GROOM LAW GROUP

MEMORANDUM

March 7, 2019

TO: Pat Cleary
Farrah Fielder
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FROM: Seth Perretta
Malcolm Slee

RE: Form 5500 Filing Requirements – Multiple Employer Plans

Section 104(c) of the Cooperative and Small Employer Charity Pension Flexibility Act ("CSEC Act") amended section 103 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") to require that multiple employer plans ("MEPs") report certain participating employer information as part of Form 5500 annual reporting. The Department of Labor ("DOL" or "Department") issued implementing regulations in 2014 requiring all MEPs, including health and welfare and retirement and pension plans, to disclose in an attachment to the Form 5500 the name and federal employer identification number ("EIN") of each employer participating in the MEP ("Current MEP Reporting Rule").

You have asked whether the Department has the authority to issue guidance that would allow professional employer organizations ("PEOs") to file with the Department the participating employer information on a confidential basis ("Proposed Alternative Reporting Method").

As described below, ERISA sections 104 and 110 provide express authority to the Department to adopt alternative reporting rules for both welfare and pension plans. This authority is evidenced by the express legislative history to ERISA, which makes clear that Congress vested authority in the Department to adopt alternative reporting rules where needed to protect plans, as well as participants and beneficiaries, and when needed to resolve "practical reporting problems." 120 Congressional Record 4731, 4760 (Aug. 22, 1974).

The facts clearly demonstrate that the Department has the authority in this specific instance to implement a Proposed Alternative Reporting Method. Absent such action, participants and beneficiaries, as well as the participating employers and the PEOs that sponsor the MEPs, all risk significant adverse effects as described below. With respect to welfare plans, in addition to being subject to predatory marketing practices by third parties, these adverse effects include the significant likelihood for disruption in needed clinical care (and increased out-of-pocket costs for participants and beneficiaries). With respect to retirement MEPs, these adverse effects include the potential for missed deferrals and corresponding employer matching contributions, deemed distributions as a result of defaulted plan loans, and the increased likelihood for "missing" or orphaned plans or participants. These adverse consequences can be avoided by the Department's adoption of a Proposed Alternative Reporting Method.[1]

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[1] As you know, on December 24, 2018 NAPEO submitted comments to EBSA on the proposed rule titled "Definition of 'Employer' under Section 3(5) or ERISA- Association Retirement Plans and Other Multiple-Employer Plans." In

While ERISA section 106 generally compels that information filed in connection with the annual report (Form 5500) be made publicly available, ERISA section 106 should not be read to restrict or otherwise limit the Department's ability to utilize its authority as vested in it by Congress under sections 104 and 110 to allow for confidential reporting of the participating employer information. An alternative conclusion would turn the statute on its head by requiring the Department to compel public disclosure even where doing so is likely to harm participants and beneficiaries and could have negative consequences to ongoing plan participation and utilization.

Lastly, we note that per U.S. Supreme Court precedent, it is well established that federal agencies may exercise their prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985). And federal agencies, including the Department, have exercised this discretion on repeated occasions in recent years, as discussed below. Accordingly, with respect to past plan years, we would recommend to the Department that it use its discretion to adopt an express or otherwise informal non-enforcement position.

- ***ERISA Section 104 Provides Broad Departmental Authority Regarding Reporting Rules for Plans***

ERISA section 104(a)(3) provides DOL with broad authority to exempt welfare plans from ***any*** ERISA reporting and disclosure obligations. Specifically, ERISA section 104(a)(3) states:

> The Secretary may by regulation exempt ***any*** welfare benefit plan from all or part of the reporting and disclosure requirements of this title, ***or may provide for simplified reporting and disclosure if he finds that such requirements are inappropriate as applied to welfare benefit plans***.

[Emphasis added.] Per this plain language, the Department may "***exempt*** *any welfare benefit plan*" from the reporting and disclosure requirements of ERISA. Or, alternatively, the Secretary "*may provide for* ***simplified reporting and disclosure***."[2]

As described below, ERISA section 110 provides similar authority to the Department with respect to pension plans. However, section 110 applies a set of criteria that generally must be satisfied for the Department to exercise this authority. There is no similar set of criteria that must be met in order for the Secretary to take action with respect to welfare plans, per the express text of ERISA section 104. Nonetheless, we note that there are strong policy reasons for why the Department can, and should, exercise its authority to adopt a Proposed Alternative Reporting Method.

The most compelling reason for the Department to adopt an alternative reporting method is that public disclosure of the participating employer information would subject employers participating in the PEO-sponsored health and welfare plans to predatory marketing practices by third parties, including insurance brokers, 401(k) MEP providers, broker consultants and others. These predatory marketing

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its comments, NAPEO addressed the issue of Form 5500 reporting for MEPs and proposed alternative methods of compliance.

