May 31, 2024

Mr. Michael Salerno
NPPG PEP Professionals, LLC
494 Sycamore Avenue
Shrewsbury, New Jersey 07702

Re: NPPG PEP Professionals, LLC
Investment Adviser Registration Analysis

Mr. Salerno:

NPPG PEP Professionals, LLC (the "PPP") has requested our opinion on whether its activities as a Pooled Plan Provider under the under the Setting Every Community Up for Retirement Enhancement Act (the "SECURE Act"), SECURE Act 2.0 of 2022, and related legislation and regulations causes it to fall within the definition of "investment adviser" under Section 202 of the Investment Advisers Act of 1940 (the "Advisers Act") for Advisers Act registration purposes.

It is our opinion, as set forth below, that PPP's activities as a Pooled Plan Provider result in it being "in the business" of "providing investment advice" to adopting employers and/or their plan participants "for compensation" and, as a result, such PPP would be considered an "investment adviser" under the Advisers Act. We have further described our understanding of the facts, analysis, and conclusion of law below. These findings do not opine on any other legal question, such as federal or state privacy laws or state securities laws.

1. Background

The SECURE Act was signed into law in 2019. The SECURE Act amended the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code to establish a new type of multiple-employer defined contribution, participant-directed retirement benefit plan, dubbed a "pooled employer plan" ("PEP"). Participating employers can adopt the PEP, pursuant to which their employees may participate in the PEP, while reducing administrative burden and regulatory risk on the part of the employer.

Under the SECURE Act, PEPs must be administered by a Pooled Plan Provider.[1] A Pooled Plan Provider is designated by the terms of the PEP as a "named fiduciary" (within the meaning of section 402(a)(2) of ERISA), as the plan administrator, and as the person responsible for performing all administrative duties for the PEP.[2] In its Final Rule Release regarding registration of Pooled Plan Providers[3], the Department of Labor ("DOL") provided insight into the activities expected to be undertaken by Pooled Plan Providers in stating, "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*" (emphasis added). This generally means that Pooled Plan Providers are responsible for performing investment-related functions for the PEP, unless that function has been reserved to the employer as an independent fiduciary.[4]

[1] *See* U.S. DEPARTMENT OF LABOR ANNOUNCES REGISTRATION REQUIREMENTS FOR POOLED PLAN PROVIDERS, available at: https://www.dol.gov/newsroom/releases/ebsa/ebsa20201112
[2] *See* ERISA Section 3(44).
[3] *See* 85 FR 72934.
[4] *See* 29 USC § 1002 (43).

Prior to the offering or provision of Pooled Plan Provider services, the PPP is required to register with the DOL as a Pooled Plan Provider. Once registered, it is understood that PPP will seek compensation for providing Pooled Plan Provider services (including without limitation the identification, selection, and monitoring of third-party investment advisers and managers, to provide investment advisory services to the PEP) to its PEP adopters and participants. Under the SECURE Act, unless such authority is reserved to the adopting employer, investment decision-making for the PEP, including with respect to the hiring or firing of an investment adviser or manager, is the exclusive domain of the Pooled Plan Provider, and a PEP adopting employer's only retained investment responsibility is the determination that the PEP in which they participate provides services commensurate with its costs.[5] Adopting employers who retain investment responsibility with respect to their PEP would incur lower fees from the PPP, as compared to those adopting employers who do not reserve such responsibility to themselves.

