plans under Title I of ERISA. That final rule did not, however, extend to so-called “open MEPs.”<sup>2</sup>

The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act)<sup>3</sup> removed possible legal barriers to the broader use of multiple employer plans by authorizing a new type of ERISA-covered defined contribution plan—a “pooled employer plan” operated by a “pooled plan provider.” The SECURE Act amended section 3(2) of ERISA to authorize these pooled employer plans, which offer benefits to the employees of multiple unrelated employers without the need for any commonality among the participating employers or other genuine organizational relationship unrelated to participation in the plan, thus enabling a type of open MEP. A pooled employer plan arrangement allows most of the administrative and fiduciary responsibilities of sponsoring a retirement plan to be transferred to a pooled plan provider. Therefore, a pooled employer plan can offer employers, especially small employers, a

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<sup>1</sup> The SECURE Act did not change the conditions for plans that were already permitted under section 3(2) of ERISA to act as a single MEP. *See, e.g.*, Advisory Opinions 2008–07A, 2003– 17A, and 2001–04A. Those classes of multiple employer plans (*e.g.*, employer association retirement plans and plans sponsored by professional employer organizations) are outside of the scope of this rulemaking, as are multiple employer plans established and maintained pursuant to bona fide collective bargaining.

<sup>2</sup> See the preamble discussion in the Final Rule on the Definition of “Employer” Under Section 3(5) of ERISA— Association Retirement Plans and Other Multiple-Employer Plans, 84 FR 37508 (July 31, 2019). The Department did, however, seek comments through a Request for Information published with that proposed rule seeking comments on whether, and if so under what conditions, open MEP structures should be treated as a multiple employer plan for purposes of Title I of ERISA.

<sup>3</sup> The SECURE Act was enacted as Division O of the Further Consolidated Appropriations Act, 2020 (Pub. L. 116-94) (December 20, 2019).

workplace retirement savings option with reduced burdens and costs compared to sponsoring their own separate retirement plan. New section 3(44) of ERISA establishes requirements for pooled plan providers, including a requirement to register with the Department and the Department of the Treasury (Treasury Department) before beginning operations as a pooled plan provider. The effective date for these provisions allows “pooled employer plans” to begin operating on January 1, 2021.

Under section 3(2) of ERISA, a pooled employer plan is treated for purposes of ERISA as a single plan that is a multiple employer plan. A pooled employer plan is generally defined in section 3(43) as a qualified retirement plan that is an individual account plan or a plan that consists of individual retirement accounts described in Internal Revenue Code (Code) section 408 that is established or maintained for the purpose of providing benefits to the employees of two or more employers, the terms of which meet certain requirements set forth in the statute.<sup>4</sup>

Specifically, the terms of the plan must:

- designate a pooled plan provider and provide that the pooled plan provider is a named fiduciary of the plan;
- designate one or more trustees (other than an employer in the plan) to be responsible for collecting contributions to, and holding the assets of, the plan, and require the trustees to implement written contribution collection procedures that are reasonable, diligent, and systematic;
- provide that each employer in the plan retains fiduciary responsibility for the selection and monitoring, in accordance with ERISA fiduciary requirements, of the person

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<sup>4</sup> 29 U.S.C. 1002(43)(B). The term “pooled employer plan” does not include a multiemployer plan or plan maintained by employers that have a common interest other than having adopted the plan. The term also does not include a plan established before the date the SECURE Act was enacted unless the plan administrator elects to have the plan treated as a pooled employer plan and the plan meets the ERISA requirements applicable to a pooled employer plan established on or after such date.

designated as the pooled plan provider and any other person who is designated as a named fiduciary of the plan, and the investment and management of the portion of the plan's assets attributable to the employees of that employer (or beneficiaries of such employees) in the plan to the extent not delegated to another fiduciary by the pooled plan provider and subject to the ERISA rules relating to self-directed investments;

- provide that employers in the plan, and participants and beneficiaries, are not subject to unreasonable restrictions, fees, or penalties with regard to ceasing participation, receipt of distributions, or otherwise transferring assets of the plan in accordance with applicable rules for plan mergers and transfers;
- require the pooled plan provider to provide to employers in the plan any disclosures or other information that the Secretary of Labor may require, including any disclosures or other information to facilitate the selection or monitoring of the pooled plan provider by employers in the plan;
- require each employer in the plan to take any actions that the Secretary of Labor or pooled plan provider determines are necessary to administer the plan or to allow for the plan to meet the ERISA and Code requirements applicable to the plan, including providing any disclosures or other information that the Secretary of Labor may require or which the pooled plan provider otherwise determines are necessary to administer the plan or to allow the plan to meet such ERISA and Code requirements; and
- provide that any disclosure or other information required to be provided to participating employers may be provided in electronic form and will be designed to ensure only reasonable costs are imposed on pooled plan providers and employers in the plan.

The fidelity bonding requirements in ERISA section 412 apply to fiduciaries and other persons handling the assets of a pooled employer plan, but the maximum bond amount for each

such plan official is \$1,000,000, as compared to the \$500,000 maximum that applies in the case of other ERISA-covered plans that do not hold employer securities.<sup>5</sup>

A pooled plan provider with respect to a pooled employer plan is defined in ERISA section 3(44) to mean a person that—

- is designated by the terms of the plan as a named fiduciary under ERISA, as the plan administrator, and as 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) that are reasonably necessary to ensure that the plan meets the Code requirements for tax-favored treatment and the requirements of ERISA and to ensure that each employer in the plan takes such actions as the Secretary or the pooled plan provider determines necessary for the plan to meet Code and ERISA requirements, including providing to the pooled plan provider any disclosures or other information that the Secretary may require or that the pooled plan provider otherwise determines are necessary to administer the plan or to allow the plan to meet Code and ERISA requirements;
- acknowledges in writing its status as a named fiduciary under ERISA and as the plan administrator;

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<sup>5</sup> The SECURE Act requires that pooled plan providers must ensure that all plan fiduciaries and other persons who handle plan assets are bonded in accordance with section 412 of ERISA. In the Department's view, the SECURE Act confirms the application of ERISA section 412 requirements to pooled employer plans, except that the Act establishes \$1,000,000 as the maximum bond amount as compared to \$500,000 for plans that do not hold employer securities. Thus, the normal section 412 rules for ERISA plans govern the bonding requirements for pooled employer plans and the pooled plan provider is subject to the provisions of ERISA section 412(b), which provides that "it shall be unlawful for any plan official of such plan or any other person having authority to direct the performance of such functions, to permit such functions, or any of them, to be performed by any plan official, with respect to whom the requirements of subsection (a) [of ERISA section 412] have not been met." See 29 CFR 2550.412-1, 29 CFR Part 2580; see also Field Assistance Bulletin 2008-04 (providing a general description of statutory and regulatory requirements for bonding). The Department does not read the SECURE Act as broadening the section 412 bonding rules to apply to persons who handle plan assets regardless of whether they handled plan funds or other property within the meaning of section 412. Similarly, the existing statutory and regulatory exemptions for certain banks, insurance companies, and registered broker-dealers continue to apply.

- is responsible for ensuring that all persons who handle plan assets or are plan fiduciaries are bonded in accordance with ERISA requirements; and
- registers as a pooled plan provider.

The SECURE Act specifies that the Secretary may perform audits, examinations, and investigations of pooled plan providers as may be necessary to enforce and carry out the purposes of the provision. The SECURE Act also directs the Department to issue such guidance as it determines appropriate to carry out the pooled employer plan and pooled plan provider provisions, including guidance (1) to identify the administrative duties and other actions required to be performed by a pooled plan provider; and (2) that provides, in appropriate cases involving a noncompliant employer, for transfer of plan assets attributable to employees of the noncompliant employer (or beneficiaries of such employees) to (a) a plan maintained only by that employer (or its successor), (b) a tax-favored retirement plan for each individual whose account is transferred, or (c) any other arrangement that the Department determines is appropriate. The SECURE Act further provides such guidance must provide for the noncompliant employer (and not the plan with respect to which the failure occurred or any other employer in the plan) to be liable for any plan liabilities attributable to employees of the noncompliant employer (or beneficiaries of such employees), except to the extent provided in the guidance. An employer or pooled plan provider is not treated as failing to meet a requirement of guidance issued by the Secretary if, before the issuance of such guidance, the employer or pooled plan provider complies in good faith with a reasonable interpretation of the provisions to which the guidance relates.

The SECURE Act also provides that the Form 5500 annual return/report of employee benefit plan (Form 5500) filing for a multiple employer plan subject to section 210 of ERISA, including a pooled employer plan, must include a list of the employers in the plan, a good faith estimate of the percentage of total contributions made by such employers during the plan year,

the aggregate account balances attributable to each employer in the plan (determined as the sum of the account balances of the employees of each employer and the beneficiaries of such employees) and, with respect to a pooled employer plan in particular, the identifying information for the person designated under the terms of the plan as the pooled plan provider. In addition, the provision authorizes the Department to prescribe simplified reporting for pooled employer plans that cover fewer than 1,000 participants, but only if no single employer in the plan has 100 or more participants covered by the plan.

The SECURE Act does not limit the class of persons who can act as pooled plan providers, but it is expected that many financial services companies (such as insurance companies, banks, trust companies, consulting firms, record keepers, and third-party administrators) will be pooled plan providers. As noted above, however, section 3(44) does require as a condition of being a pooled plan provider that the person “registers as a pooled plan provider with the Secretary, and provides to the Secretary such other information the Department may require, before beginning operations as a pooled plan provider.”<sup>6</sup>

In the Department’s view, the primary statutory purpose of the registration requirement is to provide the Department with sufficient information about persons acting as pooled plan providers to engage in effective monitoring and oversight of this new type of ERISA-covered retirement plan. Although the Department does not have specific details as to how pooled employer plans authorized under the SECURE Act will be structured or operated, the Department has assumed that they may be similar to other currently operating multiple employer plans, and the Department did not receive any comments suggesting a contrary view. Additionally, there may be challenges associated with these new types of multiple employer plans that the Department, the Treasury Department, or the Internal Revenue Service (IRS), as

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<sup>6</sup> ERISA section 3(44)(a)(ii).

the Federal agencies charged with oversight of private-sector pension plans, may need to address. The SECURE Act expressly provides that participating employers will retain certain residual fiduciary responsibilities, including responsibilities with respect to the selection and oversight of the pooled plan provider and the plan's other named fiduciaries. This raises concerns that there may be greater potential for inadequate employer oversight of the activities of a pooled employer plan, its fiduciaries, and service providers than is true of more traditional employer-sponsored plans because participating employers pass along more responsibility to the pooled plan provider than they do in other plan arrangements.

The registration process and requirements must enable the Department to identify pooled plan providers when they begin operating and to effectively oversee the providers and plans. While pooled plan providers will be required to file Forms 5500 for the pooled employer plans they operate, Forms 5500 generally are not filed until seven to nine-and-a-half months after the end of the plan year.<sup>7</sup> In the absence of appropriate detail in the registration statement, a pooled plan provider could begin operating multiple plans with hundreds or thousands of participants and millions of dollars without the agencies having any information about the pooled employer plans for almost two years.

In determining how best to implement the statutory registration requirement, the Department considered a number of alternatives including whether the statement must be filed when the provider begins operations in anticipation of offering one or more pooled employer plans, when it begins operating each individual pooled employer plan, or both. The Department

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<sup>7</sup> Title I and Title IV of ERISA and the Code establish annual reporting requirements for employee benefit plans. DOL, the Treasury Department (specifically the IRS), and the Pension Benefit Guaranty Corporation jointly developed the Form 5500 so employee benefit plans could use one form to satisfy annual reporting requirements under ERISA and the Code. The Form 5500 is part of ERISA's overall reporting and disclosure framework, helping to assure that employee benefit plans are operated and managed in accordance with certain prescribed standards and that participants and beneficiaries, as well as regulators, are provided or have access to sufficient information to protect the rights and benefits of plan participants and beneficiaries.

also does not believe that the SECURE Act provisions preclude the Department from imposing reasonable ongoing reporting requirements to enable the Department to effectively oversee pooled plan providers and the pooled employer plans they operate. Therefore, as discussed in more detail below, relying on the language in the SECURE Act requiring a registration statement, as well as on its broad authority under section 505 of ERISA to prescribe regulations,<sup>8</sup> including forms, to enable the Department to carry out its statutory oversight mission, the Department has chosen the structure set out in the final rule, which adopts the structure essentially as proposed.

The final rule requires an initial registration filing and supplemental filings. The supplemental filings are to report changes in the information in the initial filing, information about each specific pooled employer plan before initiation of operations, and information on specified reportable events. These filings (initial and supplemental) capture information that is important for the Department, the Treasury Department, and the IRS to carry out oversight and for participating employers to exercise their fiduciary duties of selection and monitoring. The final rule also requires a final filing once the last pooled employer plan offered by a pooled plan provider has been terminated and has ceased operations.

The Department believes that the initial registration, supplemental filing, and final filing requirements, when combined with the Form 5500 annual reporting requirements, will give the Department the timely access to pooled plan provider information needed to fulfill the monitoring and oversight tasks the SECURE Act placed on the agencies and will be less burdensome and less costly for pooled plan providers and pooled employer plans than some of

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<sup>8</sup> Section 505 of ERISA provides generally that the Secretary may prescribe such regulations the Secretary “finds necessary or appropriate to carry out the provisions of this subchapter. Among other things, such regulations may define accounting, technical and trade terms used in such provisions; may prescribe forms; and may provide for the keeping of books and records, and for the inspection of such books and records (subject to section 1134(a) and (b) of this title).” 29 U.S.C. 1135.

the alternatives considered. The final rule establishes a new EBSA form—EBSA Form PR (Pooled Plan Provider Registration) (Form PR)—as the required filing format for pooled plan provider registrations. Filing the Form PR satisfies the requirements under Title I of ERISA and the Code to register with the Department and the Treasury Department, respectively.

This final rule is a deregulatory action under Executive Order (E.O.) 13771. Details on the estimated costs of this final rule can be found in the regulatory impact analysis, set forth later in this preamble. Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a “major rule,” as defined by 5 U.S.C. 804(2).

