December 5, 2016

Filed Electronically: e-ORI@dol.gov

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

Re: RIN 1210-AB63 – Proposed Revision of Annual Information Return/Reports (Form 5500) and Proposed Rules Regarding Annual Reporting and Disclosure

Dear Sir or Madam:

The ACCE Benefits Trust[1], the National Association of Professional Employer Organizations ("NAPEO")[2], and the Society for Human Resource Management ("SHRM")[3] write to comment on the revisions to the Form 5500 proposed by the Department of Labor (the "Department"), the Internal Revenue Service, and the Pension Benefit Guaranty Corporation (collectively, the "Agencies") and the Department's proposed rule on annual reporting and

[1] The ACCE Benefits Trust is a group benefit trust formed for the sole purpose of providing quality employee benefits at lower costs to Chamber of Commerce employees.

[2] The National Association of Professional Employer Organizations (NAPEO) is The Voice of the PEO Industry™ and represents about 85 percent of the industry's estimated $136-$152 billion in gross revenues. PEOs provide payroll, benefits, and other HR services to small and mid-sized businesses. NAPEO has 300 PEO members that provide services to between 156,000 to 180,000 businesses employing between 2.7 and 3.4 million people. An additional 200 companies that provide services to PEOs are associate members of NAPEO. For more information, please visit www.napeo.org.

[3] The Society for Human Resource Management (SHRM) is the world's largest HR professional society, representing 285,000 members in more than 165 countries. For nearly seven decades, the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

disclosure (together, the "Proposal").[4] We respectfully request that the Agencies revise the Proposal to permit multiple-employer 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

In 2014, the Department issued an Interim Final Rule[5] implementing an amendment to ERISA section 103(g) made by legislation enacted in 2014 (Public Law 113–97) to change the annual reporting requirements with respect to multiple-employer plans. As a result of the Interim Final Rule, any plan that checks the "multiple-employer plan" box is now 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. Because Form 5500 information is generally available to the general public, this participating employer information is accessible by competitors of any association, financial institution, or other entity sponsoring a multiple-employer plan.

The Proposal states that the Department intends that the reporting changes in the Interim Final Rule will be made final effective with the implementation of final forms revisions in the Proposal.

II. Proposed Alternative Method of Compliance

The Agencies should revise the Proposal to give multiple-employer plans the option of separately submitting their lists of participating employers and estimates of the percentage of total contributions in a manner that keeps such information confidential. A multiple-employer plan that has no objection to publicly disclosing this information could file it as an attachment to the Form 5500 consistent with the current reporting requirement. However, a multiple-employer plan that determines that publicly disclosing this information could cause harm to the plan and participants should have the option of indicating in the Form 5500 filing that it will be disclosed to the Department in a separate mailing, and should have the ability to mail the information to the Department under separate cover, outside of the Form 5500 filing itself.

We believe that this alternative method of filing provides the Department with the information it wants to receive about participating employers, while allowing multiple-employer plans to protect themselves from competitors if they determine hardships could result. Keeping the participating employer information private is in the interest of plan participants, who could suffer adverse consequences and increased administrative fees if their employers switch between plans as a result of the lists being published. The Department has ample authority to provide alternative methods of compliance with this reporting requirement. And, if the information is not

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[4] *See* 81 Fed. Reg. 47495 (July 21, 2016) and 81 Fed. Reg. 47533 (July 21, 2016).
[5] 79 Fed. Reg. 66617 (Nov. 10, 2014).

provided, the Department would have the ability to reject the filing as incomplete and seek civil penalties under ERISA section 502(c)(2) through its administrative civil penalty process.

III. Rationale

A. Background on MEPs and the Interim Final Rule

Multiple-employer retirement plans or "MEPs" enable small businesses to participate in a single, tax-qualified plan under which their employees can accumulate savings for retirement. These plans, which are typically offered through trade association, financial institution or PEO arrangements, provide small businesses with a cost-effective, professionally-managed means of providing retirement benefits to their employees. Many small businesses are only able to offer retirement benefits to their employees because they can participate in multiple-employer plans, which allow employers to reduce their administrative costs by pooling resources. In fact, legislation is currently being considered in Congress that would facilitate small employer participation in so-called "open MEPs" under which the employees of totally unrelated employers could be covered by a professionally-managed retirement plan.

