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Filed Electronically

October 29, 2021

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
US Department of Labor
200 Constitution Ave., NW
Washington, DC 20210
Attention: RIN 1210-AB97

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

Dear Sir or Madam:

The Investment Company Institute¹ is pleased to submit comments on the notice of proposed forms revisions (the “Proposal”) published by the Department of Labor (DOL), the Department of the Treasury, and the Pension Benefit Guaranty Corporation (collectively, the “Agencies”).² The Proposal would make 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). Certain of the proposed changes are intended to implement statutory amendments to ERISA and the Code enacted under the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act). In addition, the Agencies are proposing changes to the Schedule H financial reporting of investment assets (including changes intended to improve the functionality of the collected data), changes to the rules for counting participants for purposes of eligibility for small plan simplified reporting, changes to improve reporting on defined benefit pension plan funding, and changes to improve compliance reporting for tax-qualified plans, among other things.

¹ The [Investment Company Institute](#) (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s members manage total assets of \$32.4 trillion in the United States, serving more than 100 million US shareholders, and \$10.1 trillion in assets in other jurisdictions. ICI carries out its international work through [ICI Global](#), with offices in Washington, DC, London, Brussels, and Hong Kong.

² 86 Fed. Reg. 51488 (September 15, 2021).

The SECURE Act includes two important changes intended to make it easier for employers to offer retirement plans to their workers, both with significant implications for annual reporting obligations.

- Section 101 of the SECURE Act allows otherwise unrelated employers to band together and participate in defined contribution multiple employer plan (MEP) arrangements referred to as “pooled employer plans” or “PEPs”. Like existing MEPs, a PEP arrangement will file a single Form 5500.³ The SECURE Act requires PEPs and other MEPs to report on Form 5500 certain information beyond that which was already required for MEPs, including the aggregate account balance of each participating employer.
- Section 202 of the SECURE Act directs the IRS and DOL to work together to modify Form 5500 so that all members of a group of defined contribution plans meeting certain requirements (including having the same trustee, named fiduciary, and plan administrator) may file a single consolidated Form 5500. The new law requires implementation of the consolidated Form 5500 framework not later than January 1, 2022, to be effective for returns and reports for plan years beginning after December 31, 2021.

While these SECURE Act changes were the impetus of the current Proposal, the Agencies took the opportunity to propose additional changes, some of which were included in a previous notice of proposed form revisions from 2016.⁴ The 2016 proposal, notable for its breadth and scope, would have imposed a significant burden on plan sponsors and their service providers tasked with completion of the Form 5500. That proposal was not finalized, though DOL indicates that it has a separate project on its semi-annual regulatory agenda that, like the 2016 proposal, would focus on a broader range of improvements to the Form 5500 annual reporting requirements.⁵

As a threshold matter, our letter strongly recommends in Part I that the Agencies hold off on aspects of this Proposal⁶ not related to implementing the SECURE Act changes for MEPs and consolidated reporting, such as the proposed revisions to Schedule H.⁷ We believe these

³ The DOL established registration requirements for providers of PEPs in November 2020, including creating new Form PR (Pooled Plan Provider Registration). 85 Fed. Reg. 72934 (November 16, 2020).

⁴ See 81 Fed. Reg. 47534 (July 16, 2016) and 81 Fed. Reg. 47496 (July 16, 2016).

⁵ The most recent agenda includes this project as a long-term agenda item and indicates that DOL expects to issue a proposal in May 2022. See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1210-AC01>. The preamble to the Proposal describes that regulatory action as “part of a strategic project with the IRS and PBGC to improve the Form 5500” by “[m]odernizing the financial and other annual reporting requirements” and “continuing to make the investment and other information on the Form 5500 more data mineable,” while also focusing on “enhancing the agencies' ability to collect employee benefit plan data that best meets the needs of changing compliance projects, programs, and activities.” 86 Fed. Reg. at 51492.

⁶ Our comments are intended to address only those aspects of the Proposal affecting defined contribution retirement plans. We do not express an opinion on aspects of the Proposal specifically applicable to defined benefit pension plans and multiple employer welfare arrangements (MEWAs).

⁷ As discussed herein, we support the Proposal’s change to the rules for counting the number of participants in a defined contribution plan, which tangentially relates to SECURE Act section 112 (permitting participation by certain long-term part-time workers).

additional changes should be repropose as part of the longer-term Form 5500 reform project, after obtaining greater input from stakeholders. The system changes that are necessary when such form changes are made are costly, and plan participants often are the ones who ultimately bear the cost. Plans not affected by the SECURE Act changes and their service providers should not be forced to implement significant changes for the 2022 plan year and then again soon after, with the anticipated modernization project. Requiring multiple rounds of significant changes in this way, as opposed to implementing the changes simultaneously, will drastically increase the overall cost.

