

November 1, 2021

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

RE: [Proposed Revision of Annual Information Return/Reports \(RIN 1210-AB97\)](#)

This letter is being provided to you to submit comments on behalf of our firm, Capin Crouse, LLP, regarding Proposed Revision of Annual Information Return/Reports (RIN 1210-AB97) issued in the September 15, 2021 Federal Register (the Proposal). We have reviewed the Proposal and below contains our comments.

Update to Forms 5500 and 5500-SF and their Instructions – Changes to Participant-Count Methodology for Determining Independent Qualified Public Account Audit Requirement for Individual Account Plans

The Proposal would change the current method of counting covered participants for purposes of determining when a defined contribution plan may file as a small plan and whether the plan may be exempt from the independent qualified public accountant (IQPA) audit requirements. The Proposal notes that participants of plans that file as a small plan would no longer have the protections provided by the IQPA audit, which could result in an increased risk of errors and fraud, and that there are conditions for small plans to be eligible for the audit waiver in CFR § 2520.104–46 designed to address those potential risks.

Capin Crouse is a public accounting firm that works exclusively with nonprofit organizations. The ERISA plans that we audit represent over 45,000 participants and an estimated \$2 billion in plan assets. Many of these plans are Section 403(b) plans. For the 2019 Form 5500 year, 5 of 71 plan audits that we performed reported fewer than 100 participant accounts on Form 5500 and would no longer be required to have an audit under the Proposal.

Our nonprofit clients are not driven by financial gain; they are driven by the impact they have in the community. At least once a year, we encounter a client that has been notified their participant count has exceeded the threshold for large plans and now requires an audit. These organizations suddenly have to bear the cost and burden of a benefit plan audit, regardless of the number of participant accounts or amount of investments. Any funds spent on administrative expenses such as audits reduces the funds available for programs.

In addition, we've had several clients throughout the years realize they did not correctly count the number of participants at the beginning of the year because they only included participants with accounts and did not include employees eligible but not participating. Once this discovery is made, the organization has to undergo amended Form 5500s along with several years of back-audits. This mistake is costly and time consuming. By changing the audit threshold to a number that is more easily defined, there is a reduced likelihood of this situation occurring.

For these reasons, we support the addition of a line item on the Form 5500 to report the count of participant account balances at the beginning of the year and determination of small plan vs. large plan status based on the number of participant accounts.

In addition to the new line to report the number of participant accounts at the beginning of the year, we would recommend a change to the name of Line 6(a) from “Active Participants” to “Employees Eligible to Participate in the Plan” to clarify the data being requested and increase accuracy. Although the instructions state these line items are to count employees eligible to participate even if they are not participating, the simple interpretation of these lines is to count only employees actively participating in the plan. Perhaps adding prior year and current year columns for all parts of Line 5 and Line 6, similar to the prior year and current year columns on Schedule H, Part I, would assist preparers in getting to the correct number of total participants at the beginning of the plan year.

#### Internal Revenue Code-Based Question for the 2022 Form 5500s

The IRS is proposing to add new questions to the 2022 Form 5500 that are designed to assist the IRS in identifying plans that are non-compliant relating to Code section 410(b) coverage, Code section 401(a)(4) nondiscrimination, and Code section 401(k) non-discrimination testing.

In spite of our support for the Proposal, we are concerned that using the count of participant accounts for determining the audit threshold may dissuade some organizations from fulfilling obligations under the universal availability rules of Section 403(b). Namely, 403(b) plan sponsors are required to communicate information on eligibility to all eligible employees, and thereafter provide an annual notification to eligible employees. Plan sponsors may use less effective means of making these communications to keep the number of participant accounts under the small plan/large plan threshold.

We recommend that two additional compliance questions for 403(b) plans be added to the Form 5500 and Form 5500-SF: 1) asking whether the Plan has notified all newly eligible participants of their eligibility to participate in the plan, and 2) asking whether the Plan has communicated eligibility requirements annually to all eligible employees. These questions align with the proposed questions for 401(k) and 401(a)(4) non-discrimination testing but are specific to 403(b) plans and address a significant risk in administering 403(b) plans.

We appreciate your consideration of our recommendations. Please contact Emily Toler at [etoler@capincrouse.com](mailto:etoler@capincrouse.com) if you have any questions or would like to discuss these comments.

Sincerely,

A handwritten signature in cursive script that reads "Emily Toler".

Emily Toler  
Partner and Director of Employee Benefit Plan Services  
Capin Crouse LLP