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Working for America's Retirement

November 1, 2021

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

via Federal eRulemaking Portal at www.regulations.gov

Re: Proposed Revision of Annual Information Return/Reports (Form 5500 Series) RIN 1210-AB63

Dear Department of Labor:

The American Retirement Association (ARA) is submitting these comments in response to the request for comments on the notice of proposed revisions to the Form 5500 Annual Return/Report of Employee Benefit Plans and proposed changes to the applicable regulations (Proposal) made by the Department of Labor (DOL), Internal Revenue Service (IRS) and Pension Benefit Guaranty Corporation (PBGC) (collectively, the Agencies). Our comments are provided to the Agencies to describe the ARA's primary concerns with the Proposal.

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system: the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), the American Society of Enrolled Actuaries (ASEA), and the Plan Sponsor Council of America (PSCA). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer sponsored plans. In addition, ARA has nearly 31,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA and its underlying affiliate organizations are diverse but united in their common dedication to the success of America's private retirement system and safeguarding the interests of participants and beneficiaries in retirement savings plans.

By DOL's description, the proposed changes to the Form 5500 Series and related regulatory amendments are intended to implement provisions of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) and to improve the Form 5500. They are designed to support oversight of employee benefit plans, provide better public access to Form

5500 data, and "allow interested private sector and other governmental stakeholders to expand their use of Form 5500 data in ways that help plan sponsors, fiduciaries and participants and beneficiaries understand their plans and plan investments better."[1]

The Proposal includes modifications to the Form 5500 Series and applicable regulations to implement the SECURE Act requirement for the development of a consolidated annual report for groups of defined contribution retirement plans.

Summary

ARA makes the following recommendations regarding proposed revisions to the Form 5500 Series:

- Adopt the proposed change to determination of the number of participants for purposes of qualifying for the plan audit waiver;
- With regard to Schedule H revisions:
    - Eliminate information regarding expense ratios, performance, and other investment features;
    - Define "hard to value assets;" and
    - Update Schedule H to reflect transactions that are unique to 403(b) plans, such as plan-to-plan transfers, transfer of assets of a grandfathered orphan account, and transfer from a non-grandfathered orphan account;
- With regard to the Schedule R revisions
    - Revise questions regarding coverage, nondiscrimination testing, and safe harbor status;
    - Eliminate or delay implementation of the question pertaining to the favorable opinion letter date and serial number; and
    - Eliminate or make optional reporting of the plan's trust EIN;
- With respect to the consolidated annual report of Groups of Plans:
    - Clarify certain elements necessary to determine when a group of plans is eligible for the consolidated reporting;
    - Eliminate the single trust requirement (requiring only the same trustee, as required by the SECURE Act);

[1] *U.S. Department of Labor Seeks Public Input on Proposed Implementation of SECURE Act Revisions to Form 5500 Employee Benefit Plan Reports,* at https://www.dol.gov/newsroom/releases/ebsa/ebsa20210914.

ASPPA ASEA NAPA NTSA PSCA

- Provide for consolidated reporting for 403(b) plans, either by modifying the guidance on "same trustee" or exercising discretion to permit consolidated reporting;
    - Eliminate the requirement of a trust-level audit, which is not consistent with the language or intent of the SECURE Act;
    - Provide streamlined ability to answer compliance questions on underlying plans; and
    - Permit a single Form 5558 filing for all plans eligible to participate in a Group of Plans and provide for an electronic filing option;
- Revise instructions to acknowledge and reflect with respect to late deferrals to 403(b) plans that while a corrective contribution must be made, the excise tax does not apply; and
- Delay implementation of all items not required by the SECURE Act for a period of at least 18 months after finalization of the regulations (e.g., plan years beginning in 2024) to permit necessary development of procedures, communication protocols, and systems capable of coordinating the responses required by the new questions.

Analysis and Specific Recommendations

I. Change in Participant-Count Methodology for IQPA Audit Waiver

The Proposal would change the rule for when defined contribution retirement plans can file as “small plans” for simplified reporting options, including waiver of the independent qualified public accountant (IQPA) annual audit. The revised rule would be based on the number of participants with account balances, instead of the current rule based on those eligible to participate even if they have not elected to participate. ***ARA strongly supports this change*** and commends the Agencies for the Proposal.