In Part II of the letter, we recommend certain changes and clarifications to the proposed form revisions implementing section 202 of the SECURE Act, the new consolidated filing framework for groups of similar defined contribution plans. Specifically, the Agencies should permit large plans within the filing group to have a consolidated plan audit, expand the consolidated filing framework to cover 403(b) plans, and clarify the requirement that participating plans have the same investments.

Finally, Part III of our letter expresses support for the Proposal's modification to the rules for determining the number of participants in a defined contribution plan, for purposes of eligibility for simplified reporting options available to small plans. This change makes sense in light of new requirements enacted under the SECURE Act that will require 401(k) plans to extend participation to certain long-term part-time workers.

I. The Agencies Should Delay and Repropose Schedule H Revisions and Other Non-SECURE Act Changes

With the stated intention of improving the usability of reported data for purposes of enforcement and analysis, the Proposal would:

- Update the Schedule H and instructions to standardize the electronic filing format for the schedules of assets required to be included in the annual return/report (Schedule H, line 4i currently requires a schedule of assets held at the end of the year and a schedule of assets held and disposed of within the year);
- Add disclosures to the schedules of assets regarding the characteristics of investments that plans hold (including identifying any qualified default investment alternatives and providing their total annual operating expenses);
- Increase the level of detail for administrative expenses reported on the Schedule H Income and Expense Statement; and
- Add new trust questions to the Form 5500, Form 5500-SF, and Form 5500- EZ, regarding the name of the plan's trust, the trust's employer identification number (EIN), the name of the trustee or custodian, and the trustee's or custodian's telephone number.

The Proposal also would add compliance questions to the Form 5500 for tax-qualified retirement plans, including questions relating to how a plan satisfies the nondiscrimination and coverage tests of Code sections 401(a)(4) and 410(b); questions relating to Code section 401(k) nondiscrimination testing and use of safe harbor designs; and questions regarding whether pre-

approved plans have been updated for changes in the law. The totality of these changes is quite significant.

We support DOL's efforts to modernize the Form 5500 and generally make the information collected on the form more usable. Although these are laudable goals, they should be balanced carefully against the potential costs and burdens that will result from required systems changes and the need to input a significant amount of new information in preparing the annual filing.⁸ In their current form, the proposed modifications to the Schedule H, line 4i schedules of assets, in particular, are highly problematic for Form 5500 filing entities and their service providers, and could benefit from additional study and further revisions.

In order to make the schedules of assets more data mineable, the proposed revisions would no longer permit plans or direct filing entities (DFEs) to create their own schedules of assets in the form of an attachment. Instead, the Proposal would establish a standardized electronic filing format for the Schedule H, line 4i schedules of assets, requiring plans to complete the schedules through IFile or using EFAST-approved third-party software.⁹ This is a significant change, even without the addition of the new data elements that are included in the Proposal. Rather than finalize this provision for plan years beginning on or after January 1, 2022, more information should be shared between DOL and the Form 5500 preparers to ensure that DOL's goal for improved data usability can be met in the least burdensome and costly manner possible.

Similarly, DOL should gather more information from Form 5500 preparers, bank trustees/custodians, and other service providers prior to finalizing the new data elements the Proposal would add to the Schedule H, line 4i schedules of assets. As proposed, many of the new required data elements could create significant additional cost and time burdens (and, in some cases, confusion), while failing to achieve DOL's goal of making "key information about plan investments" accessible to the Agencies, policymakers, employers, labor organizations, participants and beneficiaries, and the public.¹⁰ As examples, three of the new data elements are particularly problematic:

- Identification of Designated Investment Alternatives (DIAs) and Associated Total Annual Operating Expenses. We note that the line 4i schedule of assets held for investment will not capture all DIAs. For example, some large plans "construct" their own target date funds, each of which consists of different weightings of several underlying mutual fund holdings. In such cases, the target date funds (i.e., the DIAs) will

⁸ As we commented in our 2016 comment letter, it important that the Agencies carefully weigh the benefits of collecting the new information against the costs which will be ultimately borne by plan participants. For the most part, it appears that the benefits of the proposed changes would inure to the Agencies and to third parties in the form of improving enforcement and data-mining capabilities. See letter from David Abbey, Deputy General Counsel – Retirement Policy, to Office of Regulations and Interpretations, Employee Benefits Security Administration, dated December 5, 2016, available at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB63/00182.pdf>.

⁹ See 86 Fed. Reg. at 51500, 51546-7.

¹⁰ See 86 Fed. Reg. at 51500.

not appear on the schedule of assets, which will only list the aggregate holdings of each of the underlying mutual funds.

