



November 1, 2021

Via <http://www.regulations.gov> and e-mail

The Honorable Ali Khawar
Acting Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

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

Dear Acting Assistant Secretary Khawar:

AARP, on behalf of our 38 million members and all older Americans nationwide, appreciates the opportunity to submit comments on the Department of Labor's proposed revision of the annual information return/report (Form 5500) and corollary changes to the reporting and disclosure regulation. A major priority for AARP is to assist Americans in accumulating and effectively managing adequate retirement assets to supplement Social Security. Many of our members currently participate, or have participated, in employer-sponsored retirement plans. Timely, accurate and understandable reporting to participants on employee benefits is one of the hallmark requirements of the Employee Retirement Income Security Act of 1974 (ERISA) and a cornerstone of effective retirement planning and management.

When Congress passed ERISA in 1974, it imposed a new set of disclosure duties on plan administrators in order to give employees broad rights of access to materials necessary for them to understand whether their plan was financially sound and being administered in accordance with ERISA's rules and regulations. Congress recognized that participants and beneficiaries are the primary enforcers of their rights under ERISA. S.Rep. No. 127, 93 Cong., 2d Sess. (1974), *reprinted*

in 1974 U.S.S.C.A.N. 4838, 4863. Moreover, ERISA's disclosure requirements reinforce ERISA's fiduciary requirements:

[T]he safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.

Id. AARP views the Form 5500 as reporting and disclosure that promotes transparency and financial accountability for all retirement plans, including multiple employer plans (MEPs) and pooled employer plans (PEPs).

Defined Contribution Retirement Plan Groups (DCG) Reporting

With regard to consolidated filings for defined contribution retirement plan groups (DCG), AARP endorses the Department's proposal to require each individual plan to file a separate schedule with information concerning that individual plan to enable participants to identify any group which is permitted to file a consolidated report. Without this separate schedule, participants will not be able to know where they stand in relation to their plan. We note that this individual schedule would require less information than if the plan were to file its own form.

AARP appreciates the Department's use of the statutory requirements for determining the eligibility requirements in order for a plan to be a part of the DCG.¹ AARP supports the definition of eligible plan assets, including the total restriction on the holding of employer securities as an investment, so that such assets have a readily ascertainable value.

AARP also supports the restriction of brokerage windows in DCG arrangements. We believe that the type of disclosures needed to ensure that plans with these arrangements are meeting their fiduciary duties are unworkable in a group reporting arrangement. Moreover, the purpose of a having a brokerage window in a

¹ Plans included in the DCG must be defined contribution retirement plans with the same plan administrator, named fiduciaries, trustees, plan year, investment options, and trust.

401(k) plan is to permit plan participants to invest in a far wider range of investments than the typical menu of limited investment options offered by plans directly. Plans with brokerage windows would not meet the same investment option requirement which we deem crucial to these group reporting requirements.

AARP does not support simplified reporting for DCGs in general nor do we support permitting small DCGs to file as small plan filers. Given that under the DCG rules numerous plans may file together, it is imperative that reviewers of the Form 5500 be able to determine which individual plans are a part of the DCG. Obviously, each individual plan (not as part of a DCG) could still file as a small filer.

AARP also does not support permitting multiemployer plans and MEPS to take advantage of the consolidated DCG reporting arrangements. These types of plans already take advantage of various types of consolidation so permitting additional reporting consolidation would lessen transparency. Significantly, participants will find these forms more difficult to read and understand, reducing transparency into their own plans.

Plan Auditing

AARP recognizes that an independent qualified public accountant (IQPA) audit is crucial to the prudent operation and administration of an employee benefit plan. An IQPA examines the plan's financial statements and schedules to ensure they are presented fairly and in conformity with Generally Accepted Accounting Principles (GAAP) and provide an opinion as to the condition of the plan. The purpose of such an audit is to ensure that participants and beneficiaries are receiving protections under ERISA and that their plan is being operated within ERISA's standards.

A plan audit can be considered an "operational check-up" that is critical to the overall health of the plan. An audit performed by auditors who have a good understanding of the plan requirements and who are committed to meeting auditing standards can reveal many problems that otherwise may go undiscovered, including mistakes that occur during the day-to-day administration of the plan. "The fact of the matter is that most plans would not get any review of their operations if

not for the audit requirement.” Aronson LLC, *The DOL Audit Quality Study / Understanding & Avoiding the Risks of a Deficient Audit* at 6, <https://aronsonllc.com/wp-content/uploads/2018/01/The-DOL-Audit-Quality-Study-Understanding-and-Avoiding-the-Risks-of-a-Deficient-Audit.pdf>.

