

Agencies Propose Extensive Form 5500 Amendments

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The Department of Labor (“DOL”), Department of the Treasury (the “Treasury”), and Pension Benefit Guaranty Corporation (“PBGC”) (collectively, the “Agencies”) recently released a [notice of proposed revisions](#) to the Form 5500 Annual Return/Report of Employee Benefit Plan (“Form 5500”) filed for employee pension and welfare benefit plans under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and the Internal Revenue Code (the “Code”). The package issued by the Agencies contains both a notice of proposed revisions to the Forms themselves as well as a notice of proposed regulatory changes to the applicable Form 5500 regulations.

The Proposed Rules are primarily intended to implement provisions of the Setting Every Community Up for Retirement Enhancement Act of 2019 (“SECURE Act”). However, the agencies went much further, proposing changes affecting defined benefit plans, multiple employer plans (“MEPs”), pooled employer plans (“PEPs”), and multiple employer welfare arrangements (“MEWAs”). Below, we discuss many of the significant proposed changes to the Form 5500 addressed in the Proposed Rules. Comments are due to the Agencies on or before November 1st.

I. Background

The Agencies developed the Form 5500 and Form 5500-SF, Short Form Annual Return/Report of Small Employee Benefit Plan (“Form 5500 SF”), to satisfy applicable reporting requirements for employee pension and welfare benefit plans under ERISA and the Code. The Form 5500 functions as the primary source of information and data available to the Agencies regarding the operations, funding, and investments of the more than 843,000 pension and

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welfare benefit plans that file.¹ Plan administrators who fail to file the required report when due can be subject to significant monetary civil penalties under both ERISA and the Code. Currently, civil penalties under ERISA can amount to more than \$2,200 per day. In addition, the SECURE Act increased the penalties imposed under the Code for failing to file an annual report for a retirement plan, which can amount to \$250 per day, up to a maximum of \$150,000 per annual report. The DOL, in particular, maintains a very active administrative program for the assessment of Form 5500-related civil penalties.

In 2016, the Obama administration proposed a sweeping package of changes to the Form 5500 that would have dramatically rewritten the Forms. *See* 81 Fed. Reg. 47534 (July 21, 2016); 81 Fed. Reg. 47496 (July 21, 2016). Those changes were controversial and never finalized. Although the Proposed Rules are as extensive as the 2016 proposed Form 5500 changes, the Agencies have signaled that further Form 5500 revisions are likely. Specifically, the preamble to the Proposed Rules states that the DOL has added to its regulatory agenda a new project that will focus on broader revisions to the Form 5500 aimed at modernizing the Forms and enhancing the Agencies' data collection activities through the Form 5500. Stay tuned for further developments in this area.

II. Group of Plans / Defined Contribution Groups

Section 202 of the SECURE Act directs the Secretary of the Treasury and Secretary of Labor (the "Secretaries") to modify Form 5500 to allow certain groups of defined contribution plans ("DCGs") to file a single consolidated annual report/return. For plans to be eligible for the DCG reporting arrangement, Section 202 of the SECURE Act requires that the plans must be individual account plans or defined contribution plans that have the same trustee as described in Section 403(a) of ERISA, the same one or more named fiduciaries under Section 402 of ERISA, the same plan administrator under Section 3(16)(A) of ERISA and Section 414(g) of the Code, the same plan year, and provide the same investments or investment options for participants and beneficiaries ("the DCG Eligibility Requirements"). Consistent with the SECURE Act, the Proposed Rules would amend the Form 5500 to require plans to verify that they meet the DCG Eligibility Requirements in order to file a single, consolidated annual report.

The Proposed Rules would modify the Form 5500 instructions to provide that the filing requirements for large pension plans and direct filing entities (such as master trust investment accounts, collective trusts, pooled separate accounts, 103-12 investment entities and group insurance arrangements, collectively "DFEs") generally would apply to DCGs. The instructions for Part I, DFE box, would be updated to include a code for DCGs. Plans in a DCG reporting arrangement would report individual plan level information on the Schedule DCG, including, among other items, the following information: (i) whether the plan is a single employer plan, (ii) whether the plan is subject to the collective bargaining process, (iii) the name of the plan, (iv) plan sponsor identifying information, (v) financial

¹ Single employer welfare plans with under 100 participants that are unfunded or insured are exempt from filing a form 5500 under 29 CFR 2520.104-29.

information (including, among other items, the total amount of plan assets and expenses involving administrative service providers and total fees paid), (vi) compliance questions, and (vii) questions for large plans covering 100 or more participants on the IQPA report and financial statements.

The Proposed Rules would also impose several requirements on participating plans in a DCG reporting arrangement.

