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 Form 5500 Revisions RIN 1210–AB97
RE: Comments on Department of Labor Proposed Rule Regarding the Annual Reporting Requirements under Title I of the Employee Retirement Income Security Act of 1974, as amended

To Whom It May Concern,

Vestwell appreciates the opportunity to provide comments on the U.S. Department of Labor's (DOL) proposed changes to the annual reporting requirements for certain types of defined contribution pension plans. We are writing to comment specifically on the requirement for individual plans of a certain size in a Defined Contribution Group to obtain a separate audit. That requirement would deter small business owners from offering retirement plan benefits and undermine the savings goals of the SECURE Act.

About Vestwell and How We Help Small Businesses

Vestwell created a proprietary online platform that provides recordkeeping, plan administration, and other support services to defined contribution plans. Our mission is to make it easier for employers to offer retirement plan benefits to their employees. By automating various recordkeeping functions and implementing other technology innovations designed to streamline administration and reduce the risk of errors, our platform enables business owners to offer these important retirement savings plans to their employees.

Our platform is especially well suited for small and micro-cap pension plans. These business owners typically lack a dedicated benefits department, do not have a deep understanding of the applicable regulations, and do not have the capacity to undertake extensive administrative responsibilities. We have found that many of them prefer to delegate all available fiduciary and non-fiduciary responsibilities to service providers like Vestwell. Our platform and services have been well received in the market. We support more than 22,000 small businesses and their workplace savings programs across the country and numerous industries.

Historically, small businesses have been an underserved market in the retirement plan sector because of the burdens in operating these plans. Pain points such as a time-consuming process to handle payroll files, determine employee eligibility to participate in the plan, and similar friction have contributed to a well-known retirement savings gap in the United States. Recent research by the Center for Retirement Research at Boston College found that for most individuals' 401(k) plan or Individual Retirement Account ("IRA") assets represent the main source of retirement savings outside of Social Security.[1] However, according to the Boston College study, most workers have retirement balances that are substantially below the amount needed for a comfortable retirement. For example, a typical 60-year-old in 2016 had less than $100,000 in retirement savings, which is well below the potential savings if he/she had consistently saved in a workplace retirement plan starting at age 25. The study found that providing continuous access to a workplace-based savings vehicle for all employees could substantially increase retirement savings.

An additional obstacle for small business owners, both in the for-profit and non-profit sectors, is access to 401(k) and defined contribution plans. Most of these plans are created by financial advisors which often have a pre-existing relationship with the business owner.[2] Vestwell has more than 750 advisory firms that utilize our platform on an unbundled basis whereby they perform investment fiduciary services and Vestwell provides recordkeeping, plan administration, custodial and technical support. Advisors have been hindered in their efforts to scale their business to support standalone 401(k) plans because of the individual amount of attention required by each plan.

[1] Andrew D. Biggs & Alicia H. Munnell & Anqi Chen, 2019. "Why Are 401(k)/IRA Balances Substantially Below Potential?" Working Papers, Center for Retirement Research at Boston College.

[2] 2020 Defined Contribution Benchmarking Survey, *Plan Sponsor* nhttps://www.plansponsor.com/research/2020-dc-survey-plan-benchmarking/?pagesec=3

The SECURE Act Helps Thousands of Small Businesses and their Employees Save for Retirement

It's an exciting time in the retirement industry where retirement plan reform has been a key part of Congressional action. In December 2019, with the passage of the SECURE Act[3] and the Department of Labor ("DOL")'s electronic delivery rule, small- and medium-sized business owners are incentivized by tax credits and relaxing of other administrative requirements that will encourage more business owners to offer retirement plan benefits to their employees. Mandates in 12 states, with more similar legislation under consideration in 28 other states, that require employers to offer retirement benefits are expected to lead to the creation of more retirement plans offered by small businesses.

Vestwell's mission ties in perfectly with these legislative initiatives. We estimate that more than 500,000 businesses with existing 401(k) plans could be better and more efficiently served through Vestwell. Additionally, Vestwell's own analysis suggests that there are more than seven million small businesses and their employees who are missing out on the most tax efficient retirement savings solution. That means nearly 95% of small businesses in the country are not providing the optimal solution to their employees and helping to achieve a healthier financial future. In our role as a leading workplace savings fintech provider, this market requires a cost-effective, streamlined solution. Legislative initiatives play a key role in removing the friction and expense holding that holds small businesses back.

Defined Contribution Groups are Highly Desirable for Small Businesses, Financial Advisors, and Service Providers

The SECURE Act paved the way for two new plan structures that are especially attractive to small business owners.

- Pooled Employer Plans ("PEP"s), which launched this year, allow unrelated employers to participate in the same, single retirement plan, benefitting from scale and offloading fiduciary responsibilities to the service providers that support the plan. With PEPs, the pooled plan provider is the named ERISA section 3(16) fiduciary and plan administrator.

[3] The Setting Every Community Up for Retirement Enhancement Act of 2019, which makes it easier for small business owners to set up certain retirement plans that are less expensive to administer and burdensome.

- Group of Plans (which the proposed regulations refer to as Defined Contribution Groups "DCG"s), which is set to go live next year, allows groups of unrelated plans to file a single Form 5500 as long as they use the same trustee, administrator, plan year, and investment options.

DCGs are especially attractive to small business owners, service providers, and financial advisors for their simplicity. Advisors can scale their business by offering and overseeing a single investment lineup across multiple plans, even smaller plans that the advisor was unable to support previously. Recordkeepers achieve similar efficiencies which, in turn, create pricing advantages for plan sponsors that can be passed on to participants. For non-profit organizations that wish to offer an ERISA 403(b) plan, DCGs are the only option under current regulations for an aggregated retirement plan that offers the administrative convenience of a consolidated Form 5500 filing. Because of the uniformity and easier recordkeeping, there will likely also be cost savings on other secondary plan expenses like fiduciary insurance and the requisite fidelity bonds that can be passed along as well.