2. Governing Law, Associated Guidance, and Analysis

A. *Investment Adviser Definition*

Section 202(a)(11) of the Advisers Act defines the term "investment adviser," in relevant part, as:

> …any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities…

Therefore, the investment adviser definition consists of three elements: (1) providing advice, or issuing reports or analyses, on securities; (2) being in the business of providing those advisory services; and (3) providing those services for compensation. This is often referred to as the "ABC Test".

i. *Providing Advice*

In Release IA-770 (Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons who Provide Investment Advisory Services as an Integral Component of Other Financially Related Services), the SEC observed:

> A second common form of service relating to financial matters is provided by "**pension consultants**" who typically offer, in addition to administrative services, **a variety of advisory services** to employee benefit plans and their fiduciaries based upon an analysis of the needs of the plan. **These advisory services may include advice** as to the **types of funding media available to provide plan benefits**, general recommendations as to what portion of plan assets should be invested in various investment media, including securities, and, in some cases, **recommendations regarding investment in specific securities or other investments**. Pension consultants may also assist plan fiduciaries in determining plan investment objectives and policies and in designing funding media for the plan. **They may also provide general or specific advice to plan fiduciaries as to the selection or retention of persons to manage the assets of the plan**. Persons providing these services to plans are customarily compensated for their services through fees paid by the plan, its sponsor, or other persons; by means of sales commissions on the sale of insurance products or investments to the plan; or through a combination of fees and commissions.

[5] *See* SECURE Act Section 101(c)(B)(iii)(1).

(emphasis added).

The above clearly indicates the SEC's long-standing position that services such as the selection of a participant-directed retirement plan investment lineup (i.e., advice as to the "types of funding media available") and the selection or retention of third-party investment advisers for the plan (i.e., advice as to the "selection or retention of persons to manage the assets of the plan") would constitute "advisory service[s]" for the purposes of the ABC Test. As the selection of investments and investment managers is a material component of PPP's statutory responsibilities to a PEP, this element of the ABC appears to be satisfied with respect to the PPP.

This understanding is supported by the DOL's efforts to align certain of its regulatory requirements with those of the SEC. The DOL's Amendment to Prohibited Transaction Exemption 2020-02 was consciously intended to ensure the exemption's "compliance obligations are generally consistent with the best interest obligations set forth in the [SEC]'s Regulation Best Interest and its Commission Interpretation Regarding Standard of Conduct for Investment Advisers, each released in 2019." [6] The DOL has further acknowledged that its amendments to Prohibited Transaction Exemption 2020-02 were developed in consultation with other regulatory agencies, including the SEC[7] and explicitly indicated that Pooled Plan Providers are generally permitted to rely upon Prohibited Transaction Exemption 2020-02 for prohibited transaction relief.[8] The DOL's efforts to coordinate its regulatory requirements with those of the SEC, to ensure that Prohibited Transaction Exemption 2020-02's compliance obligations align with those applied by the SEC to broker-dealers and investment advisers, and to permit Pooled Plan Providers to rely on the exemption in most instances, collectively demonstrate a recognition that the material investment-related activities to be undertaken by Pooled Plan Providers align those of pension consultants already found to be within the Advisers Act's "investment adviser" definition and, consequently, to provide correspondingly aligned regulatory protections and safeguards[9] with respect to such services.

As discussed above, when permitted by the PEP's Pooled Plan Provider, adopting employers may reserve investment-related functions with respect to the PEP for themselves. Reserving PEP investment functions to the adopting employer in all instances could relieve the PPP of investment adviser registration obligations, as the remaining Pooled Plan Provider responsibilities provided by the PPP would involve neither the provision of advice regarding investment in specific securities or other investments nor the selection or retention of persons to manage PEP assets.

In practice, however, a PEP adopting employer must still answer to their Pooled Plan Provider when seeking to exercise this responsibility. Due to a Pooled Plan Provider's unique role with regard to a PEP, the Pooled Plan Provider must consider and approve of investment decisions being undertaken by an adopting employer, even if

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[6] *See* 29 CFR Part 2550.

[7] *See Id*. ("[T]o better understand whether the proposed rule and proposed amendments to the PTEs would have subjected investment advice providers to requirements that conflict with or add to their obligations under other Federal laws, the Department has reached out to and consulted with the staff of the SEC; other securities, banking, and insurance regulators; the Department of the Treasury, including the Federal Insurance Office; and the Financial Industry Regulatory Authority (FINRA), a self-regulatory organization that oversees broker-dealers.") (footnotes omitted).

