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

Re: RIN 1210-AB97 – Proposed Form 5500 Revisions

Dear Sir or Madam:

I am writing on behalf of the National Association of Professional Employer Organizations (“NAPEO”)¹ to provide comment in connection with the proposed regulation issued by the Department of Labor (“DOL”), the Internal Revenue Service (“IRS”), and the Pension Benefit Guaranty Corporation (“PBGC”) (collectively, the “Agencies”) regarding proposed changes to the Form 5500 return/report and other changes relating to benefit plan reporting (the “Proposed Rule”).

This letter specifically addresses the proposal to transfer to the DOL Form M-1 certain participating employer information for multiple employer health and welfare plans that is currently being reported by these plans on the Form 5500, notwithstanding the fact that Congress revised federal law to eliminate this reporting obligation for plan years after December 31, 2020. We respectfully request that the Agencies reconsider the proposal to retain this reporting requirement by simply moving it from the Form 5500 to the Form M-1, in light of Congress’ unambiguous action to eliminate the reporting requirement for all health and welfare plans, including multiple employer plans, as well as the significant burden and increased risk of cyber fraud and theft it creates for such plans and their participants, which is described in more detail below.

Per the Proposed Rule, the stated rationale for this reporting requirement is that “receiving participating employer information from multiple employer welfare plans is important for oversight of such arrangements and should be continued.” NAPEO certainly appreciates the DOL’s

¹ NAPEO is the voice of the PEO industry. PEOs provide comprehensive HR solutions such as payroll, employee benefits, human resources, tax administration, and regulatory compliance assistance for small and mid-sized businesses. Through a PEO, the employees of their small and mid-sized business clients also may gain access to employee benefits such as: 401(k) plans; health, dental, life, and other insurance; dependent care; and other benefits they might not typically receive as employees of a small company. There are 487 PEOs in the United States providing services to 173,000 small and mid-sized businesses, employing 4 million people. The PEO industry’s 173,000 clients represent 15 percent of all employers with 10 to 99 employees.

ability to oversee multiple employer welfare plans. Moreover, we certainly understand and appreciate the DOL's ability to seek information from multiple employer welfare plans about their participating employers in accordance with the DOL's general investigative authority. NAPEO does, however, object to the DOL's insistence that multiple employer welfare plans annually report this information on publicly available documents, whether they be the Form 5500 or the Form M-1. This is particularly the case in light of Congress' unambiguous action repealing this reporting requirement for multiple employer health and welfare plans, and the fact that there is no articulated benefit to plan participants and beneficiaries for continuing this obligation. Moreover, as noted below, the imposition of this reporting requirement (on a publicly available basis) unnecessarily increases the risk of cyber fraud and theft in a manner that seems at odds with sound public policy, as well as the Department's recent initiatives to encourage plan sponsors to safeguard information that would otherwise be used by nefarious parties to perpetrate fraud against plans, participants and beneficiaries. In all events, if the participating employer requirement is to be retained on the Form M-1, the Proposed Rule should at a minimum be amended to permit affected plans to separately submit their lists of participating employers and contribution percentage estimates in a manner in which the information remains confidential and is not made available to the public.

I. Background of ERISA Section 103(g)

Section 103 of ERISA, and the regulations issued under that section, impose an annual reporting and filing obligation on employee benefit plans, which is generally satisfied by the filing of the Form 5500 or Form 5500-SF Annual Return/Report, along with the required schedules and attachments. *See generally* 29 CFR § 2520.103-1. On April 7, 2014, the Cooperative and Small Employer Charity Pension Flexibility Act ("CSEC Act") was enacted into law. The CSEC Act amended ERISA section 103 by adding a specific new section 103(g), which read as follows:

ADDITIONAL INFORMATION WITH RESPECT TO MULTIPLE EMPLOYER PLANS.—With respect to any multiple employer plan, an annual report under this section for a plan year shall include a list of participating employers and a good faith estimate of the percentage of total contributions made by such participating employers during the plan year.

In 2014, the DOL issued an Interim Final Rule² implementing this amendment to ERISA section 103. The Interim Final Rule interpreted ERISA section 103(g) as applying not just to defined benefit pension plans (the plans that were the general subject of the CSEC Act), but also to defined contribution retirement plans and health and welfare plans. Specifically, the Interim Final Rule revised the Form 5500 Instructions to add the following:

Except as provided below, multiple employer pension plans and multiple employer welfare plans required to file a Form 5500 must include an attachment using the format below that (1) lists each participating employer in the plan during the plan year, identified by name and employer identification number (EIN), and (2) includes a good faith estimate of each employer's percentage of the total contributions (including employer and participant contributions) made by all participating employers during the year.³

² 79 Fed. Reg. 66617 (Nov. 10, 2014).

