AMERICAN BENEFITS COUNCIL

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

Re: Comments on Proposed Revision of the Form 5500 Annual Information Return/Reports (RIN 1210-AB97)

Dear Sir or Madam:

The American Benefits Council ("the Council") appreciates the opportunity to provide comments on the proposed changes to the Form 5500 series annual information return/report ("proposed revisions") issued by the Department of Labor (DOL), Internal Revenue Service (IRS) and Pension Benefit Guarantee Corporation (PBGC) (collectively, "the agencies").[1]

The proposed revisions, if adopted, would implement critical provisions of the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019, including the requirement that DOL and IRS provide a consolidated Form 5500 reporting option for certain groups of plans (referred to in the proposed revisions as "Defined Contribution Groups," or DCGs) and the expansion of multiple employer plans (MEPs) to include a new type of MEP called a "pooled employer plan" (PEP). In addition, the proposed revisions include numerous changes that go beyond what is required by the SECURE Act and that would more broadly affect employee benefit plans.

The Council appreciates the agencies' efforts to revise the Form 5500 reporting requirements in order to implement these time-sensitive and important SECURE Act

[1] 86 Fed. Reg. 51,488 (Sept. 15, 2021).

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provisions. These statutory provisions are critical in furthering the ongoing efforts of the government and private sector to provide small employers in particular with cost-effective and low-burden options to offer retirement plan coverage to their employees. As discussed below, however, **we are very concerned that the proposed revisions would—contrary to the statute and congressional intent—impose excessively burdensome requirements on DCGs and force a restructuring of widespread, current business practices for some of our members**. The proposed revisions would thus fail to fully achieve the efficiencies for DCGs that were envisioned by Congress.

We are further concerned that, similar to the agencies' 2016 proposal to significantly overhaul the Form 5500, the proposed revisions would include a material expansion in the amount and types of information that must be reported. **We remain concerned that some of these changes would create significant administrative burdens for employee benefit plan sponsors and service providers, unnecessarily increase the cost of operating employee benefit plans and reduce the appeal of plan sponsorship**.

Our comments below on the proposed revisions cover both retirement and health and welfare plans. Where applicable, our comments also apply to the proposed amendments to DOL's reporting requirements, which were published concurrently with the proposed revisions.[2]

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans. Virtually all our members file one or more Forms 5500 or assist plan sponsors in preparing and filing them.

SUMMARY OF CRITICAL ISSUES AND CONCERNS

Although we offer comments in this letter on numerous aspects of the proposed revisions to inform the agencies' efforts to update the Form 5500, we first highlight here our most significant concerns with the proposal, each of which is described in more detail below.

- **Separate audit requirement for each large plan in a DCG:** As discussed below, in implementing the SECURE Act's consolidated Form 5500 reporting option, DOL has proposed for the first time to require multiple audits with respect to a

[2] 86 Fed. Reg. 51,284 (Sept. 15, 2021).

single Form 5500 by imposing separate audit requirements on each large plan within a DCG reporting arrangement. Based on information from accounting firms, this can increase costs for each such plan by almost $7,000.

Requiring separate audits of each large plan in a DCG is contrary to the statute and congressional intent that all plans in a DCG reporting arrangement should be aggregated for purposes of the Form 5500. **We urge DOL to reconsider this critical point and instead require a single, aggregated audit of the DCG.** Providing for an aggregated audit is a threshold matter in implementing the SECURE Act in a manner that will help achieve the key efficiencies necessary for DCG reporting arrangements to serve as an important tool in reducing costs and increasing plan coverage. This approach breaks no new ground, since the audit process should be identical to the audit process for PEPs and MEPs.

- **"Same trustee" vs. "same trust" requirement for DCGs:** As discussed below, the SECURE Act requires each plan in a DCG to have the same trustee. It appears, however, that the proposed revisions and DOL's accompanying proposed rule would not only require plans in a DCG to have the same trustee but would also require they have the *same trust*.[3] **The proposal would thus impose an additional requirement on plans participating in a DCG that has no basis in statute** and it does so without explanation or acknowledgment, appearing to conflate the statute's "same trustee" requirement with a "same trust" requirement.

  Requiring all plans in a DCG to have the same trust would inappropriately and unnecessarily preclude the use of anticipated DCG structures where each participating plan maintains a separate trust but shares the same trustee, as is clearly permitted under the statute. We thus urge DOL to provide that each plan in a DCG need only have the same trustee, whether that be accomplished through a single trust or multiple trusts. In addition, the trust audit requirement—if retained in the final revisions to Form 5500—should be revised to allow for an aggregated trust audit of the trusts with respect to plans in the DCG that are subject to the audit requirement.

- **Requirement for MEPs to report aggregate account balances should be limited to defined contribution MEPs:** The SECURE Act newly requires MEPs to report the "aggregate account balances attributable to each employer in the plan

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[3] We note that there appears to be an inconsistency in Proposed DOL Regulation Section 2520.104-51(c)(2) and (4). Whereas paragraph (2) would require all plans participating in a DCG to have the "same trustee…('common trustee') and trust(s) ('common trust')" (emphasis added), which implies that multiple trusts would be permitted with respect to the plans in a DCG, paragraph (4) would provide that all plans in the DCG must "[h]ave the investment assets held in a single trust of the DCG reporting arrangement."

(determined as the sum of the account balances of the employees of such employer (and the beneficiaries of such employees)).” The proposed instructions related to this requirement suggest that all MEPs—including defined benefit MEPs—are required to provide this new information. However, the instructions do not provide any explanation regarding what is meant by “aggregate account balances” for a defined benefit plan.

