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March 23, 2023

Agencies Finalize Additional Form 5500 Changes

[35212]

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: Agencies Finalize Additional Form 5500 Changes

On February 23, 2023, the Department of Labor (DOL), Internal Revenue Service (IRS), and Pension Benefit Guaranty Corporation (PBGC) (collectively, the "Agencies")—the federal agencies with authority over retirement plans—jointly released final revisions to the Form 5500 Annual Return/Report forms (and instructions) required for pension and welfare benefit plans (collectively, "Form 5500").[\[1\]](#) At the same time, DOL released conforming updates to applicable DOL regulations.[\[2\]](#) These updates (collectively, the "Revisions") are generally applicable to Form 5500 for plan years beginning on or after January 1, 2023.

Background

In September 2021 the Agencies proposed extensive revisions to Form 5500, and DOL proposed conforming revisions to the reporting regulations under ERISA sections 103 and 104 (collectively, the "Proposal").[\[3\]](#) DOL in December 2021 released a narrow set of revisions to the Form 5500 instructions to implement changes applicable to multiple employer plans (MEPs) (including pooled employer plans (PEPs)) for plan years beginning on or after January 1, 2021.[\[4\]](#) The Agencies in May 2022 released additional revisions applicable to plan years beginning on or after January 1, 2022, focusing primarily on defined benefit plans but also making further changes applicable to MEPs (including PEPs).[\[5\]](#)

The Revisions adopt many, but not all, of the changes in the Proposal. As discussed in more detail below, those changes that were not adopted largely have been deferred to a future rulemaking effort. ICI submitted comments on the Proposal.[\[6\]](#) While many of ICI's suggestions were not incorporated, ICI's primary concern—proposed modifications to Form 5500 Schedule H—is addressed in the Revisions. (See Future Changes, below.) We note ICI's position in the discussion of each aspect of the Revisions.

Summary of Revisions

The Revisions finalize many of the provisions set forth in the Proposal with respect to defined contribution plans.[\[7\]](#) The significant changes, detailed below, include:

- Reporting applicable to Form 5500 filings by groups of similar defined contribution plans, referred to as Defined Contribution Groups (DCGs);
- A new Schedule MEP for MEPs (including PEPs); and
- A change in the definition of small plan.

The Revisions deferred action on many items included in the Proposal. Most significantly, the Agencies postponed updates to Form 5500 Schedule H that would have required significant additional details as to plan investments and, notably, a standardized electronic submission format to facilitate data mining. In our comments to the Proposal, ICI requested that these changes be postponed for further evaluation.[\[8\]](#)

Consolidated Reporting for DCGs

A key aspect of the Proposal was provisions to implement the SECURE Act section 202 requirement that Form 5500 be modified to allow DCGs to file a single, consolidated annual report/return.[\[9\]](#) Section 202(c) requires that each plan participating in a DCG must be an individual account or defined contribution plan (other than a MEP/PEP or multiemployer plan[\[10\]](#)) and must (1) have the same (a) trustee, (b) one or more named fiduciaries, (c) administrator and plan administrator, and (d) plan year beginning date, and (2) provide the same investments or investment options to participants and beneficiaries.[\[11\]](#)

The Revisions modify the Form 5500 filing instructions to provide that the filing requirements for large plans and other direct filing entities (DFEs), of which a DCG is one, generally apply to DCGs. Additional requirements include the following.

- Participating plans must report additional information in a new Schedule DCG (Individual Plan Information). In addition to the DCG providing the content required of large plans and other DFEs on Form 5500, each plan participating in a DCG must report additional plan-level information on a new Schedule DCG (Individual Plan Information) to Form 5500.[\[12\]](#) Other than as noted below, the requirements are generally in line with those in the Proposal.
- Participating plans must have the same trustee, but need not utilize the same trust. The Agencies modified the requirement that all plans participating in a DCG have the same trust, as originally proposed.[\[13\]](#) However, plans that are exempt from the trust requirement, such as 403(b) plans, may not participate in a DCG. ICI, along with numerous other commenters, recommended that the Agencies allow 403(b) plans—which do not have trustees—to participate in a DCG for a variety of reasons.[\[14\]](#)
- Participating plans must have the same investments or investment options. The Revisions continued the approach set forth in the Proposal that each plan in a DCG must have the same investment menu. The Agencies declined to modify this requirement to permit, as ICI recommended, that each participating plan select its specific investment options from a common investment platform with a set menu of potential investments.[\[15\]](#)

The Revisions do not adopt the "eligible plan assets" requirement in the Proposal for plans participating in a DCG that would have limited participating plan investments and investment options to those with a readily determinable fair market value" under

applicable DOL regulations. The Revisions also do not bar brokerage windows (under certain circumstances)[\[16\]](#) or plan investments in publicly traded employer securities[\[17\]](#)—both would have been prohibited under the Proposal.