On September 1, 2020, the Department published in the Federal Register a proposed rule and proposed EBSA Form PR. The Department invited interested persons to submit comments on these items and, in response to this invitation, the Department received 20 written comments from a variety of parties, including plan sponsors and fiduciaries, plan service and investment providers, and employee benefit plan and participant representatives. These comments are available for review on the “Public Comments” page of the Department’s Employee Benefits Security Administration website under the “Laws and Regulations” tab. Below is a detailed discussion of the provisions of the final rule, the public comments the Department received, and how these comments affected the Department’s decision-making when adopting the final rule.

## **II. Registration Requirements for Pooled Plan Providers**

The SECURE Act expressly requires, as a condition of being a pooled plan provider, that the provider register with the Department and provide other information that the Secretary may require. The SECURE Act, however, did not include specific content requirements for pooled plan provider registration. Under the final rule, the requirement to register and provide

information to the Department is triggered by specific events. The rule's requirements can be divided into three sets of filing obligations corresponding to the timing of specific events. First, there is an initial registration filing of basic identifying information about the pooled plan provider and additional information about pending legal or administrative proceedings. Second, there is a supplemental filing or filings requirement. A supplemental filing is required if there is a change in the information that was reported in the initial registration or if there is a significant new financial and/or operational event related to the pooled plan provider. A supplemental filing also is required when a pooled employer plan starts operations. The requirement for supplemental information is intended to provide the agencies, participating employers and employees, and the public information about noteworthy events occurring after the initial registration. Third, there is a final filing that is required once the last pooled employer plan has been terminated and ceased operations.

#### **A. Initial Registration**

##### *Beginning Operations as a Pooled Plan Provider*

Paragraph (a) of the final regulations states that section 3(44) of ERISA sets forth the criteria that a person must meet in order to be a pooled plan provider for pooled employer plans under section 3(43) of ERISA. This introductory paragraph provides the context and scope for the registration requirement established in the remainder of the final rule. Commenters did not raise questions or concerns with paragraph (a) in the proposed rule. Therefore, the final rule adopts this provision as proposed.

Section 3(44)(A)(ii) of ERISA contains the registration requirement. That section, in relevant part, defines a pooled plan provider as a person who “registers as a pooled plan provider with the Secretary, and provides to the Secretary such other information as the Secretary may

require, before beginning operations as a pooled plan provider.” The statute does not define what is meant by “beginning operations as a pooled plan provider.”

Paragraph (b) of the proposed rule defined the central phrase “beginning operations as a pooled plan provider” to mean “publicly marketing services as a pooled plan provider or publicly offering a pooled employer plan.” The preamble to the proposal clarified that this definition was not intended 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 a Federal employer identification number from the IRS, 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.

The proposed rule specifically solicited comments on this crucial definition in paragraph (b) by asking the following questions: Is the definition of “beginning operations as a pooled plan provider,” which determines whether initial registration is required, appropriate in scope? Should the definition exclude marketing and solicitation efforts so that the initial registration is tied solely to beginning operation of a pooled employer plan? Should the deadlines for filing an initial registration be nearer to the date of actual public marketing activities if the pooled plan provider intends only to engage in marketing and solicitation efforts, and will not enroll any employer or employee in a pooled employer plan until at least 30 days after initial registration?

A number of commenters raised significant concerns with this proposed definition, particularly with its reliance on “publicly marketing services as a pooled plan provider” or “publicly offering a pooled employer plan” as the alternative acts that would decisively establish precisely when a person is considered to have begun “operations” as a pooled plan provider. A more global objection was that registration should not turn on such early-stage and inchoate

activities of firms with potential interest in eventually serving as a pooled plan provider. A more specific concern was based on the assertions that the two selected activities—marketing and offering—were too vague.

The consensus of these commenters was that more precision and clarity is needed when dealing with the establishment of a regulatory trigger for a governmental filing requirement, especially the “public marketing” trigger. These commenters uniformly agreed that firms need to evaluate market demand before deciding whether to offer a pooled employer plan, and that there is no clear distinction between commonly accepted methods for evaluating demand and the act of “publicly marketing services” within the plain meaning of these words in the proposal.

A number of commenters stated that the line between “communications designed to evaluate market demand,” which the Department explained in the preamble of the proposal would not be actions that would trigger the proposal’s filing requirement, and “publicly marketing services as a pooled plan provider” is not clear. Neither of these terms, according to these commenters, is clearly defined in the proposed rule or its preamble, and there is no safe harbor communication design or disclaimer described that could be used to ensure that a communication provided by a pooled plan provider to evaluate market demand does not also constitute public marketing material.

To illustrate this ambiguity, commenters offered the following examples. An announcement at an industry conference of a firm’s intent to enter the marketplace as a pooled plan provider, for example, could be construed as public marketing by some but not by others. In addition, a commenter suggested that a firm making references to developing pooled plan provider services or to establishing a pooled employer plan in personal biographies, company websites, or company handouts could be construed as public marketing by some but not by others. Similarly, communications to current clients about future intentions to offer a pooled

employer plan could be construed as public marketing. Call center responses by employees, with or without marketing responsibilities in their job descriptions, could be construed as public marketing by some but not by others. In citing these examples, commenters stated that public marketing and communication is a necessary predicate for firms to gauge demand and decide whether it makes financial sense to offer or bring to market a particular product or service, and pooled employer plans are no different. Firms need to solicit interest publicly before determining whether to enter the marketplace, according to these commenters, and the proposal does not recognize that reality.

Several commenters predicted certain potential negative effects of this proposed definition. One possible effect of the ambiguity of the proposal, according to comments, is that potential pooled plan providers would register before they have fully considered and designed a product or approach to bring to market. Another possible effect, according to comments, is that potential providers would avoid entering the marketplace altogether. A third possible effect of this ambiguity relates to firms that have already begun research and marketing efforts in anticipation of pooled employer plan business operations to commence on January 1, 2021. These firms, according to one commenter, will be in immediate violation of the registration requirement upon the effective date of the final rule because research and marketing activity will have preceded registration, even if these firms register on the first possible date following publication.

For these reasons, the commenters overwhelmingly favor a final rule that defines “beginning operations as a pooled plan provider” in a manner that ties the initial registration to some core operational facet of the pooled employer plan, rather than to the type of early-stage marketing and soliciting activities in the proposal. Some commenters suggested that registration could be required in advance (e.g., 30 days) of a specific and objectively determinable act

customarily associated with the start of a retirement plan. Commenters offered the following examples: the date of plan establishment; the date of enrollment of the first participating employer and its employees; the first date of actual plan operation; the date of the first participating employer's formal adoption of a participation or similar agreement; the date of the pooled plan provider's first appointment as such by an adopting employer under a pooled employer plan; and the date when the first dollar is obligated to be held in trust.

Alternatively, other commenters suggested a less objective approach. In particular, they suggested tying the registration to whenever the pooled employer plan is considered covered under ERISA, e.g., 30 days in advance of that point. This suggestion is based on a different provision in the proposal, at paragraphs (b)(2) and (b)(6) (relating to a supplemental report containing the name and EIN for the pooled employer plan, and the name, address, and EIN for the trustee of the plan), which relies on the same longstanding facts-and-circumstances coverage principles that have governed plans under ERISA for decades. In an attempt to bring some certainty to this highly facts-and-circumstances-dependent approach, one commenter suggested that the final rule could clarify, perhaps by example, that this standard would be considered satisfied if registration occurred at some designated period (e.g., 30 days) before "the date the first pooled employer plan offered by the pooled plan provider is positioned to enter into participation arrangements with employers."

Regardless of the approach taken to define this concept, these commenters uniformly agreed that there is no need to prevent providers from marketing to potential employer members during the period between registration and plan operations. Any such prohibition would be counterproductive or even harmful to potential participating employers, according to these commenters. Providers must be able to market their pooled employer plan and pooled plan

provider services as early as practicable so that prospective participating employers can assess their options, according to these commenters.

In response to these commenters, paragraph (b) of the final rule adopts operation of a pooled employer plan as the event requiring prior registration rather than “marketing” or “offering services” as a pooled plan provider. Specifically, paragraph (b) of the final rule provides that, for purposes of implementing the statutory phrase “beginning operations as a pooled plan provider,” the final rule defines that phrase to mean when the pooled plan provider begins “initiation of operations of the first plan that the person operates as a pooled employer plan.” This term must be read in conjunction with paragraph (b)(6) of the final rule, which states, in response to the many commenters looking for a brighter-line test, that a pooled employer plan is treated as initiating operations as a pooled employer plan when the first participating employer executes or adopts a participation, subscription, or similar agreement for the plan specifying that it is a pooled employer plan or, if earlier, when the trustee of the plan first holds any asset in trust. A benefit of this approach is that it encompasses the traditional activities of pension plan formation and is intended to provide would-be pooled plan providers with maximum flexibility.

The Department agrees with the commenters that this approach will simplify the registration process. Preliminary business activities of a would-be pooled plan provider, such as establishing the business organization, creating a business plan, obtaining necessary licenses, entering into contracts with subcontractors or partners, obtaining a Federal employer identification number from the IRS, or actions and communications designed to evaluate market demand, including marketing activity, do not trigger the registration requirement. This approach also continues to advance and support the Department’s oversight functions, as the proposal sought to do. From the outset, an important purpose of the registration requirement is to provide

the Department, the Treasury Department, the IRS, and importantly, prospective employer customers and the public, with notice and relevant information about the pooled plan provider. The Department has determined that this purpose is served equally as well by the final rule's focus on plan operations, as compared to the proposal's focus on marketing and offering of services.

*Timing of Initial Registration — Changes to the Proposal's 90/30 Rule*

Paragraph (b)(1) of the proposal established a registration window by providing, in relevant part, that a person intending to act as a pooled plan provider must file the Form PR with the Department “[n]o earlier than 90 days and no later than 30 days before beginning operations as a pooled plan provider[.]” Many commenters questioned the necessity of the complex aspects of the proposal, including this provision. One commenter, in particular, stated that it is not clear what value this narrow time period (60 days) would provide to the Department in its oversight role. This commenter instead suggested expanding the 90-day period to 180 days before beginning operations. A longer window, according to this commenter, would give providers more leeway in getting a plan up and running after registration, as there could be unforeseen circumstances that delay the official establishment date of a plan.

The Department agrees with the commenters that this aspect of the proposal could be streamlined without compromising important safeguards. The principal purpose of the 90-day restriction in the proposal was to ensure the information filed with the Department is relatively accurate and current so that Federal oversight agencies and employers are able to effectively discharge their oversight and monitoring obligations. Consistent with the arguments of these commenters, the Department has concluded this purpose is adequately supported by the final rule's requirement, in paragraph (b)(3)(i) of the final rule, that a pooled plan provider submit a timely supplemental filing when there is a change in the information that was reported in an

initial filing. Accordingly, paragraph (b)(1) of final rule is changed from the proposal and does not include the “no earlier than 90 days” clause, but instead requires the filing of an initial registration “at least 30 days before the initiation of operations of a plan as a pooled employer plan.”

*Special Transition Provision — Delayed Application of the 30-Day Rule*

Paragraph (b)(1) of the final rule requires an initial registration at least 30 days before the initiation of operations of a plan as a pooled employer plan. Some commenters on the proposal stated that a significant number of firms already have committed substantial resources toward, and intend to initiate, operations of pooled employer plans on January 1, 2021, or as soon as possible thereafter. These commenters are concerned that they will be compelled to delay the initiation of operations of pooled employer plans solely because of the Department’s timeline for publishing a final rule. To address these concerns, paragraph (c) of the final rule contains a special provision that allows an initial registration to be filed anytime before February 1, 2021, provided that it is filed “on or before” the initiation of operations of a plan as a pooled employer plan. The effect of this provision is to waive the otherwise applicable 30-day waiting period between registration and the start of plan operations. The provision applies with respect to pooled plan providers that would initiate operations of a plan as a pooled employer plan on or after January 1, 2021 and before February 1, 2021. Paragraph (c) of the final rule has no effect after that date. Some commenters requested a much longer period, e.g., a period of 180 days following publication of a final rule. Requests of this magnitude, however, appear to have been predicated, at least in part, on the proposal’s reliance on “publicly marketing services” as the trigger for the registration requirement, which has been eliminated.

*Content Requirements*

The SECURE Act left it to the agencies' discretion to establish specific content requirements for the pooled plan provider registration. In developing this proposal, the Department focused on information needed by the agencies to identify, contact, and engage in timely oversight of pooled plan providers, as well as on the information that the Department could post on its website that would provide employers considering participating in a pooled employer plan, participating employees, covered employees, and other interested stakeholders the ability to identify, contact, and perform some due diligence on pooled plan providers. The Department also considered the content requirements of other registration requirements under Federal and State securities laws for investment advisers and broker-dealers. For example, among other information, registrations require disclosures of identifying and contact information, background information about the registrant's business, information about relevant management policies, names of executives and general partners, relevant legal proceedings and previous violations, and relevant negative information, such as legal problems or other business events or trouble that would be of consequence to users of the registration information. The Department also focused on minimizing the administrative burden and expense involved for pooled plan providers and the pooled employer plans they operate.

Based on those considerations, and as a result of applicable comments more fully described below, paragraph (b)(1) sets out the specific information a prospective pooled plan provider would need to file on Form PR at least 30 days before beginning operations as a pooled plan provider:

1. Legal Business Name and any Trade Name (Doing Business As). Commenters did not raise questions or concerns with this requirement; therefore, the final rule adopts this provision as proposed.

2. Federal Employer Identification Number (EIN). An EIN is a nine-digit employer identification number (for example, 00-1234567) that has been assigned by the IRS. Entities that do not have an EIN may apply for one on Form SS-4, Application for Employer Identification Number. The Form SS-4 is available by calling 1-800-829-4933 or on the IRS Web site at <https://www.irs.gov/pub/irs-pdf/fss4.pdf>. EIN data is important for accurately identifying registrants and cross-referencing information reported about the registrant on other filings, such as the Form 5500 filed by the pooled employer plans operated by the registrant. Commenters did not raise questions or concerns with this requirement. Therefore, the final rule adopts this provision as proposed.

3. Business Telephone. Paragraph (b)(1)(ii) of the final rule requires a business telephone number as a way for interested/participating employers and covered employees to contact the pooled plan provider for information. Some commenters, responding to questions in the preamble of the proposal, requested confirmation that this final regulation does not preclude a pooled plan provider from permitting a call center number to be reported as the business phone. The view of these commenters is that registrants should be able to determine the most appropriate contact information to provide on the registration. Other commenters suggested a better business practice for pooled employer plans may be to have one telephone number for potential participating employers and a different telephone for participating employers and participants, as the nature of the callers' questions and needs could be quite different. This paragraph of the final rule requires the phone number of the pooled plan provider; it does not prescribe or proscribe anything beyond that. Registrants decide what business phone number to include in the registration for this purpose. Accordingly, the final rule adopts the provision as proposed.