[2] We note that per the express language of ERISA section 104(a)(3), Congress did not require that the Secretary act "by regulation" where he elects solely to provide for simplified reporting with respect to welfare plans, as opposed to exempting welfare plans from that reporting altogether (which would require regulatory action).

practices have the likelihood of causing deleterious effects to downstream plan participants, especially if a participating employer is convinced to move from its existing multiple employer health or welfare plan to another plan arrangement (either to sponsor or establish a single employer plan or to participate in another MEP).

These deleterious effects include the disruption or cessation of critical medical care, as well as increased out-of-pocket expenses for plan participants, resulting from:

- A provider that was "in-network" for the MEP is not in-network with respect to the successor plan;
- The same benefits or drugs that are covered under the MEP may not be covered under the successor plan;
- Mid-year disenrollment from the MEP and an enrollment in the successor plan could result in participants having to start again at $0 in accumulating towards the successor plan's deductible or maximum out-of-pocket limit;
- A participant having to satisfy the successor plan's utilization management criteria, such as step therapy or pre-authorization requirements; and
- Missed payroll period contributions to medical savings accounts, such as Health Savings Accounts and flexible spending arrangements.

While these are just a few examples, they are reminders of how the unnecessary public disclosure of the required participant information has the very real likelihood of harming individual participants and family members, especially where a given employer is encouraged to transition away from the current plan.

Relatedly, we note that these problems will be especially acute for association health plans ("AHPs"), many of which recently started operating and are therefore highly vulnerable to having their participating employers "picked off" by a competitor. The potential for predatory marketing practices with respect to AHPs has the potential to affect the actuarial soundness of AHPs as well as result in higher premiums for participants.

ERISA section 104 provides ample authority for the Department to adopt a Proposed Alternative Reporting Method. And as the above discussion demonstrates, sound public policy, including the need to protect participants and beneficiaries, supports the Department's exercise of its authority in this instance.

- ***ERISA Section 110 Provides Broad Departmental Authority Regarding Reporting Rules for Pension Plans***

Similarly, ERISA section 110 (titled "Alternative Methods of Compliance") provides that, "[t]he Secretary ***on his own motion*** or after having received the petition of an administrator may ***prescribe an alternative method for satisfying any requirement of this part with respect to any pension plan***, or class of pension plan," if the Secretary 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.

[Emphasis added.]

Per the above-quoted language, ERISA section 110 imposes a set of specific criteria that must first be satisfied before the Secretary can utilize his authority to authorize an alternative reporting methodology. As described below, we believe the section 110 criteria are indeed satisfied in this instance.

Consistent purpose, adequate disclosure, adequate reporting

First, a Proposed Alternative Reporting Method, in providing a full and non-redacted accounting of the required participating employer information (albeit in a confidential manner), would provide the Department with the information needed to understand which specific employers are participating in a given MEP, as well as the overall participation levels by employers in MEPs across all the plans. In this respect, a Proposed Alternative Reporting Method would be consistent with "the purposes of this title," and would provide more than adequate reporting to the Department.

The confidential nature of the reporting of the participating employer information to the Department under a Proposed Alternative Reporting Method should *not* be found to result in inadequate disclosure to participants and beneficiaries. To the extent participants and beneficiaries seek to review the Form 5500 for the MEP in which they are participating, they would still be able to access and review all of the material aspects of the Form 5500 under a Proposed Alternative Reporting Method. The only thing participants and beneficiaries would be unable to do is use the DOL's online searchable database to search for the specific Form 5500 based on their employer's name or EIN. However, that is currently the case under the Current MEP Reporting Rule. This is because the participating employer information (such as name and EIN), as reported on an attachment to the Form 5500, is not searchable through the DOL search engine. As a result, participants and beneficiaries currently must search for their Form 5500s based on the name of the PEO plan sponsor, and a Proposed Alternative Reporting Method would not change that. Moreover, since all participants must be provided with a Summary Plan Description for the respective Plan in which they are eligible or participating, participants and beneficiaries have sufficient information regarding the name of the specific MEP to locate the related Form 5500 online using the DOL's searchable database of Form 5500s.

Imposition of unreasonable administrative burdens regarding plan operation

The Current MEP Reporting Rule imposes unreasonable administrative burdens on plan operations. As noted above, aggressive marketing by competitors (based on the publishing of the participating employer information) creates churn of the small businesses participating in MEPs, and the MEP is placed in the position of continuously having to dis-enroll participating employers and terminate participation by the affected employees. For welfare plans, this can also create extraordinary COBRA obligations. For pension plans, this creates significant populations of deferred vested participants, which the plans are then required to track until actual retirement.

