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VIA ELECTRONIC DELIVERY

October 30, 2021

Office of Regulatory Interpretation
Employee Benefits Security Administration, Room N-5655,
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

Re: Proposed Form 5500 Revisions RIN 1210-AB97; 86 FR 51488

To Whom It May Concern:

We appreciate the work of the Department of Labor (DOL), the Department of the Treasury, and the Pension Benefit Guaranty Corporation (Agencies) on the Proposed Revision of Annual Information Return/Report (Proposed Revisions) and the DOL's work on the Amendments to the Annual Reporting and Disclosure Regulations under 29 CFR § 2520 (Proposed Amendments). In addition to our request to delay any substantive changes unrelated to those required under the Setting Every Community Up for Retirement Enhancement Act (SECURE Act), our comments reflect provisions we support, modifications and clarifications requested, and responses to requested comments.

Background

The Employee Retirement Income Security Act of 1974 (ERISA) provides that every covered employee benefit plan must publish an annual report and provide it to the Secretary and make it available and furnish it upon request to participants.¹ ERISA lays out what must be included in the annual report, such as the financial statement and schedules and the information provided by the administrator, which covers basic plan demographics and administrative information.

There is scant legislative history on the annual report. However, it is clear from the legislative language that the purpose is to provide information to participants, employers in multiemployer plans and the Agencies, not to third parties unrelated to the plan. In developing in any new requirements, the Agencies should keep this in mind and not add administrative burden to collect data elements for parties unrelated to the plans.

The SECURE Act amended ERISA to allow for pooled employer plans (PEPs), and it added specific information that PEPs must include on their annual report. PEPs were effective as of

¹ ERISA § 103(a)(1)(A); 29 U.S.C. § 1023(a)(1)(A).

January 1, 2021, which means that the 2021 plan year annual report will be due in 2022. The SECURE ACT also provided for certain defined contribution group (DCG) plans to file a combined Form 5500. The SECURE Act mandated that the Secretary of the Treasury and the Secretary of Labor modify the Form 5500 “so that all members of a group of plans ... may file a single aggregated annual return or report.”² This provision is to be implemented no later than January 1, 2022, and to apply to Forms 5500 for plan years beginning after December 31, 2021.³

Current Changes Should Only Reflect the SECURE Act

The SECURE Act mandates the Agencies amend the Form 5500 and any applicable regulations by at least January 1, 2022 to implement the PEP and DCG plan provisions. However, there is nothing in the SECURE Act or other legislation that would mandate that the Agencies implement any other changes to the Form 5500 at this time. Given that the Agencies currently have a special project focusing “on a broader range of improvements to the Form 5500 annual reporting requirements”⁴, we suggest that any changes outside of those required for PEPs and DCG plans be included in the broader Form 5500 project because any changes to the reporting required on the Form 5500 and schedules takes time and cost to implement, and implementing changes in stages rather than all at once is much more burdensome.

However, our comments reflect our concern with the provisions unrelated to PEPs and DCG plans in the event the Agencies go forward with these changes or these changes are included in future rulemaking.

Support

Small Plan Determination

Under the Proposed Revisions, in determining whether a plan is a small plan for reporting purposes, instead of using all employees eligible to participate, filers would only need to look at the number of participants with account balances as of the beginning of the plan year. We support this change, especially in light of the SECURE Act’s long-term, part-time employee provision that would make more employees eligible, but who may not necessarily participate. We agree with the Agencies that this change will reduce costs for small employers, and it should help encourage plan formation. Furthermore, because this is a change in the instructions and does not add additional data elements, this change could be implemented immediately.

Schedule MB

The Proposed Revision to the Form MB would add a new line 6f that would require multiemployer, defined benefit pension plans report the interest rate used to determine the

² SECURE Act § 202(a).

³ SECURE Act § 202(e).

⁴ In its Fact Sheet, the DOL states that “the DOL has added a separate project to its semi-annual regulatory agenda that would focus on a broader range of improvements to the Form 5500 annual reporting requirements. That regulatory action is part of a strategic project with the IRS and PBGC to improve the Form 5500 Annual Return/Report.” See [SECURE Act and Related Revisions to Employee Benefit Plan Annual Reporting on the Form 5500 \(dol.gov\)](#).

present value of vested benefits for withdrawal liability determination. We support this change because it will bring more transparency to employers that participate in these plans. However, as noted above, if the Agencies' ongoing Form 5500 project includes other changes to the Form MB, this change should be included in those proposals rather than forcing plans to implement reporting changes in stages.