4. Business Mailing Address. Commenters did not request any revisions to this requirement, which is adopted as proposed.

5. Address of any public website or websites of the pooled plan provider or any affiliates to be used to market any such person(s) as a pooled plan provider to the public or to provide public information on the pooled employer plan operated by the pooled plan provider. The preamble to the proposed rule explained that the Department considers this information useful for its oversight of pooled plan providers and will also assist employers performing due diligence in selecting and monitoring pooled employer plans. The preamble also stated that the Department expects that most pooled plan providers will have such websites and believes that having information on such websites provides an alternative to requiring more information to be submitted as part of the registration process. Commenters did not raise questions or concerns with or request any revisions to this requirement in the proposal. Therefore, the final rule adopts this provision as proposed.

6. The name, mailing address, telephone number, and email address for the responsible compliance official of the pooled plan provider. Paragraph (b)(1)(v) of the proposal required the reporting of basic contact information about the pooled plan provider's "primary compliance officer." The Department is aware that many companies of the type likely to be pooled plan providers have individuals or teams of compliance officers with varying responsibilities, and this provision of the proposal relied on that relatively uncontroversial fact. The intent behind this provision of the proposal was to capture and make available basic contact information of the person responsible for these individuals or compliance officers because, in the Department's view, it is important that the Department, as well as participating employers and covered employees, have an effective means of communicating with a responsible person at the pooled plan provider regarding compliance questions or concerns.

Some commenters questioned the necessity of providing contact information for a “primary compliance officer.” To the extent the purpose of the requirement is to provide a contact for the Department’s own use, they argued that the Department as a Federal regulatory authority independently has the capacity to identify and contact a compliance officer without regard to this regulation. To the extent the requirement is designed to provide employers and employees with contact information for a person that is able to answer questions about their pooled employer plan, the commenters believed that the primary compliance officer would not be helpful. They suggested that the type of information employers and employees were likely to seek, or that they should seek, is more appropriately provided by the plan administrator, and noted that contact information for the plan administrator could be found in the summary plan description, or answered by the general business number required by paragraph (b)(1)(ii) of the proposal. These commenters accordingly suggested eliminating this aspect of the proposal.

The Department declines to adopt this global suggestion. The Department continues to believe that employers, participants, and oversight agencies will have legitimate questions specifically regarding the pooled employer plans’ compliance with applicable provisions under ERISA and the Code that cannot be answered by contacting, for example, the general number of the pooled plan provider, a salesperson, or an entry-level clerk. Pooled plan providers and pooled employer plans are new types of entities under the law, and it is reasonable to expect that affected individuals will have genuine compliance-oriented questions that may not have ready answers. Moreover, even in its own experience, the Department sometimes encounters friction when attempting to communicate with responsible compliance officials, especially at large companies with numerous touchpoints. The Department, therefore, retains a version of this requirement in the final rule, but is modifying it to address public comments.

Some commenters stated that the term “primary compliance officer” is imprecise and possibly confusing. According to commenters, some companies that might be pooled plan providers do not have compliance officers at all, while other firms have many compliance officers none of whom are necessarily “primary.” For the former group, commenters stated that presumably the Department is not requiring that a pooled plan provider hire a primary compliance officer solely for this registration regulation, and, as regards the latter group, the commenters stated that the proposal was unclear as to what laws or regulations the identified person had to be responsible for as primary compliance officer. Finally, some commenters objected to having to identify a specific individual by name, as a contact, asserting that this could raise privacy or similar concerns and necessitate supplemental filings, as required by paragraph (b)(3)(i) of the regulation, with every change in compliance officer. In response to these comments, the Department has made adjustments to the proposal.

Paragraph (b)(1)(v) of this final rule requires the “[n]ame, address, contact telephone number and email address for the responsible compliance official of the pooled plan provider.” For this purpose, the term *responsible compliance official* means “the person or persons, identified by name, title, or office, responsible for addressing questions regarding the pooled plan provider’s status under, or compliance with, applicable provisions of the Employee Retirement Income Security Act and the Internal Revenue Code as pertaining to a pooled employer plan.” As revised, this does not require a pooled plan provider to hire or promote an individual with any particular degree or certification. Rather, this standard simply requires an identification of, and basic contact information for, the person, unit, or element designated by the pooled plan provider as the point-person responsible for fielding and addressing questions about the pooled plan provider’s status under ERISA and the Code. Put differently, this provision requires nothing more than that the company identify with modest specificity whom *it* wishes to receive and address status and compliance-oriented questions under the two laws (ERISA and the Code) that

sanction the existence of this novel type of plan, and how to contact this person, office, or other element of the pooled plan provider.

7. The agent for service of legal process for the pooled plan provider and the address at which process may be served on such agent. The proposal rule explained that this provision would allow either a person or a process service company to be identified as the agent for service of legal process. Commenters did not raise any material questions or concerns with this requirement, therefore, the final rule adopts this provision substantially as proposed. However, in response to observations that the rule implements a registration requirement and does not otherwise implement substantive mandates, the final rule removes from the proposal the phrase “and in addition a statement that service of legal process may be made upon the pooled plan provider.” This removal clarifies that paragraph (b)(1)(vi) of the final rule does not confer or affect rights or obligations of parties.

8. The approximate date when pooled plan operations are expected to commence. Because the SECURE Act requires that the registration must be filed “before the pooled plan provider begins operations,” this data element will enable the Department to ensure compliance with the SECURE Act requirement. Paragraph (b)(1) of the final regulation requires that the registration be filed at least 30 days before beginning operations as a pooled plan provider, except where a provider falls within the initial 30-day transition period. Commenters did not raise questions or concerns about this provision or request any revisions to its text. Therefore, the final rule adopts this provision as proposed.

9. A description of the administrative, investment, and fiduciary services that will be offered or provided in connection with the pooled employer plans, including a description of the role of any affiliates in such services. Paragraph (b)(1)(viii) of the proposal requires the registrant to include in the initial filing a “description of the administrative, investment, and

fiduciary services that will be offered or provided in connection with the pooled employer plans, including a description of the role of any affiliates in such services.” The preamble to the proposal explained that information about various plan services to be provided by the pooled plan provider or any affiliate will assist the Department and prospective participating employers in evaluating the pooled plan provider and identifying potential conflicts of interest with respect to the operations or investments of any pooled employer plans to be operated by the provider.

Commenters raised multiple concerns with this provision. A few commenters argued that this provision (in conjunction with other provisions) is inconsistent with a simple registration requirement and should be eliminated from the final rule. These commenters argue broadly that the success of this new retirement vehicle (i.e., the pooled employer plan) will be jeopardized by excessive and unnecessary regulations. These commenters generally advocated for fewer regulatory obstacles to starting up pooled employer plans, but with careful monitoring and possible adjustments over time.

Other commenters asserted that the Department’s expectations for paragraph (b)(1)(viii) of the proposal are unclear because of tensions between the text of the regulation, on the one hand, and the proposed Form PR and related instructions, on the other. The commenters noted that the proposed regulatory text requires a “description” of the services that will be offered or provided by a pooled plan provider or affiliate, as well as a “description of the role” of any affiliates in such services. By contrast, the proposed Form PR and related instructions require only that certain boxes be checked to indicate *whether* certain services will be offered or provided by the pooled plan provider or an affiliate (no description at all), according to these commenters. Assuming that the Department intends that the narrower requirements in the proposed Form PR (i.e., *whether* services will be provided, instead of a description of and the role of affiliates) would satisfy the operative text, the commenters additionally questioned

whether such reporting offers the Department or employers any value or information not otherwise available already, such as through existing reporting obligations (Form 5500, Schedule C) and disclosure regulations.

Other commenters argued that the information required by paragraph (b)(1)(viii) of the proposal is unnecessary. This is because, according to these commenters, the SECURE Act, among other things, requires the pooled plan provider to serve as the ERISA 3(16) administrator and as a named fiduciary. As such, the pooled plan provider is “the person responsible for the performance of all administrative duties (including conducting proper testing with respect to the plan and the employees of each employer in the plan).” Accordingly, it should be evident, these commenters assert, that the pooled plan provider will provide administrative and fiduciary services. These commenters see no benefit to this proposed provision that would require the pooled plan provider to report such obvious information back to the government on the Form PR.

Other commenters questioned whether this provision would result in the disclosure of information helpful to carry out the stated objectives of the Department (to assist in the evaluation of potential for conflicts of interest). These commenters stated their belief that many pooled plan providers will offer or sponsor multiple pooled employer plans. Further, these commenters stated that many pooled plan providers will offer multiple services, directly or through affiliates, to these plans. These commenters stated their belief that some pooled employer plans will use some services offered by the pooled plan provider (or affiliates), and other pooled employer plans will use a different combination of services offered by the pooled plan provider (or affiliates). In recognition that each pooled employer plan ultimately will select its own combination of services from the pooled plan provider (or affiliates), these commenters question whether the generic list of information required by paragraph (b)(1)(iii) of the proposal (as implemented through the proposed Form PR), which is not specific to any particular pooled

employer plan, would meaningfully advance the stated objectives of the Department. These commenters suggested that potential participating employers need different information—information specific to their particular pooled employer plan—to evaluate potential conflicts, such as information more closely approximating the information covered service providers furnish to responsible plan fiduciaries under 29 CFR 2550.408b-2.

The Department declines to eliminate this provision. The SECURE Act clearly imposes an oversight duty on the Department with respect to pooled employer plans. A chief concern of the Department is potential conflicts of interest. Pooled plan providers are in a unique statutory position in that they are granted full discretion and authority to establish the plan and all of its features, administer the plan, and to act as a fiduciary, hire service providers, and select investments and investment managers. Further, at this point in time, business models for these plans are still being developed.<sup>9</sup> In light of all of this, the Department does not agree that a question that requires a pooled plan provider to identify whether it or any of its affiliates will provide services to a pooled employer plan is unreasonable or excessive in scope. In response to specific commenters' concerns about the vagueness of the proposal's requirement to explain the role of affiliates in connection with providing services, the final rule has been simplified to require merely an identification, by name and EIN, of any affiliate that is expected to provide services to the pooled employer plan. This will allow the Department to follow up as necessary.

10. A statement disclosing any ongoing Federal or State criminal proceeding, or any Federal or State criminal convictions, related to the provisions of services to, operation of, or investments of, any employee benefit plan against the pooled plan provider, or any officer, director, or employee of a pooled plan provider, provided that disclosure of any criminal

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<sup>9</sup> 85 FR 36880 (June 18, 2020) (titled Prohibited Transactions Involving Pooled Employer Plans Under the SECURE Act and Other Multiple Employer Plans).

conviction may be omitted if the conviction, or related term of imprisonment served, is outside ten years of the date of the registration. This provision in paragraph (b)(1)(ix) of the final rule was adopted from the proposed regulation with only one non-substantive change. A few commenters argued that this provision need not focus on individual employees of the pooled plan provider for reasons of privacy, as well as for reasons of scope and burden. In terms of privacy, this provision encompasses only information (e.g., caption, docket number, State) that is already in the public record. For instance, if the entire case is under seal and there is no docket or caption, the filer would not need to disclose the existence of any such sealed case. In terms of scope, a commenter objected to the notion that a pooled plan provider would have to report criminal conviction information about “any employee”—including rank-and-file employees, such as janitors or maintenance staff, whose positions make it unlikely that they could threaten the safety of a pooled employer plan. These commenters also noted that the firms likely to be pooled plan providers have thousands of employees. Like the proposal, however, the final rule does not reach as broadly as some commenters suggest. This provision reaches only those rank-and-file employees of the pooled plan provider whose conviction relates to providing services to, the operation of, or investments of, an employee benefit plan, and whose conviction or imprisonment is within the last ten years. The final rule retains this provision because it focuses on relevant negative information that will be useful in the Department’s oversight of pooled plan providers. Other statutory provisions in ERISA already evidence the relevance of this type of activity and inform the scope of paragraph (b)(1)(ix) of the final rule. For example, under ERISA section 411, the Department is responsible for ensuring that disqualified parties do not serve in positions or capacities prohibited under the statute.<sup>10</sup> Although paragraph (b)(1)(ix) of

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<sup>10</sup> Section 411 of ERISA provides “[n]o person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of title 21, murder, rape, kidnaping, perjury, assault with intent to kill, . . . any felony involving abuse or misuse of such person’s position or employment in a labor organization or employee benefit plan to seek or obtain an illegal gain at the expense of the members of the

the final rule is intentionally constructed without all the technical nuance and specifications in section 411 of ERISA, that statutory provision prohibits individuals convicted of disqualifying crimes from serving in plan-related capacities during or for a period of 13 years after such conviction or the end of imprisonment, whichever is later, subject to provisions allowing that period to be shortened.<sup>11</sup>

Finally, the proposal specifically solicited comments on whether civil judgments in private litigation should be added to this provision, and if so, the types. In the Department's view, criminal judgments are more likely, as a broad category, to be good indicators of the need for additional review or inquiry than are civil judgments in private litigation. None of the commenters unambiguously advocated including civil judgments of this type in this provision, accordingly, the Department declines to expand this provision in this manner. A non-substantive change was made to this provision. For organizational purposes, the words "ongoing" and "proceedings" were moved to this provision from paragraph (b)(1)(x) of the proposal to accommodate changes made to that provision.

11. A statement disclosing any ongoing civil or administrative proceedings in any court or administrative tribunal by the Federal or State government or other regulatory authority against the pooled plan provider, or any officer, or director, or employee of the pooled plan provider, involving a claim or fraud or dishonesty with respect to any employee benefit plan, or involving the mismanagement of plan assets. Paragraph (b)(1)(x) of the proposal required the

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labor organization or the beneficiaries of the employee benefit plan ... shall serve or be permitted to serve...(1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, employee, or representative in any capacity of any employee benefit plan, (2) as a consultant or adviser to an employee benefit plan, including but not limited to any entity whose activities are in whole or substantial part devoted to providing goods or services to any employee benefit plan, or (3) in any capacity that involves decision-making authority or custody or control of the moneys, funds, assets, or property of any employee benefit plan...."