DCGs also offer the flexibility in allowing each individual employer in the DCG to offer plan features, such as eligibility rules, employer match, and vesting schedules, that are best suited for their business. Service providers could likewise obtain flexibility regarding their pricing, offering lower fees to plans that offer features that are easy to administer and charging higher fees only to those plans that want more customization.

<u>The Proposed Regulation Audit Requirement Threatens the Existence of DCGs</u>

But critically, the proposed regulatory change that would require each employer of a certain size in a DCG to obtain its own audit may make DCGs a non-viable option for small businesses. That requirement would put DCGs at a severe commercial disadvantage relative to PEPs and multiple employer plans ("MEP"s) given that audits represent an additional expense and burden for employers. In a MEP, there is typically a single audit for the entire plan under which each participating employer must undergo its portion of the audit roughly once every three years as part of a sampling routine under generally accepted accounting standards. The practical effect of the plan-wide MEP approach is that both cost and workload for the participating employers are dramatically reduced, often by 80% or more. Small business owners are hoping that similar time and money savings would apply to DCGs, but the cost of an audit, likely in the range of $15,000 - $25,000 per plan, would easily negate any cost savings that are the driver for DCGs in the first place. If the proposed changes are enacted, plan sponsors that have more than 100 eligible employees will abandon the DCG option in favor of a PEP or MEP, where there is only one audit required, but that does not allow the flexibility in pricing and plan features available in a DCG. Alternatively, they may opt to

sponsor their own retirement plan or not offer one at all, essentially putting the small plan market back in the position it was in before the SECURE Act.

An audit at the individual plan level is also unnecessary and would only add a disproportionate cost relative to the benefit that an audit would achieve. The objectives of an audit to validate funds flowing in and out of the plan, identify late or missing contributions, obtain confirmation that the plan has sufficient controls to prevent and detect errors, and confirm compliance with DOL rules generally can be achieved through other less expensive means. The proposed Schedule DCG to Form 5500 could require additional information from the plan administrator. Late or missing contributions would still be required by each plan in a Form 5330 disclosure. The proposed regulations require holding all assets of the DCG in one trust by a single Trustee and for the trust to undergo an audit. The Department could require that trust audit to be conducted consistent with the same audit standards that would apply to large plans and by an Independent Qualified Plan Auditor. In light of the fact that DCG reporting arrangements would be consolidating the assets of many unaffiliated small plans under the control of a single trustee in a single trust, those audit standards would be an effective way of adding protections for funds aggregated in the DCG trust. This is especially true if the Trustee undergoes an audit pursuant to the AICPA professional standards or their equivalent for security and other trust criteria. There are parallels to this reporting and oversight arrangement in group insurance plans under 29 CFR 2520.103-2 and 29 CFR §2520.101-2 and Professional Employer Organizations under Treas. Reg. Section 31.7705-1.

Additional protections for participants could be achieved by limiting the investment options available to plans in a DCG to publicly traded securities and similar investments that can be valued daily, easily, and objectively. Requiring all plans in the DCG to have the same investments or investment options would effectively preclude plans that hold employer securities from participating in a DCG reporting arrangement because those investments would conflict with the investment uniformity objectives of the SECURE Act.

We also noted that the IRS proposed changes to the Form 5500, schedules, and instructions would require new disclosure at the individual plan level. The IRS proposal would require confirmation by the plan administrator that every plan in the DCG satisfies the nondiscrimination and coverage tests of Code Sections 401(a)(4) and 410(b), whether the plan sponsor used the design-based safe harbor rules or the "prior year" or "current year" ADP test, and whether the employer is an adopter of a pre-approved plan that received a favorable IRS Opinion Letter, the date of the favorable Opinion Letter, and the Opinion Letter serial number. These protections would give the Department assurances that the plan benefits are being offered to and are being participated by a fair cross section of participants with operations procedures that follow IRS approved plan features.

If the Department accepts the proposed regulations and requires each plan in the DCG to undergo a separate audit, we are strongly in favor of the proposed regulation that changes the definition of defining "eligible employees" for audit purposes. "Eligible employees" should only include participants with a balance in the plan, instead of also including eligible employees who do not participate or have a balance. Counting participants with account balances only will simplify plan administration and save many service providers and employers the headache and expense of tracking down records of now-former employees or digitizing paper records that are prone to error. This change would mean that many defined contribution plans that were required to have an audit in the past will now qualify for an exemption from the audit requirement based on the DOL's small plan audit waiver regulation at 29 C.F.R. § 2520-46. This change would also avoid the unfair result that would occur when two plans in a DCG with the same number of active participants could have different audit requirements depending on the number of non-participating but eligible employees.

In short, a consolidated audit by the DCG would achieve the financial accountability and oversight protections desired by the Department while also allowing DCGs to offer annual reporting cost-efficiencies, particularly for the small plans that we believe SECURE Act section 202 was intended to benefit and that are comparable to those that can be offered by MEPs and PEPs. It would also help the Department achieve its stated goals of the Paperwork Reduction Act, 44 USC §3501 et seq. and reduce the Department's cost burdens of reviewing Form 5500s. Closing the retirement savings gap requires giving access to small business owners and their employees to savings vehicles that can enable them to achieve a comfortable retirement. Those goals would be thwarted by adding a layer of cost and complexity for employers that would only be passed on to their participants and adds little, if any, benefit.

Thank you for the opportunity to submit our opinions on behalf of our small business clients.

Sincerely,

Aaron Schumm
CEO and Founder