



October 28, 2021

Via *Federal eRulemaking Portal*: <http://www.regulations.gov>

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

The members of the New Jersey Society of Certified Public Accountants (NJCPA) Accounting and Auditing Standards Interest Group (the Group) appreciate the chance to comment on the proposed Revision of Annual Information Return/Reports referred to above. The NJCPA has a membership of over 15,000 CPAs and prospective CPAs from public practice and private industry. The Group was formed to address technical topics affecting a wide range of reporting entities. The members have reviewed the proposed revisions and worked together to prepare this comment letter to the Employee Benefits Security Administration, Internal Revenue Service, and the Pension Benefit Guaranty Corporation (Agencies). The following comments are based on the views of the Group and may not reflect the opinions of all NJCPA members.

Overall

RIN 1210-AB97 Proposed Revision of Annual Information Return/Reports contains proposed changes to the Form 5500 Annual Return/Report forms filed for employee pension and welfare benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code). The proposed form revisions primarily relate to statutory amendments to ERISA and the Code enacted as part of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act). The Department of Labor (DOL), the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC) (collectively "Agencies") are proposing certain changes and requesting public comment of the changes. Section I(C) of the Document provides major categories of changes. The Group is providing comments on two of the categories.

Comment on Category 1

Update the Form 5500 and 5500-SF and their instructions on counting participants to change the current threshold for determining when a defined contribution plan may file as a small plan, including eligibility for the waiver of the requirement for small plans to have an audit and include the report of an independent qualified public accountant (IQPA) with their annual report. Specifically, instead of using all those eligible to participate, filers generally would look at the number of participants/beneficiaries with account balances as of the beginning of the plan year (the first plan year would use an end of year measure). This proposed change would be reflected in a new line item on the Form 5500 and Form 5500-SF



RESPONSE

The Agencies would like to provide relief for defined contribution plans that are currently classified as “large” plans based on the eligibility of the participants, but which have fewer than 100 active participants. Our members are very familiar with plans of this size and structure. Our experience demonstrates that a majority of these plans need oversight and guidance as they routinely have various compliance issues in following the specific requirements of their Plan document. Plans with over 100 eligible participants often do not have the staff, time and internal or external resources needed to ensure that all transactions are in compliance with the plan document and required regulations. The plan administrators often struggle with changing plan provisions, especially those resulting from changing regulations. They often rely on large third-party administrators (TPA) to help with the administration of the Plan but are unaware of the division of responsibility between themselves and their TPA. During our audit procedures we identify internal control and plan compliance issues (internal control deficiencies) including a few mentioned below:

- loans and distributions made without review and proper authorization,
- distributions made for incorrect amounts based on incorrect vesting percentages,
- contributions deducted from participants pay and not remitted to respective participants accounts or in a timely manner,
- employees that are not yet eligible admitted into the plan,
- eligible employees not being given the opportunity to participate in a plan,
- excess and deficient contributions due to an incorrect definition of compensation, failures to follow a participant’s election, or a disregard for the statutory limitations.

These deficiencies may not be recognized and corrected if an audit in accordance with Generally Accepted Auditing Standards (GAAS Audit) was not performed. It is the independent qualified public accountant’s responsibility to audit the plan and to communicate deficiencies noted during the audit to our clients.

Of the common deficiencies noted above, it is our concern that a plan sponsor may avoid being categorized as a large plan (as proposed some of these Plans may have less than 100 participant accounts) by not giving eligible employees the opportunity to participate in a plan. This common operational error, over time, will reduce the number of participants with balances in a plan. The emphasis on participants with account balances, rather than eligible participants, in determining which plans require an audit, will significantly delay or prevent the detection of this type of error because an audit by an independent qualified public accountant is not being performed because the error is occurring.