ARA agrees with the many commenters who note that IQPA audits are valuable. That value comes at a price, however, and the costs and benefits must be weighed. IQPA audits, even of plans with very few account balances, easily cost $10,000 or more, depending on the firm, region, plan, etc. Further, in recognition of the DOL's audit quality study,[2] plan sponsors have been even more inclined to select larger practices that perform a number of plan audits, which often are even more expensive. ARA members report that the cost of audits only continues to rise, and likely will continue in light of the AICPA's new audit standards for plans. This significant cost generally is borne by the plan participants. In a 100-account plan, the cost charged to participants will easily be $100 or more per year. In plans with fewer accounts, it is even more costly to the participant, and the impact on their retirement outcomes is staggering. Some commenters objecting to this change are the same ones loudly proclaiming the necessity of lowering other plan fees by mere dollars or cents per year. Their duplicity on the fee issue is

[2] https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/assessing-the-quality-of-employee-benefit-plan-audits-report.pdf

patent and they have not justified their objection to the proposal with any suggestion that the value an IQPA audit adds for a participant is worth the significant cost.

Further, several commenters have suggested the DOL should not change the rule because small plans are fraught with compliance errors. ARA disagrees with these commenters. ARA members report that plans of all sizes share the potential for common errors. Small plans are not more prone to errors in general. Sponsors of larger plans may have a dedicated benefits staff, but the plans and payrolls often are more complex, leading to a similar potential for errors. While all plans have the potential for errors, larger plans naturally have the potential for larger and more financially significant errors, hence why large plans are audited; ERISA acknowledged that there was a cost-benefit tradeoff in requiring an IQPA audit. As the expense of audits has increased, we believe the cost-benefit analysis can and must be revisited as the Agencies have done in the Proposal.

Further, ARA believes revisiting the cost-benefit analysis as the Agencies have done in the Proposal is critical at this juncture. With the SECURE Act's changes to eligibility provisions on the immediate horizon, a significant number of plans will become subject to an audit if the method of counting participants for the waiver is not revised. While ARA fervently hopes that many long-term part-time employees newly covered following the SECURE Act changes will participate, it seems likely that many will not. Therefore, these newly eligible employees may trigger the need for an IQPA audit, the cost of which will be borne by significantly fewer than 100 individual participants. The retirement outcomes of these participants should not be negatively impacted by the increased coverage of their part-time colleagues. Again, this re-emphasizes why the cost-benefit analysis can and must be revisited as the Agencies have done in the Proposal.

Finally, ARA strongly objects to some commenters assertions that plan sponsors will intentionally not enroll participants in the plan or will avoid automatic enrollment features. ARA is a vocal advocate for increasing the coverage of America's workers and would not support a change that we believed would decrease coverage or discourage enrollment. In our experience, plan sponsors who employ 100 or more individuals design their plans with motivations far more critical to their business than the cost of an audit—generally with a strong focus on increasing participation, improving retirement outcomes, ensuring competitive benefit packages, etc. ARA does not believe the Proposal would decrease coverage or discourage enrollment, and nothing suggests that plan sponsors would intentionally fail to follow the terms of their plans.

Thus, ***ARA strongly supports*** the proposed change to when defined contribution retirement plans can file as "small plans" for simplified reporting options, commends the Agencies for correctly balancing the costs and benefits of reporting, and agrees that the Proposal will assist in achieving the goal of reducing expenses for small defined contribution retirement plans.

II. Revisions to Schedule H

Among other revisions, the Proposal would add new breakout categories to the “Administrative Expenses” lines of the Schedule H, Financial Information. These would include specific lines for: audit fees, bank or trust company fees, actuarial fees, legal fees, valuation fees, salaries, trustee fees and expenses.

