Torrillo & Associates Certified Public Accountants

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October 18, 2021

Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Ave. NW
Washington, D.C. 20210

Attention: Proposed Form 5500 Revisions RIN 1210-AB97

Agency: Employee Benefits Security Administration, Labor;

Action: Notice of Proposed Forms Revisions

To whom it may concern:

This letter is being provided to you to submit comments on behalf of our firm, Torrillo & Associates, LLC, regarding the proposed revisions to the Form 5500 Annual Return/Report.

We have reviewed the proposal released on September 15, 2021 and below contains our comments.

B. Recent Legislative Changes Supporting Proposed Annual Reporting Improvements

Pooled Employer Plans

As your document states, Section 101 of the SECURE Act amended ERISA to allow for a new type of ERISA-covered multiple employer plan, a defined contribution pension plan called a pooled employer plan ("PEP") operated by a pooled plan provider. Since the SECURE Act became law on December 20, 2019, employee benefit plan auditors have been struggling to determine the proper audit approach for such plans due to their unique nature.

In particular, each adopting employer has its own control environment for payroll and participant data and each adopting employer can have its own plan provisions related to items such as eligibility, vesting, employer contributions, etc. We have heard auditors discuss materiality and testing certain payroll, participant data and adopting employer provisions on a limited basis. However, we struggle with how any auditor will be able to utilize materiality or perform such audits on a limited basis unless the PEP or Pooled Plan Provider ("PPP") is testing payroll, participant data and adopting employer provisions of all the participating employers

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from which the auditor could then test. The controls for payroll, participant data and the operations of any specific adopting employer provisions, are at the adopting employers and not the PEP or PPP. Unlike a corporate audit, the PEP or PPP does not control the adopting employers. We are not aware of any requirement for PEP's or PPPs to test payroll, participant data and adopting employer provisions, and therefore we do not expect that many will do so, leaving the auditor to determine which and how many adopting employers' controls, provisions, and data needs to be tested. As these plans grow in size and in the number of adopting employers, how is an auditor to get comfortable with a plan with 50, 100, or 1000+ adopting employers? Must the auditor test each of those adopting employers' payroll, participant data and adopting provisions or can the auditor test on a limited or rotational basis the adopting employers which have their own unique controls?

We are concerned that overall benefit plan audit quality might decline if auditors take various views as to how these plans should be audited. We know the DOL does not make auditing standards, however, we do know the DOL is very concerned about audit quality and protecting participants. One question on which we believe the DOL can give guidance and may help auditors assess what level of testing at the adopting employer level will be required is:

> *Does the DOL expect plan participants in PEPs to receive the same level of protection under ERISA that they receive currently for single employer plans*?

If the DOL expects the same level of protection, we would expect that, unless the PPP or PEP itself, puts in its own controls to test all of the adopting employer's provisions, payrolls and participant data on a regular basis, the auditor would need to get comfortable with such, just like they do currently for single employer plans.

We have heard others focus on the commonalities with multi-employer plans for these audits. However, we disagree with this analogy. Unlike multi-employer plans, there is no common plan sponsor, no payroll audits and no common plan provisions. A PEP could possibly have thousands of adopting employers and that would mean thousands of control environments, thousands of payroll processes, thousands of differences in plan provisions and so on. If each and every adopting employer is expecting the same level of assurance, then it may be near impossible to complete the plan audit in a timely manner if at all.

We have also heard others state that the adopting employers are like subsidiaries in a corporate audit, and the auditing of these adopting employers can be rotated just like in a corporate audit. However, we do not believe that this is a good analogy, as a big difference is that in a corporate audit, the parent company controls all of the subsidiaries that are included in the financial

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reporting. In a PEP, the PEP nor the PPP, control the adopting employers and therefore each adopting employer is its own unique control and reporting environment.

If the DOL expects the same level of protection, while the economies of scale will still be beneficial. It will force PEPs and PPPs to ensure controls are in place to protect participants. Either the PEP or PPP, will need to put controls in place to test the adopting employer's provisions, payroll and participant data which can be tested, of the number of adopting employers is limited to a population which can be audited. While efficiencies could be gained, testing a PEP or PPP will be similar to testing provisions, payroll and participant data in a single employer and therefore, the amount of adopting employers, could limit what an auditor can do. Even the largest of firms will struggle with scope if they must perform such testing with PEPS that have 100 plus adopting employers. Without guidance from the DOL, many may adopt an approach that is beneficial to complete such work, but may not give the same level of protection to participants.

We have already heard people in the marketplace touting one of the advantages of PEPs is that the adopting employers don't need to worry about audits. While this is not factually correct, it shows what some think of how the process will be different. Plan participants of a single employer plan subject to audit, have plan provisions, payroll and participant data audited annually. If the DOL expects the same level of protection to participants in PEPS, we would expect the auditors, especially if the PEPs or PPP's do not establish their own process for testing controls of the adopting employers, to audit the adopting employer's payroll, participant data and plan provisions annually.

By stating whether the DOL expects expect plan participants in PEPs to receive the same level of protection that they receive currently under a single employer plan, it will not only give auditor more perspective on how such plans should be audited, it will help the PEP industry determine what controls that they must have in place to ensure participants remain protected.

C. Overview of Proposed changes to Forms, Schedules and Instructions

General Proposed Changes—Participant Counts

The proposed revisions also include a change to the method of counting participants for determining when a defined contribution plan may file as a small plan. Specifically, instead of using all eligible to participate, filers would look at the number of participants/beneficiaries with account balances at the beginning of the plan year. Currently, ERISA Section 3(7) generally defines a participant as any employee or former employee who is or may become eligible to receive a benefit of any type from an employee benefit plan. Employee benefit plans filing Form

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5500 as a large plan (a plan with 100 or more participants as of the beginning of the plan year) are generally required to engage an independent qualified public accountant pursuant to ERISA Section 103(a)(3)(A). The proposed revision to the method of counting participants would significantly decrease the number of plans requiring an audit. Again, this appears to be contrary to the purpose of the audit requirement. The DOL has not addressed this consequence of the proposed revision. We understand that often, plan sponsors have difficulties determining the number of eligible participants. However, they ultimately benefit by going through the exercise of determining eligible participants as it lessens the risk of incorrect exclusion of eligible participants. In addition, we understand that the DOL values the assurance obtained by employee benefit plans that have annual audits as they have invested significant time and resources of their own on audit quality studies. In addition, the DOL was instrumental in the efforts to revise the auditor's report for audits of financial statements subject to ERISA. Therefore, we do not understand why they would want to reduce the number of plans subject to audit. We recommend that the DOL address this difference.

Sincerely,

Torrillo & Associates, LLC

Cc: David Torrillo, CPA/ABV, CVA
JulieAnn Verrekia