

November 1, 2021

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Action: Proposed Rule

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### **Proposed Implementation of Secure Act Revisions to Form 5500 Employee Benefit Plan Reports**

To Whom it May Concern:

We are writing to you to present our comments related to the proposed rule as named above. Those of us involved in drafting this letter are all auditors who specialize in employee benefit plans and perform plan audits anywhere from 50% to 100% of our time. As benefit plan auditors that have dedicated our careers to the middle market, we believe that we are in an excellent position to share our perspective on the proposed changes to the participant count used to determine if an audit is required. This letter is intended to highlight why changing the participant count that triggers an audit is not in the best interest of the participants or the plan sponsor. We will also share some ideas that may assist in meeting your goals. As practitioners who are very involved with our industry and frequently interact with the Chief Accountant's Office, we believe that we have common shared values that include protecting participants and their retirement assets as well as, assisting plan sponsors in maintaining compliance with the rules and regulations in a very complex environment. Furthermore, we understand the need to be sensitive to the costs involved with properly maintaining a benefit plan, but the risks associated with this proposal far exceed any potential savings.

We present the following for your consideration.

Many of us have heard the Chief Accountant speak to us at our firms or at conferences over the years, and the message that came through to us loud and clear from the time we were new staff was this: We are watch dogs, not lap dogs. That, in fact, is a direct quote from Ian Dingwall, and has been the message driven home to us. For many of us, it was part of our inspiration to work on benefit plans in the public accounting setting when there were so many other audit areas that were perhaps more beneficial to our careers.

In conversation, we often say that there are two worlds of benefit plans. We feel strongly that what may work for a large company's plan compliance may not be the same as what is crucial and relevant to smaller plan environments.

#### Operational Issues

Smaller companies often establish benefit plans as an incentive to attract new employees and compete with larger companies. However, the smaller companies usually have fewer employees in the human resource department and they have very little if any, ERISA experience which then results in situations where employees are stretched thin in their role. This has only worsened by the pandemic. Smaller companies also have a tendency to over rely on their recordkeepers when it comes to day-to-day

and annual operations. As a result, these types of plans generally experience more mistakes and errors in plan operation and administration which then makes them more difficult and time consuming to audit than larger plans that have more experienced staff, better segregation of duties, and receive a higher level of service from their record keepers.

There is a gap in service that is often missed or goes undetected within the payroll and HRIS processes. The reason for this is twofold:

- (1) Plan sponsors rely heavily on their payroll providers for payroll programming. Those programmers are typically not ERISA specialists and may be using verbal directions versus the plan document to program the system which then results in programming errors involving compensation and deferrals that may go undetected.
- (2) Record keepers are not fiduciaries. Their SOC 1 reports include user entity controls that they expect plan sponsors to have in place in order for the record keepers' controls to work properly. Often those controls center around the plan sponsor being able to detect errors in their HRIS and payroll systems when submitting the data to the record keepers. Those recordkeepers may periodically catch errors when performing certain tests or making inquiries, but typically it is not their role to do so.

It is in the aforementioned gap that a large percentage of auditor findings occur.

We thought it might be helpful if we shared some real-life examples of the types of findings that have been documented in audits within this group of plans that would no longer be subject to the audit requirement if this proposal passes. These findings were identified by experienced ERISA auditors while performing risk based audits and testing to determine if the Plan was being operated in accordance with the terms of the Plan Document. If the audit requirement was not applicable for these plans, then these mistakes and errors, and possibly others, would not be identified and could continue indefinitely, or until the Plan is large enough to require an audit.

Administrative
Plan management has an over-reliance on service providers and doesn't understand that the service provider's work still needs to be reviewed.
Plan sponsor is not maintaining current and historical Plan documents, Plan adoption agreements, Plan amendments and service provider agreements.
Summary Plan Description, Summary of Material Modifications, and annual 404(a) notices were not distributed to participants.
The plan had an insufficient ERISA bond, or no bond at all.
The sponsor confused fiduciary insurance with fidelity bond requirement
The SOC 1 report is not reviewed; the plan sponsor is unaware of the complementary user entity controls that are required to be in place in order for the record keeper controls to operate effectively.
Sponsor was involved in two stock acquisitions during one year and separately merged the plans into their plan. They were not aware that there were collective investment trust assets that remained at the original providers for a year and were then forgotten about.
The sponsor failed to perform compliance testing on the Plan for several years. It was not part of their service agreement with the recordkeeper, and it was not mentioned to them.
The TPA failed to include all plan assets in the Form 5500. This occurs more frequently with 403(b) plans who may be using multiple contract holders.