The Interim Final Rule requires any plan that checks the "multiple-employer plan" box to provide a list of participating employers and a good faith estimate of the percentage of total contributions made by each participating employer during the plan year. The list of participating employer and contribution percentage information is critical, proprietary information that is essentially the member or client list for the trade association, financial institution or PEO sponsoring the multiple-employer plan. Because Form 5500s are filed electronically using the EFAST2 system and as a result of open government laws, the general public may easily access and download Form 5500 information. As a result, third parties can easily download the participating employer information and use it to attempt to poach members or clients from competitors.

B. Negative Impacts of Public Disclosure

Requiring that this information be made available to the general public has a negative impact on small businesses and their employees. As a result of this reporting requirement, small businesses participating in MEPs are being targeted by unsolicited sales calls about alternative options for providing retirement benefits to their employees. In addition, commercial entities are sending letters to competitors of MEPs offering to aggregate and provide the participating employer information in these filings for a fee. Sales activities like these resulting from the publishing of the participating employer information are disruptive to the small businesses participating in MEPs.

Moreover, participating employers have legitimate privacy interests in keeping their names, EINs and information regarding how much they spend on various benefit plans from being publicly disclosed. For example, 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.

Allowing multiple-employer plans to keep the participating employer list from getting into the hands of competitors also is in the interest of plan participants. If, as a result of marketing activities related to publication of the lists, a small business is convinced to switch from its existing multiple-employer plan to another plan, the move to a new plan is likely to result in a disruption in plan benefits and administrative expenses that will be borne by plan participants. Such a change also could result in adverse tax and other consequences to small business employees (e.g., changes in investment options and blackout periods; causing outstanding loans to become deemed distributions; increasing the possibility of lost benefits or orphaned retirement savings).

For the foregoing reasons, requiring names, EINs and benefits information to be made public has the effect of discouraging small businesses from offering retirement plans to their employees. This is counter to recent efforts in Congress to facilitate the use of open MEPs.

C. Current Reporting Inconsistencies

Further, as a result of these negative consequences of the existing reporting requirements, there currently are great inconsistencies in how multiple-employer plans are reporting the participating employer information in their Form 5500 filings. The undersigned organizations submit that there need to be clear, consistent rules on how multiple-employer plans can comply with the participating employer reporting rules and submit the required information to the Department while protecting participating employers and their employees from adverse consequences.

IV. Recommendation

In the preamble to the Proposal, the Agencies state that the submission of this information is needed for plan oversight, research and enforcement purposes because the Agencies have no other information on the number and identity of participating employers in multiple-employer plans. But the Agencies can get this information in a manner that protects the information from being easily accessible to the public.

Importantly, the Department has ample authority to provide alternative methods of compliance with this reporting requirement. ERISA section 110 provides generally that the Department may grant plan administrators relief from "any requirement" of Part 1 of ERISA for a pension plan provided that it determines that (1) use of the alternative method is consistent with ERISA and provides adequate disclosure to plan participants and beneficiaries and adequate reporting to the Department, (2) the application of the requirement would increase the costs to the plan or impose unreasonable administrative burdens with respect to the operation of the plan, and (3) the application of the requirement would be adverse to the interests of plan participants in the aggregate.

Providing multiple-employer plans with the option of separately submitting their participating employer and estimated contribution information in a manner that keeps such

information confidential satisfies these criteria. The approach recommended in this letter is consistent with ERISA and provides adequate reporting to the Department. And, as summarized above, requiring that the information be made available to the general public increases plan costs, imposes unreasonable administrative burdens with respect to the operation of the plan, and is adverse to the interests of plan participants in the aggregate.

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For the foregoing reasons, the undersigned organizations urge the Agencies to revise the Proposal to permit multiple-employer retirement plans to separately submit participating employer and contribution information in a manner in which the information remains confidential and is not made available to the public. Under such an approach, the Department would still have the information on the number and identity of participating employers and contribution information that it needs for plan oversight, research and enforcement purposes, but provision of the information would not result in adverse consequences for multiple-employer plans, small businesses and their employees.

Sincerely,

ACCE Benefits Trust
National Association of Professional Employer Organizations (NAPEO)
Society for Human Resource Management (SHRM)