Adverse to interests of plan participants

The Current MEP Reporting Rule is clearly adverse to the interests of plan participants and beneficiaries. As noted above, it subjects participating employers and plan participants to predatory marketing practices by third parties, including other PEOs, as well as related parties, such as insurance brokers, 401(k) MEP providers, broker consultants and others. These predatory marketing practices have the potential (if not likelihood) to cause deleterious effects on downstream plan participants. This is especially so where a participating employer is convinced to leave the current MEP in favor of another arrangement.

Potential adverse effects to participants and beneficiaries include:

- Increased likelihood of lost benefits or orphaned retirement savings if the participant does not keep track of which plan maintains his or her benefits;
- Missed deferrals and related matching contributions from missed participation as a result of transitioning to new plans;
- Corresponding loss of investment earnings related to lost opportunities for continued plan participation;
- Loss of investment control related to the imposition of blackout periods;
- Resulting deemed distributions on existing plan loans (because the transition event causes a loan default under the plan's terms, as is common with many plans); and
- Loss of continued access to relatively higher quality and lower fee investments.

Again, these are just *some* of the potential adverse effects to participants and beneficiaries as a result of the Current MEP Reporting Rule. However, they should not be ignored by the Department as part of its consideration of a Proposed Alternative Reporting Method.

We also note that the application of the Current MEP Reporting Rule in the PEO context creates certain adversity for participants and beneficiaries that are unique to the industry. More specifically, where a participating employer is utilizing a MEP in a **non**-PEO context, it should be expected that this employer will find itself subject to, if not inundated by, calls prospecting for business. In this scenario, however, where the employer is not utilizing the services of a PEO and is merely participating in a non-PEO MEP,

one could reasonably expect that such prospectors would seek to lure the participating employer from one non-PEO MEP to another non-PEO MEP based on the value of the specific plan offering. In contrast, when one PEO seeks to market its services to another PEO's existing clients, the PEO is generally marketing a full suite of human resources services, not just its retirement or health benefits. Because a PEO provides a suite of services for small and mid-sized businesses such as payroll, tax reporting, compliance assistance, workers' compensation, and safety and health consulting, it should be expected that at least some participating small businesses in a given PEO-sponsored plan will be convinced to move to another PEO for reasons completely *unrelated* to the health or retirement plan being offered by the second PEO.

- ***Legislative History Reinforces Broad Grant of Authority***

In addition to the statutory language referenced above, the legislative history to ERISA clearly evidences Congress' grant of broad authority to the Secretary to authorize alternative reporting methods.

More specifically, the Joint Explanatory Statement that accompanied the final bill that became ERISA contains, in a section devoted to describing Sections 101-111 of ERISA (*i.e.*, the reporting and disclosure regime), the following language:

> Under the conference substitute, the new reporting and disclosure requirements are to be administered by the Secretary of Labor and are to be applied to all pension and welfare plans established or maintained by an employer or employee organization engaged in, or affecting, interstate commerce. . . . ***The Secretary of Labor also is authorized to waive and modify certain of these requirements for employee benefit plans***.

H.R. Conf. Rept. No. 93-1280, at 255-256 [emphasis added].

Even more explicitly, during the floor debate on the ERISA conference report, the conference-committee report was entered into the Congressional Record. Under the heading "Reporting and Disclosure," this latter report expressly states:

> *The Secretary of Labor is also given variation authority with respect to pension and welfare plans,* ***so that practical reporting problems may be alleviated***.

120 Congressional Record 4731, 4760 (Aug. 22, 1974) [emphasis added].

- ***Section 106 Should Not Stand As An Obstacle to Adoption of the Proposed Alternative MEP Reporting Method or Similar***

Of note, section 106 of ERISA, captioned, "Reports Made Public Information," provides, in part, that "the contents of the annual reports, statements, and other documents filed with the Secretary pursuant to this part shall be public information. . . ."

The fact that section 106 of ERISA provides that the annual report, *i.e.*, Form 5500, and other "documents filed with the Secretary," shall be "public information," is not surprising. After all, ERISA section 103, which is the statutory basis for the annual report, states that "[a]n annual report shall be published with respect to every employee benefit plan to which this part [1] applies." ERISA section

103(a)(1)(A). It goes on to state that each report shall be filed with the Secretary and "furnished to participants in accordance with [ERISA section 104(b)]." *Id*.