³ *Id.* at 66621.

The preamble to the Interim Final Rule explained the DOL's rationale for imposing this reporting requirement on all multiple employer plans, which was based on the statutory language of ERISA section 103(g):

*Although the CSEC Act was focused on amendments to the funding rules for certain defined benefit pension plans, **the annual reporting amendment to section 103 of ERISA did not limit the new reporting requirement to defined benefit pension plans.** Rather, the new requirement applies generally to "any multiple-employer plan." Accordingly, the interim final rule adds instructions for the Form 5500 and Form 5500-SF requiring **all multiple-employer plans (defined benefit pension plans, defined contribution plans, and welfare plans)** required to file the Form 5500 or Form 5500-SF to include with their annual report the new "Multiple-Employer Plan Participating Employer Information" attachment.*

As a result, after the Interim Final Rule was issued and for plan years beginning after December 31, 2013, any plan that checked the "multiple-employer plan" box on the Form 5500 was required to list each of its participating employers during the plan year by name and employer identification number ("EIN") and include a good faith estimate of the percentage of total contributions made by each participating employer during the plan year.

However, on December 20, 2019, the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act") was enacted into law as Division O of the Further Consolidated Appropriations Act, 2020 (Pub. L. 116-94). The SECURE Act revised Section 103(g) of ERISA to read as follows:

ADDITIONAL INFORMATION WITH RESPECT TO POOLED EMPLOYER AND MULTIPLE EMPLOYER PLANS.-- An annual report under this section for a plan year shall include—

(1) with respect to any plan to which [ERISA] section 210(a) applies (including a pooled employer plan), a list of employers in the plan and a good faith estimate of the percentage of total contributions made by such employers during the plan year and the aggregate account balances attributable to each employer in the plan (determined as the sum of the account balances of the employees of such employer (and the beneficiaries of such employees)); and

(2) with respect to a pooled employer plan, the identifying information for the person designated under the terms of the plan as the pooled plan provider.

Section 210(a) of ERISA, as referenced in the revised Section 103(g)(1), only applies to multiple employer retirement plans. Therefore, when Congress passed the SECURE Act, they unequivocally eliminated any requirement for multiple employer health plans to continue reporting a list of participating employers and estimates of the percentage of total contributions made by each such employer, effective for plan years beginning after December 31, 2020.

II. Retaining the Reporting Requirement for Multiple Employer Health and Welfare Plan Subverts Congressional Intent

Congress' intent with respect to this reporting requirement could not be clearer. After imposing an obligation on all multiple employer plans to annually report the list of their participating employers and estimate of contributions by employer (via the CSEC Act in 2014), Congress used its lawmaking authority (via the SECURE Act in 2019) to retain the reporting obligation only for multiple employer retirement plans, and specifically and expressly repealed the reporting obligation for multiple employer health and welfare plans.

Notwithstanding the clear intent of Congress that welfare plans not be subject to the reporting requirement, the Agencies state that the information reported pursuant to Section 103(g) or ERISA "has proven useful to the DOL for its oversight functions for both MEPs and those MEWAs that file the Form 5500, regardless of the types of benefits provided by the MEWA" and that "the DOL continues to believe that receiving participating employer information from multiple employer welfare plans is important for oversight of such arrangements and should be continued." Based on the DOL's wishes, the Proposed Rule would, effective for plan years beginning on or after January 1, 2022, require MEWAs that offer or provide coverage for medical benefits to provide the participating employer information on the Form M-1. New questions would be added to the Form M-1 requiring all MEWAs to identify each participating employer in the MEWA by name and EIN. MEWAs other than unfunded or insured MEWAs would also have to provide a good faith estimate of each participating employer's percentage of the total contributions made by all participating employers during the plan year. And MEWAs that do not offer or provide coverage for medical benefits, and therefore are not required to file a Form M-1 (e.g., life or disability benefits), would continue to have to report the participating employer information as an attachment to the Form 5500.