<sup>11</sup> See also *Beck v. Levering*, 947 F.2d 639 (2d Cir. 1991) (in a civil action, permitting lifetime injunction against an individual from providing services to ERISA plans).

initial filing to include a statement disclosing any ongoing criminal, civil, or administrative proceedings related to the provisions of services to, operation of, or investments of any employee benefit plan, in any court or administrative tribunal by the Federal or State government or other regulatory authority against the pooled plan provider or any officer, director, or employee of the pooled plan provider.<sup>12</sup> Similar to the information on criminal convictions, this data element focuses on information that may be useful in the Department’s oversight of pooled plan providers and that may also assist employers performing due diligence in selecting and monitoring pooled employer plans.

Regarding ongoing administrative proceedings (as opposed to criminal and civil proceedings), a number of commenters were concerned that the clause “any ongoing administrative proceeding” could be read to include routine audits, investigations, or informal inquiries by Federal and State regulators. These commenters stated that most pooled plan providers likely will be financial service organizations that are routinely subject to investigations, audits, and other administrative actions by any number of Federal and State agencies and that requiring these providers to report such actions would be burdensome and potentially misleading as to the “risks” of working with a specific provider. These commenters suggested limiting the scope of the types of administrative proceedings falling into this category in a manner that does not include routine administrative activities carried out by executive agencies as part of their routine oversight functions and responsibilities.

In response to these commenters, the Department agrees that the public would benefit from a more precise definition of “administrative proceeding” that does not include routine regulatory oversight activities of the type suggested by some commenters and that the scope of

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<sup>12</sup> Other regulatory authority includes self-regulatory organizations authorized by law, such as the Financial Industry Regulatory Authority (FINRA). However, as used in the final rule, other regulatory authority does not include any foreign regulatory authorities.

this provision could be narrowed without compromising the Department’s objectives. Paragraph (b)(1)(x) of the final rule, therefore, is limited to formal administrative hearings. This limitation was accomplished by adding a definition of “administrative proceeding” in paragraph (b)(8) of the final rule. This definition is grounded in established procedures for administrative hearings by the Department.<sup>13</sup> Paragraph (b)(8) defines this term to mean “a judicial-type proceeding of public record before an administrative law judge or similar decision-maker.” The key elements of this definition ensure a level of formality and process that operate to exclude the types of routine administrative proceedings mentioned by the commenters, such as routine audits, examinations, and benefits reviews by executive-branch agencies. In sum, the definition elevates the level of administrative proceeding above the numerous array of preliminary administrative and oversight activities mentioned by the commenters, to proceedings that involve disputes that are ripe for adjudication and matters that are of public record.

Additionally, regarding all three types of proceedings covered by paragraph (b)(1)(x) of the proposal (criminal, civil, and administrative), many commenters raised concerns regarding the general breadth of activities covered by this provision of the proposal. They requested a more substantial limitation on the type of activities covered by the subject proceedings than merely any act “related to” the “operation of” or “investments of” any employee benefit plan to which the pooled plan provider has a commercial (service or investments) relationship. Additionally, the commenters were concerned with the proposal’s extension of this provision to “any . . . employee” of the pooled plan provider. Many pooled plan providers will likely be large firms and may have thousands—even tens of thousands—of employees, according to the

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<sup>13</sup> See, e.g., 29 CFR 2571.2 (Procedures for Administrative Hearings on the Issuance of Cease and Desist Orders Under ERISA Section 521—Multiple Employer Welfare Arrangements).

commenters. The commenters maintained that the cumulative effect of these open-ended or undefined concepts will result in an expensive, impracticable, or unworkable registration.

In response to these commenters, the final rule makes another narrowing change to the proposal. The Department has determined that, without this additional change, this aspect of the final rule may be impractical for large providers and could result in so much reporting that the registration requirement would become less useful. Accordingly, paragraph (b)(1)(x) of the final rule limits the type of reportable event to matters involving claims of fraud or dishonesty with respect to any employee benefit plan, or involving the mismanagement of plan assets. These matters go to the core of the Department's oversight responsibilities and, similarly, should be of utmost relevance to potential or participating employers. These changes will reduce the reporting burden on pooled plan providers, while improving the quality of the information on file by encompassing only the most egregious claims. Commenters' concerns regarding the coverage of rank-and-file employees are not without merit. Limiting the scope of actions as described in this paragraph addresses this concern.<sup>14</sup>

Finally, the proposal specifically requested comments on the feasibility and advisability of expanding this provision in the final rule to include settlements of fiduciary liability claims against pooled plan providers with the Department or the Pension Benefit Guaranty Corporation, including settlements under ERISA § 206(d)(4)(A)(iii). Commenters were asked whether such

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<sup>14</sup> The preamble to the proposal provided that, for purposes of registration, employees of the pooled plan provider would include employees of the pooled employer plan, but only those who handle assets of the plan within the meaning of section 412 of ERISA or who are responsible for the operations or investments of the plan. 85 FR 54288. The intent of this provision is to avoid potential oversight gaps by treating certain employees of the pooled employer plan, if any, as if they are employees of the pooled plan provider in order to subject them to the disclosure requirements of the regulation. The provision identifies a subset of employees of the pooled employer plan who are in important positions of plan operations or handle plan assets. Commenters did not raise questions or concerns about this provision. Therefore, the final rule adopts this provision as proposed. In response to one comment, however, this provision was relocated from the preamble to paragraph (b)(10) of the final rule for complete transparency.

information would be helpful to employers performing due diligence in selecting and monitoring pooled employer plans. The commenters who responded to this specific request uniformly rejected such an expansion. They reasoned that most lawsuits are settled without admission of fault and disclosure of such information, therefore, would not necessarily prove itself to be helpful or reliable to prospective or participating employers and may even have adverse or otherwise chilling effects on the establishment of pooled plan providers and pooled employer plans. Based on the public record, the Department declines to expand this provision in this manner.

## **B. Reportable Event Supplemental Filings**

The final rule provides for two types of supplemental filings. The first type focuses on the commencement of operations by a pooled plan provider of a pooled employer plan. The second type of supplemental filing deals more generally with changes in circumstances of the pooled plan provider that have occurred since the provider's initial filing. Both types of supplemental filings will provide important information to the Department, the Treasury Department, and the IRS, to help them protect plan participants and beneficiaries and conduct more effective monitoring and oversight of pooled employer plans and pooled plan providers. Without this kind of timely information, the agencies would typically not learn of risks to a pooled employer plan until the plan files a Form 5500, possibly many months after the event (assuming the information was even required to be reported on the Form 5500), and when opportunities for protecting plan participants from financial injury have been missed. Reporting changes in the previously filed registration information also will help the Department ensure that the information regarding pooled plan providers posted on its website and available to the public is up to date. Otherwise the Department, employers, and the public would have to rely on outdated information until a Form 5500 was filed for the plan and then would need to compare

the registration information with the subsequently filed information about pooled plan providers in Forms 5500 submitted by the pooled plan provider on behalf of the pooled employer plans the providers operate. The need to rely upon, compare, and resolve differences between registration statements and Forms 5500 would dramatically reduce the value of registration filings as a ready and reliable data source for the Department, employers, and the public.

*Commencement of a Pooled Employer Plan – Paragraph (b)(2)*

Paragraph (b)(2) of the final rule requires a pooled plan provider to file a supplemental report before beginning to operate a pooled employer plan. The supplemental filing must contain the name and plan number (PN) that the pooled employer plan will use for annual reporting, and the name, address, and EIN for the trustee for the plan.<sup>15</sup> Under paragraph (b)(2), this supplemental information must be filed “[n]o later than the initiation of operations of a plan as a pooled employer plan.” Sometimes, however, a pooled plan provider will know this information at the time it submits its initial filing. If so, paragraph (b)(2) is satisfied if the pooled plan provider includes this information with the initial filing. This supplemental information must be reported earlier than the other supplemental information required pursuant to paragraph (b)(3) of the final rule, which must be reported within the later of 30 days after the calendar quarter in which the reportable event occurred or 45 days after a reportable event. The earlier timing requirement in paragraph (b)(2) arises from Code section 413(e)(3), which provides that the requirements to be a pooled plan provider (including the requirement to register with the Secretary of the Treasury before beginning operations as a pooled plan provider) must be satisfied “with respect to any plan.”

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<sup>15</sup> Subsequent filings on Form 5500 are publicly available through the Department’s EFAST website, available at [efast.dol.gov](http://efast.dol.gov). Using the EFAST search function, an interested person may review any Form 5500 filings by a specific pooled employer plan by entering the plan’s name and PN.

One change was made to this provision from the proposed regulation. Whereas the proposal required the EIN for the pooled employer plan, paragraph (b)(2) of the final rule requires the PN that the pooled employer plan will use for annual reporting purposes. Paragraph (b)(1)(iii) of the final rule already requires disclosure of the EIN of the pooled plan provider. Thus, the combination EIN/PN for each pooled employer plan would be the pooled plan provider's nine-digit EIN and the three-digit PN that the pooled plan provider assigns to each pooled employer plan it operates. This change eliminates the burden on a pooled plan provider to obtain a separate EIN for each pooled employer plan it operates. Instead, the pooled plan provider simply uses its own EIN and self-assigns a PN for the particular pooled employer plan. This change also establishes a much stronger link between the Form PR and the pooled employer plan's Forms 5500 Annual Return/Report. One commenter requested the Department, among other things, to take active efforts to ensure that the pooled plan provider's Form PR and the pooled employer plan's annual reports will be appropriately cross-linked. This change responds to this commenter's request.

*Other Reportable Events—Paragraph (b)(3)(i) through (v)*

Paragraph (b)(3) of the final rule requires a supplemental filing for any changes in the previously reported registration information and for certain specified events within the later of 30 days after the calendar quarter in which the change or reportable event occurred or 45 days after a reportable event. This is a longer period than was permitted under the proposed regulation,

which required a supplemental filing within 30 days of each such reportable event. This extension was based on commenters' concerns with the brevity of the timeframe in the proposal.

In evaluating the 30-day deadline in the proposal, the commenters were concerned that they would need to establish a complex and costly tracking system to monitor for supplemental reporting events, reducing the profit margins and incentives to offer pooled employer plans. The commenters argued that the number and scope of potential reportable events would effectively require daily tracking and reporting because every day necessarily is the end of a prior 30-day period. The commenters suggested an annual updating requirement as an alternative.

In response to these concerns, the final rule requires a supplemental filing for any changes in the previously reported registration information and for certain specified events within the later of 30 days after the calendar quarter in which the change or reportable event occurred or 45 days after a reportable event. The Department agrees with the commenters that the proposal's 30-day deadline could have potentially created unnecessary burden for some pooled plan providers. The Department, however, is unable to conclude that a single annual update for all reportable events that occurred in that year reliably provides the Department, other agencies, and participating employers with sufficiently timely information to discharge the obligations that underpin the establishment of this rule. Such an approach would reduce the reliability of registration information, which could be quite stale. For instance, an annual update of the sort recommended by the commenters would be well in excess of the 180 days creditors generally have to file against a debtor in matters of bankruptcy. Further, the final rule limits the scope of the supplemental reporting requirements in paragraph (b)(3)(iii) of the final rule, potentially obviating at least some of the concerns underpinning the length of commenters' request. On balance, the Department believes the "quarterly" rule in the final regulation strikes a fair balance between the proposal and the commenters' request. The Department recognizes that

an occurrence triggering a supplemental filing could happen within days of the end of a quarter; the final rule thus provides that pooled plan providers at a minimum will have 45 days to submit a supplemental filing.

Changes that trigger a supplemental filing under paragraph (b)(3) are as follows:

1. Changes in information previously reported. Paragraph (b)(3)(i) of the final rule requires a supplemental filing in the case of a change in the registration information previously reported by the pooled plan provider. This provision in the final rule is the same as in the proposed rule with one non-substantive change. One commenter suggested that we limit the changes that require a supplemental filing under paragraph (b)(3)(i) to those that are “material.” The Department declines this suggestion because, in its view, all of the registration information required in an initial filing is material. The purpose of paragraph (b)(3)(i) of the final rule is to ensure that the registration information the Department has, and that it posts on its website, is accurate and up to date so that the Department and prospective and participating employers are able to perform their oversight and due diligence activities, respectively, and accurate and up-to-date information is essential to these functions. Moreover, in other parts of this final rule, we have circumscribed the information that is to be included in an initial filing and have also extended the timeframe for submitting the supplemental filing, both of which should ameliorate concerns that registrants potentially would be filing copious non-material information. The non-substantive change is to clarify that updated disclosure relating to criminal, civil, or administrative proceedings need not be made pursuant to paragraph (b)(3)(i) if such information is otherwise being disclosed pursuant to paragraphs (b)(3)(iii)-(v).

2. Changes in corporate or business structure. Paragraph (b)(3)(ii) of the final rule requires a supplemental filing in the case of any significant change in corporate or business structure of the pooled plan provider, e.g., merger, acquisition, or initiation of bankruptcy,

receivership, or other insolvency proceeding for the pooled plan provider or affiliate that provides services to any pooled employer plan, or ceasing all operations as a pooled plan provider. A significant change in corporate or business structure could have consequences that affect the pooled employer plans as well as participating employers and covered employees and could also give rise to possible conflicts of interest that would not have existed in the absence of the transaction.

One clarification was made to this provision from the proposed regulation. The proposal would have required a supplemental filing in the case of an insolvency proceeding of an affiliate of a pooled plan provider regardless of whether the affiliate provides services to a pooled employer plan. Some commenters broadly questioned the need for any supplemental reporting of any event involving affiliates of the pooled plan provider, arguing that this registration requirement should be limited to pooled plan providers only. Other commenters, however, suggested that insolvency proceedings of affiliates may be relevant for purposes of this rule if the affiliate provides services to the pooled employer plan. The Department agrees with these commenters that insolvency proceedings of an affiliate of the pooled plan provider are more relevant when the affiliate is a service provider of the pooled employer plan, and less so when the affiliate has no service relationship to the plan. Information about an insolvency proceeding of an affiliate that does not provide services to the pooled employer plan, although not irrelevant, may be in excess of what is necessary for the Department to discharge its oversight obligations under the statute. Such information, moreover, may be of limited or no value to participating employers with respect to their selection and monitoring obligations identified in section 3(43) of ERISA. Accordingly, information about an insolvency proceeding of an affiliate does not have to be reported in a supplemental filing under the final rule, unless the affiliate is a service provider of a pooled employer plan. In these circumstances, the Department believes the cost of the disclosure is justified by its value to oversight officials. The Department added “that

provides services to any pooled employer plan” to paragraph (b)(3)(ii) to effect this clarification.<sup>16</sup>

One commenter suggested that the Department consider narrowing this proposed requirement even further to limit reporting of mergers and acquisitions of pooled plan providers. These events, according to this commenter, could be quite common for financial corporations and in some cases, may involve entities that will have no relation to the pooled employer plan. Instead of a blanket reporting obligation, the commenter recommend limiting this requirement to situations that will directly impact the pooled plan provider and its pooled employer plan offerings. The Department declines to adopt this suggestion because the pooled plan provider serves a critical role in sponsoring the pooled employer plan and therefore significant changes in its corporate or business structure may raise important considerations with respect to the plan. Unlike the disclosure provisions related to insolvency, this provision only applies to the pooled plan provider and does not apply to any affiliates. Therefore, the Department believes that the burden in providing this disclosure will be infrequent and low.

