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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

Attention: RIN 1210-AB66-CSEC Act Form 5500 Interim Final Rule

Re: Multiple Employer Plan Reporting

Dear Sir or Madam:

We respectfully submit these comments on the interim final rule on the above subject. We recommend that the Department of Labor ("Department" "DOL") limit the requirement to include an attachment listing all employers to multiple employer defined benefit plans, which were the focal point of the legislation. At a minimum, we believe the Department should not require other types of plans, *i.e.*, defined contribution ("DC") and group health and welfare plans, to include any employer (or employee) contribution information, and should make such relief applicable to 2014 plan year filings.

We explain the reasons for our recommendations below.

I. Background

The Cooperative and Small Employer Charity Pension Flexibility Act ("CSEC") generally exempted a small subset of multiple employer defined benefit plans from the rigorous and volatile minimum funding requirements enacted in the Pension Protection Act of 2006 ("PPA"). Instead, this subset of multiple employer plans is again governed by the pre-PPA minimum funding requirements (minus the "deficit reduction contribution" requirement). This funding relief was provided primarily on the basis that these cooperative and small employer charity plans have stable employer populations as well as the structural attributes that support applying the more flexible pre-PPA funding rules.

The CSEC includes a provision (sec. 104(c)) that amends the general annual reporting requirements of ERISA (Sec. 103) as follows:

> "(g) 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."

The interim final rule implements the above CSEC change in the annual reporting requirements in the broadest possible way. 79 Fed. Reg. 66617 (Nov. 10, 2014). Under these rules, starting with Form 5500 annual reports for the 2014 plan year (filed in 2015), the administrator of a multiple employer plan must attach a schedule that (1) lists all participating employers and their EINs and (2) includes an estimate of the percent of contributions that each employer contributes (taking into account both employer and employee contributions) to the plan. The interim final rules impose these new listing requirements on all multiple employer plans – DB, DC and welfare plans – even though the overwhelming focus of the CSEC legislation was on defined benefit plans and only 30 or so plans qualify for CSEC relief.

II. Supporting Reasons

We believe strong policy and practical considerations support limiting the expanded reporting rule to defined benefit plans. The collection of employer lists for DC and welfare plans is not necessary to implement any policies of CSEC – the CSEC legislation focused solely on ERISA minimum funding requirements, which do not apply to the vast majority of defined contribution plans or to any group health and welfare plans.[1] While the drafters of CSEC section 104(c) admittedly were not careful to make this distinction, the Department should avoid imposing costly new burdens on all multiple employer plans without a strong enforcement justification to do so. Indeed, DOL itself notes that this new rule would apply to over 4,700 defined contribution plans and over 500 welfare plans.

We believe there are compelling reasons to narrow this requirement.

- ***Extra Costs Likely Will be Borne by Participants*** – In multiple employer defined contribution plans, administrative expenses are typically borne directly by plan participants and beneficiaries, and may adversely impact net investment returns. In group health and welfare plans, the extra costs may impact the level of benefits

[1] Only "money purchase" DC plans are subject to minimum funding requirements and they do not create any potential liability for the Pension Benefit Guaranty Corporation ("PBGC") in any event.

employers are willing or able to fund. There is no valid reason to saddle these plans and their participants with needless extra reporting costs.

- ***Faulty Premises Underlie the New Requirement*** – DOL presumes that plans will not have to devote much attention to meeting this new requirement since the rules for summary plan descriptions ("SPD") require the SPD to contain a statement that a complete list of employers may be obtained by participants on request. Working from this premise, DOL estimates that it will take a financial professional only 30 minutes to create an attachment containing the list of participating employers, their EINs, and their percentage of total plan contributions. Both of these assumptions are faulty. Merely because participants may request a list of contributing employers does not mean they have done so. Indeed, we are familiar with some multiple employer plans where such a request has never been made. And, even if it were made, the SPD rules do not require the plan to calculate and disclose each employer's contribution percentage – only the names must be provided. Moreover, we believe large multiple employer plans may require as many as 30 hours of staff time – certainly not 30 minutes – to compile the required employer list.

