November 1, 2021

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Attn: Proposed Revision of Annual Information Return/Reports
RIN 1210-AB97

Filed Electronically

Dear Sir or Madam:

Thank you for the opportunity to provide comment on the proposed changes to Form 5500, including incorporation of SECURE Act provisions related to multiple plan filings (Proposed Rule). Empower Retirement serves more than 67,000 plans with over 12 million participants and we are very active in the small employer market where multiple plan arrangements tend to be most prevalent.

We applaud the agencies' efforts to provide guidance on Section 202 of the SECURE Act related to consolidated reporting for a group of plans in advance of the January 1, 2022, date when those arrangements become available. We also strongly support the Department's position that every employer participating in a consolidated reporting arrangement be able to act as a named fiduciary to their own plan. We do, however, have significant concerns related to some aspects of the Proposed Rule and believe they run contrary to Congress's intent to encourage plan formation and reduce compliance costs and other burdens on employers.

1. The audit requirements for a Defined Contribution Group (DCG) will negate any potential benefit to employers who might otherwise participate in a DCG.

Congress created the option for a group of plans with the same named fiduciaries, trustee, plan administrator, plan year, and investments or investment options to file a single Form 5500. The intent was clearly to make it easier and less expensive for plans to fulfill their annual reporting obligation. We believe that the requirements of the Proposed Rule run contrary to Congress's intent to create a less burdensome filing option for plans willing to accept the conditions of SECURE Act Section 202.

The key time and cost savings in a multiple plan filing are derived from the ability to conduct a single audit of the arrangement that satisfies the audit requirement under ERISA § 103(a)(3)(A) for all participating employers. This is the case in all other multiple plan filings (MEPs, PEPs, PEOs) and is consistent with GAAS rules, yet the Proposed Rule does not allow for this option in a DCG. Instead, the

Proposed Rule requires both an audit of the aggregated financial statements and schedules across the DCG and individual plan audits for every participating employer not eligible for an audit waiver. The methodology used to assess plan level compliance in a MEP is to conduct a sampling of plan and participant data and that methodology is approved by GAAS rules and has been accepted as sufficient disclosure by the DOL. Requiring plans in a DCG to both contribute to the cost of an aggregated audit of the group's financials and also bear the cost of an individual plan audit (unless eligible for an audit waiver) will increase the time and cost of filing, not decrease it as Congress intended. Without the benefit of a decreased filing burden there is no reason for employers to accept the restrictions imposed by Section 202 of the SECURE Act. We recommend that DOL eliminate the requirement for individual participating employer audits and allow DCGs to use the same audit methodology used in MEPS and other multiple filing arrangements.

2. A single Form 5558 filing by the common Plan Administrator in a DCG should be all that's required to obtain an extension of time to file Form 5500.

Section 202 of the SECURE Act requires all plans in a DCG to have a common Plan Administrator. The Proposed Rule clarifies that the ERISA §3(16) rule defaulting to the employer as the Plan Administrator does not apply to a DCG and further clarifying that the responsibilities of the common Plan Administrator in a DCG include signing and retaining copies of the Form 5500. The Proposed Rule, however, does not permit the common Plan Administrator to obtain an extension of the filing deadline and instead requires each participating employer to file a separate Form 5558.

There are several concerns with this requirement. The first is the additional time and cost involved in separate filings. More importantly, this requirement creates significant logistical problems for the common Plan Administrator. It is highly likely, particularly in a large DCG, that some participating employers will be more responsive than others so it could end up that 99% of employers file Form 5558 but, due to missing a single Form 5558, the availability of an extension may be compromised. This would further discourage the use of DCGs and there is no clear policy served by giving the common Plan Administrator in a DCG all filing responsibilities except for Form 5558 filings. We recommend that the Department clarify in its final rule that the common Plan Administrator is responsible for signing, timely filing (including any requests for an extension), and retaining the Form 5500 annual report for a DCG.

3. The portions of the Proposed Rule unrelated to SECURE Act requirements should be eliminated from this proposal and incorporated into the Department's future broader proposal

The Proposed Rule contains many new requirements unrelated to SECURE Act requirements, including compliance questions and more detailed reporting of expenses and investments. It is on the Department's regulatory agenda to issue a broader proposed rule on Form 5500 changes. Any change to the form will involve significant build costs to collect new data and populate now questions and, if the Department is considering changes similar to its 2016 proposal, the scope of that project from a record

keeping perspective is substantial. It would be significantly more efficient from a time and cost perspective to incorporate all required changes in a single project rather than do one piece now with a 2022 effective date and another piece later with a different effective date. It would also allow for more meaningful comment on these proposed changes if the regulated community understood the entirety of what the Department wants to accomplish. We therefore recommend that all proposed changes unrelated to the SECURE Act be eliminated from the Proposed Rule and incorporated into the broader project, including the following:

- Changes to Schedule H – both content and reporting methodology
- Tax code compliance questions
- Details re/the favorable IRS Opinion Letter for adopters of pre-approved plans

We do think the portion of the Proposed Rule changing the participant counting methodology from all eligible to those with account balances should be retained in the Proposed Rule since that change is related to the SECURE Act requirement to include long-term, part-time employees. We commend the Department for making this change that results in a fairer and more logical application of the audit waiver and short form filing rules.

Thank you for this opportunity to comment and I welcome the opportunity to speak with you further on this topic if you would find that helpful.

Sincerely,

**Edmund F. Murphy III, President & CEO**
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