3. Receipt of notice of new administrative proceedings or enforcement actions.

Paragraph (b)(3)(iii) of the proposed regulation required supplemental reporting by the registrant on “receipt of written notice of the initiation of any administrative or enforcement action related to the provision of services to, operation of, or investments of any pooled employer plan or other employee benefit plan, in any court or administrative tribunal by any Federal or State governmental agency or other regulatory authority against the pooled plan provider or any officer, director, or employee of the pooled plan provider.” Commenters raised similar concerns with this provision in the proposal as with paragraph (b)(1)(x) of the proposal (which dealt with

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<sup>16</sup> In response to a comment seeking confirmation, the Department confirms that the supplemental reporting with respect to merger or acquisition relates only to “M&A” activity of the pooled plan provider, not any of its affiliates.

disclosures of *ongoing* criminal, civil, or administrative proceedings). These concerns were mostly based upon the provision's scope and breadth, particularly regarding the types of actions, the types of administrative proceedings, and the class of actors against whom actions would be initiated. The Department narrowed the scope of paragraph (b)(1)(x) of the final rule in two ways, as discussed above in this preamble. The Department, therefore, narrowed the scope of paragraph (b)(3)(iii) of the final rule to match the scope of paragraph (b)(1)(x) of the final rule. Accordingly, paragraph (b)(3)(iii) of the final rule requires a supplemental filing if a pooled plan provider receives written notice of the initiation of any administrative proceeding or enforcement action in any court or administrative tribunal by any Federal or State governmental agency or other regulatory authority against the pooled plan provider, or any officer, director, or employee of the pooled plan provider involving a claim of fraud or dishonesty with respect to any employee benefit plan, or involving the mismanagement of plan assets. Timely knowledge of such actions will help the agencies fulfill their oversight functions and assist prospective and existing participating employers in properly carrying out their duties under the SECURE Act provisions with respect to selection and monitoring of pooled employer plans.

4. Receipt of notice of finding of fraud, dishonesty, or mismanagement. Paragraph (b)(3)(iv) of the final regulation requires a supplemental filing if the registrant receives written notice of a negative finding in any matter described in paragraph (b)(1)(x) or (b)(3)(iii) of this section. This provision is essentially the same as its predecessor in the proposed rule, although changes were made to conform to revisions to paragraphs (b)(1)(x) and (b)(3)(iii) of the final rule. Those revisions to paragraphs (b)(1)(x) and (b)(3)(iii) of the final rule, which dictated the revisions to paragraph (b)(3)(iv), are discussed above in this preamble. The purpose of paragraph (b)(3)(iv) of the final regulation is to capture the findings, if negative, of the proceedings described in paragraphs (b)(1)(x) and (b)(3)(iii) of the final regulation. A decision is negative if there is finding of fraud or dishonesty related to providing services to any employee

benefit plan (including a pooled employer plan), or if there is a finding of mismanagement of plan assets. This information is important for agency oversight and for participating employers with respect to their duties under the SECURE Act provisions regarding selection and monitoring of the pooled employer plans.

5. Receipt of notice of filing of criminal charges. Paragraph (b)(3)(v) of the final rule requires a supplemental filing if a pooled plan provider receives written notice of the filing of any Federal or State criminal charges related to the provision of services to, operation of, or investments of any pooled employer plan or other employee benefit plan against the pooled plan provider or any officer, director, or employee of the pooled plan provider. Such actions, too, are relevant to the selection and monitoring obligations of participating employers, and while ERISA section 411 bars serving as an ERISA fiduciary following a wide range of crimes, this information is limited to those criminal charges related to the provision of services to, operation of, or investments of any pooled employer or other employee benefit plan. Commenters did not raise questions or concerns with this requirement. Therefore, the final rule adopts this provision as proposed.

Although the final rule largely adopts the proposed criminal disclosures without change, the Department is concerned with potential reputational harm in the cases of persons acquitted of the criminal charges for which a prior reporting has been made under this section. To address this concern, the Department added paragraph (d) to the final rule. Paragraph (d) provides that a pooled plan provider may file an update to remove any matter previously reported under paragraph (b)(1)(ix) or (b)(3)(v) of the final rule for which the defendant has received an acquittal.” For this purpose, the term “acquittal” means a finding by a judge or jury that a defendant is not guilty or any other dismissal or judgment which the government may not appeal and includes situations where a prosecuting authority voluntarily dismisses charges with an

ability to subsequently re-file. Likewise, the Department reserves the right to remove such information independently or in response to a request from a person acquitted of such charges.

### **C. Amendment and Correction of Registration Information**

Pooled plan providers can file corrections and amendments of their initial registration and reportable event filings through the electronic filing system. Inadvertent or good faith errors in registrations do not nullify a person's status as a pooled plan provider, provided that a corrected or amended filing is submitted within a reasonable period of the discovery of the error or omission. If correcting only information previously reported, such as entry of an incorrect name for the agent for service of legal process, a person would indicate on the form that the filing is an amended filing, not a supplemental filing.

Further, the Department expects to propose, through a separate rulemaking, new questions on the Form 5500 that would ask whether a pooled plan provider filed its registration statement with the Secretary, including any required updates, and to report the electronic confirmation number provided to the pooled plan provider at the time that the registration was received. These would be similar to the questions currently on the Form 5500 that require reporting by multiple employer group health plans about their compliance with registration and reporting requirements on the Form M-1 (Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs)). The questions would provide the Department, the Treasury Department, the IRS, participating employers, and other stakeholders

with information that would allow them to connect the Form PR registration with the Form 5500 for all pooled employer plans operated by the registrant.

#### **D. Final Filing**

If a pooled plan provider has ceased operating all pooled employer plans and has filed a supplemental reportable event filing to indicate that the last pooled employer plan for which it served as the pooled plan provider has been terminated and ceased operating, the provider is required to file a final registration filing. For this purpose, a plan is treated as terminated and having ceased operations when a resolution has been adopted terminating the plan, all assets under the plan (including insurance/annuity contracts) have been properly distributed to the participants and beneficiaries or legally transferred to the control of another plan, and when a final Form 5500 has been filed for the plan. The final Form PR filing is due within the later of (a) 30 days after the calendar quarter in which the final Form 5500 for the last pooled employer plan operated by the pooled plan provider was filed,<sup>17</sup> or (b) 45 days after such filing. A single combined filing may be used both to report the date that the last pooled employer plan operated by the provider has been terminated and ceased operating, including filing the final Form 5500 in accordance with its instructions, and to serve as the final Form PR filing by the pooled plan provider. The final filing assists the Department's maintenance of an accurate database of

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<sup>17</sup> A final Form 5500 cannot be filed for a pooled employer plan until all assets under the plan (including insurance/annuity contracts) have been distributed to the participants and beneficiaries or legally transferred to the control of another plan. The final Form 5500 must be filed, absent an extension of time, no later than the last day of the 7th calendar month after the end of the plan year in which the plan terminated, but it can be filed earlier, including as a short plan year filing, if the pooled employer plan were to cease having participants and beneficiaries and distribute all the assets in the middle of a plan year.

persons serving as pooled plan providers and provides accurate public information about pooled plan providers to employers, participants, beneficiaries, and other interested persons.

## **E. Electronic Filing**

This final regulation requires electronic filing of all pooled plan provider registrations with the Department. The Department is using the same electronic system for pooled plan providers to file the Form PR that plan administrators currently use to file the Form 5500. Regular mail is not the most efficient or cost-effective way to file and process this information. Because the internet is widely accessible to persons who the Department expects to be interested in being pooled plan providers, they will find electronic filing easier and more cost-effective than paper filing. The electronic submission process will also assist pooled plan providers by ensuring that all required information is included in the registration before the electronic filing can be completed through the internet site. In addition, the process provides an electronic registration confirmation receipt. Electronic filing also will facilitate the disclosure of the information to participating employers, covered participants and beneficiaries, and other interested members of the public. Once a registration is filed, the data would be posted on the Department's Web site and be available to the public. Therefore, filers and data users all stand to benefit from electronic filing in ways that are consistent with the goals of the E-Government Act of 2002.<sup>18</sup>

Under ERISA Section 505, in addition to having the authority to prescribe such regulations the Department determines may be necessary or appropriate to carry out the provisions of Title I of ERISA, the Department has the authority to prescribe forms. The Department used this authority to create the Form PR. Form PR and the accompanying

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<sup>18</sup> Pub. L. 107-347, sec. 2 (Dec. 17, 2002).

instructions are the required filing format for pooled plan provider registrations and the Form PR must be filed electronically with the Department of Labor at <https://www.efast.dol.gov/>.

#### **F. Coordination with the Treasury Department and the Internal Revenue Service**

The SECURE Act requires pooled plan providers to register with the Department as well as with the Treasury Department and the IRS. The Department coordinated with those agencies to develop the final regulation. Filing the registration statement with the Department, including the supplemental statement identifying a pooled employer plan for which the pooled plan provider is acting in that capacity prior to the initiation of operations of each such plan, satisfies the Code requirement to register as a pooled plan provider with respect to that plan. The Department will continue to consult with the Treasury Department and the IRS in connection with their development of the pooled plan provider registration requirements and filing process.

#### **G. Good Cause Finding For Immediate Registration**

The Administrative Procedure Act (5 U.S.C. 553 (d)) (APA) permits a rule to become effective immediately, rather than after a 30-day delay, if there is good cause to do so. The SECURE Act allows pooled plan providers to begin operations on January 1, 2021, but only if they first register with the Department. Commenters on the proposed rule requested that the Department make the registration process available as soon as possible. Some commenters even requested that the Department accept registrations before publication of a final rule. The Department agrees that pooled plan providers will benefit from having the ability to register immediately, and not wait for a 30-day effective date period. For those providers that plan to begin operating a pooled employer plan on January 1, 2021, making them wait for the expiration of the APA's 30-day effective-date period will unnecessarily compress their overall start-up obligations into a smaller window of time and may, in fact, impede a provider's contractual

obligation to begin operation of a pooled employer plan on January 1, 2021. Moreover, no one is harmed by allowing registrants to file early, as the statute itself does not allow pooled employer plans to begin operations until January 1, 2021. In fact, an immediate effective date will allow important information to be publicly available that will enable employers, and ERISA plan participants and beneficiaries, more time to evaluate the bona fides of a particular pooled employer plan. Accordingly, the Department finds there is good cause for the final rule to become effective immediately, rather than after a 30-day delay.

### **Regulatory Impact Analysis**

*Summary* – The SECURE Act was enacted to expand retirement savings. Section 101 of the SECURE Act amends section 3(2) of ERISA to eliminate the commonality of interest requirement for establishing certain individual account plans, or “pooled employer plans,” that meet specific requirements. Among these requirements, such plans must designate a pooled plan provider to serve as a named fiduciary and as the plan administrator. Further, section 101 of the SECURE Act requires pooled plan providers to register with the Department and the Treasury Department before beginning operations. The statute expressly provides a separate authorization for the Department to require additional information.

The Department has examined the effects of this rule as required by Executive Order 12866,<sup>19</sup> Executive Order 13563,<sup>20</sup> the Congressional Review Act,<sup>21</sup> Executive Order

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<sup>19</sup> Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993).

<sup>20</sup> Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 18, 2011).

<sup>21</sup> 5 U.S.C. 804(2) (1996).

13771,<sup>22</sup> the Paperwork Reduction Act of 1995,<sup>23</sup> the Regulatory Flexibility Act,<sup>24</sup> section 202 of the Unfunded Mandates Reform Act of 1995,<sup>25</sup> and Executive Order 13132.<sup>26</sup>

### *1.1. Executive Orders*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, “significant” regulatory actions are subject to review by the Office of Management and Budget (OMB).<sup>27</sup> Section 3(f) of the Executive Order defines a “significant regulatory action” as an action that is likely to produce a rule that does any of the following:

- (1) has an annual effect on the economy of \$100 million or more in any one year, or adversely and materially affects a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (such actions are also referred to as “economically significant”);
- (2) creates a serious inconsistency or otherwise interferes with an action taken or planned by another agency;

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<sup>22</sup> Reducing Regulation and Controlling Regulatory Costs, 82 FR 9339 (Jan. 30, 2017).

<sup>23</sup> 44 U.S.C. 3506(c)(2)(A) (1995).

<sup>24</sup> 5 U.S.C. 601 et seq. (1980).

<sup>25</sup> 2 U.S.C.1501 et seq. (1995).

<sup>26</sup> Federalism, 64 FR 153 (Aug. 4, 1999).

<sup>27</sup> Regulatory Planning and Review, *supra* note 2.

(3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A full regulatory impact analysis must be prepared for major rules with economically significant effects (for example, impacts of \$100 million or more in any one year), and OMB reviews “significant” regulatory actions. OMB determined that this rule is not economically significant within the meaning of section 3(f)(1) of the Executive Order but is significant under 3(f)(4). Therefore, the Department has provided an assessment of the potential costs, benefits, and transfers associated with this final rule. In accordance with the provisions of Executive Order 12866, OMB has reviewed this final rule.

### *1.2. Introduction and Need for Regulation*

As added by the SECURE Act, section 3(44) of ERISA requires a person to register as a pooled plan provider with the Secretary, and provide other information the Secretary may require, before operating a pooled employer plan. This final rule responds to the direction given to the Secretary in the SECURE Act and specifies the requirements for registering with the Secretary.