Forfeitures have been accumulating for three years without being used. Within that account there are also stale checks for missing participants that have been ignored.
The sponsor did numerous furloughs, and some of those employees did not return to work, they also did layoffs when they closed two locations permanently. No one discussed with them the modified partial plan termination rules.
The plan sponsor was unaware that their advisor was not skilled enough to work with an ERISA plan. He had not been seen or heard from in over three years. They were also not aware that he had been making \$250,000 a year on the \$5m plan.
The investment advisor for the plan was a party in interest and there was not service agreement present.
Service provider was set up to provide notices to participants, but sponsor had to ensure the benefits box was checked in order for that to occur properly, and they were inconsistent with this process.
Sponsor inadvertently checked the wrong boxes on the adoption agreement, thinking that all areas that addressed "matching contributions" were referring to the same match. They ended up setting up two separate types of required matching contributions.
Provider attempted to split the 403(b) plan into two separate plans to help the sponsor lower their compliance costs. They inadvertently set up two plans with universal availability and two audit requirements.
The sponsor was not reading all the notices from their record keeper properly, so a transfer in limbo from their former recordkeeper was rejected by the new recordkeeper as they didn't know how to allocate the funds. It had belonged primarily to one person.

Employee Information
Duplicate employees were listed on the census file.
Errors noted in the census file for date of hire, date of termination, and date of birth. Re-hired employees were not properly tracked and break in service rules were not followed.
Improper demographic information transmitted to the recordkeeper, resulting in errors related to eligibility, vesting and forfeitures.

Eligibility
Plan Sponsor unaware that the Plan was amended for auto enroll - therefore no one during the year was auto enrolled in the Plan.
Plan Sponsor did not notify employees when they become eligible to participate.
Overall lack of employee education with the Plan.
Not waiting to enroll participant into the Plan on the first day of each calendar month.
Inconsistencies with the timing of participant entry dates: participants inconsistently enrolled on the 1st or 2nd pay checks after the participant enrolled in the Plan.
The plan sponsor did not modify their approach to offering employees the Plan during the pandemic when all their employees were working remotely.
Auto enrollment procedures were in place, but they had not considered how to address employees who became eligible after hire due to a change in status or position.



### Payroll

The treatment of various compensation codes, such as bonus, severance, commission, fringe benefits, and cash tips, were not being treated in accordance with the definition of compensation. This led to errors with respect to deferral calculations and employer contributions.

Employees were paid for incorrect hours, or their pay-rate was not in agreement with approved documentation from the personnel files.

The plan had two definitions of compensation. There were two different match formulas and several profit sharing formulas. The company changed payroll providers and every formula was set up incorrectly. Additionally, the programmer treated them like health and welfare benefits and did not calculate them on unscheduled payrolls which included bonus and commission runs

Definition of compensation was not programmed properly. It was proper in the first year, but it wasn't checked each year as new forms of compensation were added. Bonuses were excluded improperly for six years.

The payroll codes were not established correctly and improperly excluded bonus payments from employee deferrals for the last 10 years

### Participant Elections

Participant deferral election changes were implemented late, incorrectly, or not implemented at all.

Documentation of elective deferral rate changes were not being maintained.

Newly enrolled participant deferral requests were not properly set up in the payroll system.

Contributions were not allocated to the investments selected by the participants.

### Contributions

True-up calculation was not performed, or was a manual calculation and errors were noted in the formula.

Late remittances noted in plans on a regular basis.

Several participants were not set up properly in the payroll system so did not receive a match.

Highly compensated participants received matching contributions on wages that exceeded the IRS annual compensation limit.

Certain vacation paychecks were inadvertently not deferred upon. Participant did not receive missed deferrals and related matching contributions.

Errors in the calculation of employer match.

Deferral rates used for contributions did not agree to employee deferral requests.

Payroll provider was not remitting off cycle contributions to the Plan

Payroll clerk used incorrect template and uploaded the proper total amount of contributions, but all allocations were incorrect.

Contributions for a pay date were sent twice or missed entirely.

Roth contribution formula was set up improperly in payroll and all Roth contributions were miscalculated from plan inception forward.

Two employees with same name had contributions go to each other's accounts. This is relatively common.

### Participant Loans

Interest rates charged on two participant loans were not in accordance with the Plan document.

Interest rates on the loan issued was incorrectly utilized by the TPA.



### Withdrawals

Vesting was incorrectly calculated in multiple plans.

Management did not review or authorize participant distributions.

Participant took a withdrawal prior to the last payroll being remitted to the plan; the participant was never notified of the remaining balance.

### Benefit Obligations

Actuarial valuations did not consider newly eligible participants.