While the ARA generally favors transparency, we have several, very significant concerns with having this specific data for the breadth of these expenses be readily publicly available. We appreciate the desire to gather detailed information for enforcement purposes. However, public availability of detailed Schedule H information regarding expense ratios, performance, and other investment features will significantly and unnecessarily heighten the risk of frivolous litigation, which unnecessarily increases the cost of maintaining retirement plans. ARA is not aware of any other instance in which a fiduciary is required to report its fiduciary process to the government in a publicly available filing. This is a dangerous precedent that will dramatically increase the cost of maintaining retirement plans. Further, the cost of responding to and defending these frivolous suits may be borne in part by retirement plan participants, decreasing their retirement savings with no added benefit to them personally. This flies in the face of the Agencies' and the public's interest in decreasing overall fees and costs of retirement plans.

In addition, the time necessary to collect this information would delay many Form 5500s as the information may not be tracked or may not be tracked based on the line-item categorization and would likely require manual intervention until recordkeeping systems can be updated. These data points are more appropriately communicated to participants as part of the ordinary plan disclosure process. The increased cost of modifying systems to report them on the Form 5500 and the certain increase in costs that will come from making them publicly available significantly outweighs any marginal benefit in enforcement. Therefore, ***ARA strongly recommends*** that information regarding expense ratios, performance, and other investment features be eliminated.

ARA also recommends that the instructions be expanded to define “hard to value assets.” ARA is concerned that the term is ambiguous and the absence of clear guidelines from the Agencies will create inconsistent reporting of similar assets and create a material risk of plan sponsors unintentionally misrepresenting assets under penalty of perjury.

ARA also recommends that Schedule H be updated to reflect transactions that are unique to 403(b) plans, as outlined in our comment letter dated October 31, 2019.[3] For example, the schedule and instructions should designate a place to report plan-to-plan transfers, transfer of assets of a grandfathered orphan account, and transfer from a non-grandfathered orphan account.

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[3] ARA comment letter dated October 31, 2019, located at https://araadvocacy.org/wp-content/uploads/2020/03/19.10.31-ARA-Comment-Letter-to-DOL-403b-Form-5500-reporting.pdf.

III. Revisions to Schedule R

ARA recommends that the Agencies revise the compliance questions related to coverage, nondiscrimination testing, and safe harbor status. The questions are not able to be answered as written. The questions imply that a plan has only a single nondiscrimination test, do not reflect that a plan may comply with a safe harbor for some but not all employees on a disaggregated basis, and do not reflect that different testing elections may apply to different portions of the plan. For example, a plan that allows for immediate eligibility for elective deferrals and statutory eligibility for safe harbor contributions would be safe harbor for statutory employees. However, the plan would be subject to ADP testing for non-statutory employees. The complexity of testing elections is not easily translated to the Form 5500 questions and therefore the instructions will need to be more fully developed to provide the necessary guidance. Therefore, ***ARA recommends*** the coverage, nondiscrimination testing, and safe harbor-related questions be revised and additional instructions provided.

ARA recommends that the question pertaining to the favorable opinion letter date and serial number be eliminated or delayed. This is not information currently maintained in recordkeeping systems. If implemented, this item should be significantly delayed because the system would need to be developed and then the data would have to be collected and entered, sometimes manually. ARA is concerned the cost and burden of implementing this change would significantly exceed the marginal value of this information to the Agencies.

ARA recommends that the question regarding the plan's trust EIN be either eliminated or made optional. The trust EINs often are not used as amounts are typically reported under a service provider EIN, the IRS frequently inactivates or cancels plan trust EINs due to inactivity, and certain plans such as 403(b) plans do not have a trust. There also is not a way for plan sponsors to confirm the trust's EIN or whether the IRS has deactivated the EIN. Finally, the plan's trust EIN is not information currently maintained in most recordkeeping systems. Thus, ARA is concerned the cost and burden of implementing this change would significantly exceed the value of this information to the Agencies.

IV. Consolidated Annual Report for Groups of Plans

The ARA believes that key efficiencies would need to be recognized to make consolidated Form 5500s for groups of plans an important tool for increasing retirement plan coverage while reducing costs. These efficiencies include requiring audits of only large plans in the group and no audit required in the case of a group of plans consisting only of small plans; not requiring employers within the group of plans to sign the Form 5500 annually; and reducing the number of interactions an administrator has with EFAST as compared to the filing of separate Forms 5500 with respect to each plan in a group.