- Plans must not hold any employer securities and must be invested 100% in certain “eligible plan assets” (such as mutual funds, bank or insurance company issued contracts valued at least annually, publicly traded securities held by a registered broker, cash and cash equivalents and plan loans to participants). These requirements also apply to plans eligible to file the 2-page Form 5500-SF.
- Each plan’s assets must be held in the same trust, but the use of sub-trusts within the same trust is permitted.
- The Form 5500 would require an IQPA audit report attached for each plan participating in the DCG reporting arrangement (unless the plan is eligible for the waiver of the audit requirement under DOL regulations).
- A trust-level audit, and trust-level financial statements, would be required in addition to an audit for each participating plan.

At present, plans that are exempt from the trust requirement (such as 403(b) plans and certain insured plans) would not be permitted to participate in DCG reporting arrangements. In addition, MEPs are barred from the consolidated DCG reporting arrangements under the Proposed Rules. The Agencies believe that such an arrangement as applied to MEPs, which already file a single Form 5500 covering all participating employers in the plan, could “result in an undesirable reduction in transparency and financial accountability” and could add complexity and cost for such groups of plans. However, because the Agencies “acknowledge such a rule is not expressly set forth in Section 202 of the SECURE Act,” the Agencies solicit public comments on whether multiemployer plans and MEPs should be barred from DCG reporting.

Plans that include brokerage windows would also be barred from participating in a DCG arrangement. The Agencies asked for comments on whether such features should be permitted in a DCG arrangement and also solicited comments on whether the DCG reporting option should exist for plans that use the same custodial account or insurance policy as the funding vehicle for the plans.

The DCG consolidated reporting option, in its current form, is limited and involves expense. The participating plans are limited to investing 100% of their assets in assets that have a readily available value (such as mutual funds and cash equivalents) and may not hold employer securities or brokerage window features. In addition to requiring each plan to have its own audit (if the audit requirement applies to the plan), the trust itself must also receive an audit. Therefore, it may make sense to file as a DCG arrangement only after the plan has reached a certain threshold of participating employers. Moreover, if the participating plans have fewer than 100 participants with account balances, the plans

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will generally be eligible for an audit waiver and to file the Form 5500-SF. As a result, a DCG arrangement that includes small plans may determine it makes more sense to file a Form 5500-SF for each participating plan rather than file as a DCG arrangement.

III. MEPS

The Proposed Rules would add a new “Schedule MEP” to the Form 5500 that would require retirement MEPs to provide plan specific information on an annual report including, among other items, the type of multiple employer pension plan (*e.g.*, association retirement plan, professional employer organization (“PEO”), pooled employer plan, or other), the name of the plan administrator, participating employer information (including the EIN), and the percentage of total contributions by each participating employer for the plan year. The Proposed Rules add a checkbox to the Form 5500 on Part II, Line 10(a)(5) to indicate that a Schedule MEP is attached to the report. The instructions for what constitutes a MEP would generally be left unchanged, but the Proposed Rules would make conforming changes to include references to various MEP types, including PEO-sponsored plans and PEPs.

Section 103(g) of ERISA requires a MEP to list on its annual report the employers participating in the MEP and to provide a good faith estimate of the percentage of total contributions made by each participating employer during a plan year. Section 101 of the SECURE Act amended Section 103(g) of ERISA to require that an annual report for a MEP also include the aggregate account balances for each participating employer (*i.e.*, the sum of the account balances of the employees and beneficiaries for each employer) in the MEP beginning on January 1, 2021. The Schedule MEP incorporates this requirement by including a place to fill in the aggregate account balances attributable to each participating employer.

IV. PEPs

Section 101 of the SECURE Act added ERISA Sections 3(43) and 3(44) to allow for a new and distinct type of defined contribution pension plan called a PEP, which is operated by a “pooled plan provider” (“PPP”). Unlike other MEPs, a PEP allows unrelated employers to participate in the plan without a common interest (*e.g.*, a common trade, line of business or industry). To operate a PEP, a PPP is required to file a registration statement (a “Form PR”) with the Secretary of Treasury, which asks for identifying information such as the EIN for the PPP, the identity of any affiliates providing services, trustees, and the plan name of the PEP.

The SECURE Act’s amendments to ERISA require PEPs to file a Form 5500 that includes all of the same participating employer information as discussed above for MEPs (*i.e.*, the percentage of total contributions made by each participating employer during a plan year and the aggregate account balances attributable to each participating employer in the plan). As is also the case with MEPs, PEPs would complete and attach the newly created Schedule MEP as part of the Form 5500. The Schedule MEP includes a “Part III” specifically for PEPs to provide additional PEP-specific information such as whether the PPP is in compliance with the Form PR requirements, whether affiliated services have

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been provided to the PPP, and whether the PPP has acknowledged in writing that it is a named fiduciary and plan administrator of the plan.

