

Publications

DOL Finalizes Significant Form 5500 Changes for 2023 Year

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On February 24th, the Employee Benefits Security Administration, Internal Revenue Service, Treasury, and Pension Benefit Guaranty Corporation (together, “the Agencies”) released [Final forms revisions and Final Rules](#) related to the Form 5500 (the “Final Rule”). This Final Rule follows a [Notice of Proposed Rulemaking \(the “Proposed Rule”\)](#) published in September 2021, and two subsequent final Form revisions addressing issues related [to multiple employer plans \(“MEPs”\)](#) and [pooled employer plans \(“PEPs”\)](#) published in December of 2021 and May of 2022. The Final Rule addresses many of the outstanding reporting issues from the September 2021 proposal, as explained further below. These Form 5500 changes are effective for the 2023 reporting year. Most notably, this package of Form 5500 changes includes reporting rules related to defined contribution “groups of plans” or DCGs, changes to Schedules MB, SB and R for defined benefit plans, the addition of IRS compliance questions, and a change to the counting method for determining whether a defined contribution plan is subject to audit. The changes are summarized below.

I. Group of Plans/Defined Contribution Groups

The [SECURE Act](#) directed that the Form 5500 be modified to allow certain groups of defined contribution plans (“DCGs”) to file a single consolidated annual report/return. The Final Rule modifies the Form 5500 instructions to provide that the filing requirements for large pension plans and direct filing entities (“DFEs”) generally would apply to DCGs. Plans in a DCG reporting arrangement will be required to report specific individual plan level information on a Schedule DCG.

The following are some of the notable aspects of the Final Rule applicable to DCG reporting:

- Plans will have to verify that they meet the eligibility requirements to be a DCG, as set forth in the SECURE Act, in order to file a single, consolidated annual report. Therefore, plans that are exempt from the trust requirement would not be permitted to participate in DCG reporting arrangements. In addition, MEPs and PEPs are barred from the consolidated DCG reporting arrangements under the Final Rule. However, the Agencies acknowledged that they had received a litany of comments stating that 403(b) plans that do not meet those requirements, including nontrusted 403(b) plans, should be allowed to participate, and solicited further comments on the technicalities of how this might operate.
- The Final Rule eliminated the proposed requirement that DCG Plans 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), stating that the SECURE Act’s requirement that all plans participating in the DCG reporting arrangement have the same investments or investment options, together with the requirement for a plan-level audit for small plans that do not meet the conditions for the DOL small pension plan audit waiver regulation, will likely result in DCG reporting arrangements requiring participating small plans to invest in “eligible plan assets” in any event.
- Plans may utilize one or more separate trusts as part of a DCG reporting arrangement, including trusts that may be set up for particular employers, as long as the same trustee is used.
- The Final Rule requires only a plan-level audit for each plan that is subject to audit. We note that SECURE 2.0 eliminated the trust-level audit requirement for DCG arrangements.
- The Proposed Rule contained provisions barring plans that offer brokerage windows and employer securities from participating in a DCG arrangement. However, the Agencies clarified in the preamble to the Final Rule that the brokerage windows could participate in a DCG arrangement under certain circumstances described in the updated regulations. Likewise, the Final Rule allows publicly traded securities of a particular employer held in a DCG common investment option that is otherwise a prudent option would not preclude participation in a DCG reporting arrangement.

II. Changes to the Schedule of Assets Held for Investment Deferred

The Proposed Rules contained several content requirements for two Schedule H attachments, the “Schedule of Assets Held for Investment” and the “Schedule of Assets Held and Disposed of within the Plan Year,” that would have required these schedules be filed electronically in a structured format so that they are data-minable. However, the Agencies decided to defer these changes to the Schedule H attachments for consideration in DOL’s broader Form 5500 modernization project, which is forthcoming.

III. Funding for Defined Benefit Plans

The Final Rule contain changes to the Schedules MB, SB, and R, for defined benefit plans. According to the Agencies, 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.

IV. Schedule MEP

The Final Rule incorporates the addition of the new Schedule MEP (Multiple-Employer Pension Plan Information), as contemplated by the Proposed Rules, to “generally consolidate SECURE Act related reporting for a MEP filer in one easily identifiable schedule.” Schedule MEP is broken into three parts:

- Part I requires the plan to identify what type of MEP it is (association retirement plan, professional employer organization plan, PEP, or “other”);
- Part II requires the plan to list the names and EINs of all participating employers in the plan, the percentage of total contributions made by each employer for the plan year, and (for defined contribution plans) the aggregate account balances attributable to each employer, as well as information about any working owners or other individuals participating in the plan who are not associated with an employer;
- Part III includes questions reflecting the SECURE Act’s reporting requirements for PEPs, by linking the Form PR (Pooled Employer Registration) to the Form 5500 for each plan operated by a pooled plan provider.

V. Form M-1 Changes Deferred

The Proposed Rules would have required multiple employer welfare plans that offer or provide coverage for medical benefits to provide a list of each participating employer in the plan in the Form M-1 (along with information about employer contributions made for certain plans). Currently, such a list is required to be filed by such plans as an attachment to the Form 5500.

In the preamble to the Final Rule, the Agencies announced that they have decided to defer any transfer of the participating employer reporting requirement to the Form M-1 and to consider that change as part of the Agencies' broader Form 5500 improvement project. In the meantime, multiple employer welfare plans required to file a Form 5500 will be required to continue to report the participating employer information as an attachment to the Form 5500.

VI. Miscellaneous Revisions to the Form 5500

The following are some other notable issues addressed by the Final Rule:

- **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. To provide some relief to plans that may have a disproportionate number of eligible employees that are not actually participating in the plan, the Agencies changed the rule so that 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.

As we noted in our [summary of the Proposed Rule](#), the change to the method of counting participants for individual account plans will 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. This change also 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.

- **New breakout categories added to the "Administrative Expenses" lines of the Schedule H balance sheet.** The Final Rule adds new breakout categories include specific lines for: audit fees, bank or trust company fees, actuarial fees, legal fees, valuation fees, salaries, trustee fees and expenses. Plans should be cognizant that this information will now be publicly available and subject to scrutiny by DOL and outside parties.
- **Trust Information Not Included In Final Rule.** Under the Proposed Rule, several 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. In response to critical comments, the Agencies declined to include these additional questions in the Final Rule.
- **Addition of IRS Compliance Questions.** Three new IRS compliance questions would be added to the Schedule R and Schedule DCG, asking (1) if the employer aggregated plans in testing, and whether plan satisfied the nondiscrimination and coverage tests of Code section 401(a)(4) and 410(b); (2) whether the plan sponsor uses the design-based safe harbor rules or the "prior year" or "current year" ADP tests; and (3) whether the employer adopted a "pre-approved" plan, and the date and serial number of the IRS opinion.

Applicability Dates

The Form 5500 changes announced in the Final Rule are effective for plan years beginning on or after January 1, 2023. As noted in the Final Rule, the Agencies are currently working on broader Form 5500 changes in an effort to modernize the Form 5500 and improve the Agencies' data collection efforts. We will keep you informed of any future changes in this area.