The required information allows the Department to identify pooled plan providers so that it may monitor their actions. While the Form 5500, which pooled plan providers will also be required to file, collects important information, Form 5500 reporting is generally unavailable for more than 18 months after a plan starts. The SECURE Act’s registration requirement gives the Department more immediate access to pooled plan provider information, allowing the

Department (and other agencies) to observe how this new market develops and assess the need for further guidance.

### *1.3. Affected Entities*

The goal of the SECURE Act is to increase retirement savings, particularly by expanding the options for small employers to participate in multiple employer plans, such as pooled employer plans. The Department expects this expansion to produce administrative savings and new opportunities to provide retirement savings plans for many small employers. Section 101 of the SECURE Act allows commercial service providers to serve as plan administrators and named fiduciaries of defined contribution pension plans that offer retirement benefits to the employees of more than one unrelated employer. Expanding the ways in which service providers and employers may craft and join multiple employer plans (including pooled employer plans) should reduce costs and administrative burdens for participating employers. For example, a single Form 5500 filing by the pooled plan provider would satisfy the annual reporting requirement for all the participating employers, instead of separate Form 5500 filings and audits for each individual employer. Pooled plan providers would be both a named fiduciary and plan administrator for the pooled employer plan, and they are required to register with the Department before operating any such plans.

The Department has identified certain existing entities that it believes would be most likely to serve as pooled plan providers. For example, recordkeepers that currently administer retirement plans may be well positioned to serve as pooled plan providers and some recordkeepers have affiliated entities that may seek to provide investment alternatives and services to the plan. Similarly, many Professional Employer Organizations (PEOs) have served as plan administrators and would likely have relevant experience to serve as pooled plan providers. Further, insurance companies have expressed interest in serving as pooled plan

providers and some have prior experience providing similar services. Chambers of Commerce have connections with employers, but many are small with few full-time staff. Also, few Chambers of Commerce have sponsored MEWAs. While retirement plan advisors such as broker-dealers and registered investment advisers are also plausible candidates, the Department believes that some would be reluctant to assume the named fiduciary and plan administrator roles. Entities such as registered investment advisers may be more comfortable serving as section 3(38) investment managers for the pooled plan providers.

Given these considerations, the Department estimates that approximately 3,200 unique entities will initially register to serve as pooled plan providers. Recordkeepers and plan administrators of existing defined contribution plans are most likely to enter the market, followed by PEOs, direct annuity writers, Chambers of Commerce, and plan advisors.

**Estimated Pooled Plan Provider**

	Universe	Expected Share	Estimated Number
Unique Recordkeepers and Plan Administrators for existing DC Plans <sup>a</sup>	2,378	50%	1,189
Professional Employer Organizations <sup>b</sup>	907	25%	227
Chambers of Commerce <sup>c</sup>	4,000	5%	200
Large Broker-Dealers <sup>d</sup>	173	5%	9
Registered Investment Adviser Firms <sup>d</sup>	30,246	5%	1,512
Direct Annuity Writers (Insurance Companies) <sup>e</sup>	386	25%	97
<b>Total</b>	<b>38,090</b>	<b>8%</b>	<b>3,233</b>

<sup>a</sup> 2017 Form 5500 Schedule C Data.

<sup>b</sup> National Association of Professional Employers, <https://www.napeo.org/what-is-a-peo/about-the-peo-industry/industry-statistics>" <https://www.napeo.org/what-is-a-peo/about-the-peo-industry/industry-statistics>.

<sup>c</sup> Association of Chamber of Commerce Executives reports that there are 4,000 Chambers with at least 1 full-time staff person.

<sup>d</sup> 2019 FINRA Industry Snapshot. FINRA reported 3,607 FINRA registered firms in 2018. There were 173 with 500 or more registered representatives.

<sup>e</sup> National Association of Insurance Commissioners.

*1.4. Benefits*

The SECURE Act requirement that pooled plan providers first register with the Department before beginning operations alerts regulators to the presence and intent of new entities. Registering allows potential pooled plan providers access to this newly created market. These registrations would require contact information, the address of any public website(s) of the pooled plan provider or affiliates used to market such person as pooled plan provider to the public, and the date operations are expected to commence. The registrations will be publicly available and provide a complete list of registered pooled plan providers. In addition, the supplemental filing requirement ensures that providers update their initial filing to report changes relevant to the pooled plan provider's and participating employers' fiduciary duties (including, for example, inception of bankruptcy and criminal or regulatory enforcement actions against the pooled plan provider involving a claim of fraud or dishonesty with respect to any employee benefit plan, or involving the mismanagement of plan assets). This will help provide transparency regarding the provider's management and business practices, allowing employers to better survey the market when choosing a pooled plan provider or deciding whether to continue to rely on an existing provider and enabling the Department and Treasury Department to carry out their statutory oversight duties.

Some commenters were concerned that the information required in the registration would expose pooled plan providers to litigation risk and a heightened degree of regulatory scrutiny. Some commenters also were concerned that disclosing ongoing criminal, civil, or administrative proceedings against the pooled plan providers would deter employers from engaging with pooled plan providers. While the Department acknowledges these concerns, the Department believes that the registration and supplemental filing requirements will provide the Department, other agencies, and potential or participating employers information (including transparency regarding fraud, dishonesty, and mismanagement of plan assets) they need to discharge their legal obligations under the law.

In the Department's view, the statutory purpose of the registration requirement is to provide the Department with sufficient information about entities acting as pooled plan providers to engage in effective monitoring and oversight of this new type of ERISA retirement plan. As discussed above, the potential for inadequate employer oversight of the activities of a pooled employer plan and its plan fiduciaries and other service providers may be greater than is true of other plans sponsored by employers because the participating employers in pooled employer plans give more responsibility to the pooled plan provider than they typically give service providers in other plan arrangements. The final regulation's information collection, which the Department has limited to minimize burden, will assist the Department in fulfilling its oversight responsibilities. Disclosure of any websites containing marketing information for any pooled employer plan(s) established by the provider, the date operations are expected to commence, and changes relevant to the pooled plan provider's fiduciary duties (including, for example, bankruptcy, litigation, and ongoing criminal or regulatory enforcement actions involving fraud or dishonesty) all serve to help with monitoring and oversight.

As stated above, the SECURE Act amended ERISA to remove possible barriers to the broader use of multiple employer plans. This objective was accomplished primarily by allowing multiple unrelated employers to participate in an open MEP called a pooled employer plan that does not require commonality among participating employers or a genuine organizational relationship unrelated to participation in the plan. By allowing most of the administrative and fiduciary responsibilities of sponsoring a retirement plan to be transferred to pooled plan providers, pooled employer plans give employers the option of providing a workplace retirement plan to their employees with reduced burdens and costs as compared to sponsoring their own separate single employer retirement plan. Consequently, more plan formation and broader availability of workplace retirement plans should occur, especially among small employers.

The Department is uncertain of the number of pooled employer plans that could be created based on the final rule, the number of employers that will participate in such plans, and the number of participants and beneficiaries that will be covered by them. The Department is confident, however, that pooled employer plans will be created to take advantage of the new statutory structure.

It is possible that each pooled plan provider that registers will offer at least one new pooled employer plan and larger pooled plan providers will offer more than one new pooled employer plan. As is the case with multiple employer plans generally, pooled employer plans are likely to vary substantially in size, although small pooled employer plans are less likely to offer the economies of scale that could exist for large or very large pooled employer plans.

The effects on coverage are somewhat uncertain because of the possibility of at least some zero-sum gain. Some new pooled employer plans will attract participating employers that currently do not offer retirement savings opportunities to their employees. The result in this situation would be a net coverage increase, and retirement security could be improved to some extent for the employees of these participating employers.<sup>28</sup> At the same time, however, the Department expects that some existing retirement plans, most likely those of small single employer plan sponsors, could terminate or otherwise cease to operate in their current form and merge into pooled employer plans. A dominant influence in this direction would be the administrative cost savings and other operational efficiencies that come with economies of scale.

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<sup>28</sup> Workplace retirement plans often provide a more effective way for employees to save for retirement than saving in their own IRAs. Compared with saving on their own in IRAs, workplace retirement plans offer employees (1) higher contribution limits; (2) generally lower investment management fees as the size of plan assets increases; (3) a well-established uniform regulatory structure with important consumer protections, including fiduciary obligations, recordkeeping and disclosure requirements, legal accountability provisions, and spousal protections; (4) automatic enrollment; and (5) stronger protections from creditors. At the same time, workplace retirement plans provide employers with choice among plan features and the flexibility to tailor retirement plans that meet their business and employment needs. See 84 FR 37528.

The Department has repeatedly acknowledged the potential benefits that could accrue to small employers and their employees if they join together in multiple employer plans and similar cooperative arrangements.<sup>29</sup>

For different reasons, though, it also is possible that some existing multiple employer plans would convert to pooled employer plans.<sup>30</sup> According to the most recent Form 5500 data, there are 4,523 defined contribution multiple employer plans.<sup>31</sup> Conversions of this type might occur, for example, if a multiple employer plan were to conclude that restrictions under section 3(5) of ERISA, such as the geographic limitations imposed pursuant to 29 CFR 2510.3-55(b)(2), the substantial employment function test for bona fide professional employer organization arrangements in 2510.3-55(c)(1), or the tests articulated in the Department's subregulatory guidance for an entity to be considered a bona fide group or association of employers were disadvantageous or inefficient relative to the conditions for being a pooled employer plan.

The total number of defined contribution plans, therefore, could decrease as a result of these mergers and conversions. Even so, however, net coverage (i.e., the number of total defined contribution plan participants) could increase, because (1) participants in plans that merge or convert into pooled employer plans would continue to be covered under a retirement plan, and (2) some employers that do not currently provide their employees with retirement plan access would join pooled employer plans and their employees would count as newly-covered participants.

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<sup>29</sup> 84 FR 37508 (July 31, 2019) (Definition of "Employer" Under Section 3(5) of ERISA— Association Retirement Plans and Other Multiple-Employer Plans); see also 83 FR28912 (June 21, 2018) (Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans).

<sup>30</sup> Section 101 of SECURE Act itself contemplates such conversions and provides a special rule for existing plans to elect pooled employer plan status (new section 3(43)(C)) of ERISA).

<sup>31</sup> *Private Pension Plan Bulletin: Abstract of 2018 Form 5500 Annual Reports*, Employee Benefits Security Administration (forthcoming 2020).

Pooled employer plans generally would benefit from scale advantages that small businesses do not currently enjoy, and the Department expects that such plans will pass some of the attendant savings onto participating employers and participants. Large scale may create two distinct economic advantages for pooled employer plans. First, as scale increases, marginal costs for pooled employer plans would diminish and pooled plan providers would spread fixed costs over a larger pool of member employers and employee participants, creating direct economic efficiencies. Second, asset managers commonly offer proportionately lower prices, relative to money invested, to larger investors, under so-called tiered pricing practices resulting in decreased expense ratios based on the aggregate amount of money invested by a single pooled employer plan.

For example, larger plans tend to have lower fees overall.<sup>32</sup> Generally, small plans with 10 participants pay approximately 50 basis points more than plans with 1,000 participants.<sup>33</sup> Small plans with 10 participants pay about 90 basis points more than large plans with 50,000 participants. Grouping small employers together into a pooled employer plan could facilitate savings through administrative efficiencies and sometimes through price negotiation (market power). The degree of potential savings may be different for different types of administrative functions, e.g., scale efficiencies can be very large with respect to asset management, and may be smaller, but still meaningful, with respect to functions such as marketing, distribution, asset management, recordkeeping, and transaction processing.

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<sup>32</sup> 84 FR 37508, 37535.

<sup>33</sup> Deloitte Consulting and Investment Company Institute, Inside the Structure of Defined Contribution/401(k) Plan Fees, 2013: A Study Assessing the Mechanics of the “All-in” Fee (Aug. 2014). Deloitte Consulting LLP conducted a survey of 361 defined contribution plans for the Investment Company Institute. The study calculates an “all in” fee that is comparable across plans including both administrative and investment fees paid by the plan and the participant. Deloitte predicted these estimates by analyzing the survey results using a regression approach calculating basis points as a share of assets. See 84 FR 37508, 37535.

Other potential benefits of the expansion of MEPs through the creation of pooled employer plans could include (1) increased economic efficiency as small businesses can more easily compete with larger companies in recruiting and retaining workers due to a competitive employee benefit package; (2) enhanced portability for employees that leave employment with an employer to work for another employer participating in the same pooled employer plan; (3) higher quality data (more accurate and complete) reported to the Department on the Forms PR and 5500; and (4) increased operating efficiency for small businesses by shifting the administrative burden associated with establishing and maintaining a retirement plan to a pooled plan provider.

### *1.5. Costs*

The costs most directly associated with this rule are those incurred to prepare and submit the registration statement. The PRA section, below, discusses these costs in detail. As required under E.O. 13771, the estimated cost is \$688,000 in the first year and \$72,400 in subsequent years.<sup>34</sup> The perpetual time horizon annualized cost is \$106,100 in 2016 dollars, using a seven percent discount rate, discounted from 2016. Other indirect costs may also be attributed to the regulation, depending on the extent of pooled employer plan formation, as well as the extent of conversions, mergers, and contractions among existing plans. The likely extent of these actions and associated costs is highly uncertain. With respect to any new pooled employer

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<sup>34</sup> The total ten-year cost is \$1,215,000 with a three percent discount rate and \$1,084,000 with a seven percent discount rate. The annualized ten-year cost is \$142,000 using a three percent discount rate, and \$154,000 using a seven percent discount rate.

plan, these indirect costs would relate to a pooled plan provider complying with the requirements of the SECURE Act that are not codified by this final regulation.

Some commenters suggested that the final rule's reporting requirements would be burdensome and duplicative of other ERISA-required reporting requirements. One commenter asserted that the pooled plan provider should not be required to report any information other than the pooled plan provider's basic contact and identifying information. While the Department acknowledges these concerns, the Form 5500 data generally is not available for 18 months after a plan starts operation. Therefore, the Form PR will provide the Department with more immediate access to pooled plan provider information. This will allow the Department to monitor pooled plan providers and assess the need for further guidance, which will help protect the interests of plan participants and beneficiaries. In addition, changes to the proposed rule have been made to address overbreadth and redundancy concerns.