As a threshold matter, the phrasing of this new requirement in the SECURE Act only makes sense in the context of a defined contribution plan—in a defined benefit plan there are not “account balances” of each employee that sum up to the total “aggregate account balances” of the employer. **Thus, we urge the agencies to clarify in the final instructions that this requirement does not apply to defined benefit plans.** If the agencies determine that the requirement does apply to defined benefit plans, then **it is vital that the Form 5500 instructions provide a workable means for defined benefit plans to provide this information using readily available data and without imposing significant new administrative burdens and costs on the plans**. Further, we ask that DOL apply a good faith standard to the aggregate account balances as reported by defined benefit MEPs.

- **Proposal to prohibit plans funded by insurance or custodial accounts from participating in a DCG:** DOL and IRS state that they do not believe that the SECURE Act requirement for a “trustee” can be read to include “plans without trustees funded by insurance or custodial accounts pursuant to the trust exceptions in ERISA [S]ection 403(b).” DOL and IRS requested comments, however, on whether they should nevertheless use their general regulatory authority to provide a consolidated Form 5500 reporting option for such plans. As discussed further below, the Council encourages DOL and IRS to allow these plans to join a DCG. A prohibition on their participation is an unnecessarily restrictive reading of the statute. What Congress requires in Section 202 of the SECURE Act is simply that all of the plans have the “same” trustee, and two plans that do not use a trustee clearly have the “same” trustee in the plain meaning of that phrase.

- **Streamlined option to extend the filing due date for plans in a DCG:** DOL has proposed that, because participating in a DCG filing is an alternative to each participating plan filing its own Form 5500, “that would mean that each plan would have to submit its own IRS Form 5558 to extend the plan’s due date, and, as a consequence, extend the due date for the DCG filing.” DOL requested comments, however, on whether DCG reporting arrangements should be able to file a single Form 5558 to obtain an extension for filing the DCG’s Form 5500 on behalf of the participating plans as an alternative. As discussed further below, our members **strongly support allowing the administrator of the DCG to file a**

single Form 5558 on behalf of the plans that are anticipated to be included in the DCG's Form 5500 and we urge DOL to make this option available.

- **Expanded reporting, in general:** With respect to the proposed revisions' expansion of the Form 5500's reporting requirements in general, including the proposed changes to Schedule H, we urge the agencies to eliminate information requests that will create unnecessary administrative burdens and increase costs without providing meaningful benefits for plan sponsors, participants, or the public. Much of the cost of the proposed revisions will ultimately be passed on to the plans and participants for whose benefit these changes are being sought. We further urge the agencies not to proceed with proposed additional information requests that would further drive up the cost of plan sponsorship by unnecessarily increasing litigation risks for plan sponsors and service providers.

COMMENTS REGARDING PROPOSED RETIREMENT PLAN REPORTING CHANGES

I. Comments Regarding Proposed DCG Reporting Requirements

Section 202 of the SECURE Act requires DOL and IRS to allow DCGs to file a single consolidated Form 5500 if certain requirements are met. Very generally, to be eligible to file a consolidated Form 5500, the SECURE Act requires all plans in the DCG to have the same trustee, the same named fiduciary(ies), the same plan administrator and the same plan year. In addition, the plans must provide the same investments or investment options for participants and beneficiaries. The statute provides DOL and IRS with discretion over determining what information about each individual plan in the group should be included with the consolidated Form 5500 for purposes of enforcement and administration.

a. Overview of Proposed Reporting Requirements for DCGs

Very generally, DOL and IRS have proposed to implement Section 202 of the SECURE Act by requiring DCGs using the consolidated reporting option to:

- file Form 5500 under the rules that generally apply to a large defined contribution plan;
- include a Schedule DCG for each covered plan, including **separate audits for each of the participating large plans**; and
- hold the investment assets of the participating plans in a **single trust** of the DCG arrangement and include with the Form 5500 an **audit of the trust financial statements**.

In addition, the proposed revisions would require each plan in the DCG to meet certain conditions, including not holding any employer securities and being 100% invested in certain secure, easy-to-value assets (e.g., mutual funds). All information in connection with a DCG's consolidated Form 5500 report would be reported in the aggregate except for the information on Schedule DCG, which would provide plan-level information.

b. Proposed Requirement for Separate Audits of Each Large Plan in the DCG

Under current law, generally, a Form 5500 for a defined contribution plan must contain an opinion from an independent qualified public accountant ("IQPA") as to whether the plan's financial statements and schedules are fairly presented (the "audit requirement"). There is, however, generally no audit requirement with respect to a plan covering fewer than 100 participants. In other words, each Form 5500 must be accompanied by *at most* one opinion from an IQPA in order to meet the audit requirement.

Now, in implementing the SECURE Act's consolidated Form 5500 reporting requirement, DOL has proposed for the first time to require multiple audits with respect to a single Form 5500 by imposing separate audit requirements on each large plan within a DCG reporting arrangement. Based on information from accounting firms, this can increase costs for each such plan by almost $7,000.

Requiring separate audits of each large plan in a DCG is contrary to the statute and congressional intent that all plans in a DCG reporting arrangement should be aggregated for purposes of the Form 5500. ***We urge DOL to reconsider this critical point and instead require a single, aggregated audit of the DCG.*** Such an aggregated audit would preferably encompass only those large plans in the DCG, with no audit required in the case of a DCG reporting arrangement that consists only of small plans. Providing for an aggregated audit is a ***threshold matter*** in implementing Section 202 of the SECURE Act in a way that will achieve the key efficiencies necessary for DCG reporting arrangements to serve as a meaningful tool in reducing costs for employers and increasing retirement plan coverage for employees.

