



November 1, 2021

Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210
Attention: Proposed Revision of Annual Information Return/Reports RIN 1210-AB97

RE: [Annual Reporting and Disclosure \(RIN 1210-AB97\)](#)

The American Institute of Certified Public Accountants (AICPA) appreciates the opportunity to comment on Annual Reporting and Disclosure (RIN 1210-AB97) issued in the September 15, 2021 Federal Register (the Proposal). The Department of Labor (DOL) proposed revisions would amend reporting regulations to the Form 5500 *Annual Return/Report of Employee Benefit Plan* and Form 5500-SF *Short Form Annual Return/Report of Small Employee Benefit Plan*. These comments were prepared by the AICPA Employee Benefit Plan Audit Quality Center Executive Committee and the AICPA Employee Benefit Plans Expert Panel.

Changes to Method of Determining Small Plan Status for Certain Filing Exemptions and IQPA Audit Requirement

The Proposal would change the current method of counting covered participants for purposes of determining when a defined contribution plan may file as a small plan and whether the plan may be exempt from the independent qualified public accountant (IQPA) audit requirements. The Proposal notes that participants of plans that file as a small plan would no longer have the protections provided by the IQPA audit, which could result in an increased risk of errors and fraud, and that there are conditions for small plans to be eligible for the audit waiver in CFR § 2520.104–46 designed to address those potential risks.

The IQPA audit is an important part of the safeguards established by Congress in ERISA to protect plan participants. We support the DOL's efforts to evaluate the cost benefit of a financial statement audit for small plans. We recognize that the DOL is a significant user of IQPA audits, and that a financial statement audit as contemplated by Congress may not be cost effective for certain small plans with over 100 eligible participants but with very few active participants. However, we have concerns about the diminished protections to plan participants as detailed below. We believe there are other significant considerations that should be made by the DOL before finalizing a change to the audit threshold that

would exempt an estimated 11,362^[1] small plans from an IQPA audit. Before making a final change to the audit threshold, we recommend the DOL:

- Determine and communicate how the DOL will monitor and evaluate compliance for the plans that would no longer be subject to an IQPA audit.
- Determine the adequacy of current reporting, and possible need for additional reporting, by the affected plans to the DOL related to plan compliance.
- Determine whether additional or expanded DOL compliance projects, programs and activities are needed, including plan sponsor education, resources, and outreach.
- Consider cost-effective alternatives to a financial statement audit for small plans, such as certain compliance assessment procedures performed by CPAs in accordance with professional attestation standards.
- Reevaluate the current conditions for the small plan audit waiver.
- Consider the potential negative impact of the proposed threshold change on employee participation in the plan.

Accordingly, we believe the DOL should reevaluate the change in audit threshold as part of its separate project focusing on a broader range of improvements to the Form 5500 annual reporting requirements rather than in the annual forms update project.

Plan Compliance Assistance and Monitoring

An IQPA audit includes understanding the plan's internal control over financial reporting, which allows auditors to identify and communicate control weaknesses, compliance issues, and/or plan operational errors so they can be corrected. New audit standards for employee benefit plans (SAS No. 136) are effective for all plans next year and will require auditors to focus on relevant plan provisions, which can lead to the identification of reportable findings. These new standards were developed with DOL's participation. Such matters, if not detected and corrected, may directly affect participants and their retirement benefits. These issues occur frequently in small plans that would be exempt as a result of this Proposal and, most often, they are identified as a result of the IQPA audit.

Smaller plans may have a higher likelihood of errors and noncompliance because plan sponsors have limited resources to establish proper controls and monitor compliance with the plan document, ERISA, and DOL regulations. Some smaller plans have complex plan provisions and large account balances. While some small employers are able to effectively manage their plan and have no compliance issues, auditors often find multiple errors and noncompliance occurring in these plans, such as the following:

- Participants are not enrolled in the plans on a timely basis.
- Late remittances of employee withholdings go undetected and uncorrected.
- Prohibited transactions occur and are not identified, reported, or corrected.
- Eligible compensation definitions in plans are not correctly applied.
- There is no process in place for evaluating and monitoring of service providers, including but not limited to reviewing SOC 1 reports.
- Inaccurate data is used in census, which impacts discrimination testing.
- Plan sponsors misunderstand what expenses can and cannot be paid by the plan.

^[1] DOL estimate of the number plans that currently provide an IQPA audit report that would be exempt from the IQPA audit under the Proposal [Proposed rule, Annual Reporting and Disclosure (RIN 1210-AB97)]

- Hard to value investments are not properly valued or reported.
- Controlled group testing is not performed because plans sponsors lack the knowledge about when such testing is required.
- Plan sponsors are not aware that a partial plan termination has occurred and the effect it has on the plan and plan participants.

Cost Effective Alternatives to a Financial Statement Audit

We recommend the DOL evaluate whether small plan filers should have cost effective periodic assessments by a CPA of the plan's compliance with the plan document, ERISA, and DOL regulations. Limited compliance procedures could be less costly than a financial statement audit while providing plan participants with protections contemplated under ERISA.

Encourage Plan Participation

Plans with over 100 eligible participants but fewer than 100 participants with account balances can be indicative of low employee participation in the plan. We believe the Proposal could have the unintended consequence of discouraging plan sponsors from promoting plan participation to eligible employees and adopting automatic enrollment features in the plan to avoid an IQPA audit. This runs counter to the DOL's goal of promoting retirement savings. We recommend the DOL evaluate the impact of the change in counting covered participants on plan participation and consider how to mitigate potential disincentives for plan sponsors to promote plan participation. One possible way would be to require plans to have automatic enrollment as a condition to qualify for the small plan audit waiver.

Reevaluate the Small Plan Audit Waiver

The DOL acknowledges that participants would no longer have the protections provided by the audit, which could result in an increased risk of errors and fraud. The Proposal states that the current small plan audit waiver is designed to address those potential risks. However, as discussed above, there are potential control, operational and/or noncompliance risks that are not considered under the small plan audit waiver. We recommend the DOL evaluate additional conditions for the small plan audit waiver, including, for example, establishing conditions of plan compliance and automatic enrollment to promote participant protection and encourage plan participation. This will help to serve the public and participant interest by establishing conditions of compliance before allowing for an audit waiver.

Retroactive Application for Plans with Short Year

As the DOL finalizes the proposed change for the audit threshold, the DOL should consider the effect on plans filing under the Short Plan Year Rule in 2021. For example, if a plan meets the small plan threshold in 2020, then becomes subject to audit in 2021 because eligible participants exceed 120; however, they elect the Short Plan Year Rule to defer filing the accountant's report (in accordance with 29 CFR 2520.104-50) until 2022, would an audit be required for the 2021 plan year?

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The AICPA Employee Benefit Plan Audit Quality Center is a firm-based voluntary membership center of over 2,450 CPA firms that audit employee benefit plans. The AICPA Employee Benefit Plan Expert Panel

serves the needs of AICPA members on financial reporting and audit matters related to employee benefit plans.

The AICPA is the world's largest member Association representing the accounting profession with more than 431,000 members in 130 countries and territories, and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate the DOL consideration of our recommendations. Please contact Ian MacKay at Ian.MacKay@aicpa-cima.com if you have any questions or would like to discuss these comments.

Sincerely,

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