Consequently, AARP does not support the proposal’s change in counting of participants to only those participants with an account. The proposal potentially leaves too many plans unaudited – including plans with below average participation rates – with no opportunity for review of plan operations.

Moreover, AARP does not support the concept of auditing different types of plans together. There are significant enough differences in the standards for and operation of plans that they should not be treated the same and not audited together.

AARP supports the requirement of a trust-level audit and trust-level financial statements in addition to an audit for each participating plan. AARP also strongly supports the continuing separate audit requirement for a large plan that elects to participate in a DCG and file with the DCG’s consolidated Form 5500.

Multiple Employer Welfare Association (MEWA) Reporting

With regard to changes in the reporting and disclosure for MEWAs, AARP supports the proposal including adding the list of contributing employers. This is consistent with similar disclosures for other types of plans in the proposal.

If the Department changes where information is going to be reported for MEWAs (or any other plan), when an individual searches for a plan there should be a notation that additional information can be found on another form. Participants may not have the sophistication to know that they need to look at multiple forms to obtain a complete financial picture of their plan.

Multiple Employer Plans (MEP) Reporting

AARP commends the Department for following the statutory criterion of requiring participating employer information for all MEPs, including PEPs, as well as the new aggregate account information that is relevant only for pension plans.

AARP supports the addition of Part III of the Schedule MEP requiring PEPs to file PEP-specific information. In particular, we support requiring the PEP to provide the “ACK ID”—the acknowledgement code generated by the system in response to a completed filing—for the most recent Form PR submitted. Without this information, it would be extremely difficult for participants to find the Form PR. Consequently, we support the Department’s decision to reject the Form 5500 as incomplete if the “ACK ID” is not provided. Finally, we support the requirement that PEPs must indicate whether certain services were provided by an affiliate, and, if relying on a prohibited transaction exemption for the use of an affiliate, to identify the prohibited transaction exemption by number.

AARP does not support simplified reporting for MEPs. As we state elsewhere, the Form 5500 promotes transparency and financial accountability and there is no evidence demonstrating that MEPs are better operated than single employer plans. Having said this, AARP suggests that two questions be added to the Schedule MEP. The first question is the total number of participants for the MEP and the second is the number of participants for each participating employer. These questions will enable the Department of Labor to determine the number of MEPS and types of participating employers which meet the 1,000/100 threshold for a potential simplified report before deciding whether simplified reporting should be permitted, and, if so, the conditions surrounding such reporting.

Defined Benefit Plan Reporting

With regard to the Schedule MB for multiemployer plans, AARP supports the government’s proposals including the reporting of withdrawal liability payments and amounts as well as demographic information such as the average age and monthly benefit for terminated vested and retired participants. AARP suggests that a question be added to the Schedule as to whether the interest rate used in

determining the present value of vested benefits for withdrawal liability has changed from the previous year and, if so, the reason for the change.

AARP also supports the proposed changes to Schedule R requiring multiemployer plans to list employers that contributed more than 5 percent of the plan's total contributions for the plan year, along with the 10 highest contributing employers to the plan for the plan year, regardless if a top contributor meets the 5 percent rule. This will permit the government to better monitor the health of multiemployer plans.

Likewise, AARP supports the proposed changes to Schedule SB for single-employer defined benefit plans, especially the demographic and benefits reporting. Such reporting is consistent with the reporting required of PBGC-covered multiemployer plans.

Financial Reporting

Excessive fees or lower returns in investment options negatively affect 401(k) account balances. Indeed, small changes to 401(k) plan fees substantially affect the amount of benefits that plan participants accrue for retirement and whether they will have adequate assets in retirement.² Of course, high fees and expenses also negatively impact the amount of defined benefit plan assets. AARP has consistently advocated for more transparency concerning the amount of fees and expenses, and vigorously supports the proposal's more detailed fee and expense reporting requirements as one more step towards transparency and a determination of whether a plan's fees and expenses are reasonable. Such reporting is particularly important for MEPs where fraud, abuse and imprudent investments may be more difficult to detect due to the pooled arrangement.