Notably, ERISA sections 104 and 110 (providing broad discretion to the Secretary to implement the reporting requirement) appear to give the Department the authority to modify the rules under ERISA section 106 (regarding public disclosure of filed information). ERISA section 104 gives the Department the authority to exempt any welfare benefit plan from "**all or part** of the reporting and disclosure requirements of this subchapter" (which would include ERISA section 106)[emphasis added]. Similarly, ERISA section 110 allows the Department to "prescribe an alternative method for satisfying **any requirement of this part**" (which also would encompass ERISA section 106)[emphasis added].

From a policy perspective, we do not believe that section 106 should be construed as an obstacle to the Department's allowance of a Proposed Alternative Reporting Method. To begin, it would be an odd result – and certainly contrary to Congressional intent – to interpret the statute such that the public disclosure language of ERISA section 106 restricts the Department's authority under ERISA sections 104 and 110. Such an interpretation turns on its head Congressional intent and could lead to results that could harm plan participants. For example, assume an instance where the Department believes the reporting of certain plan-related information is necessary, but where public disclosure of such information would have deleterious effects on participants and beneficiaries. Under a reading of the statute where ERISA section 106 controls, the Department would be compelled by law to publicly disclose this information notwithstanding a finding of adverse consequences to participants and beneficiaries if such information is published. This cannot be the case given the specific focus in section 110 on allowing the Secretary to act where necessary to protect participant and beneficiary interests. Moreover, as noted above, the legislative history indicates Congress vested the Secretary with the authority to not only act as necessary to protect participants and beneficiaries, but also where necessary to solve "practical reporting problems." To construe ERISA section 106 to limit the application of sections 104 and 110 would construe the statute specifically in a manner to *cause* such a practical reporting problem. Thus, we think such a reading of the statute is misplaced.

To the extent the Department feels compelled to construe ERISA in a manner that would mandate public disclosure of any filed information by PEOs regarding participating employer information, we believe an acceptable alternative would be a rule that permits PEOs to file the information in a redacted manner (*see* examples as set forth in Appendix A), subject to DOL's authority to request an unredacted copy as needed for purposes of ERISA. Under such an interpretation and rule, PEOs would then be permitted to file the information in a redacted manner (which would be subject to public disclosure), but would not be required to disclose the unredacted employer information, unless otherwise requested by the Department.

- ***The Department Should Use Its Discretion to Adopt A Non-Enforcement Position Regarding Prior Plan Years***

With respect to Form 5500s that have already been filed by the industry (or non-PEO MEPs), we note that the Department, like all federal agencies, has broad prosecutorial discretion and, thus, can exercise its discretion to adopt an express or otherwise informal non-enforcement position with respect to past plan years and/or previously filed Form 5500s. *See Heckler*, 470 U.S. at 832. Three recent examples of where the Department exercised this discretion either on its own or in concert with other agencies, include:

- DOL adopted a series of non-enforcement policies with respect to certain provisions in the ACA's claims and appeals rules through a series of technical releases. *See* Tech. Rel. 2010-01; Tech. Rel. 2010-02; DOL Tech. Rel. 2011-11.

- DOL, along with the Departments of Health and Human Services ("HHS") and Treasury ("Treasury") (including the Internal Revenue Service ("IRS")) adopted "temporary transition relief" for expatriate plans to "gather further information and analyze [the] challenges [faced by expatriate plans] to determine what actions may be appropriate regarding the current requirements under the Affordable Care Act," and announced that through December 2015, "the Departments will consider the requirements of subtitles A and C of Title I of the Affordable Care Act satisfied if the plan and issuer comply with the pre-Affordable Care Act version of Title XXVII of the Public Health Service Act." FAQs about the Affordable Care Act Implementation, Part XIII, Q1 (Mar. 8, 2013). This announcement effectively suspended the application of all of the PHSA's new requirements to expatriate plans until at least January 2016.

- HHS, DOL, and the IRS issued a Frequently Asked Question that delayed the applicability of the ACA's requirement that employers inform their employees of the availability of Exchanges, including the availability of health premium tax credits and cost-sharing reductions for those eligible. *See* FAQs about Affordable Care Act Implementation Part IX, Q1 (Jan. 24, 2013).

Other recent examples of federal agencies adopting a non-enforcement position are:

- The IRS delayed the health insurance and employer responsibility reporting requirements. Notice 2013-45.

- IRS announced that it would not impose any penalties under the employer responsibility requirements for 2014. *Id.*, Letter from Mark Mazur, Assistant Secretary for Tax Policy, IRS to Fred Upton, Chairman of the House Committee on Commerce and Energy, July 9, 2013 (relying on a grant of regulatory authority substantially similar to that given the Departments in implementing the ACA. *See, e.g.*, PHSA § 2792; ERISA § 734; Code § 9833).