[8] *See Id*. ("However, a named fiduciary or administrator or their Affiliate (including a Pooled Plan Provider (PPP) registered with the Department of Labor under 29 CFR 2510.3-44) may rely on the exemption if it is selected to provide investment advice by a fiduciary who is Independent of the Financial Institution, Investment Professional, and their Affiliates" (footnotes omitted)).

[9] *See Id*. ("In particular, in the Department's view, PTE 2020-02, as amended and published elsewhere in today's Federal Register, is consistent with the requirements of the SEC's Regulation Best Interest and the fiduciary obligations of investment advisers under the Advisers Act. Therefore, broker-dealers and investment advisers that have already adopted meaningful compliance mechanisms for Regulation Best Interest and the Advisers Act fiduciary duty, respectively, should be able to adapt easily to comply with the amended PTE").

responsibility for making those decisions have been explicitly reserved to the adopting employer. Functionally, then, it remains the Pooled Plan Provider that exercises ultimate decision-making in this respect, in that the adopting employer cannot exercise its investment-related authority without the Pooled Plan Provider's acquiescence. In addition, certain Pooled Plan Providers may not permit adopting employers to retain any investment-related functions at all, further illustrating the degree to which Pooled Plan Providers ultimately control investment-related functions for PEPs. As such, even in circumstances in which the PPP permits an adopting employer to retain investment decision-making responsibility, it is conceivable that the SEC could conclude that the PPP's retained authority still constitutes the provision of advisory services for the purposes of the ABC Test.

ii. *In the Business*

In Release No. IA-770, the SEC explained:

> As a general matter, the staff would take the position that a person who provides financial services including investment advice for compensation is in the business of providing investment advice within the meaning of Section 202(a)(11) unless the advice being provided by such person is solely incidental to a non-investment advisory business of the person, is non-specific, and is not rewarded by special compensation for such investment advice. (footnotes omitted).

The above sets forth a general presumption that a financial services provider who provides investment advice will be considered to be in the business of providing such investment advice, absent satisfaction of three specific pieces of criteria: (1) the advice is solely incidental to non-investment advisory business; (2) the advice is non-specific; and (3) the advice is not rewarded by special compensation. The PPP is inherently a financial services provider, and so each of the three criteria must be met for this presumption to be overcome.

For the purposes of this analysis, it can be assumed that any investment-related services provided by the PPP will be solely incidental to its non-investment advisory business of providing Pooled Plan Provider services in satisfaction of factor (1) above.

On the other hand, it is clear that factor (2) cannot be met by the PPP when rendering its Pooled Plan Provider services. As a Pooled Plan Provider, the PPP is an ERISA plan fiduciary. ERISA Rule 404a-1 sets forth the investment duties of an ERISA fiduciary with respect to the provision of investment advice. Included within those duties are:

> (b)(2)(ii): …consideration of the following factors as they relate to such portion of the portfolio:
>
> > (A) The composition of the portfolio with regard to diversification;
> >
> > (B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and
> >
> > (C) The projected return of the portfolio relative to the funding objectives of the plan.
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> (b)(4): A fiduciary's determination with respect to an investment or investment course of action must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis, using appropriate investment horizons consistent with the plan's investment objectives and taking into account the funding policy of the plan established pursuant to section 402(b)(1) of ERISA.

The above illustrates that an ERISA fiduciary, like the PPP, must tailor its investment advice services to the unique needs and objectives of the subject plan. In this way, the advice to be provided by the PPP must always be

"specific," in that it should pertain to the PEP's individual circumstances and should not be general, non-tailored advice.

Specificity of advice can also turn on the nature of the advice itself, as opposed to how tailored that advice is to a recipient's circumstances. In Release No. IA-770, the SEC stated:

> The staff would, however, take the position that such a person is in the business of providing investment advice if, on anything other than rare and isolated instances, he discusses the advisability of investing in, or issues reports or analyses as to, specific securities or specific categories of securities (e.g., bonds, mutual funds, technology stocks, etc.).

