NOVA 401(k) ASSOCIATES

November 1, 2021

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

Re: Proposed Revision of Annual Information Return/Reports (Form 5500 Series)
RIN 1210-AB97

Nova 401(k) Associates is submitting this letter in response to the request for comments on the proposed changes to Form 5500 (the "Proposal") made by the Department of Labor ("DOL"), Internal Revenue Service ("IRS") and Pension Benefit Guaranty Corporation ("PBGC") (collectively, the "Agencies"). Nova is a third-party administrator (a "TPA") serving over 6,500 employers. Our current practice involves plans of all types including Multiple Employer Plans ('MEPs'). Nova's primary focus is on employers with fewer than 2,000 employees. Our affiliate, Administrative Fiduciary Services Inc. ("AFS"), serves as an independent administrative fiduciary and provides administrative fiduciary services and support. Neither Nova nor AFS offer investment products, investment advice or daily record-keeping as part of our services.

As a TPA, Nova prepares thousands of Form 5500s each year. Our comments on the Proposal are informed by our experience. We appreciate the Agencies giving interested parties, such as Nova, the opportunity to provide comments on the Proposal.

IRS 401(k) Compliance Question

The Proposal would add a question at line 21a of Schedule R asking whether the plan sponsor used the design based safe harbor rules or, if applicable, the prior year or current year ADP test. The preamble asserts that ADP testing and nondiscrimination testing are significant compliance issues for section 401(k) plans. "[A] plan that performs prior year or current year ADP testing is more likely to have compliance issues than a plan with a design based safe harbor."[1]

Nova respectfully disagrees with this statement. Although ADP testing is a complicated process, so is properly operating a safe harbor 401(k) plan. In fact, the preamble goes on to note two compliance challenges for safe harbor plans, i.e., meeting the annual contribution and annual notice requirements.[2] Unfortunately, the myriad qualification requirements contained in the tax code makes compliance a challenge for any type of retirement plan. ADP testing is no different. Plan sponsors should not be forced to adopt a safe harbor plan design in order to avoid being targeted by the IRS

[1] Proposed Revision of Annual Information Return/Reports, 86 Fed. Reg. 51503, Sept. 15, 2021.
[2] *Id.*

for enforcement action. Nova recommends the IRS reconsider targeting its enforcement resources based on whether a 401(k) plan utilizes or does not utilize a safe harbor plan design.
Nova also believes the question is confusing and does not address the many testing options available to 401(k) plan sponsors. The question reads as follows:

> 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 question indicates the selected answer is to indicate how the plan satisfies both IRC §401(k)(3) and IRC §401(m)(2). The question, however, only asks about the ADP test with no reference to the ACP test. If ACP test information is desired, there should be a separate set of check boxes for 401(m) testing.

With that said, the real problem is that the question does not consider the many ADP and ACP testing options available to a plan sponsor. For example, a 401(k) plan can be both an ADP tested plan and a safe harbor plan for the same plan year. This often occurs in 401(k) plans that permit employees to begin making elective deferrals before completing one year of service. Plans such as these often provide safe harbor contributions to the non-excludable employees and do ADP testing on the portion of the plan covering the excludable employees. It is unclear how the proposed question would be answered in such circumstances. Another common design is for the plan to rely on the safe harbor rules to satisfy the ADP test and do ACP testing on the matching contribution portion of the plan. The instructions and question should be clarified to address these circumstances.

We also question whether it is really necessary to solicit whether the plan uses current year testing as compared to prior year testing. It is our experience that the vast majority of non-safe harbor 401(k) plans use the current year testing method. Based on anecdotal conversations with other providers, we believe our experience is the norm. In addition, it is not clear whether there is any potential compliance risk associated with a plan sponsor's choice in this regard. Nova believes the question could be simplified by simply asking whether the plan uses ADP/ACP testing without regard to whether it is based the prior year approach or the current year approach.

Nova recommends the Agencies modify proposed Line 21a. to Schedule R to add separate check boxes to delineate between ADP testing and ACP testing. The question should be simplified by removing any reference to whether ADP/ACP testing is based on the current year approach or the prior year approach. The instructions should clarify that a plan sponsor should check all boxes that apply in cases where a plan is a both a safe harbor plan and an ADP/ACP tested plan in the same plan year. Nova also recommends that the IRS consider a more refined approach to its enforcement priorities rather than targeting a 401(k) plan simply because it relies on ADP/ACP testing.

Change to Participant-Count Methodology for IQPA Audit Waiver

The Agencies are proposing to change the rules with respect to determining whether a plan can qualify for the small plan audit waiver under 29 CFR 2520.104-51. Under the present methodology, any employee eligible to participate in the plan is included in the participant count irrespective of whether that employee has accrued any benefits or received any contributions. The Proposal would modify these rules for defined contribution plans by only including participants and beneficiaries who have an account balance.

Nova strongly agrees with the proposed change. The current rules have resulted in plans with a similar number of participating employees being treated quite differently with little policy reasons for doing so. The potential inconsistent treatment will only be heightened when long-term part-time employees become eligible to participate. Many smaller employers may choose to terminate their plan if forced to pay a $10,000 to $15,000 plan audit fee as a result of the influx of part-time employees participating in the plan. The proposed change will provide small employers with a meaningful reduction in the costs and burdens of plan sponsorship and thereby encourage new plan formation.