### Some examples of ways that audits add value to Plan Sponsors and help improve Plan compliance

- Improved plan fiduciary oversight resulting from our plan audit comments, observations and recommendations to the plan administrator.
  - Plan oversight committee charter
  - Oversight committee meeting minutes
  - Investment policy statements
  - Fee policy statements
  - Investment and retirement savings education
- Improved communication and engagement with third-party recordkeepers and service providers
  - Leading to periodic review of plan document design and provisions
  - Increased employee education
  - Review of how the plan sponsor can increase employee participation and contributions to the plan
  - Correction of participant data and eligible compensation (census information) which impacts both the administration of plan provisions, as well nondiscrimination test
- Increased awareness of potential plan provision options to encourage employee participation and contributions including:
  - Automatic enrollment, including ensuring participants are enrolled timely
  - Auto escalation
  - Roth contributions
  - Adding employer matching and/or non-elective contribution features
- In the years following our initial plan audits we see significant improvement in the plan sponsor's application of existing plan provisions including the following:
  - Proper application of the plan's eligibility provisions
  - 403(b) plans compliance with universal availability rule
  - Definition of compensation, adherence to the plan definition of "qualified compensation" and the correct calculation of both deferral amounts and employer match amounts
  - Improved plan sponsor internal controls
  - Improved identification and self-correction of missed participant contributions, missed eligibility and enrollment, missed employer contributions and delinquent participant contributions
  - Remittance consistency and timeliness of contributions
  - Timely and proper utilization of forfeitures
  - Ensuring the plan has a fidelity bond

### Incentive

Audits are not easy, but they serve a valuable purpose for both participants and plan sponsors alike when performed properly. One of our concerns in changing the participant count approach is that it appears to incentivize employers to reduce their participant headcount to avoid an audit by discouraging employees from participating in the plan, or not informing them of their eligibility for the plan. With continuing concerns about the availability of social security for future generations, many Americans may be heavily relying on their pension plan to fund their retirement. By proposing a change in the audit requirement to only count participants with account balances, this could discourage and even disincentivize employers from offering auto-enrollment features. Plans that may have previously had internal controls in place to ensure that all eligible employees were offered the ability to participate in the plan may no longer feel the need to maintain those controls or even communicate to the employees about their ability to participate in the Plan.

If the proposal to change the participant count moves forward, we would like to suggest that there also be a modification to the audit waivers for small plans. We suggest an auto-enroll requirement for small plans. If the Plan was required to have an auto enrollment feature in addition to holding eligible plan assets, this would address the potential risk that employees were not being offered the opportunity to participate in the Plan. In addition, a calculation could be added to show the percentage of active employees participating in the Plan. (Active contributing/Total employees.) This is a straightforward formula that is easily derived and provides valuable information to the DOL on the risk that employees may not be offered the Plan.

### Timing of this Proposal

Lastly, we do not think that the timing is appropriate for this change. Due to the ongoing impact of the pandemic, we have all seen major staff shortages at our clients. Many Human Resources professionals are overwhelmed trying to hire employees for the company, and other strategic tasks important to running a business. This means that they may take a "set it and forget it" approach to the Plan. There is a heightened risk that operational issues will go undetected, and this is exactly what we have been finding in our audits.

### Recommendations

While we strongly disagree with this proposed change to the participant count at this juncture, we are sensitive to the attempt to help reduce small companies costs in this area. However, as noted above we believe that the risks associated with this proposal to the participants and even the plan sponsor, far exceed any potential savings to the plan sponsors.

We recommend the following:

- (1) Primarily we recommend NOT changing the participant count at this challenging time. This is the time that participants need our help in protecting their accounts the most.
- (2) We recommend that you consider changing the requirements for small plans to obtain an audit waiver that includes having an auto-enrollment feature.



- (3) We recommend that a taskforce be put together that includes key stake holders such as qualified plan auditors who audit small to medium-sized plans, TPAs, recordkeepers, etc. to discuss the feasibility of and ideas for a different type of compliance audit for small plans. These compliance audit procedures would be performed by licensed CPAs that would focus more on the plan's compliance with the plan document and ERISA rules and regulations rather than the financial statements themselves.

Thank you for taking the time to consider our comments. We appreciate the opportunity to share our perspective and ideas with you. Please feel free to reach out should you have any further questions. This is a dialogue that should continue as we believe that the right solution to address participant risk and plan sponsor costs can be achieved.

Respectfully,



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Monique Elliott, CPA



[Melissa G. Critcher \(Nov 1, 2021 11:25 EDT\)](#)

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Melissa Critcher, CPA



[Valerie Wawrin \(Nov 1, 2021 13:31 EDT\)](#)

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Valerie Wawrin, CPA



[Anne Morris \(Nov 1, 2021 14:34 EDT\)](#)

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Anne Morris, CPA



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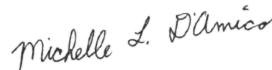
Alice Evans, CPA



[Jodi Malis \(Nov 1, 2021 13:04 EDT\)](#)

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Jodi M. Malis, CPA, CGMA



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Michelle D'Amico, CPA



[Kelly Mann \(Nov 1, 2021 14:47 CDT\)](#)

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Kelly Mann, CPA












# Comment Letter-FINAL

Final Audit Report

2021-11-01

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