We would emphasize that the potential need to adapt current accounting standards to produce a single, aggregated audit with respect to a DCG should not prevent DOL from implementing the statute as intended. As with most standards, accounting standards must adapt—and have adapted—over time. For example, if a single audit of the DCG would require the development of a special financial reporting framework (e.g., a regulatory framework) under which the combined financial statements of a group of unaffiliated plans would be prepared, then DOL should develop such a framework to carry out the intent of the statute. And it is important to note that the

substance of the audit should be effectively the same as an audit of a PEP or a MEP, so an aggregated audit would not be breaking any new ground.

c. Proposed Requirement for Single Trust and Related Trust Audit Requirement

As noted above, one of the SECURE Act's requirements for plans that participate in a consolidated group Form 5500 filing is that each plan have the same trustee. It appears, however, that the proposed revisions and DOL's accompanying proposed rule would not only require all plans in a DCG to have the same trustee, but they would also require all plans to have the same trust.[4] The proposal would thus impose an additional requirement that has no basis in the statute and it does so without explanation or acknowledgment, appearing to conflate the statute's "same trustee" requirement with "same trust."

Although some of the Council's members might offer DCG reporting arrangements using a single "master" trust with sub-trusts for each plan, other members have anticipated offering DCG reporting arrangements in which each plan in the DCG would have its own separate trust while sharing the same trustee. As long as the statute's "same trustee" requirement is met, we believe it would be inappropriate for DOL to preclude the use of a particular structure that is clearly permissible under the statute. **We thus urge DOL to provide in the final revisions that each plan in a DCG need only have the same trustee and not the same trust.**

With respect to the proposed requirement that each DCG reporting arrangement include with the DCG's Form 5500 an audit of the trust's financial statements, it follows that, in keeping with the statutory requirement to simply share the "same trustee," **we request that DOL modify this requirement so that DCGs with plans that have separate trusts may file a single, aggregated audit of the trusts** related to the plans subject to the audit requirement. This approach would also be consistent with our request for a single, aggregated audit of the plans in a DCG, as described above.

d. Proposal to Prohibit Plans Funded by Insurance or Custodial Accounts from Filing as a DCG

As noted above, the SECURE Act requires that each plan participating in a DCG arrangement have the same trustee. In the preamble to the proposed revisions, DOL and IRS state that they do not believe that the SECURE Act requirement for a "trustee" can be read to include "plans without trustees funded by insurance or custodial accounts pursuant to the trust exceptions in ERISA Section 403(b)." DOL and IRS requested comments on whether they should nevertheless use their general regulatory authority to provide a consolidated Form 5500 reporting option for such plans.

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[4] See note 3.

The Council encourages DOL and IRS to permit plans without trusts that are funded by insurance or custodial accounts, such as Code Section 403(b) plans, to file as part of a DCG reporting arrangement. As DOL and IRS note, such plans generally do not have a trustee. Thus, for example, the argument is that a group of 403(b) plans without trustees can never satisfy the requirements to join a DCG. This argument is an unnecessarily restrictive reading of the statute. The reference to "trustee" in Section 202 cross-references ERISA Section 403(a), which applies to 403(b) plans, but specifically exempts 403(b) annuities or custodial accounts from needing a trustee. Thus, the trustee required by ERISA Section 403(a) is the same for all 403(b) plans, which is none. Moreover, Section 401(f) of the Internal Revenue Code provides that an annuity or a custodial account "shall be treated as a trust."

What Congress requires in Section 202 of the SECURE Act is simply that all of the plans have the "same" trustee and two plans that do not use a trustee clearly have the "same" trustee in the plain meaning of that phrase. Congress clearly could have required plans to use a trust to qualify as a DCG and chose not to do so. As a result, we believe that all plans that are funded by insurance or custodial accounts and that have the same one or more named fiduciaries, same administrator, same plan year, offer the same investments and similarly lack a trustee due to the ERISA Section 403(b) exemption should be permitted to file as part of a DCG arrangement.

Furthermore, the broader interpretation is consistent with the congressional intent behind Section 202 of the SECURE Act. There is no evidence of any intent by Congress to exclude plans funded by insurance or custodial accounts, which fit every other element of Section 202 from both a technical and policy perspective. But even if Congress for some unclear reason intended to limit Section 202 to plans with trustees, DOL should nevertheless use its general regulatory authority to offer plans that are exempt from the trust requirement and that have the same insurance or custodial account provider a similar opportunity to participate in a DCG reporting arrangement. A helpful option designed for small employers should not be made unavailable to such an employer simply because it has, for example, a 403(b) plan and is thus exempt from the requirement to have a trustee (and in fact does not have a trustee, consistent with the exemption).

e. Proposed Process to Extend the Filing Due Date for Plans in a DCG

In the notice of proposed rulemaking that accompanied the proposed revisions, DOL proposed the addition of a new regulation that would establish the filing deadline for all plans in a DCG arrangement as no later than the end of the seventh month after the end of the common plan year that all plans in the group must have (i.e., the same Form 5500 deadline that the plans would have if they were filing individually). DOL states in the preamble that, because the DCG filing is an alternative to each participating

plan filing its own Form 5500, "that would mean that each plan would have to submit its own IRS Form 5558 to extend the plan's due date, and, as a consequence, extend the due date for the DCG filing." DOL requested comments, however, on whether DCG reporting arrangements should be able to file a single Form 5558 to obtain an extension for filing the DCG's Form 5500 on behalf of the participating plans as an alternative.