The Proposal would establish a new type of direct filing entity called a Defined Contribution Group Reporting Arrangement (DCG) and add a new Schedule DCG (Individual Plan

Information) that such reporting groups must file, in addition to meeting more generally applicable Form 5500 requirements. The Proposal would increase the filing burden for small plans that may have benefitted from the guidance, contrary to the intent in the SECURE Act (e.g., a plan level financial audit for groups of small plans and the expanded reporting requirements of Schedule DCG compared to Form 5500-SF).

Eligibility for DCG Filing

To be eligible to file as a DCG, plans must meet certain requirements, including having the same trustee, the same one or more named fiduciaries, the same plan administrator, the same plan year, and provide the same investments or investment options for participants and beneficiaries (the DCG Eligibility Requirements). Consistent with the SECURE Act, the Proposed Rules would amend the Form 5500 to require plans to verify that they meet the DCG Eligibility Requirements. However, the meaning of "common investment options" as used in the Proposal is not clear. For example, does the requisite commonality imply that all participants of participating employers in the DCG must have the same fund options under their plan? The ***ARA recommends*** the agencies clarify the meaning of this term.

Trust Requirement

The ARA is concerned that the requirement of a single trust may exceed statutory intent and be unnecessary. Small, preapproved plans may have individual trusts or participate in group trusts. The SECURE Act requires only that they name the same trustee in order to participate in a Group of Plans. ARA sees nothing in the Act or Congressional intent that would limit DCGs to only those plans that utilize a group trust arrangement and therefore recommends that this requirement be removed.

ARA recommends that the Agencies remove the express limitations on plans that are not subject to the trust requirement filing as DCGs. We acknowledge that section 202 of the SECURE Act requires all plans filing a consolidated Form 5500 as a Group of Plans to have the same trustee as described in ERISA section 403(a). ERISA section 403(a) applies to 403(b) plans, but specifically exempts 403(b) annuities or custodial accounts from needing a trustee. Thus, following the logic, the trustee required by ERISA section 403(a) is the same for all 403(b) plans—none. Second, the broader interpretation is consistent with Congressional intent. There is no evidence of any intent by Congress to exclude section 403(b) plans, which fit perfectly in every other element of section 202 of the SECURE Act from both a technical and policy perspective. Additionally, even if the Agencies do not find this argument persuasive, 403(b) plans might, by design, be permitted to hold annuities and custodial accounts through a trust structure. ARA would also support the Agencies exercising their discretionary authority to provide a consolidated reporting scheme for 403(b) plans. Therefore, ***ARA recommends*** that the Agencies provide for a consolidated reporting options for 403(b) plans, by expanding the reading of the SECURE Act statute to permit 403(b) Groups of Plans or developing a new reporting

scheme, but in either event it should remove the current language restricting 403(b) plans from forming Groups of Plans to permit design-based alternatives that might meet the requirements.

Audit Requirement

The Proposal would also require an audit report by an IQPA for each plan participating in a DCG reporting arrangement unless the plan is eligible for the waiver of the audit requirement under DOL regulations as well as a trust-level audit of the trust's financial statements. The ARA believes this trust-level audit is not consistent with the language or the spirit of the SECURE Act. Indeed, we emphasize that certain efficiencies are essential for making a group of plans work as Congress intended. Currently small single-employer defined contribution plans are not subject to any audit, at the plan-level or the trust level. Adding a new audit requirement to small plans will merely add costs to maintenance of a plan and effectively penalize small plans for being in a group, which was clearly not the intent of the SECURE Act provision. In addition, as noted above, nothing in the SECURE Act requires plans to participate in the same trust, but only that they name the same trustee, and therefore the statute does not contemplate having a single reporting entity that could be audited at a trust level. Therefore, ***ARA recommends*** the trust-level audit be eliminated.

Plan-Specific Detail

Additionally, the ARA believes that being judicious in the individual plan information that is requested would also increase efficiencies. ***ARA recommends*** streamlining questions and limiting the number of plan-specific inquiries to the extent possible. For example, compliance questions should be answered generally on a group basis, but if there was a compliance issue with respect to only some plans within the group, the administrator could include a schedule providing additional information with respect to only those plans. Under this approach, a group of plans with no compliance issues would simply answer the compliance questions once on behalf of the entire group. Still, if there is a compliance issue for one or more plans within the group of plans which must be reported, the information for such plans could be included as an attachment or on schedules to the consolidated Form 5500.