- Inclusion of All Government or Market Exchange Registration or Identity Numbers. The Proposal’s instructions for the schedules of assets would require inclusion of the CUSIP, CIK, LEI, NAIC Company Code, or other government or market exchange registration or identity number, as applicable. The instructions further state that “you must include all that apply,” with the entries “separated by commas.”¹¹ It is simply not practical for plans, DFEs, or their service providers to obtain, store, and generate standardized reporting for all government or market registration or identity numbers that could possibly apply to a mutual fund, security, or other asset held for investment. Moreover, it is not clear how the benefits of including *all* possible identifiers would outweigh the significant time and cost burdens this would add to compiling the schedules of assets.
- Inclusion of “Hard-to-Value” Checkbox. The Proposal would require checking a box for each asset held for investment that is “hard-to-value.” The proposed instructions for the Schedule of Assets Held for Investment state that any asset that is “not listed on any national exchanges or over-the-counter markets, or for which quoted market prices are not available from sources such as financial publications, the exchanges, or the National Association of Securities Dealers Automated Quotations System (NASDAQ)” be identified as a hard-to-value asset.¹² Unlike the current instructions for line 4g of the current Schedule H, the proposed instructions do not clarify that mutual funds should not be treated as hard-to-value,¹³ which is likely to create confusion.

Though the bulk of our concerns relate to the Schedule H modifications, as described above, we believe that the other proposed revisions not needed to implement the SECURE Act should likewise be postponed for further evaluation and repropose as part of the broader Form 5500 modernization project.¹⁴ The Agencies should take into account the significant negative impact that multiple rounds of Form 5500 revisions would have on the cost of plan administration.

II. The Agencies Should Modify the Proposed Revisions to Implement Section 202 of the SECURE Act to Better Achieve its Goals

Section 202 of the SECURE Act directs the Agencies to create a new consolidated reporting framework for groups of similar defined contribution plans. To this end, the Proposal would add a new type of DFE called a defined contribution group (DCG) reporting arrangement and establish a new Schedule DCG (Individual Plan Information)¹⁵ for such filing arrangements, in

¹¹ See 86 Fed. Reg. at 51549-550, 51553.

¹² See 86 Fed. Reg. at 51549.

¹³ The current instructions state that Form 5500 filers should “not check ‘Yes’ on line 4g for mutual fund shares.” See Form 5500, Instructions for Schedule H, line 4g and 4h.

¹⁴ As stated in note 6 supra, we are not expressing a view on proposed revisions applicable to defined benefit pension plans and MEWAs.

¹⁵ The Proposal includes as Appendix B, a facsimile of proposed Schedule DCG and instructions. See 86 Fed. Reg. at 51519.

addition to the more generally applicable Form 5500 requirements. The Proposal would require a separate Schedule DCG (Individual Plan Information) for each plan participating in the group, while information on the various other schedules to the Form 5500 would be reported in the aggregate. The Proposal states that Schedule DCG generally would report less individual plan information than if an individual plan filed its own Form 5500.

We recommend the following improvements to the proposed DCG reporting arrangement framework.

A. Allow Consolidated Audits

In the proposed conditions for plans to participate in a DCG reporting arrangement, the Proposal provides that a large plan electing to participate in a DCG must continue to be subject to its own separate audit by an independent qualified public accountant (IQPA) and that the audit report for the plan would have to be filed with the consolidated Form 5500 of the DCG reporting arrangement. As explained in the preamble, DOL believes that Generally Accepted Auditing Standards (GAAS) would not support a consolidated audit of all the participating plans in the DCG reporting arrangement.¹⁶

The SECURE Act's consolidated reporting framework is intended to reduce the costs and burdens of maintaining a plan, which in turn will encourage more employers to offer retirement plans and allow more workers to save for retirement. The Proposal should be viewed through this lens. Unfortunately, the Proposal's requirement that any large plans participating in the DCG would continue to be subject to a separate plan-level audit will prevent the new reporting option from achieving its goal. Plan-level audits generally are one of the biggest expense components associated with the annual reporting requirement. Not allowing a consolidated audit of the large plans participating in a DCG will mean that, for these plans, very little cost-savings will result from participating in the DCG. The Institute strongly urges the Agencies to permit a consolidated audit for all plans participating in the group of plans that would otherwise be subject to the audit requirement.¹⁷

In the preamble to the Proposal, DOL suggests that large plans participating in a DCG and the DCG administrator could reduce expenses by hiring the same auditor to perform the trust audit and the individual plan audits.¹⁸ This expectation is unlikely and impractical. Especially as the number of participating plans grows larger, getting all large employers in a DCG to agree to use the same auditor as the one used for the trust audit would be difficult. Some of the large plans may have existing relationships with audit firms and want to continue those relationships.