We have heard from members that they strongly support allowing the administrator of the DCG to file a single Form 5558 on behalf of the plans that are anticipated to be included in the DCG's Form 5500 and we urge DOL to make this option available. Filing a single Form 5558 would substantially streamline the process for requesting extensions when needed. We recommend that the DCG administrator would file a Form 5558 that includes a schedule listing all plans to which the extension would apply. Although the filing extension would apply to each plan listed on the DCG's Form 5558, it is important that the schedule of plans not be viewed as a final, definitive list of which plans will ultimately be included in the DCG's Form 5500. For example, it may be necessary for the DCG arrangement to exclude a plan if the plan fails to timely provide information necessary to complete the DCG's Form 5500. In that case, the filing extension achieved for that subsequently excluded plan through the DCG's aggregate Form 5558 would still apply and the plan would simply be required to file its own individual Form 5500 by the extended deadline.

f. Proposed Limitations on "Same Investment" Requirement

Section 202(c)(3) of the SECURE Act requires that all plans in a DCG "provide the same investments or investment options to participants and beneficiaries." In the preamble to the proposed revisions, DOL and IRS state their belief that the SECURE Act's "same investments or investment options" requirement "effectively precludes plans that hold employer securities from participating in a DCG reporting arrangement as well as preclud[es] treatment of brokerage windows as an 'investment option' because [they] would conflict with the investment uniformity objectives of the SECURE Act requirement." Despite this view, DOL and IRS nevertheless requested comments on whether the final rule should allow employer securities as an exception to the "same investments or investment options" requirement. DOL and IRS additionally requested comments on whether to allow brokerage windows, self-directed brokerage accounts and similar features in plans participating in DCG arrangements.

The use of brokerage windows in self-directed retirement plans is one of two areas under study by DOL's ERISA Advisory Council in 2021. In the Council's written testimony submitted to the ERISA Advisory Council in connection with its August 26, 2021 hearing, we summarized the key reasons why many plan sponsors choose to offer brokerage windows as follows:

"Brokerage windows serve specific investment needs of a relatively small group of participants who seek access to a much broader set of investments, including different types of investments, and many plan sponsors believe it is important to respond to those interests of participants because it helps to keep them engaged in the plan. Furthermore, this allows plan sponsors to maintain a small more manageable fund menu for the vast majority of the plan participants."

The above reasons for offering brokerage windows—and the resulting benefits to all participants—would be no different for many of the current and prospective plan sponsors that we expect to consider participating in a DCG. For those employers that determine offering a brokerage window is an important feature to any retirement plan offering, we urge DOL and IRS to allow DCGs to make this option available. Some Council members would find it helpful to have a rule under which either (1) *all plans* in the DCG must make the brokerage window available to participants, or (2) *no plans* in the DCG may make a brokerage window available. Other Council members, however, would find it more helpful if each participating plan in the DCG could separately choose whether to make a DCG's brokerage window option available to its participants.

With respect to employer securities, we strongly support making an exception to the "same investments or investment options" requirement so that plans offering employer securities would not be ineligible to participate in a DCG for that reason alone. For example, we are aware of groups of plans that exist today (for example, the separate retirement plans of a parent company and its subsidiaries) that would meet all of the requirements to file a consolidated Form 5500 but for the fact (and in the absence of an exception) that one plan offers employer securities whereas the others do not. We also anticipate that the inability to continue offering company stock in an employer's plan would be a key deterrent for many employers that might consider joining a DCG reporting arrangement, even if the DCG would otherwise result in cost savings and other benefits to the plan. Employers should not be forced to choose between making employer securities available as an investment option (which ERISA specifically contemplates and encourages) and participating in a DCG reporting arrangement.

In addition, we ask DOL to clarify that its starting premise, which holds that the SECURE Act effectively precludes plans that hold employer securities from participating in a DCG reporting arrangement, does not apply to employer securities held indirectly through a diversified pooled investment fund, such as a collective investment trust, that is offered as an investment option by all of the plans in the DCG.

g. Request for Comments on Allowing One-Participant Plans to Participate in a DCG

Section 202(c) of the SECURE Act provides that a plan not subject to Title I of ERISA shall be treated as meeting the requirements that the plans in a consolidated group have

the same trustee, same named fiduciary(ies), and same plan administrator if the same person that performs each of those functions, as applicable, for all other plans in such group performs each of such functions for such plan. The IRS notes in the preamble to the proposed revisions that it views this provision as being directed at one-participant plans that file Form 5500-EZ. In this regard, the IRS requested comments on whether Form 5500-EZ filers are expected to be interested in participating in a DCG structure, including a separate DCG structure only for Form 5500-EZ filers.

Some Council members have expressed that allowing one-participant plans to participate in a DCG would be a beneficial and well-received option for such plans—particularly a structure under which Form 5500-EZ filers may file as part of a group of only Form 5500-EZ filers. As such, we encourage the IRS to develop a group filing option for Form 5500-EZ filers. Doing so would also fulfill the congressional intent that such an option be made available.