We also suggest an additional question to ascertain how fees and expenses are allocated among plans in various pooled arrangements. For example, it may not be unreasonable for an employer with 50 employees to pay different fee(s) than an employer with 2,000 employees.

² The Government Accountability Office (GAO) estimated that \$20,000 in a 401(k) account that had a one percentage point higher fee for 20 years would result in an over 17% reduction--over \$10,000--in the account balance. U.S. Gov't Accountability Office, GAO-07-21, *Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees* 7 (2006).

AARP suggests that the Form 5500 would be an appropriate vehicle for collecting information on fees charged to participants or alternate payees by a retirement plan—including plan service provider fees the plan passes on to participants—for review and qualification of domestic relations orders (DROs). The Form 5500 only needs two questions: does the plan charge any fees for review and qualification of DROs; and if so, what is the fee. DOL should collect this data so it can make a determination whether any guidance or regulation is needed.

AARP also urges that the Department, in its broader project, consider additional changes to the Form 5500 regarding fees including, among others, information about indirect service provider compensation, revenue sharing and weighted average of fund operating expenses (based on fund balance).

AARP agrees that the updates to Schedule H to standardize an electronic format of plans' schedules of investment assets are crucial to the Labor Department's fiduciary enforcement.³ The current Form does not permit identification of ERISA plans that invest in a particular investment or type of investment. Such standardization will allow data aggregation and review so that the proposed changes are much more useful in identifying such ERISA plans.⁴ AARP commends the Department for this first step towards making the Form 5500 and its schedules more reader friendly and useful. We urge the Department, in its broader project, to consider other changes to the Form and its schedules to make it easier for participants and beneficiaries to access, find, and read. The DOL search function for Forms 5500 currently requires the searchers to already have in their possession a significant amount of information in order to find their plans.

Trust Information

We wholeheartedly agree that information about the trust – its name, its EIN, the name of the individual trustee or custodian, its address, and telephone number of the trustee or custodian – should be reported on the Form 5500. In this time of remote work, AARP suggests that the email address of the trustee and/or custodian be added as Line 6e. Moreover, as we have previously suggested to the

³ To enhance readability, any amount should be entered with commas.

⁴ For example, this change would have made it easier to identify those ERISA plans that had invested in the Madoff funds.

Department, AARP recommends that identifying and contact information should be requested for any person that touches the plan including, but not limited to, fiduciaries and service providers. Frequently, in plan documents and the Form 5500, the named fiduciary is designated either as a committee, Board, sponsoring employer, or particular officer by title alone (*e.g.*, Chief Financial Officer or SVP for Human Resources). This does not tell plan participants the identity of the actual people with responsibility for the plan. We urge the Department to require that where a fiduciary is other than a named individual (*e.g.*, committee, board, entity, or corporate position), the name, corporate position (if appropriate), address, telephone number and e-mail address of a primary designated individual contact be disclosed on the Form 5500. This would obviously include those individuals who have been delegated or asked by the corporate entity to serve in these capacities. If there are different organizations, committees, or entities that are listed on Form 5500, then the Form should require one primary designated contact for each such entity.

For additional suggestions for improving the Form 5500, see AARP Comment Letter, dated Dec. 5, 2016, to *DOL Proposed Revision of Annual Information Return/Reports and Proposed Rules - Annual Reporting and Disclosure*, <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB63/00139.pdf>.

Compliance Questions

AARP supports the addition of a nondiscrimination and coverage test question in order to permit the IRS to audit plans for noncompliance with the statutory standards. The corollary question as to the type of test the plan used to determine its compliance with the nondiscrimination and coverage standards is an essential follow-up question. These questions are particularly important given the proposed change to the method of counting participants to determine if the plan is a small plan. The instructions should reiterate the correct method of counting participants for nondiscrimination testing. Finally, knowing whether the employer is an adoptor of a pre-approved plan and the favorable opinion letter, its date and identifying information will be helpful for both participants and the government.

* * * * *

We appreciate the Department's interest and commitment to improving employee benefit reporting. We urge the Department to timely act and are willing to provide any further assistance as needed.

If you have any questions, please feel free to contact Michele Varnhagen of our Government Affairs office at MVarnhagen@aarp.org or 202-434-3829.

Sincerely,



David Certner
Legislative Counsel and
Legislative Policy Director
Government Affairs

cc: Timothy D. Hauser
Deputy Assistant Secretary

Joe Canary
Office Director
Office of Regulations and Interpretations