Another commenter suggested that disclosing the pooled plan provider's compliance officer would be burdensome, positing that the Department was effectively requiring pooled plan providers to create a compliance officer role. The Department has now clarified that this is not the case. The final rule simply requires an identification of, and basic contact information for, the person, unit, or element designated by the pooled plan provider as the point-person responsible for fielding and addressing questions about the pooled plan provider's status under ERISA and the Code. Put differently, this provision requires nothing more than for the company to identify whom it wishes to receive and address status and compliance-oriented questions. The Department has tailored this provision as narrowly as possible to advance its intended objective without requiring any changes in business practices. Thus, the Department does not expect that

pooled plan providers will incur costs to hire additional employees to serve as responsible compliance officials.

### *1.6. Transfers*

Several potential transfers could occur because of this final rule. To the extent the formation of pooled employer plans leads employers that previously sponsored retirement plans to terminate or freeze these plans and join a pooled employer plan, there may be a transfer if the pooled employer plan has different service providers and asset types than the terminated plan. A similar transfer might occur in cases where employers who previously did not offer their employees a retirement plan join a pooled employer plan. Employees of these employers may have been saving for retirement previously in different ways, such as through an IRA, which would have different service providers. Service providers that specialize in providing services to pooled employer plans or are affiliated with a pooled plan provider might benefit at the expense of other providers who specialize in providing services to small plans or IRAs. Those different service providers would experience gains or losses of income or market share.

The rule could also result in asset transfers if pooled plan providers invest in different types of assets than plans that merge or convert to pooled employer plans. For example, small plans tend to rely more on mutual funds, while larger plans have greater access to other types of investment vehicles such as bank common collective trusts and insurance company pooled separate accounts, which allow for specialization and plan specific fees. This movement of assets could see profits move from mutual funds to other types of investment managers.

Finally, the Code generally gives tax advantages to certain retirement savings over most other forms of savings.<sup>35</sup> Consequently, all else being equal, workers who are saving money in tax qualified retirement savings vehicles generally can enjoy higher lifetime consumption and wealth than those who do not. The magnitude of the relative advantage generally depends on the worker's tax bracket, the amount contributed to the plan, the timing of contributions and withdrawals, and the investment performance of the assets in the account. Workers that do not contribute to a qualified retirement savings vehicle because they lack access to a workplace retirement plan do not reap this relative advantage. This rule would likely increase the number of American workers with access to tax-qualified workplace retirement plans, which would spread this financial advantage to some people who are not currently receiving it. If access to retirement plans and savings increase because of this rule, a transfer will occur flowing from all taxpayers to those individuals receiving tax preferences as a result of new and increased retirement savings.

As is evident from the foregoing, the exact magnitude of the potential transfers is uncertain at this stage, as are the precise identities of the transferors and transferees. Much depends on the number of pooled employer plans that eventually come into existence, the extent of plan consolidation, the number of employers that begin participating anew in pooled employer plans, and the savings habits of the employees of these employers (who might have heretofore been saving through an IRA). Major influences on each of these factors include, among other things, the nature, extent, and timing of the regulatory intervention needed to implement the SECURE Act, as well as the general state of the economy.

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<sup>35</sup> Employer contributions to qualified pension plans and, generally, employee contributions made at the election of the employee through salary reduction are not taxed until distributed to the employee, and income earned on those amounts is not taxed until distributed. The tax expenditure for "net exclusion of pension contributions and earnings" is computed as the income taxes forgone on current tax-excluded pension contributions and earnings less the income taxes paid on current pension distributions.

### *1.7. Uncertainty*

While the Department has identified types of service providers that it believes will be well positioned to act as pooled plan providers, it is unclear how many will choose to enter the market and whether they will do so in the first year of enactment or in later years. The Department solicited comments on which and how many entities are likely to register as pooled plan providers. However, the Department did not receive comments that specifically addressed this question. Thus, the Department has based its assumptions on discussions with stakeholders and articles on emerging markets.

### *1.8. Regulatory Alternatives*

Section 101 of the SECURE Act requires pooled plan providers to register with the Secretary and provide such other information as the Secretary may require, before beginning operations as a pooled plan provider. The Department considered several alternative forms of information to be included that are discussed below.

The Department could have required fewer data elements, such as contact information only, including address and email. While slightly less burdensome than the final rule's requirements, requiring fewer data elements would provide substantially less information to the Department, which would impede its ability to fulfill its critical oversight role of protecting participants and plan assets. Employers also would receive less information to survey the market when choosing a pooled plan provider or deciding whether to continue to rely on an existing provider.

The Department considered requiring pooled plan providers to file a registration for each pooled employer plan. This would have required pooled plan providers to file multiple similar

filings. The Department did not choose this option, because it would have required pooled service providers to make multiple filings while providing minimal additional benefits.

The Department also considered not requiring pooled service providers to make supplemental filings. While this option would have been less burdensome than the chosen option, it would have provided less information to the Department and interested employers. Requiring pooled service providers to report updated information to the Department can provide key information the Department needs to fulfill its oversight role. Therefore, the Department determined that the benefits of requiring supplemental filings justify any additional cost that pooled plan providers would incur to furnish the updated information.

## *2. Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments concerning the information collection request (ICR) included in the Registration Requirements to Serve as a Pooled Plan Provider to Pooled Employer Plans ICR (85 FR 54288). At the same time, the Department also submitted an information collection request (ICR) to the Office of Management and Budget (OMB), in accordance with 44 U.S.C. 3507(d).

The Department did not receive comments that specifically addressed the paperwork burden analysis of the information collection requirement contained in the proposed rule.

In connection with publication of this final rule, the Department submitted an ICR to OMB requesting approval of a new collection of information under OMB Control Number 1210–0164, which expires on November 30, 2023. OMB approved the ICR on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

A copy of the ICR may be obtained by contacting the PRA addressee shown below or at [www.RegInfo.gov](http://www.RegInfo.gov). PRA ADDRESSEE: G. Christopher Cosby, Office of Regulations and Interpretations, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW, Room N-5718, Washington, D.C. 20210; [cosby.chris@dol.gov](mailto:cosby.chris@dol.gov). Telephone: 202-693-8410; Fax: 202-219-4745. These are not toll-free numbers.

The SECURE Act requires a person to register as a pooled plan provider with the Secretary, and provide other information the Secretary may require, before beginning operations. This information collection contains the requirements to register with the Secretary under section 3(44) of the Act. The information collection will use the same EFAST 2 electronic filing system that pooled plan providers will use to file the Form 5500 required to be filed on behalf of the pooled employer plan the provider operates.

The Department has designed a two-part approach for this requirement. The first consists of a simple registration of mainly contact information and links to marketing websites. Pooled plan providers must electronically register with the Department at least 30 days before beginning operations. Pooled plan providers that will initiate operations of a plan as a pooled employer plan on or after January 1, 2021, can register anytime before February 1, 2021, provided that the registration is filed “on or before” the initiation of operations of a plan as a pooled employer plan. The 30-day waiting period between registration and the start of plan operations for these pooled plan providers will be waived. The information included in the registration should be collected by the pooled plan provider during its normal course of business, so collection should not require additional effort by the administrator. The Department estimates that compiling and submitting the initial registration information will take about 45 minutes and impose no additional costs on the administrator. To limit costs, a pooled plan provider needs to file only one registration regardless of the number of pooled employer plans it operates, provided that a

supplemental statement is filed identifying each pooled employer plan before the initiation of operations of the plan as a pooled employer plan. Assuming roughly 3,200 pooled plan providers, the Department estimates a burden of 2,425 hours, with an equivalent cost of \$402,000, in the first year.<sup>36</sup>

If the pooled plan provider does not begin operating any new pooled employer plans, does not change its contact information, or does not experience any changes as described in the final rule, it may go for a period of months or years without needing to supplement its registration. The Department anticipates that this will often be the case.

Pooled plan providers are required to file a supplemental filing within the later of 30 days after the calendar quarter in which a reportable event occurred or 45 days after a reportable event. The supplemental filing requirement is similar to, although more limited than, filers' obligations with respect to the Form M-1, which requires entities to submit additional filings to document changes. Approximately seven percent of entities filing a Form M-1 in 2017 submitted an additional filing after undergoing a change. Assuming pooled plan providers will behave in a similar manner, the Department estimates that approximately 230 pooled plan providers will submit supplemental filings documenting changes annually, including in the first year.

The supplemental filing amends the original registration to include information either for pooled employer plans that begin operations or cease operations, or for material changes relevant to the pooled plan provider's fiduciary duties (including, for example, bankruptcy, litigation, and criminal or regulatory enforcement actions involving fraud or dishonesty). Accordingly, the

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<sup>36</sup> 3,223 pooled plan providers \* 0.75 hours = 2,425 hours. 2,425 hours \* \$165.63 = \$401,653. Labor rates are EBSA estimates, found at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf>.

Department estimates the supplemental filing will take 30 minutes for pooled plan providers to submit. The Department does not believe, however, that the pooled plan provider will incur any additional costs beyond the labor costs necessary to collect and submit this information. The Department estimates that there will be 3,460 filings under the second part of this requirement in the first year, imposing a burden of 1,730 hours, with an equivalent cost of \$287,000.<sup>37</sup>

In subsequent years, the Department believes that the percentage of pooled plan providers reporting beginning or ceasing operations of pooled employer plans will roughly parallel the experience of Form M-1 filers. Approximately 14 percent of Form M-1 filers indicated they began operations in 2017, while six percent indicated they ceased operations.<sup>38</sup> Assuming pooled plan providers behave in a similar manner, the Department expects an additional 650 registrations related to beginning or ceasing operations annually in subsequent years.<sup>39</sup> These filings have an associated hour burden of 324 hours with an equivalent cost of nearly \$54,000 in subsequent years.

The estimated total burden of this information collection is 4,155 hours, with an equivalent cost of \$688,000, in the first year and 437 hours, with an equivalent cost of \$72,400, in subsequent years.<sup>40</sup>

The Department expects many pooled plan providers will file the first part of registrations in the initial year, and significantly fewer will file in subsequent years as the market

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<sup>37</sup> 3,460 pooled plan providers \* 0.50 hour = 1,730 hours. 1,730 hours \* \$165.63 = \$286,540. Labor rates are EBSA estimates, found at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebbsa-opr-ria-and-pra-burden-calculations-june-2019.pdf>.

<sup>38</sup> Pension plans face additional burdens in terminating, and so using welfare plans termination rates as a proxy may overstate the number of incidents.

<sup>39</sup> 3,233 \* 0.14 = 453 pooled plan providers report pooled employer plans beginning operation, 453 pooled plan providers \* 0.50 hour = 227 hours. 227 hours \* \$165.63 = \$37,598 3,233 \* 0.06 = 194 pooled plan providers report pooled employer plans ending operation, 194 pooled plan providers \* 0.50 hour = 97 hours. 97 hours \* \$165.63 = \$16,060.

<sup>40</sup> 873 filings \* 0.5 hours = 437 hours. The 873 filings in subsequent years are 453 pooled plan providers reporting pooled employer plans beginning operations, 194 pooled plan providers reporting pooled employer plans ending operations, and 226 pooled plan providers filing other changes.

stabilizes. Incidents of filing updated and amended registration statements are expected to increase after the first year, as pooled employer plans enter and exit the market, change service providers, and change pooled employer plan offerings.

A summary of paperwork burden estimates follows:

*Type of Review:* New collection

*Agency:* Employee Benefits Security Administration, U.S. Department of Labor.

*Title:* Registration requirements to serve as a pooled plan provider to pooled employer plans

*OMB Control Number:* 1210–0164.

*Affected Public:* Businesses or other for-profits.

*Estimated Number of Respondents:* 1,660 3-year average (3,233 first year, 873 subsequent years)

*Estimated Number of Annual Responses:* 2,813 3-year average (6,693 first year, 873 subsequent years)

*Frequency of Response:* Occasionally

*Estimated Total Annual Burden Hours:* 1,676 3-year average (4,155 first year, 437 subsequent years)

*Estimated Total Annual Burden Cost:* 0

### 3. *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA)<sup>41</sup> imposes certain requirements with respect to Federal rules that are (1) subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act<sup>42</sup> and (2) likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a final rule is not likely to have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present a final regulatory flexibility analysis of the final rule. The Department has determined that this final rule, which would require prospective pooled plan providers to register with the Department prior to beginning operations, is not likely to have a significant economic impact on a substantial number of small entities. Therefore, the Department certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The Department estimates that only about eight percent of the potential market will be subject to the rule as pooled plan providers. Each of these entities would incur an estimated cost of \$124 to register and \$83 to update the registration if needed. Below is justification for this determination.

### *3.1. Need for and Objectives of the Rule*

Section 101 of the SECURE Act requires pooled plan providers to register with the Department, the Treasury Department, and the IRS. As noted above, the Treasury Department and the IRS have indicated that filing the registration statement with the Department will also satisfy the Code's registration requirement. The information required to be reported under the final rule would allow regulators to identify and monitor pooled plan providers. While some of the required information may be found in the Form 5500, which pooled plan providers will also be required to file on behalf of each participating employer plan they operate, this reporting is

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<sup>41</sup> 5 U.S.C. 601 et seq. (1980).

<sup>42</sup> 5 U.S.C. 551 et seq. (1946).

not available for more than 18 months after the pooled plan providers begin operating. The Form 5500, however, would not necessarily include some important information regarding the pooled plan providers themselves, such as bankruptcy filings, or the commencement of any criminal, civil, or administrative proceedings involving a claim of fraud or dishonesty with respect to any employee benefit plan or involving the mismanagement of plan assets. Requiring pooled plan providers to register gives both the agencies and the public, including participating employers, more immediate access to the information for monitoring purposes, and enables the agencies to monitor how this new market develops and assess whether further guidance is needed.

### *3.2. Affected Small Entities*

The Department has identified certain existing entities that it believes would be most likely to serve as pooled plan providers. For example, recordkeepers that currently administer retirement plans are well positioned to serve as pooled plan providers. Similarly, many PEOs have served as plan administrators and would likely have little trouble taking on the role of pooled plan provider. Further, many insurers have expressed interest in serving as pooled plan providers. While retirement plan advisors such as broker-dealers and registered investment advisors are also plausible candidates, the Department believes that many would be reluctant to assume the named fiduciary and plan administrator roles. Entities such as registered investment advisors may likely be more comfortable serving as section 3(38) investment managers for the pooled plan providers.

Based on such considerations, the Department estimates that roughly 3,200 unique entities will initially register to serve as pooled plan providers. Recordkeepers and plan administrators of existing defined contribution pension plans are most likely to enter the market, followed by PEOs, chambers of commerce, and plan advisors.