II. Comments Regarding Proposed Changes for MEPs

Section 101 of the SECURE Act created PEPs, which are a new type of MEP with certain additional requirements. Section 101 also expanded the information that MEPs (including PEPs) must report about participating employers on Form 5500 in order to comply with Section 103(g) of ERISA. Prior to the SECURE Act, ERISA generally required MEPs to include an attachment listing the participating employers and a good faith estimate of the percentage of total contributions made by each participating employer during the year. The SECURE Act added to that reporting requirement the additional requirement of including the aggregate account balances attributable to each participating employer. Additionally, Section 101 authorized DOL to provide for simplified Form 5500 reporting for MEPs that cover fewer than 1,000 participants, as long as each participating employer in the MEP has fewer than 100 participants covered by the plan.

a. Overview of Proposed Changes for MEPs

The proposed revisions would implement the Form 5500-related aspects of Section 101 of the SECURE Act by adding the new Schedule MEP. Very generally, Schedule MEP would:

- provide certain identifying and categorical information about the MEP;
- provide a Section in which to report the information required under Section 103(g) of ERISA, including an additional column to newly report the aggregate account balances of participating employers; and

- collect the additional information required of PEPs, including 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.

b. Clarify that the Requirement to Report Aggregate Account Balances of Participating Employers Applies only to *Defined Contribution* MEPs

As noted above, the SECURE Act newly requires MEPs to report the "aggregate account balances attributable to each employer in the plan (determined as the sum of the account balances of the employees of such employer (and the beneficiaries of such employees))." Because this new reporting requirement first applies for plan years beginning after December 31, 2020, the agencies have proposed that MEPs would satisfy the requirement for plan years beginning in 2021 by including it in the non-standard attachment that MEPs file with the Form 5500. For plan years beginning on or after January 1, 2022, the agencies have proposed that this information would be included as part of the new Schedule MEP that was included as part of the proposed revisions.

The proposed instructions related to this requirement indicate that all MEPs are required to complete this new reporting requirement, including, apparently, defined benefit plans. While all PEPs are defined contribution plans, Schedule MEP applies to all MEPs, some of which are defined benefit plans. However, the instructions do not provide any information regarding what is meant by "aggregate account balances" for a defined benefit plan. As a threshold matter, we question whether the expanded 103(g) reporting requirement was intended to apply to defined benefit MEPs at all. The SECURE Act states that the aggregate account balances are "determined as the sum of the account balances of the employees of such employer (and the beneficiaries of such employees)." That phrase only makes sense in the context of a defined contribution plan—in a defined benefit plan there are not "account balances" of each employee which sum up to the total "aggregate account balances" of the employer. This reading of the SECURE Act—that the new disclosure requirement applies only to defined contribution plans—also makes sense given that the vast majority of MEPs—including all PEPs—are defined contributions plans. **Thus, we urge the agencies to clarify in the final instructions that this requirement does not apply to defined benefit plans.**

If the agencies determine that the requirement does apply to defined benefit plans, then the agencies must explain how such a requirement would apply to a defined benefit plan. One Council member suggested that, if the new requirement was intended to apply to defined benefit MEPs, then perhaps it was intended that defined benefit MEPs would fulfill this requirement by reporting the assets allocated to each employer for funding purposes. Critically, however, some defined benefit MEPs—namely pre-

1989 (or pre-TAMRA) plans—are not required to allocate assets among participating employers for funding purposes.[5] As such, pre-1989 plans would have no basis for providing, and no ability to provide, the aggregate account information that would be required under the proposed revisions.

In light of the significant challenges and costs this requirement would create for defined benefit MEPs, we urge DOL to exclude defined benefit plans—and particularly pre-1989 plans—from this requirement. If DOL does not exclude defined benefit plans, then it is vital that the Form 5500 instructions provide a workable means for defined benefit plans to provide this information using readily available data and without imposing significant new administrative burdens and costs on the plans. Further, we ask that DOL apply a good faith standard to the information reported.

c. Additional Reporting Requirements for PEPs

As described above, the proposed revisions would require PEPs to report 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. As proposed, it appears that this information would need to be reported beginning with the 2022 Form 5500 on the new Schedule MEP.

On June 18, 2020, DOL published a Request for Information on prohibited transactions involving PEPs. Although some PEPs have been operational since January 1, 2021, DOL has yet to issue any guidance on this issue. At a minimum, we urge DOL to postpone this reporting requirement until after DOL has issued guidance on prohibited transactions and PEPs. We further ask that DOL reconsider requiring PEPs to report their reliance on a prohibited transaction exemption on Schedule MEP, which unfairly targets PEPs for special reporting.

d. Request for Comments on Simplified Reporting for Small MEPs

The SECURE Act amended Section 104(a)(2)(A) of ERISA to authorize the Secretary to provide for simplified Form 5500 reporting for MEPs that cover fewer than 1,000 participants, as long as each participating employer has fewer than 100 participants covered by the plan.

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[5] Code Section 413(c)(4)(A) provides that in the case of the plan established after December 31, 1988, each employer is generally treated as a separate plan for purposes of Code Section 412. Thus, pre-TAMRA plans that did not make the election described in Code Section 413(c)(4)(B) are not required to treat each participating employer as maintaining a separate plan, and would not have maintained records to generate each employer's "aggregate account balance," if that term even made sense in the context of a defined benefit plan.

DOL noted in the preamble to the proposed revisions that it is not currently proposing to amend the current reporting rules to establish a ''simplified report'' for such plans. DOL did, however, invite stakeholder comments on why MEPs subject to ERISA Section 210(a) should be subject to different reporting requirements than single employer plans that cover fewer than 1,000 participants and on appropriate conditions and limitations for such a simplified report. In addition, DOL states in the preamble that the proposed revisions "would require all MEPs, similar to the current rule for multiemployer plans and the proposed rule for DCGs, to file the Form 5500 regardless of whether they would otherwise be eligible to file the Form 5500-SF."[6] The preamble further notes that small MEPs would have the same simplified Form 5500 reporting as small pension plans, including MEPs, that currently file the Form 5500, for example, filing Schedule I instead of Schedule H and filing without an audit report.