It should also be noted that the tales of woe put forth by the accounting community if this change is made are overstated at best. Nova and other TPAs work closely with our plan sponsor clients to ensure their plans comply with the tax code and ERISA irrespective of whether the plan is subject to the independent audit requirement. To suggest, as one previous commentor on the Proposal did, that employers will purposely violate the terms of their plan with respect to enrolling long-term part-time employees to avoid an independent audit is ludicrous. There is obvious self interest in the accounting community pushing back on this proposed change.

Nova recommends the Agencies adopt the proposed change to the participant counting methodology so that only participants and beneficiaries with account balances are considered active participants for purposes of qualifying for the small plan audit waiver.

Proposed Changes to Schedule H

The Proposal would add greater detail to Schedule H pertaining to investments. Of particular note is the requirement to indicate, for participant directed individual account plans, whether the investment is a designated investment alternative (DIA) or a qualified default investment alternative (QDIA) and, for any such investment, the annual operating expense ratio reported on the most recent participant "404(a)(5) statement."

Nova is concerned with the rapid implementation of these requirements beginning with the 2022 plan year. Given the timing of the Proposal and the need for the Agencies to give due consideration to the comments they receive in response to this Proposal, it is likely the final regulations and forms will not be available until late spring or early summer of 2022. Nova will be relying on the recordkeepers and financial services companies that we work with to update their systems for these new data points as trying to enter this information manually would be very difficult at best. Our experience is that these firms typically avoid doing work twice and therefore will wait until the Proposal is finalized before beginning to make permanent systems changes. As a result, it may be very challenging to

have all this work done in time to include the new data points in the 2022 plan year Form 5500. Delaying implementation by one year will not endanger any policy goal but will reduce the costs and burdens of collecting the desired information. A one-year delay would be in keeping with the policy goals of the Paperwork Reduction Act of 1995 to minimize the burden of the collection of information by the federal government on those who must respond.

Nova recommends that the Schedule H changes be delayed by one year or made optional for the 2022 plan year to provide additional time for recordkeepers and financial services firms to update their systems.

Trust Information

The Proposal would add questions to Schedules H and I soliciting the name of the plan's trust, the trust's EIN and the name and telephone number for the trustee. Nova questions how important this information really is given the EIN used to report distributions and withholding is already reported on Schedule R. In fact, the proposed instructions indicate that if a trust does not have an EIN, the payor EIN reported on Schedule R should also be used as the EIN reported for the trust on Schedule H or I. In any case, if the Agencies desire this information, additional time should be provided for service providers to solicit the information from clients. That will require outreach to and education of plan sponsors.

The question does not indicate what information should be provided if plan assets are held in an insurance policy pursuant to the trust exemption provided by ERISA § 403(b)(3). A "Not Applicable" response should be available to plans who do not have a trust or trustee.

In addition, we still hear sporadic reports of trust EINs being deactivated despite previous indications from the IRS that this practice had stopped. We strongly encourage the IRS ensure that trust EINs are not being deactivated.

Nova recommends the new trust questions be delayed by one year or made optional for the 2022 plan year.

Pre-approved Plan Opinion Letter Date and Serial Number

For plan sponsors who have adopted a pre-approved plan, the Proposal would add two new questions to Schedule R to solicit the date of the most recent favorable opinion letter and opinion letter's serial number. Nova believes the instructions should be clarified as to what it means to adopt a pre-approved plan in a number of situations. For example, it is not clear whether a plan sponsor who made modifications to a pre-approved document in way that would negate reliance on the favorable opinion letter should complete the new question. Does it make a difference if the sponsor submits the modified pre-approved plan for a determination letter?

Nova recommends the IRS clarify in the instructions what it means to be the adopter of a pre-approved plan.

New Schedule MEP

The Proposal would add a new Schedule MEP to implement the reporting requirements for MEPs as modified by the SECURE Act. Included in Schedule MEP is Part III to be completed by pooled employer plans (PEPs).

Nova's concern is not with the Form 5500 reporting for PEPS but instead with the lack of guidance provided by the IRS and DOL with respect to PEPs. The SECURE Act was signed into law on December 20, 2019. Almost two years have passed since its enactment and the only guidance issued to date are final regulations pertaining to the registration requirements for Pooled Plan Providers ("PPP"). The SECURE Act authorizes both the IRS and DOL to issue guidance to carry out the purposes of the PEP, including the administrative duties and other actions to be performed by the PPP. Guidance in this area would be helpful to plan sponsors as well PPPs.

Nova recommends the IRS and DOL issue guidance to clarify and otherwise carry out the provisions in the SECURE Act pertaining to PEPs.

Conclusion

Nova appreciates the opportunity to provide input on the Proposal. Should you have any questions, please feel free to contact Craig Hoffman, Attorney/Senior Consultant, at choffman@nova401k.com.

Sincerely,

/s/_____
Karen N. Smith
President