- ***Employer Privacy and Antitrust Concerns*** – Mandating these disclosures raise special privacy concerns for many organizations. Contributing employers may legitimately not want to have this non-public information – including their EIN and how much they spend on various benefits plans – disclosed, especially in view of the availability of Form 5500 information to the general public. Public disclosure of this information can have far-reaching effects, well beyond ERISA compliance, particularly for association plans where there generally is heightened membership sensitivity. For example, various parties with whom an association effectively competes to provide employee benefits may use the list of contributing employers (in essence, the proprietary customer list) to stage a "raid" on the plan's contributors and potentially undermine its financial soundness. Indeed, publicly sharing such membership and contribution information may even involve potential violations of federal antitrust laws. For example, one of our firm's trade association clients requires that any sharing of company data regarding employee salaries, contributions, etc., be reviewed and approved in advance by the association's counsel.

- ***DOL Has Broad Authority to Obtain Desired Information*** – DOL has ample authority to obtain the complete employer list if it has an enforcement interest in getting such information from a particular multiple employer plan. Under section 504 of ERISA, DOL has broad subpoena power to request virtually any information that it may need to enforce ERISA or prevent violations. We respectfully submit that the multiple employer plan universe is better served by

the Department's judicious use of this authority, rather than imposing onerous new reporting requirements each year on thousands of plans.

In summary, there are ample grounds to limit this new requirement to multiple employer defined benefit plans, and avoid burdening thousands of other plans with more reporting costs and burdens.

III. DOL Has Ample Authority to Provide Alternate Methods of Compliance

We note briefly that any question as to whether the Department has the authority to limit the new requirement is clearly addressed by its broad authority to prescribe alternate methods of compliance. Since ERISA was enacted, section 110 has provided that the Department may grant plan administrators relief from "any requirement" of Part 1, if it determines –

> (1) that the use of such alternative method is consistent with the purposes of this title and that it provides adequate disclosure to the participants and beneficiaries in the plan, and adequate reporting to the Secretary.
>
> (2) that the application of such requirement of this part would—
>
> (A) increase the costs to the plan, or
>
> (B) impose unreasonable administrative burdens with respect to the operation of the plan, having regard to the particular characteristics of the plan or the type of plan involved; and
>
> (3) that the application of this part would be adverse to the interests of plan participants in the aggregate.

We respectfully submit that relief from the new reporting requirement generally fits these criteria, including imposing increased costs and unreasonable administrative burdens. We urge the Department to use that authority here if it is considered necessary to do so.

IV. Less Onerous Alternatives/Desired Clarifications

If the Department nevertheless does impose expansive new reporting rules on all multiple employer plans, we respectfully submit that it should take one or more of the following steps to minimize additional burdens on plans.

Multiple Employer Group Health Plan VEBAs – Under recent changes in the IRS reporting requirements (Form 990) for tax-exempt organizations that are "voluntary employee beneficiary associations" ("VEBAs") under section 501(c)(9) of the Internal Revenue Code, certain employer list requirements apply. In particular, each VEBA generally is required to list all contributors and provide their EINs as Part II of Schedule R.

We recommend that multiple employer welfare plans that fund benefits through VEBAs be allowed to simply submit the VEBA information to satisfy any employer list required for the Form 5500 filing.

Relief From Contribution Information – Even if the Department does not exclude DC plans and/or welfare plans from the new list requirement, we respectfully submit that these plans should be exempt from having to include the employer contribution ratios and related information. Since these other plans are not subject to minimum funding rules, the rationale for requiring this information for each employer simply is not apparent. And this information – which will change each year for each employer – likely will take plan administrators the longest amount of time to collect and adjust each year. Accordingly, granting relief in this area will go a long way to reduce the burdens of expanded reporting.

Clarification of Contribution Percentage – At the very minimum, we ask that the instructions to this item on the Form 5500 make it absolutely clear that filers need only include gross contribution information, *i.e.*, total contributions transmitted by each employer to the plan, without having to break out the portions that are employer-paid and employee-paid on the attachment. Many plans do not have access to the employer/employee contribution breakdown, and it would be very burdensome to require them to do so on an annual basis. There is no valid reason to require this detailed information to be collected, compiled and reported.

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We appreciate your consideration of our recommendations. We would be pleased to meet with you to discuss them or respond to questions you may have.

Sincerely,

Louis T. Mazawey