- Each participating large plan must have an individual plan audit.[\[18\]](#) The Revisions adopted the Proposal's requirement that large plans participating in a DCG have a plan-level audit, and that small plans either have a plan-level audit or meet the waiver conditions.[\[19\]](#) In the preamble to the Revisions, DOL indicates that the revised methodology for determining whether a plan is a small plan for reporting and audit purposes (discussed below) will relieve some smaller plans from this plan-level audit requirement. ICI strongly urged the Agencies, along with several other commenters, to permit a consolidated audit for all plans participating in a DCG, rather than requiring a plan-level audit for each plan participating in a DCG.

Schedule MEP

The Revisions create a new Schedule MEP to consolidate into one schedule the reporting required of a MEP (including PEP) filer under SECURE Act section 101.[\[20\]](#)

Revised Methodology for Defining Small Plans

The Revisions adopted the Proposal's revised method for determining whether a plan is a "small plan." This definition impacts both whether a plan can file as a "small plan" and whether an annual plan audit is required. Previously, a small plan was defined as a plan with less than 100 participants with plan account balances as of the beginning of the plan year and with less than 100 individuals eligible to participate in the plan. This definition had the unfortunate result that plans with a low participation rate (potentially less than 50 participants) were required to perform an annual plan audit. The Revisions modify this rule to define a small plan as a plan with less than 100 participants with account balances as of the beginning of the applicable plan year, striking the reference to individuals eligible to participate in a plan. ICI supported this change.

Additional Updates

In addition to the significant updates detailed above, the Agencies implemented other changes impacting defined contribution plans. We note the following changes in the Revisions.

- Additional administrative expenses categories for Schedule H. The Agencies adopted changes to Form 5500 Schedule H that expand the categories of administrative expenses that must be reported.[\[21\]](#)
- IRS compliance questions. The Revisions add three IRS tax compliance questions to Form 5500.[\[22\]](#)

Future Changes

As noted above, the Agencies deferred action on numerous elements of the Proposal. In the preamble to the revisions, the Agencies stated:

Some changes ... that were included in the September 2021 proposal are being deferred for further development and public input as part of a more general Form 5500 improvement project listed on DOL's semi-annual regulatory agenda. [\[23\]](#)

Of note, proposed revisions to Form 5500 Schedule H that would (i) significantly expand the required information as to plan investments, and (ii) require standardized electronic

submission of Schedule H information, were deferred. Making Form 5500 Schedule H plan investment and other information more data mineable is a goal specifically noted in the Administration's semi-annual regulatory agenda.^[24] While the Agencies have already received comments on these proposed revisions in connection with the Proposal, as noted above they anticipate soliciting additional public input as an updated package of proposed Form 5500 improvements is developed.

David Cohen
Associate General Counsel, Retirement Policy

Notes

[1] The final forms and instructions were published at 88 Fed. Reg. 11984 (Feb. 24, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-02-24/pdf/2023-02653.pdf>. DOL's press release is available at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20230223>.

[2] The DOL regulations were published at 88 Fed. Reg. 11793 (Feb. 24, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-02-24/pdf/2023-02652.pdf>.

[3] 86 Fed. Reg. 51488 (Sept. 15, 2021). The proposal is available here <https://www.govinfo.gov/content/pkg/FR-2021-09-15/pdf/2021-19714.pdf>. See ICI Memorandum 33783, dated Sept. 22, 2021, available at <https://www.ici.org/memo33783>.

[4] 86 Fed. Reg. 73976 (Dec. 29, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-12-29/pdf/2021-27764.pdf>. See ICI Memorandum No. 33975, dated Dec. 29, 2021, available at <https://www.ici.org/memo33975>.

[5] 87 Fed. Reg. 31133 (May 23, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-05-23/pdf/2022-10658.pdf>. See ICI Memorandum No. 34161, dated May 25, 2022, available at <https://www.ici.org/memo34161>.

