GROOM LAW GROUP

Louis T. Mazawey
(202) 861-6608
lmazawey@groom.com

November 1, 2021

By Electronic Mail

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Federal eRulemaking Portal: http://www.regulations.gov
Attention: Proposed Form 5500 Revisions RIN 1210-AB97

Re: Expanded Form 5500 Reporting for Multiple Employer Plans

Dear Sir/Madam:

This letter sets forth comments and concerns we have identified with the proposed revision of the Form 5500 rules and schedules for 2021 and later plan years as they apply to association-sponsored multiple employer pension plans ("Association MEPs"). (Our firm may file additional comments on issues affecting MEPs and "pooled employer plans.")

I. Reporting of "Aggregate Account Balances"

Appendix C of the Proposed Revisions (86 Fed. Reg. 51488, at page 57,541) would require MEPs to provide four pieces of additional information for each participating employer. Item 4 relates to "Aggregate Account Balances Attributable to Participating Employer."

We recommend that this item not apply to multiple employer pension plans that determine their minimum funding requirements as if all participants were employed by a single employer and, therefore, did not elect "employer-by-employer" treatment under the Technical and Miscellaneous Revenue Act of 1988 ("TAMRA"). IRC § 413(c)(4)(B). Such pre-TAMRA "single plans" have no reason to create "account balances" or other separate measures of each employer's "participation" in the plan. This is especially true for "CSEC" plans – under Code section 413(d), such plans (which may be pre-TAMRA plans) determine their funding requirements as if there is only one employer.

We understand that the Department considers section 101(g) of the SECURE Act as the basis for requiring this information, but we respectfully submit that this provision should not be interpreted to require plans that do not maintain "account balances" for each employer to create them solely for reporting purposes. Any requirement to create these calculations for MEPs with hundreds of employers would add considerable costs – many tens of thousands of dollars annually – for no compelling reason. It would not assist participants or participating employers in understanding the obligations, liabilities or expenses associated with plan participation or the

funded status of the plan. Further, we are concerned that this information would be publicly available where it could be misinterpreted or misapplied – suggesting that plan assets are being segregated for particular employers. Some of these concerns already apply to the Annual Funding Notice requirement as applied to these plans – and creating "account balances" on the Form 5500 would only add to the confusion.

If the Department or the Service would like additional funding information about pre-TAMRA "single plan" MEPs or CSEC plans, it may be available on other portions of the Form 5500. Or the plan administrator could be requested on an individual basis to furnish information on how it allocates contributions or liabilities among participating employers. If the Department insists on requiring these pre-TAMRA single plans to generate employer-level "account balances" solely for reporting purposes, we strongly recommend that the plan administrator be granted significant flexibility in selecting the methodology for allocating assets among employers so long as that methodology is clearly disclosed.

II. Reporting of Long-term Benefit Projections on Schedule SB

The proposal would modify Part VI of the 2022 Schedule SB to require considerable additional information for defined benefit plan MEPs. This could include a "schedule of active participant data" containing schedules of active participants, broken down by age, with average monthly benefits for active, terminated vested and retired participants and beneficiaries receiving payments.

In addition, defined benefit plans with 500 or more total participants would be required to provide projections of expected benefit payments, separately for each of the above groups, and for the entire plan, for each of the next 50 years based on specific assumptions (*e.g.*. no additional accruals or plan entrants). This information (to be included on Schedule SB – Line 26b) would have to be created and updated annually – at great expense to the affected plans. In this regard, contrary to the Agencies' apparent assumptions, this information is not updated automatically.

We are concerned that this aspect of the proposal would impose substantial additional costs and burdens on plans without any apparent benefit. Nothing in the SECURE Act specifically requires that this detailed information be created and provided. In this regard, defined benefit plan MEPs are already subject to minimum funding and PBGC reporting requirements – there is no compelling reason to add another layer of costly demands on pension plans. In this regard, pension MEPs generally involve fewer financial risks than multiemployer plans already subject to such projection requirements.

At a minimum, we recommend that "CSEC" Plans (as defined in Code section 414(y)) be exempt from any additional reporting requirements. (Such plans are not currently required to complete line 26.) When Congress amended ERISA in 2014 to allow CSEC plans to determine their funding requirements based on pre-PPA funding rules, pay lower PBGC premiums, etc., it

recognized that such plans pose even fewer risks to the PBGC than pension MEPs generally. Consistent with this Congressional policy, the Agencies should not add further financial reporting burdens that increase plan costs.