Some of our members have indicated that providing simplified reporting for small MEPs up to 999 participants would be an important option in keeping administrative expenses low for the small employers in particular that often seek to provide retirement plan coverage through a MEP. Doing so would also encourage the creation of new MEPs, many of which would benefit from the simplified reporting option authorized by the SECURE Act. Even if a new MEP would eventually become ineligible for simplified reporting as it gains participants over time, the option would help keep costs low for participating employers until greater economies of scale can be achieved.

Providing a simplified reporting option for MEPs with fewer than 1,000 participants (and fewer than 100 participants per participating employer) would treat these employers on par with those small employers that may have chosen to join a DCG instead. There is no reason to subject small employers to sharing in the cost of an audit simply because they decided to participate in a MEP rather than join a DCG or maintain their own small plan and file a separate annual report/return. More importantly, Congress determined that providing this simplified reporting option for small MEPs up to 999 participants was the right policy decision in order to "remove possible barriers to broader use of multiple employer plans."[7] As such, we request that DOL use its authority under the SECURE Act to provide this option for small MEPs.

III. Comments Regarding Proposed Schedule H Changes

a. Overview of Proposed Schedule H Changes

The proposed revisions include changes to Schedule H that would require plans to report more information at a more granular level. These changes primarily consist of significant changes to the Line 4i Schedules of Assets, including establishing a

[6] 86 Fed. Reg. 51,500.

[7] H.R. Rep. No. 116-65, at 46 (2019).

standardized electronic filing format, which would make the information more searchable. Plans would newly be required to report, for example, whether an investment is a designated investment alternative (DIA) or a qualified default investment alternative (QDIA) in a defined contribution plan, and if so, would be required to provide the total annual operating expenses expressed as a percentage of assets (as contained in the most recent participant fee disclosure statement). Plans would also be required to check a box indicating if the issuer, borrower, lessor, or similar party is a party-in-interest, or if an asset is held in a participant-directed brokerage account that is required to be broken out and separately reported. For assets disposed of during the year, plans must newly report, for example, total expenses incurred with the disposal, including any termination or surrender charges.

In addition, although not illustrated in the appendices to the proposed revisions, the preamble describes that the agencies would also add new breakout categories to the "Administrative Expenses" category of the Income and Expenses Section of Schedule H.

b. Proposed Requirement to Identify Hard-to-Value Assets

Under the proposed revisions, plans would be required to indicate on the Line 4i Schedules of Assets whether any of the plan's investments are "hard-to-value" assets. For this purpose, the proposed instructions for Line 4i provide that common collective trusts (CCTs) and pooled separate accounts (PSAs) must be identified as hard-to-value assets if the CCT or PSA is itself primarily invested in hard-to-value assets. This is true regardless of whether the CCT or PSA is valued annually.

This "hard-to-value" label for CCTs and PSAs that are valued annually mischaracterizes those investments and is unfair when compared to the treatment of registered mutual funds that may also be invested primarily in hard-to-value assets without being labeled as hard-to-value assets. CCTs and PSAs are regulated by state banking and insurance agencies, can be accurately valued and typically provide the same daily net asset value provided by mutual funds. Accordingly, we are requesting that the agencies remove the requirement to identify CCTs and PSAs as hard-to-value assets on the Line 4i Schedules of Assets when they are independently valued at least annually.

c. Proposed Requirement to Include Total Annual Operating Expenses from Most Recent 404a-5 Statement

As described above, the proposed revisions would require plans to newly provide on the Line 4(i) Schedule of Assets Held for Investment the total annual operating expenses expressed as a percentage of assets (as contained in the most recent participant fee disclosure statement) for any asset that is a DIA or QDIA. In a footnote to the preamble, DOL states that requiring the total annual operating expenses from the 404a-

5 statements is intended to allow third-party 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 to their retirement."

We believe that the proposed requirement to include total annual operating expenses is unnecessary and unhelpful. It is unnecessary because DOL's 404a-5 regulation already creates an employer reporting obligation to participants that includes disclosure of total annual operating expenses. Including a portion of the same information on the Schedule H would not provide any additional protection or information to participants. The proposed requirement is unhelpful because, as an initial matter, it creates additional burdens for plan sponsors that increase the costs of complying with plan reporting requirements. Of even greater concern is the fact that highlighting total annual operating expenses in this manner will create an inappropriate focus on this single aspect of plan investments. DOL's goal of making the Schedule H Schedules of Assets more data-mineable for third-party aggregators will unnecessarily stifle plan sponsors and drive up the cost of plan sponsorship by increasing litigation risk. Because the proposed requirement would create the risk of significant harm to the retirement system with little to no offsetting benefits, we request that DOL not finalize this aspect of the proposed revisions.

If DOL nevertheless adopts its proposal to include total annual operating expenses, then we request additional information regarding the mechanics of this requirement including especially what DOL means in referring to the "most recent" 404a-5 statement. For example, if the plan issues a new 404a-5 statement after the end of the plan year to which the Form 5500 relates, but prior to the time of filing, is that the statement from which the operating expense information should be drawn, even though it reflects expenses from a different plan year? Having flexibility in this regard would be helpful. We also ask that DOL provide flexibility in how operating expenses are reported in cases where the plan's recordkeeper updates an electronic version of the 404a-5 statement throughout the year as fund changes occur.

d. Proposed Expansion of Administrative Expense Breakout Categories

As noted above, the preamble to the proposed revisions states that the proposal would add new breakout categories to the "Administrative Expenses" category of the Income and Expenses Section of Schedule H. On the current Form 5500 (2020), administrative expenses are reported across four categories: (1) professional fees; (2) contract administrator fees; (3) investment advisory and management fees; and (4) other. The preamble describes that additional breakouts would be added for the following:

- Salaries and allowances
- Independent Qualified Public Accountant ("IQPA") Audit fees