The Proposed Rules also provide the following revisions to the Form 5500 related to the creation of PEPs:

- Amend the Instructions to the Form 5500 to make explicit that PEPs must report the same identifying information (*e.*, EIN, identified affiliates and other service providers and trustees) on the Form 5500 as reported by the PPP on the Form PR;
- Add trust questions to the Form 5500 regarding the name of the trustee or custodian, the trust's EIN, and the trustee or custodian's telephone number, which will "enable the agencies to more efficiently focus on compliance concerns for retirement plan trusts, including those for pooled employer plans";
- Amend the Instructions to the Form 5500 to state that PEPs and DCGs would not report investment assets aggregated into master trust investment accounts, if applicable; and
- The Proposed Rules would add breakout categories to Schedule H in part to reflect the need for transparency and improved reporting of fees and expenses for service providers in the PEP and MEP context. Such categories would include: "salaries and allowances," "IQPA Audit fees," "Recordkeeping and Other Accounting Fees," "Bank or Trust Company Trustee/Custodial Fees," "Actuarial fees," "Legal fees," "Valuation/appraisal fees".

The Proposed Rules also solicit comments on whether more tailored questions in Schedules C (Service Provider Information) and H of the Form 5500 should be included to gather more concrete information on reporting fees and expenses incurred by PEPs and other MEPs. Such information could include how fees and expenses are allocated among participating employers and among covered participants and beneficiaries. The Preamble to the Proposed Rules provides that such comments would be helpful in furthering the overall goal of fee transparency, which is particularly important in the PEP and MEP context given that "traditional service providers end up acting as plan sponsors and administrators." The Agencies added that useful comments would include "suggestions on how to improve reporting of direct and indirect service provider compensation."

V. Simplified Reporting

Section 101(d) of the SECURE Act amended ERISA Section 104(a)(2)(A) to provide that the Secretary of Labor "may by regulation prescribe simplified annual reports" for single employer pension plans covering fewer than 100 participants, or MEPs with fewer than 1,000 participants in total, as long as each participating employer has fewer than 100 participants.

However, the Proposed Rules do not address simplified reporting. Rather the Proposed Rules solicit comments on why simplified reporting should be extended to MEPs with fewer than 1,000 participants and what appropriate conditions and limitations "would ensure transparency and accountability comparable to that for other large retirement plans."

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Under the Proposed Rules, all MEPs would be required to file the Form 5500, even if they would otherwise be eligible to file the Form 5500-SF. DOL noted that this approach is consistent with (“similar to”) the current rule for multiemployer plans and the proposed rule for DCGs. DOL’s reasoning was that uniform filing requirements across all plans facilitate “consistent and informed oversight.”

Small MEPs (those with less than 100 participants as of the beginning of the plan year) would, however, be eligible for the same simplified reporting requirements that apply to small pension plans that currently file Forms 5500. This means that small MEPs would, under the Proposed Rules, file Schedule I: Financial Information – Small Plan rather than the longer and more detailed Schedule H: Financial Information. Neither would small MEPs be required to have an audit. Small MEPs would also be exempt from filing the Schedule C: Service Provider Information and Schedule G: Financial Transaction Schedules.

VI. Changes to the Schedule of Assets Held for Investment

The Proposed Rules would amend the content requirements for the “Schedule of Assets Held for Investment” and the “Schedule of Assets Held and Disposed of within the Plan Year” to require that these schedules be filed electronically in a structured format so that they are data-minable. The preamble to the Proposed Rules states that the change is “designed to improve the consistency, transparency, and usability of information reported regarding plan investments.”

The proposal to make the schedules of assets held for investment purposes uniform and electronic was proposed by the Agencies in 2016 and is clearly a key goal for the Agencies. Currently, identifying the investments held by a plan must be done manually because the investment schedules are not required to be attached in any particular format. For example, there is no efficient method for the DOL to identify all of the ERISA plans that invest in a specific investment such as a collective investment trust, mutual fund, or limited partnership. DOL states in the preamble to the Proposed Rules, that the Form 5500 data helps DOL, the Internal Revenue Service (“IRS”), and the PBGC “more effectively...and efficiently provide oversight, assist with compliance, and enforce the provisions of ERISA and the Code” and the Form 5500 “is one of the important tools the DOL uses to carry out its responsibility to detect and investigate [ERISA] violations.” Standardizing an electronic format for the plan’s investment schedules will allow data aggregation and review, which could be used both by the DOL’s enforcement division as well as plaintiff’s attorneys.