While the Department does not have complete information on which of these entities meet the Small Business Administration’s definition of a small entity, many of these entities likely are small. The Department estimates that about half of current recordkeepers and plan administrators currently serving defined contribution plans would register to become pooled plan providers. Other types of providers will likely comprise a smaller share of entities that register. Overall, the Department estimates that about eight percent of the universe of entities the Department has identified as well-suited to serve as pooled plan providers are likely to register. The table below includes both large and small entities. The Department cannot estimate with specificity the distribution by size of the providers that will choose to become pooled plan providers. However, most of the providers in these service categories meet the Small Business Administration definition of small entities. If the percentages in the footnote are applied to the number of affected entities in the table below, about 2,600 businesses could be small businesses.<sup>43</sup>

**Estimated Pooled Plan Provider**

	Universe	Expected Share	Estimated Number
Unique Recordkeepers and Plan Administrators for existing DC Plans <sup>a</sup>	2,378	50%	1189
Professional Employer Organizations <sup>b</sup>	907	25%	227
Chambers of Commerce <sup>c</sup>	4,000	5%	200
Large Broker-Dealers <sup>d</sup>	173	5%	9
Registered Investment Advisor Firms <sup>d</sup>	30,246	5%	1512
Direct Annuity Writers (Insurance Companies) <sup>e</sup>	386	25%	97
<b>Total</b>	<b>38,090</b>	<b>8%</b>	<b>3,233</b>

<sup>a</sup> 2017 Form 5500 Schedule C Data.

<sup>b</sup> National Association of Professional Employers, <https://www.napeo.org/what-is-a-peo/about-the-peo-industry/industry-statistics>.

<sup>43</sup> Some possible affected industries by NAICS code are as follows: 524292 third-party administration, more than 90 percent small business; 524113 underwriting annuities and life insurance, more than 70 percent small business; 523999 financial investment services, more than 95 percent small businesses; 523999 brokerage, financial investment services, more than 95 percent small business; 561330 professional employer organization, more than 90 percent small business.

<sup>c</sup> Association of Chamber of Commerce Executives reports that there are 4,000 Chambers with at least 1 full-time staff person.

<sup>d</sup> FINRA Industry Snapshot. FINRA reported 3,607 FINRA registered firms in 2018. There were 173 with 500 or more registered representatives.

<sup>e</sup> National Association of Insurance Commissioners.

One commenter was concerned that the rule would expose pooled employer plans to litigation risk. The commenter suggested that this would dissuade pooled plan provider from registering and thus, there would be fewer pooled employer plans available to small employers. While the Department acknowledges this concern, the Department believes that the rule will result in a greater availability of workplace retirement plans among small employers. By allowing most of the administrative and fiduciary responsibilities of sponsoring a retirement plan to be transferred to pooled plan providers, pooled employer plans provide small employers with the option of providing a workplace retirement plan to their employees with reduced burdens and costs as compared to sponsoring their own separate single employer retirement plan.

### *3.3. Impact of the Rule*

The Department estimates that it would take the average pooled plan provider with a labor rate of \$165.63 only 45 minutes to register, at an expense of \$124.23, because the information necessary is readily available through the normal course of business.<sup>44</sup> Pooled plan providers submit the filing only when data elements change, the administrator begins or ceases operations for any pooled employer plan, or the pooled plan provider undergoes a change. The supplemental filing will require an estimated 30 minutes to complete, at an expense of \$82.82. As with the initial registration, the required information for the supplemental filing is readily available. The cost to file both a registration and a supplemental filing in a single year would be

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<sup>44</sup> To register: 0.75 hours per pooled plan provider; 0.75 hours \* \$165.63 = \$124.23. To update a registration: 0.50 hours \* \$165.63 = \$82.82. The total labor rate for a financial manager is used as a proxy for the labor rate. Labor rates are EBSA estimates found at [www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf](http://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf).

\$207.16, which would be less than one percent of revenue if a business had more than \$20,700 in revenue. The Department lacks complete data to determine the number of firms that do not meet this revenue threshold. Available data suggests that 15 percent of possibly affected firms have less than \$100,000 in revenue.<sup>45</sup>

To further illustrate how small a \$207 burden is, note that a one-person firm consisting of an individual with a labor rate of \$165.63 would need to work only 125 hours to have revenue of \$20,700. That same individual working 2,000 hours, a standard work year, would produce revenue of \$331,260, resulting in \$207.16 being significantly less than one percent of revenue.

### *3.4. Duplicate, Overlapping, or Relevant Federal Rules*

The final rule does not conflict with any relevant Federal rules. Section 101 of the SECURE Act requires pooled plan providers to register both with the Department and with the Treasury Department and the IRS. The final Form PR satisfies requirements under both Title I of ERISA and the Code. Moreover, the statute expressly authorizes the Departments to require reporting of additional information.

### *4. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector.<sup>46</sup> For purposes of the Unfunded Mandates Reform Act, as

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<sup>45</sup> Data set supplied by the Small Business Administration containing data on the number of firms and revenue by NAICS codes. Estimates used NAICS codes 524292, 56133, 523120, 52393, 523130, and 524113.

<sup>46</sup> 2 U.S.C. 1501 et seq. (1995).

well as Executive Order 12875, this final rule does not include any Federal mandates that the Department expects would result in such expenditures by State, local, and tribal governments, or the private sector.<sup>47</sup> This rule simply requires entities that choose to become pooled plan providers to register with the Department.

##### *5. Federalism Statement*

Executive Order 13132 outlines fundamental principles of federalism, and requires that Federal agencies adhere to specific criteria when formulating and implementing policies that have “substantial direct effects” on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government.<sup>48</sup> Federal agencies promulgating regulations that have federalism implications must first consult with State and local officials, then describe in the preamble to the final rule the extent of their consultation and the nature of the officials’ concerns.

This final rule does not have federalism implications because it will not have direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among various levels of government. This final rule simply requires private companies that choose to offer pooled employer plans to register with the Department.

#### **List of Subjects in 29 CFR Part 2510**

Employee benefit plans, Pensions

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<sup>47</sup> Enhancing the Intergovernmental Partnership, 58 FR 58093 (Oct. 28, 1993).

<sup>48</sup> Federalism, *supra* note 7.

For the reasons stated in the preamble, the Department of Labor amends 29 CFR part 2510 as follows:

**PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, G, AND L OF THIS CHAPTER**

1. The authority citation for part 2510 is revised to read as follows:

**Authority:** 29 U.S.C. 1002(1), 1002(2), 1002(3), 1002(5), 1002(16), 1002(21), 1002(37), 1002(38), 1002(40), 1002(42), 1002(43), 1002(44), 1031, and 1135; Secretary of Labor’s Order No. 1- 2011, 77 FR 1088 (Jan. 9, 2012); Sec. 2510.3-101 and 2510.3-102 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 5 App. (E.O. 12108, 44 FR 1065 (Jan. 3, 1979)) and 29 U.S.C. 1135 note. Sec. 2510.3-38 is also issued under sec. 1, Pub. L. 105-72, 111 Stat. 1457 (1997).

2. Add § 2510.3-44 to read as follows:

**§ 2510.3-44 - Registration Requirement to Serve as a Pooled Plan Provider to Pooled Employer Plans**

(a) General. Section 3(44) of the Act sets forth the criteria that a person must meet to be a pooled plan provider for pooled employer plans under section 3(43) of the Act.

(b) Registration requirement. Subparagraph (A)(ii) of section 3(44) requires the person to register as a pooled plan provider with the Department and provide such other information as the Department may require, before beginning operations as a pooled plan provider. For this purpose, “beginning operations as a pooled plan provider” means the initiation of operations of the first plan that the person operates as a pooled employer plan, as described in paragraph (b)(6)

of this section. To meet the requirements to register with the Department under section 3(44) of the Act, a person intending to act as a pooled plan provider must:

(1) At least 30 days before beginning operations as a pooled plan provider, file with the Department the following information on a complete and accurate Form PR (Pooled Plan Provider Registration) in accordance with the form's instructions.

(i) The legal business name and any trade name (doing business as) of such person.

(ii) The business mailing address and phone number of such person.

(iii) The employer identification number (EIN) assigned to such person by the Internal Revenue Service.

(iv) The address of any public website or websites of the pooled plan provider or any affiliates to be used to market any such person as a pooled plan provider to the public or to provide public information on the pooled employer plans operated by the pooled plan provider.

(v) Name, address, contact telephone number, and email address for the responsible compliance official of the pooled plan provider. For purposes of this paragraph (b)(1)(v), the term "responsible compliance official" means the person or persons, identified by name, title, or office, responsible for addressing questions regarding the pooled plan provider's status under, or compliance with, applicable provisions of the Act and the Internal Revenue Code as pertaining to a pooled employer plan.

(vi) The agent for service of legal process for the pooled plan provider, and the address at which process may be served on such agent.

(vii) The approximate date when pooled plan operations are expected to commence.

(viii) An identification of the administrative, investment, and fiduciary services that will be offered or provided in connection with the pooled employer plans by the pooled plan provider or an affiliate. For purposes of this paragraph (b)(1)(viii), the term “affiliate” includes all persons who are treated as a single employer with the person intending to be a pooled plan provider under section 414(b), (c), (m), or (o) of the Internal Revenue Code who will provide services to pooled employer plans sponsored by the pooled plan provider and any officer, director, partner, employee, or relative (as defined in section 3(15) of the Act) of such person; and any corporation or partnership of which such person is an officer, director, or partner.

(ix) A statement disclosing any ongoing Federal or State criminal proceedings, or any Federal or State criminal conviction, related to the provision of services to, operation of, or investments of, any employee benefit plan, against the pooled plan provider, or any officer, director, or employee of the pooled plan provider, provided that any criminal conviction may be omitted if the conviction, or related term of imprisonment served, is outside ten years of the date of registration.

(x) A statement disclosing any ongoing civil or administrative proceedings in any court or administrative tribunal by the Federal or State government or other regulatory authority against the pooled plan provider, or any officer, director, or employee of the pooled plan provider, involving a claim of fraud or dishonesty with respect to any employee benefit plan, or involving the mismanagement of plan assets.

(2) No later than the initiation of operations of a plan as a pooled employer plan, as described in paragraph (b)(6) of this section, file with the Department a supplemental report using the Form PR containing the name and plan number that the pooled employer plan will use for annual reporting purposes, and the name, address, and EIN for the trustee for the plan.

(3) File with the Department a supplemental report using the Form PR within the later of 30 days after the calendar quarter in which the following reportable events occurred or 45 days after a following reportable event occurred:

(i) Any change in the information reported pursuant to paragraph (b)(1) or (2) of this section unless otherwise disclosed pursuant to paragraphs (b)(3)(iii) through (v) of this section.

(ii) Any significant change in corporate or business structure of the pooled plan provider, e.g., merger, acquisition, or initiation of bankruptcy, receivership, or other insolvency proceeding for the pooled plan provider or an affiliate that provides services to a pooled employer plan, or ceasing all operations as a pooled plan provider.

(iii) Receipt of written notice of the initiation of any administrative proceeding or civil enforcement action in any court or administrative tribunal by any Federal or State governmental agency or other regulatory authority against the pooled plan provider, or any officer, director, or employee of the pooled plan provider involving a claim of fraud or dishonesty with respect to any employee benefit plan, or involving the mismanagement of plan assets.

(iv) Receipt of written notice of a finding involving a claim of fraud or dishonesty with respect to any employee benefit plan, or involving the mismanagement of plan assets in any matter described in paragraph (b)(1)(x) or (b)(3)(iii) of this section.

(v) Receipt of written notice of the filing of any Federal or State criminal charges related to the provision of services to, operation of, or investments of any pooled employer plan or other employee benefit plan against the pooled plan provider or any officer, director, or employee of the pooled plan provider.

(4) Only one registration must be filed for each person intending to act as a pooled plan provider, regardless of the number of pooled employer plans it operates. A pooled plan provider must file updates for each pooled employer plan described in paragraph (b)(2) of this section, any change of previously reported information, and any change in circumstances listed in paragraph (b)(3) of this section, but may file a single statement to report multiple changes, as long as the timing requirements are met with respect to each reportable change.

(5) If a pooled plan provider has terminated and ceased operating all pooled employer plans, the pooled plan provider must file a final supplemental filing in accordance with instructions for the Form PR. For purposes of this section, a pooled employer plan is treated as having terminated and ceased operating when a resolution has been adopted terminating the plan, all assets under the plan (including insurance/annuity contracts) have been distributed to the participants and beneficiaries or legally transferred to the control of another plan, and a final Form 5500 has been filed for the plan.

(6) For purposes of this section, a person is treated as initiating operations of a plan as a pooled employer plan when the first employer executes or adopts a participation, subscription, or similar agreement for the plan specifying that it is a pooled employer plan, or, if earlier, when the trustee of the plan first holds any asset in trust.

(7) Registrations required under this section shall be filed with the Secretary electronically on the Form PR in accordance with the Form PR instructions published by the Department.

(8) For purposes of this section, the term “administrative proceeding” or “administrative proceedings” means a judicial-type proceeding of public record before an administrative law judge or similar decision-maker.

(9) For purposes of this section, the term “other regulatory authority” means Federal or State authorities and self-regulatory organizations authorized by law, but does not include any foreign regulatory authorities.

(10) For purposes of paragraphs (b)(1)(ix) and (x) and (b)(3)(iii) and (v) of this section, employees of the pooled plan provider include employees of the pooled employer plan, but only if they handle assets of the plan, within the meaning of section 412 of the Act, or if they are responsible for operations or investments of the pooled employer plan.

(c) Transition rule. Notwithstanding paragraph (b)(1) of this section, a person intending to act as a pooled plan provider may file the Form PR on or before beginning operations as a pooled plan provider (dispensing with the 30-day advance filing requirement) if the filing is made before February 1, 2021.

(d) Acquittals and removal of information. A pooled plan provider may file an update to remove any matter previously reported under paragraph (b)(1)(ix) or (b)(3)(v) of this section for which the defendant has received an acquittal. For this purpose, the term “acquittal” means a finding by a judge or jury that a defendant is not guilty or any other dismissal or judgment which the government may not appeal.

Signed at Washington, DC.

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Jeanne Klinefelter Wilson,

Acting Assistant Secretary, Employee Benefits Security Administration, Department of Labor