- Recordkeeping and Other Accounting Fees
- Bank of Trust Company Trustee/Custodial Fees
- Actuarial Fees
- Legal Fees
- Valuation/appraisal fees
- Trustee fees/expenses (including travel, seminars, meetings)

At a general level, we are concerned that many of the changes to Schedule H will increase administrative burdens and costs that will ultimately be passed on to the plans and participants for whose benefit the changes are being sought. In an effort to limit those administrative burdens and costs, we encourage the agencies to eliminate proposed information requests that would produce few marginal benefits to plans and participants. With respect to these additional breakout categories of Administrative Expenses in particular, we have heard particular concerns from our members that this level of detail will be difficult and costly to track. Accordingly, we encourage the agencies to carefully consider which breakouts are actually useful for the purpose of the annual information return/report and to eliminate any breakouts that are unnecessary.

e. Reporting of Certain Assets Held in Brokerage Windows

The proposed revisions would require plans to indicate through a new check box on the Line 4i Schedule of Assets Held for Investment whether an asset is held in a participant-directed brokerage account that is required to be broken out and separately reported. Because such assets are already required to be separately reported on the Line 4i schedules, the addition of the proposed check box would require programming changes but would otherwise not entail reporting new information or information that is not currently tracked by plans. That being said, this proposed addition, along with DOL's statements in the preamble that a separate regulatory project may result in even more changes to Form 5500 reporting, have raised some concerns that DOL may be contemplating requiring more detailed reporting of the underlying investments selected by participants within a brokerage window. Similar to the concerns stakeholders raised with respect to Q&A-30 of FAB 2012-02 (prior to its modification by FAB 2012-02R), we would again caution DOL against imposing burdensome reporting requirements on brokerage windows that would cause plan sponsors to remove them from their plans. As the Council has indicated on multiple occasions, brokerage windows benefit all participants in a plan (not just those who use the window) because they allow plan sponsors to maintain a small, more manageable fund menu for the vast majority of the plan participants.

IV. Support for Change to Participant Count Methodology for Defined Contribution Plans

The Council generally encourages the agencies to implement changes that would streamline and simplify the preparation and filing of the annual information return/report. Consistent with this recommendation, the proposed revisions include a change to the method by which defined contribution plans must count participants for purposes of determining whether they are subject to the large plan audit requirement. Currently, plan size is determined based on the total number of participants at the beginning of the plan year, including those who are eligible to have contributions made under a 401(k) plan—even if they have not elected to participate and have no account balance. Under the proposed revisions, plan size would generally be determined based on the number of participants with account balances as of the beginning of the plan year (as reported in a new line item on Form 5500 or Form 5500-SF).

The Council supports this proposed change in participant count methodology. The proposed change is especially important in light of the SECURE Act's new eligibility rules for long-term, part-time employees, which will greatly increase the number of eligible employees that would be included in a plan's participant count under the current rules for determining plan size. Without the proposed change in methodology, the new long-term, part-time employee rules will newly subject many plans to the large plan audit requirement, thus increasing the cost burden of sponsoring a retirement plan on small employers.

V. Comments Regarding Proposed Schedule SB Changes

a. Schedule SB, Line 26

The proposed revisions would include changes to the Schedule SB, line 26 reporting requirements for defined benefit plans with 500 or more total participants (with participants counted as of the valuation date for this purpose). As described in the preamble, such plans would be required to attach "a projection of benefits expected to be paid in each of the next 50 years broken down into three categories based on the participant's or beneficiary's status on the valuation date (i.e., active, terminated vested, in pay status)." In addition, the agencies have proposed that these plans "report the average age and average monthly benefit separately for terminated vested participants and retired participants and beneficiaries receiving payments."

We assume the above changes would require the reporting of average account balances for terminated vested participants with cash balance benefits, but confirmation on this point would be appreciated.

b. Participant/Benefit Amount Exhibits

The agencies have proposed changing the Schedule MB "age/service" scatter attachment for multiemployer plans by deleting the required information related to

cash balance plans and adding a requirement to report average accrued monthly benefits as of the valuation date for each grouping (for plans with 1,000 or more active participants at the beginning of the year). Although the preamble states that the agencies also propose making the Schedule SB, line 26 reporting requirements about demographics and benefits "similar to the requirements for PBGC-insured multiemployer plans," it is unclear whether the agencies are likewise proposing to remove the required information related to cash balance plans for purposes of Schedule SB.

One of our members has indicated that producing the various tables that are currently required by Schedule SB for plans that have both cash balance and traditional formulas is very labor intensive and producing the proposed age/service scatter described above with respect to Schedule MB would be more straightforward. We therefore encourage the agencies—if it was not already their intent to do so—to apply the change described above with respect to the Schedule MB age/service scatter to the Schedule SB, too.

VI. Clarification of IRS Compliance Questions

a. Question Regarding 401(k) Plans

The proposed revisions would add the following IRS compliance question to the Schedule R and Form 5500-SF:

> *If this is a Code Section 401(k) plan, check the correct box to indicate how the plan is intended to satisfy the nondiscrimination requirements for employee deferrals and employer matching contributions (as applicable) under Code Sections 401(k)(3) and 401(m)(2)?*
>
> __ *Design-based safe harbor method*
> __ *"Prior year" ADP test*
> __ *"Current year" ADP test*
> __ *N/A*

The proposed instructions to the above compliance question state that all applicable boxes should be checked for a plan that tests different groups of employees on a disaggregated basis. The instructions do not address, however, how MEPs and DCG arrangements should complete this question. We ask that the final instructions clarify whether such plans or arrangements should also check each box that applies with respect to, for example, the employers participating in a MEP or the plans participating in a DCG.

b. Question Regarding Pre-approved Plans

The proposed revisions would add the following IRS compliance question to the Schedule R, Form 5500-SF and Form 5500-EZ:

> *If the plan sponsor is an adopter of a pre-approved plan that received a favorable IRS Opinion Letter, enter the date of the Opinion Letter ___/___/___ (MMDD YYYY) and the Opinion Letter serial number _________.*

Council members have indicated they need clarification of whether the date of the letter and the serial number is as of the "beginning date" or "ending date" of the plan year. Clarification is also needed if a plan has utilized more than one pre-approved plan in the same year.