Modifications and Clarifications

Schedule H, line 4i and 29 CFR § 2520.103-10(b)(1)(i)(G)

Not only does the proposal establish a standardized electronic filing format for line 4i, but it also adds the following new data elements:

- Hard to value assets;
- CUSIP, CIK, LEI, NAIC Company code, or other registration number;
- The assets category of amounts from line 1b, and whether such asset is:
 - Held through a CCT or PSA that did not file a Form 5500;
 - A designated investment alternative (DIA) in a defined contribution plan;
 - A qualified default investment alternative (QDIA) in a defined contribution plan;or
 - Held in a participant-directed brokerage account that is required to be broken out and separately reported;
- If the asset is either a DIA or a QDIA, the total annual operating expenses for the DIA expressed as a percentage of assets that were furnished to the participants and beneficiaries in their most recent "404a-5" statement.

Participant-directed brokerage account assets reported in the aggregate generally may be treated as one asset held for investment purposes. However, investment in tangible personal property, loans, partnership or joint venture interest, real property, employer securities or investment that could result in a loss in excess of the account balance of the participant or beneficiary must be reported as separate aggregation of assets on line 4i(1), with an indication of which of the line 1c breakouts they were reported.

In footnote 40 of the Proposed Revisions, the Agencies claim that the requirement to include the total annual operating expenses from the 404a-5 statements is intended to help further the objective of helping America's workers manage and invest their contribution to their 401(k) plans by allowing "third-party data aggregators to build tools that will help employers, participants and beneficiaries, the Agencies and other interested members of the public evaluate and monitor investment alternatives being made available for America's workers to save their retirement."⁵

First, as noted above, the Form 5500 is to provide information to participants and the Agencies, not for third parties or other members of the public. Given that this information already is provided to each participant, it is unclear how including it in the Form 5500, which is not

⁵ 86 Fed. Reg. 51501(Sept. 15, 2021).

directly provided to participants, is helpful. The requirement to include total annual operating expenses for a plan's DIAs from the *most recent* 404a-5 statement also will create confusion and additional burdens. Plans furnish these statements at different time intervals, and in some cases the *most recent* 404a-5 statement may be issued after the close of the plan year but before the relevant Form 5500 is due, resulting in information for the current plan year being reported on the Form 5500 for the prior plan year, which could be particularly confusing if the plan has made recent changes to its DIA line-up during the current plan year.

Even were ERISA's goal to provide plan information to third party aggregators, merely providing the expense ratios of a plan's DIAs does not provide meaningful opportunities for data analysis because it is not comparing apples to apples because different DIAs or QDIAs will have different operating expenses. Also, as noted above, the data will likely be inconsistent because of the timing of filing the Form 5500, making it of little use in helping employers compare costs. This information could also have significant unintended consequences of increasing lawsuits against plans by empowering plaintiffs' lawyers to bring settlement-based excess fee cases based solely on isolated information from the Form 5500 filing without full context.⁶

With respect to brokerage windows, we agree that any assets reported in the aggregate generally should be treated as one asset held for investment purposes. However, plans should not be required to break down brokerage window investments any further because doing so may not be possible, and, where it is, will be costly because of the need to involve other third parties, yet it adds limited value to the Agencies.

Finally, were the Agencies to keep this provision in future rulemaking, it also should clarify what are hard to value assets. It would be seemingly unfair to ask fiduciaries to report such assets, when DOL has not provide more guidance in this area even though it has been requested to do so.⁷

DCG Plans: Same Investment or Investment Options

For a DCG plan to be able to file a consolidated return, Section 202(c)(3) of the SECURE Act requires that all plans "provide the same investments or investment options to participants and beneficiaries." DOL should clarify that this requirement is met where there is a common investment platform where participating plans may select from available investments, but each participating employer is not required to make all investment available to their employees.

Pooled Employer Plans

On June 17, 2020, the DOL published a Request for Information (RFI) related to PEPs. Within the RFI, the DOL specifically requested information related to conflicts and prohibited

⁶ The number of ERISA excess fee class action suits, many of which are copycat cases filed by a handful of law firms, has exploded in the past 18 months, culminating in over 100 excessive-fee suits in 2020—a five-fold increase over the prior year, and there are numerous more cases that have been filed in 2021. See *Understanding the Rapid Rise in Excessive Fee Claims*, available at [pension-trustee-excess-fees-fiduciary-whitepaper.pdf \(aig.com\)](#)

⁷ See Advisory Council Report on Hard to Value Assets and Target Date Funds available at <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/hard-to-value-assets-and-target-date-funds>; U.S. Dep't of Labor Office of Inspector Gen., 09-13-001-12-121, Employee Benefits Security Administration Needs to Provide Additional Guidance and Oversight to ERISA Plans Holding Hard-To-Value Alternative Investments available at [09-13-001-12-121b.pdf \(dol.gov\)](#)

transaction exemptions (PTEs), including whether the current PTEs are sufficient, and, if not, what amendments or new PTEs would be needed. The DOL received 30 comments to the RFI, many of which addressed this issue. However, to date, the DOL has not issued any guidance in this area.