Form 5558

ARA strongly recommends that the Agencies permit a DCG to file one extension for every plan that would be eligible to file with the DCG, with a list of EINs and plan numbers. The requirement for participating employers to each individually file an Application for Extension of Time to File Certain Employee Plan Returns, the Form 5558 is burdensome and again counter to intent of SECURE Act.

In addition, ***ARA strongly recommends*** that the Agencies permit the Form 5558 to be filed electronically for all plans regardless of whether they are part of a DCG. The current system of submitting the Form 5558 to the IRS in Ogden, Utah on paper is very labor intensive and expensive for filers and the IRS. In addition, the current manual intake system has been prone to

data entry and other errors which have imposed significant additional effort and expense on plan sponsors to rectify. Significant efficiencies could be gained by allowing the electronic filing of Form 5558.

V. Additional Revision to Instructions

ARA recommends the instructions should be revised to acknowledge and reflect with respect to late deferrals to 403(b) plans that while a corrective contribution must be made, an excise tax does not apply and therefore a Form 5330 would not be required. ARA believes the Agencies reviewed this suggestion previously and agreed with the analysis and therefore the instructions should be updated.

VI. Proposal Implementation Timeline

The data necessary to support the responses to the new line items include information that service providers are not immediately poised to provide. The quality and accuracy of the data collected will be greatly enhanced if preparers/plan administrators are given sufficient time to create procedures, communication protocols, and systems capable of coordinating the responses required by the new questions that are not directly related to the SECURE Act provisions.

As a practical matter, service providers generally do not gear up for systems changes based on draft or proposed changes; instead, these businesses must wait until final forms are issued. It then generally takes 12 - 18 months for the necessary capital investments to be approved and technology, communication, and procedure changes to be developed and implemented. Recordkeeping systems are the primary source for most data required for preparation of the current Form 5500 Series.

The information that must be collected to respond to the new compliance questions, investment-related questions, and the new schedule SB questions, however, is not currently resident in most recordkeeping databases. This information is presently captured in separately maintained systems that may be maintained by a different service provider or may not be tracked at all. Coordination or integration of these systems, information from other providers, and development of a mechanism to gather data that is not being tracked, will be required to accurately provide the information requested by the new questions. Some of the larger service providers have responsibility for more than 10,000 plans and the costs to reprogram systems will be significant.

Consider the data required to respond to the Opinion Letter questions. Many plans are currently in the process of document restatements that will impact this reporting. It will therefore require special effort to review documents that have been adopted during the restatement process and to ensure this information is properly maintained for easy retrieval on a prospective basis. Similarly, the disclosure of nondiscrimination testing and coverage methodologies, which may involve multiple service providers, or which may be resolved beyond the due date of the Form 5500 series filing.

Given the enormity of the data collection required for the new questions, and the systems changes that are inevitably linked to the capture of such data for reporting purposes, service providers need adequate time to put in place sufficient mechanisms to respond to this initiative.

In addition, a later effective date also will provide additional time for the IRS to evaluate public comments on the Proposal and to make refinements and enhancements to both the form and its instructions. ***ARA recommends*** that the financial burdens of the Proposal be reduced by delaying by at least one year the implementation of the proposed changes not related to the SECURE Act to allow time needed by plan sponsors, plan administrators and their service providers to accommodate the extensive data collection, programming, and other system modifications that will be necessary. Alternatively, the proposed changes that are not related to SECURE Act provisions could be incorporated into a larger project with a single effective date. This could save a significant amount of cost and would also give DOL the flexibility to adjust changes as needed in the broader project to accomplish its goals.

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The ARA very much appreciates the Department's commitment to safe and efficient administration of workplace retirement savings plans of America's workers, and we would welcome the opportunity to further discuss with you the issues described in this comment letter. These comments were prepared by ASPPA's Reporting and Disclosure Subcommittee on behalf of the ARA. Please contact Allison Wielobob, General Counsel at the ARA at (703) 516-9300, if you have any comments or questions regarding the matters discussed above.

Thank you for your time and consideration.

/s/

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/s/

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