III. Comments Opposing More Tailored Questions on Fees and Expenses (and Allocation) [Preamble p. 51500]

The Department has asked for comments regarding whether it should request on the Form 5500 additional fee and expense information for pooled employer plans and other MEPs, including information "on how fees and expenses are allocated among participating employers and among covered participants and beneficiaries." 86 FR 51500. The Department noted that informing plan fiduciaries and participants about plan expenses is "particularly important in the case of pooled employer plans and MEPs given their structure and the roles that traditional service providers end up playing as plan sponsors and plan administrators." *Id.*

In our view, the currently required fee and expense reporting and disclosure is sufficient for association MEPs. These MEPs are sponsored by associations themselves controlled by member employers (and not service providers) and their fiduciaries are typically employer representatives. These fiduciaries receive section 408(b)(2) disclosures from plan service providers. And they publicly disclose on the current Form 5500 Schedules C and H, and the attached financial statements, detailed information regarding service arrangements and plan expenses. Further disclosure is provided for defined contribution MEPs through the annual participant disclosures, which are specifically designed to identify administrative and investment expenses.

We do not believe that the Department should force plan administrators to describe in the Form 5500 how plan expenses are allocated among participants (or worse yet, provide a per participant or per employer expense *amount*). While expenses do affect participant account balances in defined contribution MEPs, these expenses – and how they are allocated among participants – are sufficiently described in the annual participant fee disclosures (29 CFR 2550.404a-5(c)(2)(i)), and are summarized in the current Form 5500, Schedule H. In the case of a defined benefit MEP, generating and reporting an expense amount per participant would be particularly unhelpful because expenses do not reduce or affect the benefit to which a participant is entitled.

Similarly, requiring disclosure of expenses by employer would require that this amount be calculated as it is not currently a metric used or found useful by such plans. Employers participating in defined contribution MEPs have access to the most important of expense information through the participant fee disclosures. As for defined benefit MEPs, employer decisions to join or continue participating in the plan are commonly based on an evaluation of total contribution costs and funding levels, inclusive of expenses, in relation to benefits offered. In the case of pre-TAMRA MEPs or CSEC plans, an allocation of expenses by employer is

particularly unhelpful because funding obligations (which potentially could be impacted by expenses) are not determined on an employer-by-employer basis.

IV. Comments on IRS Compliance Questions

The proposed revision to Form 5500 would add the following two IRS-related compliance questions to Schedule R.

> Line 21a. Does the plan satisfy the coverage and nondiscrimination tests of Code sections 410(b) and 401(a)(4) by combining this plan with any other plans under the permissive aggregation rules?
>
> □ Yes □No
>
> Line 21b. If this is a Code section 401(k) plan, check the correct box to indicate how the plan is intended to satisfy the nondiscrimination requirements for employee deferrals and employer matching contributions (as applicable) under Code sections 401(k)(3) and 401(m)(2)?
>
> □ Design-based safe harbor method □ "Prior year" ADP test □ "Current year" ADP test
>
> □N/A

The proposed revisions to the Schedule R Instructions do not address how a multiple employer plan should answer these questions. These plans may have hundreds of employers each of which is required to pass nondiscrimination testing separately.

In the case of the aggregation question, the IRS noted in the preamble to the proposal that "a plan that is aggregated with another plan to pass either nondiscrimination or coverage testing generally has more issues that are technically complicated and raise the possibility of non-compliance" and therefore it might target such a plan for review. In our experience, however, very few employers participating in multiple employer plans use permissive aggregation to establish that they comply with the nondiscrimination requirements. And when they do, the plan administrator of the multiple employer plan typically does not have all of the information. Accordingly, we recommend that multiple employer plans be exempted from line 21a.

As to Line 21b, if any reporting is required, multiple employer plans could be asked to list the number of employers that use prior year testing and current year testing. The value of this information would appear to be minimal, however.

* * *

We appreciate your consideration of these comments. Please let us know if you would like to discuss them or need more information.

Sincerely,

Louis T. Mazawey