We understand that GAAS raises questions about the concept of a consolidated audit that require consideration, but we believe that the standards should not preclude the use of consolidated audits for large plans participating in a DCG arrangement. As in other contexts, it is within

¹⁶ See 86 Fed. Reg. at 51495.

¹⁷ Generally, pension plans and funded welfare plans with 100 or more participants are required to have an audit of the plan's financial statements performed by an IQPA.

¹⁸ See 86 Fed. Reg. at 51496.

DOL's authority to provide special rules outside of GAAS when needed.¹⁹ Ultimately, DOL should carefully reconsider its proposed separate audit requirement, taking into account the central importance of the consolidated audit to achieving the goals of Congress in enacting section 202. Without the ability to use consolidated audits, the SECURE Act's new reporting option will be rendered ineffective and superfluous.

B. Allow Participation by Plans Without Trustees

Section 202(c)(2)(A) of the SECURE Act requires that all plans in the consolidated filing group have the same trustee (as described in section 403(a) of ERISA). Currently, the Proposal does not contemplate the participation in a DGC by plans without trustees, such as 403(b) plans, which use custodial accounts or insurance contracts as funding vehicles. The Proposal asks for comments on whether the Agencies should, pursuant to their general regulatory authority, provide a consolidated reporting option for plans that use the same custodial account or insurance policy as the funding vehicle for their plans, and if so, whether special conditions should apply in light of the absence of a trustee or trustees.

We recommend that the Agencies allow for participation in a DGC by 403(b) plans even though such plans do not have trustees. ERISA specifically excepts such plans from the trust requirement under section 403. We believe there is no clear reason (policy or technical in nature) to treat these plans differently and these plans could benefit equally from the consolidated filing framework. Absent a clear concern over potential abuse or other problems resulting from their participation, the Agencies should expand the DGC arrangements to include ERISA-covered 403(b) plans.

C. Clarify the "Same Investments" Requirement

Section 202(c)(3) of the SECURE Act requires that all plans in the consolidated filing group provide the "same investments or investment options" to participants and beneficiaries. The Proposal provides little guidance on the meaning of this requirement, other than noting the Agencies' view that it effectively prevents plans with brokerage windows and plans holding employer securities from participating in a DGC reporting arrangement (although comments are requested on that issue). Questions have arisen regarding the extent of the "same investments or investment options" requirement. It is unclear whether, for example, all plans within the group must have the same exact menu of investment options for participants, or, alternatively whether individual participating plans can choose a tailored menu of investment options from a provider's platform that includes a wider range of investments offered to all the plan sponsors.

We urge the Agencies to clarify that the "same investments or investment options" requirement would permit a common investment platform, from which each participating plan could select the specific investment options to be available on its plan menu. Otherwise, requiring each plan to have the exact same line-up of investments would greatly limit the ability to use the DGC framework. It is common for plans sharing a common plan administrator that might otherwise meet the criteria for participating in a DGC, to have their own section 3(21) investment adviser

¹⁹ Similar concerns have been confronted in other situations, such as the inclusion of affiliated service group members in a single employer plan audit and 403(b) plans with grandfathered contracts not required to be included in an audit.

helping the individual plan sponsor assess the prudence of selecting specific investment options for its plan. If this type of arrangement is not accommodated in the DCG filing context, a significant portion of plans will be left out.

III. The Agencies Should Retain the Proposed Method for Determining the Number of Participants in a Defined Contribution Plan

The Proposal would change the method of calculating the number of participants in a defined contribution plan for purposes of being able to file as a “small plan” for simplified reporting, including waiver of the annual audit. Instead of counting all those eligible to participate, only those participants and beneficiaries with account balances as of the beginning of the plan year would be counted (the first plan year would use an end of year measure as well). We fully support this change because it would help reduce costs and burdens for smaller plans affected by the new eligibility rules for long-term part-time workers enacted under the SECURE Act.²⁰ The expanded eligibility rules could cause more plans to exceed the threshold number participants for filing as a large plan, even where some of those newly eligible employees do not have account balances.

* * *

ICI appreciates the opportunity to comment on the Proposal. If you have any questions about our comment letter, please feel free to contact David Abbey (david.abbey@ici.org), Elena Barone Chism (elena.chism@ici.org), or Shannon Salinas (shannon.salinas@ici.org).

Sincerely,

/s/ David Abbey

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²⁰ Section 112 of the SECURE Act generally requires 401(k) plans (except for collectively-bargained plans) to permit participation by workers who complete at least three consecutive years of service with at least 500 hours of service each year.