[6] See ICI Memorandum No. 33877, dated November 2, 2021, available at <https://www.ici.org/memo33877>, for a discussion of the ICI's comments to the proposal and a link to the comments.

[7] The Revisions also adopt changes to certain schedules required of defined benefit plans. As this memorandum is limited to discussion of changes impacting defined contribution plans, these changes are not discussed.

[8] See ICI Memorandum No. 33877, dated November 2, 2021, available at <https://www.ici.org/memo33877>, for a discussion of the ICI's comments to the proposal and a link to the comments.

[9] For a summary of the SECURE Act, see ICI Memorandum No. 32118, dated December 20, 2019, available at <https://www.ici.org/memo32118>.

[10] The Agencies in the Proposal solicited comments on whether to include MEPs/PEPs and multiemployer plans in DCGs. The Revisions do not permit such plans to participate in a DCG due to concerns that it would lead to a reduction in transparency and financial accountability. 88 Fed. Reg. at 11996.

[11] These conditions are discussed in detail in the preamble to the Revisions. 88 Fed. Reg. at 11993-96.

[12] The contents of Schedule DCG include basic information about the participating plan, plan financial information, plan compliance information, and the required plan audit report and financial statements. The requirements are summarized in more detail at 88 Fed. Reg. at 11992-93.

[13] Commenters to the Proposal noted that this requirement differed from the statutory DCG requirement of the "same trustee", and that there are numerous reasons why the same trust may not best serve the needs of different plans. 88 Fed. Reg. at 11988.

[14] 88 Fed. Reg. at 11996. The Agencies explained that in their view the commonality requirement of SECURE Act Section 202(c) would permit a 403(b) plan to participate in a 403(b) plan only DCG but not in a DCG alongside 401(a) plans. The Agencies expressed interest in comments on such an arrangement. Id.

[15] DOL explained its view that "allowing substantial variation in the investments or investment options of participating plans is not an appropriate reading of the SECURE Act terminology requiring the "same" investments or investment options." 88 Fed. Reg. At 11995. In addition, allowing this structure would, in DOL's view, require more plan level detailed financial reporting on Schedule DCG which in DOL's view would be inconsistent with the objective of reducing the costs of annual reporting for plans in a DCG.

[16] Investments in a brokerage window must be limited to assets with a readily discernable fair market value as described in 29 CFR 2520.103- 1(C)(2)(ii)(C).

[17] Any plan investment in publicly traded employer securities must be otherwise prudent under ERISA.

[18] The Revisions do not carry over the proposed requirement for a consolidated trust level audit. Because the Agencies are no longer requiring that all plans participating in a DCG have the same trust, a trust level audit is less feasible than it was under the Proposal. Moreover SECURE 2.0 Act section 345 amends section 202(a) of the SECURE Act to no longer permit any group level audits of DCGs.

[19] DOL explained its rationale for requiring plan-level audits in the preamble to the Revisions. 88 Fed. Reg. at 11991.

[20] The specific requirements of Schedule MEP are summarized in the preamble to the Revisions. 88 Fed. Reg. at 11997-12000.

[21] The Revisions add new breakout categories for Salaries and allowances, Contract administrator fees, Recordkeeping fees, IQPA audit fees, Investment advisory and investment management fees, Bank or trust company trustee/custodial fees, Actuarial fees, Legal fees, Valuation/appraisal fees, Other Trustee fees/expenses, and Other expenses. The Agencies in the preamble to the Revisions stated that they "have determined that to get a better picture of plan expenses, particularly those related to service providers, more detail

in this category is warranted", noting further that this additional detail will allow for some cross-testing of the amounts reported as direct service provider compensation on Form 5500 Schedule C. 88 Fed. Reg. at 12005, 12006.

[22] These questions (also included in Schedule DCG), which are largely unchanged from the Proposal, ask (i) about non-discrimination and coverage testing, (ii) whether employer aggregated plans utilized design-based safe harbor rules or the ADP test, and (iii) if an employer who adopted a pre-approved plan received a favorable IRS determination letter and, if so, requests details as to the letter.

[23] 88 Fed. Reg. at 11985.

[24] Fall 2022 Unified Agenda of Regulatory and Deregulatory Actions, available at <https://www.reginfo.gov/public/do/eAgendaMain>. The specific agenda item referencing improvements to Form 5500 is available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1210-AC01>.

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