As the PPP's role, by definition, except in limited circumstances, requires the provision of advice with respect to investments and/or investment managers, ERISA would generally require the PPP to give advice that would be "specific" enough to prevent reliance on this definitional exclusion. That is, the PPP will generally be responsible for hiring, retaining, and/or firing one or more specific investment managers on behalf of a PEP, and this activity would occur regularly, as opposed to being limited to rare and isolated instances. As illustrated above, the SEC considers the advice regarding the selection or retention of investment managers to be advice concerning securities. And because provision of this advice by the PPP would not be limited to rare and isolated instances, the advice to be provided by the PPP regarding the selection or retention of investment managers would likely be considered "specific."

Factor (3) requires that a financial service provider not receive "special compensation" for investment advice that is provided, in order to conclude that the service provider is not in the business of providing investment advice. In exploring the concept of "special compensation" with respect to broker-dealers, the SEC cited prior guidance from its general counsel:

> As the Commission's general counsel opined in a 1940 letter responding to questions about "special compensation," where the only difference in the services provided to two brokerage customers is that one receives advice and the other does not, and the firm always charges a higher amount to the customer that receives the advice, the customer paying the higher transaction amount is paying "special compensation."[10]

As applied to a Pooled Plan Provider, the principle described above indicates that, if the only difference in services provided to two PEPs is the Pooled Plan Provider's investment advice, and if the Pooled Plan Provider would charge a higher amount to the PEP that receives this service, then the Pooled Plan Provider would be in receipt of "special compensation" for the purposes of factor (3). Because the PPP would assess a higher fee with respect to engagements where it was undertaking investment-related functions, the PPP would be in receipt of "special compensation" and, as a result, would be unable to overcome the presumption that it was "in the business" of providing advisory services.

In similar, but clearly distinguishable, contexts, the SEC has granted no-action relief from investment adviser registration for employers who provide services to plans established for the benefit of the employer's employees. On December 5, 1995, the SEC granted no-action relief pursuant to a request from the Pension and Welfare Benefit Administration ("PWBA") of the DOL concerning adviser registration for employers who provide investment-related information and services to their own employee benefit plans. In granting such relief, the SEC stated:

[10] Release No. IA-2652, n. 22.

> The employer-employee relationship is unlike the commercial relationship between an investment adviser and its client that the Advisers Act was intended to regulate. Employers that provide investment-related information to their employees about the employers' defined contribution plans typically do so not with a profit motive but in an attempt to educate those employees about retirement plans and the investment alternatives available through those plans. These employers are typically not "in the business" of providing investment advice to their employees.

In a follow-up request from the PWBA, on February 22, 1996, the SEC elaborated:

> The second question is whether the position stated in the December 5th letter is intended to address the status under the Advisers Act of a person other than an employer who provides investment-related information to plans or plan participants. As noted in the letter, our position is based on the unique nature of the employment relationship. Consequently, our position is not intended to address whether a third-party service provider meets the definition of investment adviser under the Advisers Act. Whether such a person meets the definition of investment adviser continues to depend on the application of all the factors set out in Section 202(a)(11), including the type of information provided.

Collectively, these no-action letters indicate that an employer who provides services that constitute investment advisory services to a plan established for the benefit of its own employees would generally not be "in the business" of providing such services and, consequently, would not meet the definition of "investment adviser" under the Advisers Act, as such employer-provided services would not resemble the traditional adviser-client commercial relationship, and the employer would typically not have a profit motive in providing such services to its employees. Conversely, this exemption only extends to the subject employer----a third-party service provider retained by the employer to service the plan would retain the commercial relationship and profit motives of a typical adviser and, as such, could be within the Advisers Act investment adviser definition based upon the application of the ABC Test to such third-party.