VII. Funding for Defined Benefit Plans

The Proposed Rules contain changes to the Schedules MB, SB, and R, discussed below. These changes are intended to increase transparency and provide PBGC with additional information and data to more accurately project defined benefit pension plans’ and PBGC’s own liabilities, as well as help PBGC conduct more effective investigations. These changes would impact the 23,371 single-employer and 1,373 multiemployer defined benefit plans covered by PBGC.

The proposed changes to Schedule MB include:

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- Withdrawal liability reporting. Line 3 currently requires reporting of all employer and employee contributions to the plan, including withdrawal liability payments and amounts. Under the Proposed Rules, the filer would be required to attach a withdrawal liability breakdown by date and whether a payment was a periodic payment or a lump sum.
- Actuarial assumptions. In reporting various actuarial assumptions, the filer would be required to report the interest rate used to determine the present value of vested benefits for withdrawal liability purposes. Additionally, the questions relating to the expense load would be modified to, *inter alia*, require a filer to indicate whether the expense load is included in normal cost and how the amount of the expense load is determined.
- Miscellaneous additional information. The Proposed Rules would make changes to line 8 to require additional information about the demographics, benefits, contributions, and withdrawal liability payments for large plans (*e.*, plans with 500 or more participants). For example, filers would be required to provide 50-year benefits and contributions projections, and the average age and monthly benefit for terminated vested and retired participants.
- Clarifying change. The Proposed Rules make changes to clarify the previously-confusing language in line 4f and corresponding instructions regarding when plans that are in “critical” or “critical and declining” status are projected to emerge from such status or become insolvent.

The proposed changes to Schedule SB include:

- Demographics and Benefits. Under the Proposed Rules, single-employer plans with at least 500 participants would be required to provide demographics and benefits information similar to that required to be reported by PBGC-covered multiemployer plans. This information would include 50-year projections of benefits broken down by status (*e.*, active, terminated vested, retiree) and a report of participants’ and beneficiaries’ average age and monthly benefit by status.
- ARPA elections. Part IX and corresponding instructions would be revised to require reporting of an election under the American Rescue Plan Act of 2021 (“ARPA”) rather than the Pension Relief Act of 2010, which is no longer relevant.

The proposed change to Schedule R would require multiemployer plans to not only list employers that contributed more than 5 percent of the plan’s total contributions for the plan year, but also the top 10 highest contributing employers to the plan for the plan year, even if a top contributor contributes less than 5 percent of the total plan contributions.

Finally, the Proposed Rules would modify the instructions to permit—but not require—certain attachments to the Schedules MB and SB to be provided in a spreadsheet form rather than PDF or TXT formats.

VIII. Multiple Employer Welfare Arrangements

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The Proposed Rules would require MEWAs that offer or provide coverage for medical benefits to provide a list of each participating employer in the MEWA (by name and EIN) in the Form M-1, and, for certain MEWAs, a good faith estimate of each participating employer's percentage of the total contributions made by all participating employers during the plan year.

In 2014, when the Cooperative and Small Employer Charity Pension Flexibility Act ("CSEC Act") was enacted into law, it amended Section 103 of ERISA to require all multiple employer plans (both retirement and welfare) 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 on the plan's Form 5500. In late 2014, DOL issued a regulation confirming that this requirement would apply for plan years beginning after December 31, 2013. (Unfunded and insured multiple employer health plans were exempt from the requirement to provide the contribution information).

However, when the SECURE Act became law, it amended Section 103(g) of ERISA so that only retirement plan MEPs had to provide the employer list and contribution breakdown, thus eliminating the requirement for health and welfare plans for plan years beginning after December 31, 2020. Therefore, many MEWAs were looking forward to ceasing completing the contributing employer list with their 2021 Form 5500 filing.

But in the Notice, DOL notes that the information regarding participating employers "has proven useful to the DOL for its oversight functions for both MEPs and those MEWAs that file the Form 5500" and that it believe there are other "rulemaking and reporting authorities" that provide a basis for continuing the reporting requirement for MEWAs. Therefore, DOL is now proposing that this information would be added to the Form M-1 filing for both plan and non-plan MEWAs.

The Form M-1 is required to be filed annually by MEWAs, and also upon certain triggering events that may occur mid-year. For example, an M-1 Form is required to be filed when a MEWA begins operating in a new state, when its participant count increases by 50% or more, and if it merges with another MEWA. Because the contributing employer list has been added to the Form M-1, a MEWA could conceivably be required to file a contributing employer list multiple times per year with the government. Unfunded and insured MEWAs would remain exempt from the requirement to provide contribution information. An additional line would be added to the Form M-1 requiring MEWAs to report any self-employed individuals receiving coverage from the MEWA that are not associated with a particular participating employer.