VII. More Time Needed to Implement Changes

The proposed revisions with respect to the SECURE Act's expanded reporting for MEPs under Section 103(g) of ERISA and the creation of a DCG reporting option are required to be implemented beginning with the 2021 plan year and the 2022 plan year, respectively, due to statutory deadlines. The agencies have proposed, however, that all other changes included in the proposed revisions would be applicable with respect to reporting for plan years beginning on or after January 1, 2022, even though these other revisions are not subject to a statutory deadline.

Some Council members are very concerned that the time provided to implement many of the additional proposed changes will be far too short, particularly in light of the scope of the proposed expansions to Schedule H and Schedule R reporting and increased standardization. Plans would need to be ready to begin tracking several aspects of the proposed new information requirements immediately at the beginning of the plan year. For calendar year plans, that would require having all necessary programming and systems changes completed by January 1, 2022, which is only two months away. By the time the agencies finalize the adoption of any of the proposed revisions, that time will be even shorter. For these reasons, we request that the agencies delay the implementation of the proposed revisions to Schedules H and R for at least another plan year, so that any such changes would not be reported any earlier than for plan years beginning on or after January 1, 2023. Alternatively, in light of DOL's separate project to work on even broader Form 5500 changes in the near future, we suggest that it may be more time and cost efficient—for both plans and the government—to wait and make all changes at the same time with the same effective date.

In addition, although we appreciate that the expanded reporting for MEPs under Section 103(g) of ERISA is required by statute to apply to plan years beginning on or after January 1, 2021, as noted in our discussion above, it is particularly unclear how defined benefit MEPs would comply with the new requirement to report aggregate

account balances of participating employers. As further discussed above, if DOL does not agree to exempt defined benefit MEPs from this new reporting requirement, then we ask that DOL provide a workable means for such plans to meet the requirement using readily available data. In order to give defined benefit MEPs adequate time to make any necessary programming changes to comply with any additional instructions DOL may provide for defined benefit MEPs, we ask that DOL not take any action against defined benefit MEPs that make a reasonable, good faith attempt at estimating and reporting aggregate account balances for both the 2021 and 2022 plan years.

COMMENTS REGARDING PROPOSED HEALTH PLAN REPORTING CHANGES

I. Comments Regarding Proposal to Transfer to the DOL Form M-1 Certain Participating Employer Information for Multiple Employer Health and Welfare Plans

The SECURE Act amended Section 103(g) of ERISA to eliminate the requirement for multiple employer health and welfare plans to continue reporting a list of participating employers by name and employer identification number, as well as (for MEWAs other than unfunded or insured MEWAs) a good faith estimate of each employer's percentage of total contributions, as an attachment to the Form 5500 (while maintaining this requirement for multiple employer retirement plans). Notwithstanding this change to the law, the proposed revisions would, effective for plan years beginning on or after January 1, 2022, require MEWAs that offer or provide coverage for medical benefits to provide this same information on the Form M-1. MEWAs that are not required to file a Form M-1 would continue to have to report the participating employer information as an attachment to the Form 5500.

While the proposed revisions state that "the DOL continues to believe that receiving participating employer information from multiple employer welfare plans is important for oversight of such arrangements and should be continued," Congress made an explicit determination when it amended Section 103(g) of ERISA that welfare plans should no longer be subject to such a reporting requirement. Maintaining this requirement, but simply moving it from the Form 5500 to the Form M-1, is directly contrary to the express and unambiguous intent of Congress.

In addition, the proposed revisions do not offer a compelling rationale why this information should be reported on the Form M-1, which is a publicly available document. We understand that DOL is of the view that this information will assist DOL in plan oversight. However, DOL has not articulated why this information must be made public, including how it might benefit participants or beneficiaries, and we are not aware of any such benefit.

For its own oversight purposes, the DOL could obtain this information through its well-established investigatory authority, but the reporting of employer names and EINs (and the health plan to which they are linked) on a publicly available document exposes plan participants and beneficiaries and their employers to potential cybersecurity fraud. Imposing such a requirement in connection with the Form M-1 seems contrary to the DOL's recent efforts to ensure that plans, participants and beneficiaries are protected against cybersecurity and other related criminal activity. Moreover, for many of our members that sponsor plans that file a Form M-1, the list of participating employer and contribution percentage information is proprietary information that essentially is also a list of their clients, and making this information publicly available negatively affects their business.

For the foregoing reasons, the proposed revisions should be amended to either eliminate this reporting requirement entirely, or to give MEWAs the option of separately submitting their lists of participating employers and estimates of the percentage of total contributions as an attachment to the Form M-1 that would not be publicly posted.

* * * * *

We look forward to discussing these issues with you as you move forward. Thank you for the opportunity to provide our view and suggestions. If you would find it helpful to discuss any of these matters with us, please contact me at 202-289-6700 or ldudley@abcstaff.org.

Sincerely,

Lynn Dudley
Senior Vice President, Global Retirement & Compensation Policy