We acknowledge that section 112 of the SECURE Act, which provides eligibility to long-term part-time workers, will ultimately increase the number of plans that require the GAAS audit. We appreciate the DOL’s expectation that excluding from participant count those participants who are eligible to participate but do not have an account balance will reduce expenses for employers to establish and maintain a small retirement plan and as a consequence, encourage more employers to offer workplace based retirement savings plans to their employees. However, cost savings and the fact that there will be additional large plans in the future should not have an impact on the Agencies decision whether a



GAAS Audit is required. We believe that these plans have and continue to benefit from an audit. We also believe that this change may adversely affect the participants in these plans. ERISA rules are designed to ensure that benefit plans are fair and financially sound for the protection of the workers, and the GAAS audit is one vehicle for ensuring that these protections are in place.

Accordingly, we disagree with the agency's proposal to change the threshold and for the protection of the participant.

Although it is not within the scope of the agency's request for public comment, we would like to offer a suggestion to address the number of deficiencies in the plans with less than 100 participant accounts. It is rare that the auditor finds material errors in the basic financial statements provided by the administrators and their TPAs. Typically, the only difference between financial statement and form 5500, are timing issues such as an accrual of participant receivables or excess contributions payable. The vast majority of our testing and findings are related to the plan's compliance with regulations and its plan document, rather than accounting issues. We suggest that the Agencies consider not a GAAS Audit, but a compliance audit, in the form of agreed upon procedures for these plans. We believe that this type of attestation engagement would be less costly than the GAAS Audit and provide the participants with the oversight and protection that they need against the above-mentioned common errors in their accounts.

Comment on Category 2

Update the Form 5500 and its instructions to establish requirements pursuant to section 202 of the SECURE Act for consolidated returns/reports for eligible defined contribution group (DCG) reporting arrangements as an alternative method of compliance for certain individual account or defined contribution retirement plans relying on the consolidated report to satisfy the generally applicable requirement that employee benefit plans file a Form 5500. This would include adding a new Schedule DCG (Individual Plan Information) to provide individual plan-level information for defined contribution pension plans covered by a DCG consolidated Form 5500 filing. It would also include adding a new checkbox on the Form 5500 (Part II, line 10a(4)) to indicate that Schedule DCG is attached to the Form 5500, with a space for the filer to enter the number of Schedules DCG (one per plan) attached to the Form 5500 filing.

Within the discussion of the DCG, proposed § 2520.104-51(c)(2)(iii) provides that all plans participating in a DCG reporting arrangement must have a designated common plan administrator that is the same plan administrator for all the participating plans. The Department is soliciting comments on whether the final rule should address whether individual plans participating in a DCG may have a separate statutory administrator responsible for other duties ERISA assigns to the plan administrator (e.g., distribution of summary plan descriptions).

RESPONSE

We believe that the final rule should address the situation. Because the SECURE Act was not explicit when describing the responsibilities of the common administrator, we are



concerned that plan sponsors will rely on third-party administrators to the detriment of plan participants. A single person or persons must be accountable for the actions (or non-actions) of the plan. Our experience tells us that this individual should have a vested interest in the plan; typically, an individual employed by the Sponsor and immersed in the day to day operations of the plan and human resources of the Sponsor. Volume administrators will not have this interest and consequently the plan may experience deficiencies as described in Category 1 above.

Abnormalities will always exist regarding payroll and human resources. These abnormalities, such as reissued payroll checks, rehiring of terminated employees and dozens of other situations, are handled by the sponsor's human resource personnel. Sponsor personnel are more likely to be aware of the effect of the abnormalities on the employee benefit plan and should be responsible for these and all issues affecting the plan at the sponsor level including changes to the plan whether by amendment or regulation. We believe that the DOL should consider the separate statutory administrator and define the role to avoid confusion regarding the division of responsibilities between volume administrator and the statutory plan administrator.

We believe that a full and clear description of the function of each administrator should be published within the rules and form instructions. We envision the common administrator responsible for the filing of the form 5500 and compliance testing required to complete the form while a separate statutory administrator, presumably employed at the sponsor, be responsible for all other ERISA responsibilities.

Respectfully submitted,

Accounting and Auditing Standards Interest Group
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