The SECURE Act provides that the Secretary “shall issue such guidance as the Secretary determines appropriate to carry out this subsection, including guidance . . . to identify the administrative duties and other actions required to be performed by a pooled plan provider under this subsection.”⁸ However, to date, the Secretaries have not issued guidance or regulations with respect to a pooled plan provider’s administrative duties.

The Proposed Revisions would require a pooled plan provider to acknowledge in writing its administrative responsibilities for the plan. In addition, the pooled plan provider would be required to disclose whether any services were provided through affiliates or other related parties, and, if relying on a PTE, list the PTE number. Given that the DOL has not issued any guidance with respect to either of these items, a pooled plan provider should not be required to make such affirmations or disclosures.

DCG Plans

Form 5558

In the preamble to the Proposed Amendments and in footnote 20 to the Proposed Revisions, the Agencies state that to extend the due date for DCG plan reporting, each participating plan would have to submit the Form 5558 to the IRS. We propose that the DCG plan administrator be allowed to submit one form on behalf of all participating plans on whose behalf it is filing the Form 5500.

Audit

The Proposed Amendments would require that each participating plan is either audited by an independent qualified public accountant or satisfies the waiver requirement. Proposed Amendment § 2520.104-51(c)(4)(iii). Nothing in Section 202 of the SECURE Act requires that there be an audit at the participating plan level rather than at the trust level. If the purpose of Section 202 is to ease administrative burdens of plans participating in a DCG plan, requiring audits at the plan level frustrates this purpose.

Plans Funded Through Insurance or Custodial Arrangements

The Proposal Amendments would not allow plans without trustees that are funded through insurance products or custodial accounts to participate in a DCG plan filing. There is no indication that Congress intended the group filing alternative not to apply to plans exempt from ERISA’s trust requirement, including 403(b) plans offered by educational and nonprofit employers. Even if that were true, Section 202 of the SECURE Act does not prohibit the Agencies from allowing these plans to participate in DCG plan filings on similar terms.

⁸ 26 U.S.C. §413(e)(4)(A)(i); 29 U.S.C. § 1002(44)(C)(i).

Requested Comments

Employer and Brokerage Window Investment in DCG Plans

In the preamble to the Proposed Revisions, the Agencies ask whether the final regulation should allow investment in employer securities or brokerage windows to be investment options in DCG plans. Although likely rare, we believe that both should be options. With respect to employer securities, if this is not allowed, this may preclude an existing plan from transitioning to a DCG plan. Given that the point of the DCG plan filing is to lessen administrative burdens, merely because employer securities are allowed, should not preclude its use. Furthermore, it may be possible that that employer securities could be a part of a more diversified "plan asset" fund, such as a collective investment trust, that is available as a DIA. In such a case, such indirect holding of employer securities should not preclude a plan from being part of the DCG plan.

With respect to brokerage windows, the brokerage window itself should be looked at as an investment option, not each underlying investment. As such, it would not contradict Section 202(c)(3)'s requirement that a DCG plan provide the same investments or investment options to participants and beneficiaries.

Schedule SB

The Proposed Revisions would require plans with 500 or more total participants as of the valuation date to attach a projection of benefits expected to be paid in each of the next 50 years broken down by active participants, terminated vested participants and retired participants and beneficiaries receiving payments, assuming no additional accruals, experiences are in line with valuation assumptions, no new entrants are covered by the plan, and benefits are paid in the form assumed for valuation purposes. The rationale for the change is to "better align filing requirements for single-employer defined benefit plans with the more detailed requirements for PBGC-insured multiemployer plans." However, the DOL does not say why this is needed or how this information will be useful, but they do state that they "do not believe the benefit projection requirement would be burdensome for such single-employer plans, as almost all valuation software automatically generates these numbers."⁹ We do not see a reason for including this other than adding additional administrative burdens on plans, particularly for plans that could not easily generate these numbers through valuation software.

Administrative Expenses and Other Fees

In the preamble to the Proposed Revision, the Agencies asked whether the final regulation should require more detailed reporting regarding the fee and expense information on the Form 5500. We do not believe that including participant level fees, such as QDRO processing, on the Form 5500 is necessary. This information is already disclosed to participants and beneficiaries, and requiring it on the Form 5500, which is not directly provided to participants, would do nothing in helping their understanding of plan expenses.

⁹ 86 Fed. Reg. 51488, 51502 (Sept. 15, 2021).

Conclusion

We appreciate the Agencies' need for the changes related to PEPs and DCG plans. However, as noted above, any other changes should be part of the broader Form 5500 Agency project.

Sincerely,

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