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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

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

To Whom it May Concern:

This letter is in comment to the Proposed Revision of Annual Information Return/Reports, specifically regarding the proposed change to participant-count methodology for determining independent qualified public accountant audit requirements for induvial account plans. I became aware of the proposed revisions from an alert sent by the AICPA's Employee Benefit Plan Audit Quality Center, of which I am a member. I have been an employee benefit plan auditor, specifically of defined contribution plans, since 2013: first, as staff auditor at a small firm in Sacramento, and now as a sole practitioner in my own firm.

Last year, I acquired three new audit clients for the 2019 plan year. Two of these clients had just started their plans that year, and one had been in existence for two years prior. One of these plans that began in 2019 only had approximately 30 participating employees (with an account balance); however, due to them having substantially more that were eligible, they did not qualify for the audit waiver, but clearly would under the new proposal.

What did all three of these audits have in common? The plan administrators were oblivious when it came to understanding their fiduciary responsibilities and were even more oblivious when it came to internal controls over the plan administration. They had received no guidance or training from their TPAs. Out of just those three audits, I saw: a lack of annual meetings and monitoring of service providers; untimely remittances leading to prohibited transactions; a lack of the terms of the plan, requiring corrective actions, and ultimately more untimely remittances; issues with eligibility and auto-enrollment, requiring corrective actions and, once again, more untimely remittances; a lack of a bond; and issues with participant accounts.

According to the DOL's website and its Fiduciary Education Campaign (link here: https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/fiduciary-responsibilities/fiduciary-education-campaign) (paraphrased), plan sponsors and other fiduciaries have a solemn responsibility to protect the interests of the workers and retirees in their benefit plans. The program emphasizes the obligation of plan sponsors and other fiduciaries to: understand the terms of their plans; select and monitor service

providers carefully; make timely contributions to fund benefits; avoid prohibited transactions; and make timely disclosures to workers and their beneficiaries and reports to the government. In just my three audits, I saw issues with all but one of these. In fact, in 2019 and 2020, none of them had monitored their services providers at all, let alone carefully; in 2019, one of them had late remittances and in 2020 they all had late remittances; due to the late remittances, they all had prohibited transactions; and in 2020, one of the plans approved an incorrect employer match due to a lack of understanding of the terms of their plan.

Further, according to the FAQs of retirement plans and ERISA compliance found on the DOL's website (link here: https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-compliance.pdf) (paraphrased), plan fiduciary responsibilities also include: carrying out their duties with skill, prudence, and diligence. As evidenced, above, the administrators/sponsors are lacking in this area. They can't carry out their duties with skill, prudence, and diligence because they simply don't know what their duties are.

As I was reading the news release on the DOL's website (link here: https://www.dol.gov/newsroom/releases/ebsa/ebsa20210914), I found Acting Assistant Secretary for Employee Benefits Security Ali Khawar's comments particularly interesting. Mr. Khawar stated that these proposed changes would support the agencies' oversight of employee benefit plans. This seems rather contradictory to me, since the audit requirement part of this proposal would actually lessen the agencies' oversight of employee benefit plans by expanding the number of plans that would qualify for the audit waiver.

This reminded me of the DOL's audit quality study, wherein they found a link between audit quality and the number of plans a firm audits: firms that had fewer EBP audit engagements had the most major deficiencies in their audits. I think the same idea applies here in the plans themselves: the fewer plan participants, the more deficiencies in their internal controls, and therefore, the more errors in plan administration and compliance. Smaller companies are inherently less complex and formal than their large counterparts. Smaller companies and their plans are exactly the plans that should be audited. Expanding the exemption for them would be like cutting Peer Review requirements for those audit firms with less than 25 EBP engagements, which are exactly the firms that need it most.

In the DOL's publication, Selecting an Auditor for Your Employee Benefit Plan (link here: https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/selecting-an-auditor-for-your-employee-benefit-plan.pdf) (paraphrased), it touts an audit as being a "vital protection" for a plan, and that it is in the best interest of the sponsor and the participants that they "maximize the value of the audit process." Further, it states that at the conclusion of the audit, auditors will report significant deficiencies or material weaknesses in internal controls and may suggest recommendations for improvement. This is exactly what the smaller plans need – they need to know what DOL considers an untimely remittance, and the consequences of them (lost earnings, excise taxes, prohibited transactions). They need to know the importance of the annual meetings and monitoring of the service providers. They need to know what happens when they decide to calculate the employer match on their own and inadvertently exclude participants that should have received the contribution (and again, the consequences: lost earnings, QNECs, excise taxes, prohibited transactions).

This proposed change to participant-count methodology also seems to be counterintuitive to the new SAS No. 136, which is meant to improve audits and enhance the communicative value and transparency of the reports (paraphrased from AICPA information available on the Center website). The new SAS also includes additional requirements for plan administrators. Why would this be implemented only to cut out the audit strata it would most benefit?

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In closing, I feel it is a disservice to the participants of those plans that would fall under the audit exemption should this proposed change pass. If the three plans I referenced earlier were started in 2022 and were able to get an audit waiver, the issues I discovered during the audit would have gone unnoticed and the plan participants would have continued to be negatively affected. I understand the annual plan audit is a large expense that most plan sponsors are not fond of; to be honest, I'm not terribly fond of the peer review expense, but I understand its importance. In both cases, I think the benefit outweighs the cost. If the goal of Title I of ERISA is to protect the interests of participants and their beneficiaries in employee benefit plans, I do not think changing the participant-count methodology and expanding the audit exemption is a means to that end.

Thank you for taking the time to consider these comments.

Respectfully,

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