While the DOL would like to maintain the since-repealed reporting requirement for multiple employer welfare plans, the Proposed Rule does not confront the plain fact that Congress does not share this position. As noted above, Congress took explicit action to eliminate this reporting requirement for multiple employer welfare plans, and this cannot be disputed. When Congress passed the SECURE Act, it very clearly revised the language in section 103(g) of ERISA to make it clear that only multiple employer retirement plans should have to annually report "a list of employers in the plan and a good faith estimate of the percentage of total contributions made by such employers during the plan year." Certainly, if Congress felt that it was important for the DOL to continue receiving such information from multiple employer welfare plans, it would have simply left the language in ERISA section 103(g) as it was. Alternatively, if Congress wanted to maintain this reporting requirement, but instead utilize the Form M-1 for such reporting, as the Agencies are now proposing, Congress could have amended section 101(g) of ERISA (which effectively created the Form M-1 requirement) to specifically require MEWAs to report a list of their participating employers and an estimate of contributions by employer. But Congress did not do so. Indeed, one of the most basic principles of administrative law is that while agencies are generally entitled to deference in the interpretation of statutes that they administer, "the agency... must give effect to the unambiguously expressed intent of Congress." *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842-843 (1984).

When the DOL enacted the Interim Final Rule in 2014 imposing the reporting requirement on all multiple employer plans, it based that requirement on the legislative language of the CSEC Act. To reiterate, the DOL stated in the preamble to the Interim Final Rule, “Although the CSEC Act was focused on amendments to the funding rules for certain defined benefit pension plans, the annual reporting amendment to section 103 of ERISA did not limit the new reporting requirement to defined benefit pension plans.” But after using the absence of any such limiting language as the foundation for imposing the requirement on all benefit plans, the DOL does not now acknowledge that Congress has since imposed such a limit, by narrowing the scope of plans that are subject to ERISA section 103(g).

The Proposed Rule does concede that “the DOL originally relied on ERISA section 103(g) when it added the requirement for all multiple employer plans to provide the participating employer information” but then states “there are other rulemaking and reporting authorities that support continuing the reporting requirement for multiple employer welfare plans and extending it to non-plan MEWAs that file the Form M-1.” The Proposed Rule then implies that ERISA sections 101(g), 505, and 734 would provide similar authority.⁴

But ERISA section 101(g) provides, in relevant part, that the DOL “may, by regulation, require... multiple employer welfare arrangements to report, not more frequently than annually, in such form and such manner as the Secretary may require for the purpose of determining the extent to which the requirements of part 7 [of ERISA] are being carried out in connection with such benefits.” The list of participating employers and an estimate of their respective contributions provides no information that would allow the DOL to determine whether the benefits being provided by the MEWA are in compliance with part 7 of ERISA. Section 505 and 734 of ERISA simply affirm the DOL’s general authority to promulgate regulations under ERISA, which is undisputed - but this authority is also not unfettered, in the face of the unambiguously expressed intent of Congress.

Finally, in the portion of the Proposed Rule addressing multiple employer welfare plans that do not have to file the Form M-1 (and that the DOL would have continue to report participating employers as an attachment to the Form 5500), the DOL indicates that its authority stems from ERISA section 103(c)(2), which provides that in the Form 5500, the plan administrator will furnish “the name and address of each fiduciary.” (The DOL notes that in its view, “the [participating employer in a MEWA] is acting as a fiduciary with respect to its decision to provide ERISA-covered benefits through a MEWA rather than through a single employer plan and also is a fiduciary for purposes of continuing to monitor the plan that it adopted.”) However, the DOL quite obviously is not, in fact, establishing this reporting requirement to obtain “the name and address of each fiduciary.” It is, instead, asking for information that exactly aligns with the repealed reporting requirement (i.e., the names of participating employers and the estimate of

⁴ Notably, the Proposed Rule provides that “for the 2021 plan year, pending the implementation of the Form M-1 changes, all plan MEWAs would continue to provide participating employer information as a nonstandard attachment to the 2021 Form 5500 Annual Return/Report in a similar manner as currently required.” But to reiterate, the SECURE Act specifically repeals the obligation of MEWAs to provide this information with the Form 5500 for plan years beginning after December 31, 2020. No explanation is given as to why the DOL believes it has authority to continue this reporting obligation through the Form 5500 for the 2021 plan year, which is particularly remarkable given the DOL’s implicit acknowledgment (i.e., by shifting the reporting obligation to the Form M-1) that Congress took this authority away when it passed the SECURE Act.

contributions). For the DOL to take the position it is not attempting to reinstate the reporting requirement that was repealed by the SECURE Act simply belies reality.

