BOSTON COLLEGE
LAW SCHOOL

November 1, 2021

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

RE: Proposed Revision of Annual Information Return/Reports, RIN 1210-AB97

To Whom It May Concern:

I appreciate the opportunity to submit this comment letter on the "Proposed Revision of Annual Information Return/Reports." My research focuses on retirement security in the United States, including the provision of retirement benefits by private and public employers. My recent work has examined multiple employer defined-contribution plans, with a particular focus on multiple employer plans (MEPs) administered by professional employer organizations (PEOs).[1]

While the pooling of employers and capital in the provision of retirement benefits has the potential to improve access to workplace retirement plans in the United States, multiple employer plans raise novel governance and oversight challenges. My research has shown that the traditional benefits of plan size have not mapped directly onto existing multiple employer plans. While PEO 401(k) plans may provide the smallest employers with retirement plans that are less costly than the plans typically available to the smallest individual employers, the considerable aggregation of assets and expertise in the largest PEO MEPs has not produced the kinds of cost-savings that are evident in the largest single-employer plans.

To realize the full potential of aggregation for retirement savings programs in the United States, further analysis is needed to examine the fees in various kinds of multiple employer plans, including those sponsored by associations of employers and professional employer organizations. As the Department of Labor (DOL) notes, the Form 5500 Annual Return/Report functions "as a primary means by which the operations of plans can be monitored by participating employers in multiple employer plans and other group

[1] Natalya Shnitser, *Are Two Employers Better Than One? An Empirical Assessment of Multiple Employer Retirement Plans*, 45 J. CORP. L. 743 (2020), https://lawdigitalcommons.bc.edu/lsfp/1278/.

arrangements, plan participants and beneficiaries, and by the general public."[2] To date, however, the lack of an identifier for particular kinds of multiple employer plans and the lack of consistency in Schedule H reporting have hampered comparisons of plan costs and investment menus across different types of plans.

The proposed rule would significantly improve the disclosure and reporting regime for all plans, including multiple employer plans. The proposed changes would ease access to and use of the information provided on Form 5500. Of particular significance are the proposed changes to make the data machine readable and to standardize the schedules of investment assets required to be included in the annual return/report. It is vital that investments be described consistently by filers to facilitate robust analysis across different types of plans.

The new Schedule MEP would make it possible to systematically track and evaluate the new plan types that have been established in recent years. Part I would specifically identify different types of MEPs: group or association retirement plans within the meaning of 29 CFR 2510.3– 55(b); professional employer organization plans within the meaning of 29 CFR 2510.3–55(c); pooled employer plans (PEPs) within the meaning of ERISA Section 3(43), and other MEPs covering the employees of two or more employers that are not single or multiemployer plans for annual reporting purposes.

Part III of Schedule MEP introduces requirements that would apply only to a subset of multiple-employer retirement plans. Notably, in 2019, DOL expanded the types of arrangements that could be treated as MEPs under ERISA.[3] In the same year, the SECURE Act established PEPs. Individual employers can now participate in a variety of arrangements that centralize plan administration and pool plan assets. These include MEPs sponsored by PEOs, as well as PEPs sponsored by pooled plan providers (PPPs). PEOs can serve as PPPs and "bona fide" PEOs can also sponsor PEO MEPs if the PEO meets certain requirements established in the 2019 DOL regulation.[4]

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[2] 86 Fed. Reg. 51489.
[3] 29 CFR 2510.3–55.
[4] As described in the proposed rule, "[a] defined contribution pension plan sponsored by a PEO is a MEP that is a PEO Plan if the PEO (1) performs substantial employment functions on behalf of its client employers, and maintains adequate records relating to such functions; (2) have substantial control over the functions and activities of the MEP as the plan sponsor, the plan administrator, and a named fiduciary and continues to have plan obligations to MEP participants after the client employer no longer contracts with the organization; (3) ensures that each client employer that adopts the MEP acts directly as an employer of at least one employee who is a participant covered under the MEP; (4) ensures that participation in the MEP is available only to employees and former employees of the PEO and client employers, employees and former employees of former client employers who became participants during the contract period between the PEO and former client employers, and their

The proposed rule would have the effect of establishing different sets of reporting requirements for PEOs, depending on whether the PEO is sponsoring a MEP or acting as a PPP for a PEP. For the latter, the proposed rule would require completion of Part III of Schedule MEP. Among other requirements, Part III would obligate a PEP to indicate whether the pooled plan has complied with the registration requirements for PPPs and to indicate whether certain services were provided by an affiliate and, if relying on a prohibited transaction exemption for the use of an affiliate, to identify the prohibited transaction exemption.

As the DOL acknowledges in the proposed rule, information about service provider fees and expenses is particularly critical in the case of PEPs and MEPs "given their structure and the roles that traditional service providers end up playing as plan sponsors and plan administrators."[5] The DOL also recognizes that "by their nature, MEPs have the potential to build up a substantial amount of assets quickly and the effect of any abusive schemes on future retirement distributions may be hidden or difficult to detect for a long period."[6] The proposed rule specifically solicits comments on whether more questions should be added to report fee and expense information on PEPs and other MEPs, including information about the allocation of fees and expenses among participating employers and among covered participants and beneficiaries.

My research suggests that for multiple employer plans, disclosure about services provided by affiliates, as well as comprehensive disclosure about the allocation of fees and expenses is critical for effective monitoring and oversight of such arrangements. In the context of MEPs, and particularly PEO MEPs, it is necessary to consider how the bundling of services and costs for a variety of HR services may affect the required disclosures on Form 5550. Professional employer organizations are for-profit entities that enter into contractual arrangements to serve as "co-employers" and provide certain HR related services to their client employers. While serving as a "professional employer," the PEOs may offer various benefits – including retirement plans, health insurance, workers' compensation, and unemployment insurance policies. In this capacity, the PEO may pay itself or an affiliated entity for the provision of administrative or investment services to a plan, charge a markup on rates that the "pool" can obtain, and pay itself insurance broker fees. In this way, even though a "bona fide" PEO must perform "substantial employment functions" on behalf of its client employers, a PEO's relationship with the employees of its clients may be quite different than the relationship between more traditional employers

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beneficiaries; and (5) meets any other applicable conditions under 29 CFR 29 CFR 2510.3-55(c)." 86 Fed. Reg. 51512.

[5] 86 Fed. Reg. 51500.

[6] 86 Fed. Reg. 51500.

and employees. Individual client employers, meanwhile, may have limited ability and incentive to monitor their PEO-sponsored benefit plans, particularly if the fees for various HR services and benefits are bundled, and if leaving a PEO entails high switching costs.

Accordingly, while PEPs are subject to the particular requirements set forth in the SECURE Act, in general the considerations that motivate the additional Schedule MEP Part III requirements for PEPs apply to other MEPs, especially PEO MEPs. While the introduction of Schedule MEP is an important and positive development, the emergence of different sets of regulatory requirements for PEPs and other MEPs could lead to confusion for participating employers, participants, beneficiaries, and the general public.

Thank you for the opportunity to comment on the proposed rule.

Sincerely,

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Associate Professor of Law