For multiple employer plans that provide welfare benefits other than medical care, the contributing employer list will remain as it is today, an attachment to the Form 5500.

Adding the list of contributing employers to the Form M-1 for both plan and non-plan MEWAs will be an unwelcome surprise for MEWAs. While DOL believes the list of participating employers is useful for its ability to oversee MEWAs, most MEWAs view their list of participating employers as proprietary and will chafe at the prospect of adding this information to the Form M-1. Moreover, the Form M-1 may need to be filed multiple times per year by a MEWA. For example, a new Form M-1

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must be filed mid-year if the MEWA merges or experiences a significant increase in participants. For this reason, some MEWAs may need to file a contributing employer list multiple times per year. Filed Forms M-1 are publicly available (like the Form 5500) so a MEWA's list of participating employers will be fully accessible.

IX. Miscellaneous Revisions to the Form 5500

The Proposed Rules would also add the following key revisions, among other items:

- [IQPA Audit Requirement for Individual Account Plans](#). A large plan (generally with 100 or more participants) is required to attach an IQPA audit report and related financial statements to its Form 5500. Currently, whether a plan qualifies as "large" is based on the number of employees who are eligible to participate in the plan as of the beginning of the plan year, regardless of whether all of those eligible employees have elected to make contributions and have account balances. The Preamble to the Proposed Rules notes that "some stakeholders have pointed out that the use of this definition may result in two plans with the same number of active participants, with one subject to an audit and the other not based on the number of non-participating but eligible employees." To correct this issue, the Proposed Rules change the method of counting participants for individual account plans. Whether the plan is "large" or "small" for purposes of the audit requirement would depend upon the number of participants with *account balances* as of the beginning of the plan year and appropriate lines would be added to the Form 5500 for these plans (as reported on proposed line 6g(1) on the Form 5500 or line 5c(1) of the Form 5500-SF).
- [2021 Annual Return/Report Instructions for MEPs and PEPs](#). The Proposed Rules would revise the 2021 Form 5500 to provide "an interim method of reporting participating employer information for MEPs and PPP identifying information pending the Schedule MEP implementation." This method would consist of including a "nonstandard attachment" to the 2021 Form 5500 as currently required, with the content of such attachment to include the aggregate account balances attributable to each participating employer in the plan consistent with the SECURE Act's amendments to Section 103(g) of ERISA.
- [New breakout categories would be added to the "Administrative Expenses" lines of the Schedule H balance sheet](#). New breakout categories would include specific lines for: audit fees, bank or trust company fees, actuarial fees, legal fees, valuation fees, salaries, trustee fees and expenses.
- [Trust Information](#). Trust questions would be added to the Form 5500, including lines that would identify the name of trust, the trust's EIN, and the name and phone number of the trustee.
- [IRS Questions](#). Certain IRS questions would be added for retirement plans, including questions related to nondiscrimination and coverage testing, whether the plan utilizes a pre-approved plan, and, if so, the date of the plan's favorable determination letter.

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The change to the method of counting participants for individual account plans should be a welcome change for many plan sponsors. Allowing a plan to qualify as a small plan based on having fewer than 100 participants with account balances will simplify plan administration and save many plans the headache and expense of the annual plan audit. This change means that many defined contribution plans that were required to have an audit in the past will now qualify for an exemption from the audit requirement based on the DOL's small plan audit waiver regulation at 29 C.F.R. § 2520-46.

The addition of new categories to the Administrative Expense lines of Schedule H is clearly an enforcement tool. DOL will doubtlessly use the detailed information regarding plan payments for legal, audit, recordkeeping and trustee fees to review whether the plan's expenses are reasonable. This detailed information will also be available to the plaintiff's bar. The trust and IRS questions are also added to improve the Agencies' enforcement efforts. The IRS compliance questions will be used to assess the plan's compliance with qualification requirements and identify plans for further examination or audit.

X. Applicability Dates and Next Steps

If adopted, the proposed amendments would generally apply to plan years beginning on or after January 1, 2022 (*i.e.*, applicable to the 2022 Form 5500 filings, which will be filed during calendar year 2023). However, the proposed amendments to implement Section 103(g) of ERISA (*i.e.*, the amendment requiring the aggregate account balances for each patriating employer in a MEP or PEP listed on the Form 5500) would apply to reporting for plan years beginning on or after January 1, 2021. Comments on the Proposed Rules must be submitted to the Department of Labor by November 1, 2021.

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