

August 19, 2024

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

Re: NPPG PEP Professionals, LLC – Denial of No-Action Request

Mr. Salerno:

On May 22, 2023, NPPG PEP Professionals, LLC (“NPPG”), a Pooled Plan Provider registered with the Department of Labor (“PPP”) under the Setting Every Community Up for Retirement Enhancement Act (the “SECURE Act”), submitted a No-Action Letter request (the “NAL”) to the United States Securities and Exchange Commission (the “SEC”), requesting relief from registration requirements under the Investment Advisers Act of 1940 (the “Advisers Act”). The NAL was denied by the SEC on June 18, 2024.

In issuing its denial, the SEC stated: “Whether [NPPG] is required to register with the [SEC] as an investment adviser is a facts and circumstances determination. Accordingly, we do not believe it is appropriate to issue no-action relief in this context.”

As a result of this denial, a follow-up call with SEC staff members and attorneys (the “Staff”) was held, in an effort to determine whether a sufficient body of facts and circumstances could be established under which the Staff would feel comfortable issuing an opinion on Advisers Act registration.

A variety of factual scenarios were presented to the Staff, each with a varying degree of investment responsibility retained by NPPG. In each scenario, it was expressed that NPPG would qualify to register with the SEC, if registration was deemed to be required. Specifically, the following scenarios were included in those presented to the Staff:

1. NPPG would cause multiple investment managers (as defined under Section 3(38) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”)) to be made available within a Pooled Employer Plan (“PEP”). A PEP’s adopting employers (“AEs”) would be responsible for the selection and ongoing monitoring of the chosen investment manager, and would directly contract with any selected investment manager(s) for the provision of services to the AE’s PEP participants; and
2. NPPG would not select or recommend any investment managers for its PEPs. All decisions regarding the selection or retention, as well as ongoing monitoring, of investment managers would be made by AEs. NPPG’s only authority would be to admit the investment manager to the PEP and provide the investment manager with access to the AE’s appropriate data, so that the investment manager could be made available to the AE and discharge its services accordingly.

The Staff declined to offer an opinion as whether either of the above scenarios were sufficient to avoid Advisers Act registration, but did share:

- With respect to Scenario 1, the Staff recognized that recommendations regarding the selection or retention of investment managers could be considered investment advice for Advisers Act registration purposes. As a result, if the “in the business” and “compensation” elements for registration were satisfied (pursuant to the ABC Test, discussed in our May 31, 2024 Memo), there can be little doubt that the Staff would conclude that registration would be required in this scenario.
- With respect to Scenario 2, the Staff did not believe there was a sufficient basis to conclude that registration would not be required. For example, it was noted that, even if investment-related functions were reserved to an AE in the AE’s capacity as an independent fiduciary, a PPP still retains significant, non-

delegable authority over a PEP, effectively making the PPP a “gatekeeper” to the PEP. This gatekeeping authority would allow NPPG, as PPP, to control which service providers (including investment managers) were permitted to service the PEP, even if the authority to select and monitor the service provider was reserved exclusively to the AE. This, in turn, could be determined to be the indirect rendering of investment advice by NPPG as PPP.

- Furthermore, under ERISA, plan fiduciaries, such as PPPs, are subject to the concept of co-fiduciary liability. Generally speaking, an AE in Scenario 2 would be an ERISA fiduciary to the AE’s portion of the PEP for a variety of reasons¹, including with respect to the AE’s investment manager decision-making². As such, the PPP would retain a degree of liability for the AE’s investment manager selections, as an ERISA fiduciary “shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan...if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.”³ Therefore, as a practical matter, instances of PPPs permitting AEs to exercise unfettered discretion over the selection and retention of investment managers are unlikely to exist, as such arrangements would expose the PPPs to significant co-fiduciary risk, without the ability to meaningfully manage or mitigate such risk or potential fiduciary breach.
- It was respectfully asserted to the Staff that the lack of current regulatory guidance on the topic of investment adviser registration, as applied to PPPs, poses a significant risk to this nascent industry and the hundreds of thousands of retirement participants currently being served through PEPs. Although the Staff did not provide specific registration guidance under the specific PPP scenarios presented at this time, the Staff spoke about first addressing this risk through other means, such as Risk Alerts or Exam Priority notices.

Collectively, then, it can be determined that neither Scenarios 1 nor 2 conclusively justify non-registration under the Advisers Act. It is further reasonable to assume that instances where all investment manager decision-making responsibility and associated liability is reserved to the AE, and the PPP maintains no oversight or control responsibility over such decision-making, will not exist in practice, due in part to the co-fiduciary risks outlined above. As a result, it is understood that a PPP could not avoid the direct or indirect provision of investment advice, while simultaneously managing its ERISA co-fiduciary risk. Thus, my discussion with the Staff further cemented my opinion as to why PPPs, including NPPG, generally fall within the definition of “investment adviser” and, as such, are subject to registration requirements.

Very Truly Yours,

Ryan Walter

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¹ See 29 U.S. Code § 1002(21)

² See 29 U.S. Code § 1002(43)(B)(iii)(II)

³ 29 U.S. Code § 1105