In the instant case, unlike an employer-employee relationship, the PPP retains a commercial relationship with the plan with clear profit motives. Indeed, providing investment-related services, including investment advice, to a PEP for compensation generally describes the Pooled Plan Provider business model. As a result, it would not be plausible for the PPP to rely on the relief provided in these no-action letters.

iii. *For Compensation*

The term "compensation" is broadly construed. Generally, the receipt of any economic benefit, whether in the form of an advisory fee, some other fee relating to the total services rendered, a commission, or some combination, satisfies this element.[11] According to the SEC in Release No. IA-770:

> It is not necessary that a person who provides investment advisory and other services to a client charge a separate fee for the investment advisory portion of the total services. The compensation element would be satisfied if a single fee were charged for the provision of a number of different services, which services included the giving of investment advice…within the meaning of the Advisers Act.
>
> …
>
> Accordingly, a person providing a variety of services to a client, including investment advisory services, for which the person receives any economic benefit, for example, by receipt of a single fee or commissions upon

[11] *See* Release No. IA-1092 (Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services) (October 8, 1987).

the sale to the client of insurance products or investments, would be performing such advisory services "for compensation" within the meaning of Section 202(a)(11) of the Advisers Act.

The PPP would be providing investment advisory services, as explained above, in the manner typical of most Pooled Plan Providers. As a result, the compensation to be received by the PPP would constitute "compensation" for the purposes of Advisers Act Section 202(a)(11), since the PPP would receive an economic benefit in exchange for a bundle of services, which bundle includes the provision of investment advice.

iv. *DOL and SEC Registrations*

Pooled Plan Providers are required to register with the DOL prior to offering or providing PPP services.[12] The DOL did not grant Pooled Plan Provider registration exemptions for firms that were otherwise registered with and regulated by other federal agencies and, in fact, explicitly acknowledged that many regulated entities would be subject to Pooled Plan Provider registration with the DOL.[13]

Conversely, it is understood that Pooled Plan Providers registered with the DOL will not be exempt from SEC registration as investment advisers, on the basis of DOL registration alone. Under Advisers Act Section 203(b), registration requirements apply to any person who falls within the definition of "investment adviser." Section 202(a)(11)(A)-(E) of the Advisers Act expressly excludes certain persons or firms from the definition of an investment adviser. These firms need not register as investment advisers under the Advisers Act. Those explicitly excluded from the "investment adviser" definition are:

- Domestic banks and bank holding companies (savings and loan institutions, federal savings banks, foreign banks, and credit unions do not fall within this exclusion)
- Lawyers, accountants, engineers, and teachers if their performance of advisory services is solely incidental to their professions.
- Brokers and dealers if their performance of advisory services is solely incidental to the conduct of their business as brokers and dealers, and they do not receive any special compensation for their advisory services.
- Publishers of bona fide newspapers, news magazines, and business or financial publications of general and regular circulation.
- Persons and firms whose advice, analyses, or reports are related only to securities that are direct obligations of, or obligations guaranteed by, the United States, or by certain U.S. government-sponsored corporations designated by the Secretary of the Treasury (e.g., FNMA, GNMA).

The Advisers Act also grants the SEC the authority to exclude, by order, other persons and firms not within the intent of the definition of "investment adviser." However, as Pooled Plan Providers are not included in the enumerated categories of persons exempt from the "investment adviser" definition, and because no order has been issued granting such an exemption, the PPP would not be excluded from the definition of "investment adviser" pursuant to Advisers Act Section 202(a)(11)(A)-(E).

B. <u>Conclusion</u>

[12] *See* 85 FR 72934.

[13] *See Id*. at page 72936 ("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.'").

It is our opinion, based on the facts and our interpretation of the laws, regulations, and associated guidance outlined above, that the PPP would be considered an "investment adviser" for the purposes of determining Advisers Act Section 203(b) registration requirements.

The opinions expressed in this letter are based on the facts known, state of the law, and SEC guidance referenced herein as of the date set forth above. We are not opining on, and we assume no responsibility for, the applicability or effect of any other laws on the matters discussed in this letter.

This letter may be relied upon solely by NPPG PEP Professionals, LLC. No other party may rely upon this letter or the opinions it expresses without our prior written consent.

Very Truly Yours,

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