- IRS expanded this transition relief for certain employers with 50 to 100 employees for 2015, as well as provided additional relief with respect to the percentage of employees who must be offered coverage to avoid employer responsibility penalties. *See generally* Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act, Q&As 29-39.

- HHS approved a "three year transition period in Massachusetts for the elimination of current state rating factors . . . that are otherwise disallowed under the Affordable Care Act." *See* Letter from Gary M. Cohen to Joseph Murphy, Massachusetts Commissioner of Insurance (Apr. 5, 2013). HHS acknowledged that the ACA did not expressly allow for the adoption of transition rules for non-Exchange standards, such as PHSA § 2701(a). *Id.*

- HHS announced that "given the scope of the coverage changes that states and the federal government will be implementing on January 1, 2014, and the value of building on the

experience that will be gained from those changes," HHS will not implement the ACA's basic health program until 2015. *See* Questions and Answers: Medicaid and the Affordable Care Act (Feb. 2013), Q1.

- HHS established a temporary non-enforcement policy with respect to certain organizations with religious objections to covering contraceptive services that provides a one-year safe harbor from enforcement by the Agencies. *See* CCIIO Guidance on the Temporary Enforcement Safe Harbor with Respect to the Requirements to Cover Contraceptive Services Without Cost Sharing (Feb. 10, 2012).

- IRS issued guidance establishing a one-year delay in the effective date for Form W-2 reporting of group health benefits. *See* Interim Relief with Respect to Form W-2 Reporting of the Cost of Coverage of Group Health Insurance Under § 6051(a)(14), IRS Notice 2010-69 (Nov. 1, 2010).

- IRS announced that the nondiscrimination rules for insured group health plans required by PHSA § 2716 would not be enforced pending rulemaking. *See* Affordable Care Act Nondiscrimination Provisions Applicable to Insured Group Health Plans, IRS Notice 2011-1 (Jan. 10, 2011) (Compliance with the ACA requirement that non-grandfathered group health plans may not discriminate in favor of highly compensated individuals "should not be required (and thus, any sanctions for failure to comply do not apply) until after regulations or other administrative guidance of general applicability has been issued."). This guidance remains in effect.

- The ACA eliminated the "retiree-only" exception that had been codified in the PHSA at § 2721(a). However, because the ACA did not amend the parallel retiree-only exceptions in the Code and ERISA, HHS announced that it "does not intend to use it resources to enforce the requirements of HIPAA or the Affordable Care Act with respect to nonfederal governmental retiree-only plans." 75 Fed. Reg. 34537, 34540 (June 17, 2010). While consistent with previous statutory authority, there is nothing in the statute that specifically granted HHS the authority to waive its enforcement authority with respect to retiree-only plans. Instead, HHS used its inherent authority to harmonize the ACA's requirements and implement an equitable solution. This guidance remains in effect and is likely permanent.

As the above examples demonstrate, the federal agencies have been more than willing to use, and in fact have utilized, their individual and collective enforcement discretion where necessary to serve the public interest. The potential adverse effects to MEP participants and beneficiaries, especially in the PEO context, support the Department's adoption of a non-enforcement position with respect to the Current MEP Reporting Rule.

➢ ***Conclusion***

As the legislative history indicates, the Secretary of Labor has been given the authority by Congress, per ERISA sections 104 and 110, to undertake actions to protect against adverse consequences to plans and participants, and so that "practical reporting problems may be alleviated." The Current MEP Reporting Rule imposes material costs and burdens on PEO-sponsored plans and is not in the best interests of plan participants and beneficiaries. Absent further action by the Department, participating employers

and employees will remain subject to predatory marketing practices and the related downstream consequences, such as the likelihood for missed 401(k) deferrals and related employer matching contributions, default of existing plan loans (and related tax treatment as a "deemed distribution"), and disruption in medical care as a result of losing access to in-network physicians, such as their primary care physician. Accordingly, the Department should take the steps needed to protect participants and beneficiaries.

Appendix A

Potential Options for Redacted Reporting of MEP Participating Employer Information

1. Partially redacted participating employer name and EIN

Participating Employer Name	Participating Employer EIN	% of Plan Contributions
AmaXXX	XXX-XX-9670	0.08%

2. MEP-designated client ID number and partially redacted EIN

Participating Employer Name	Participating Employer EIN	% of Plan Contributions
Client ID No. 2537	XXX-XX-9670	0.08%

3. Partially redacted name and client ID number in lieu of EIN

Participating Employer Name	Participating Employer EIN	% of Plan Contributions
AmaXXX	Client ID No. 2537	0.08%