III. Retaining the Reporting Requirement for Multiple Employer Health and Welfare Plans is Unnecessarily Burdensome, Is Contrary to the Interests of Plan Participants and Beneficiaries, and Does Not Accord with DOL's Recent Initiatives to Safeguard Plans, Participants and Beneficiaries Against Cyber Fraud

In the Proposed Rule, it is stated that the DOL finds the information relating to participating employers in MEWAs “useful... for its oversight functions,” and “important for oversight of such arrangements.” But nowhere is it explained why this information should be furnished by a MEWA on either a Form 5500, or a Form M-1. Certainly, the DOL may use its investigatory authority to obtain this information (privately) from any MEWA it line with its oversight authority. However, requiring the reporting on a publicly available document serves no discernable benefit to plan participants and beneficiaries, and may in fact create risk for them.

The Form M-1, like the Form 5500, is a publicly available document. Because the Form M-1 must be filed electronically and, as a result of open government laws, anyone with access to the Internet may easily access and download Form M-1 information. As a result, third parties can easily obtain the participating employer information. While there are obvious uses for DOL in having access to the participating employer data, it is difficult to identify another entity that will be able to use this information positively.⁵ For example, a plan participant could obtain information from a Form M-1 regarding the plan's operation and compliance with applicable federal law, but it is unclear why a plan participant (and employee of an employer that participates in the MEWA) would want to know, or care about, the names of the other employers that participate in the MEWA (or, for that matter, the estimated contributions).

To the contrary, the unnecessary public disclosure of participating employer information could create risks to participants and beneficiaries. The DOL is well aware of the increased incidence of cybersecurity fraud and other criminal activity surrounding benefit plans.⁶ It is easy to see how a cyber-criminal might use the information on a Form M-1 to target the smaller employers (with presumably less robust cybersecurity protocols) that typically participate in MEWAs. Nefarious individuals could presumably target the employees of a small employer participating in a MEWA, and then “spoof” either the MEWA itself, or the MEWA's health insurer, in order to generate a phishing attack. Employees who receive an email from an entity purporting to be the MEWA or their health insurer are likely to trust that the email is legitimate - because they would have no expectation that such information would be readily available on the Internet for anyone to access.

For many plans, the list of participating employer and contribution percentage information is critical, proprietary information that is essentially the member or client list for the entity sponsoring the multiple-employer plan. Market developments would indicate that making this

⁵ The Proposed Rule identifies “state insurance regulators” as potential users of Form M-1 data, but if an ERISA-covered welfare plan is a MEWA, states generally have their own enforcement authority to the extent consistent with ERISA Section 514(b)(6)(A). Therefore, it is not clear that state insurance regulators need to rely on the Form M-1.

⁶ See, e.g., <https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/online-security-tips.pdf> (noting the risk of a “phishing” attack that “may look like it comes from a trusted organization.”)

information publicly available (through the Form 5500) has negatively impacted small businesses and their employees. For example, some commercial entities solicit competitors of the sponsors of multiple employer plans offering to aggregate and provide the participating employer information in these filings for a fee. These types of aggressive sales activities do not benefit the small businesses participating in MEWAs, nor the participants and beneficiaries. And if small employers are solicited to switch from one MEWA to another mid-year, changes in plans can result in clinical disruption of care (*e.g.*, because certain services or drugs may not be covered under the successor plan or an in-network clinician may be out-of-network under the successor plan) as well as increased out-of-pocket costs (*e.g.*, where participants are required to restart deductibles and maximum out-of-pocket limits).

Also, the participating employers in MEWAs have legitimate privacy interests in keeping their names, EINs and information regarding how much they may contribute to various benefit plans from being publicly disclosed. Members of associations are sensitive to disclosure of this information because of antitrust concerns, and employers do not want their competitors to have confidential human resource information.

NAPEO has previously offered to the DOL other alternatives that would satisfy the DOL's policy goals without making the list of participating employers publicly available. One option would be for the DOL to simply obtain the list from MEWAs on an "as needed" basis consistent with the DOL's general oversight authority. Alternatively, if the DOL insists on retaining an annual list requirement, the Proposed Rule should be amended to give MEWAs the option of separately submitting their lists of participating employers and estimates of the percentage of total contributions as an attachment to the Form M-1 that would not be publicly posted (as opposed to on the Form M-1 itself), so that the information remains confidential. We believe that this alternative method of filing would provide the DOL with the information it wants to receive about participating employers, while protecting MEWAs, the employers that participate in MEWAs, and the plan participants and beneficiaries.

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We appreciate your consideration of our comments. Should you have any questions or wish to discuss our comments further, please contact Thom Stohler or Nick Kapiotis of NAPEO at (703) 836-0466.

Sincerely,



Pat Cleary
President and CEO