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December 2, 2016

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: RIN 1210-AB63
Annual Reporting and Disclosure, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Via email: e-ORI@dol.gov

Re: Proposed Revision to DOL Reporting Regulations to Implement Notice of Proposed Forms Revisions (RIN 1210-AB63)

Plante & Moran, PLLC (Plante Moran) appreciates the opportunity to comment on the proposed revision to the Department of Labor's (DOL) reporting regulations ([RIN 1210-AB63](#)) published in the July 21, 2016 *Federal Register*. These revisions are necessary to implement the forms revisions proposed in the DOL, Department of the Treasury ("Treasury"), Internal Revenue Service (IRS), the Pension Benefit Guaranty Corporation (PBGC) and Employee Benefits Security Administration ("EBSA") Notice of Proposed Forms Revisions which was also published in the July 21, 2016 *Federal Register*.

Plante Moran audits over 1,200 benefit plans and prepares over 550 Forms 5500, Annual Return/Report of Employee Benefit Plan, each year. We are responding on our behalf as auditors and Form 5500 preparers as well as advocates for our 900 benefit plan clients. These clients have assets from under \$1 million to over \$29 billion and participant counts of 100 to over 175,000.

In the interest of providing a timely response, we limited our suggested changes to those we believe, if made, will have the most significant impact. We feel strongly about the role we play in helping to protect the assets and financial integrity of employee benefit plans in a cost effective manner; and as such, we have compiled the following comments for your consideration.

Due Process

Section 2520.103-6 of the regulations provide a definition of the reportable transaction for Annual Return/Report. Section 2520.103-10 of the regulations provide a definition of the Annual Report including the financial schedules that are to be included (in the audited financial statements and attached to the Form 5500). The proposed revisions discuss the intent regarding the content of the Schedule of Reportable Transactions, the Schedule of Assets Held for Investment, and the Schedule of Assets Acquired and Disposed within the Plan Year.

The proposed revisions related to Section 2520.103-6 and Section 2520.103-10 specifically state that "[r]ather than list all the required contents of [these schedules], the proposed amendment...would **simply reference the contents of the schedule[s] listed in the relevant Form 5500 Annual Return/Report instructions.**"

While generally, the Agencies have conducted notice and comment rulemaking before making significant changes to the forms and schedules, “significant” is subjective. By removing the requirement that the regulations list the content of these schedules and, rather, reference the Form 5500 instructions, we feel the DOL would be given authority to make changes to the Form 5500 and related instructions (which could be construed as significant by some users) without public input. The Form 5500 instructions are often released very late in the year and with little or no input from the public. In order to allow for timely public comment, we recommend leaving the content description within the regulations which will require the DOL to request public comment before making significant changes.

Certifications

Section 2520.103-8 of the regulations and proposed regulations discuss the requirements and use of a certification to perform a limited scope audit. The limited scope certification has been and continues to be a key document in any limited scope audit. There have been few changes in the limited scope regulations; however, relationships between vendors have become more complex, as have the types of investments held by plans. As such we support the DOL’s objective to improve transparency as it relates to certifications.

There have been many changes in the relationships between plan service providers and vendors and the ways in which investments are “held” in the years since the regulations were first developed. The original regulations did not necessarily consider these new and different situations. As such, much has been left up to interpretation. Some interpretations were issued directly from the DOL, as was the case with Advisory Opinion 93-21a (regarding brokerage firms) and a 2002 Information Letter (regarding situations where the certifying entity is not the entity that holds the investments). However, there are many areas and situations that have still been left up to the interpretation of individual plan administrators and individual audit practitioners.

We agree with and support the Government Accountability Office’s and DOL’s Inspector General recommendation that the DOL revise section 2520.103-8 to improve the information being reported to plan administrators electing a limited scope audit. We specifically support the DOL’s efforts to clarify and more specifically address reporting of agency relationships. To bring further consistency in application and interpretation, we would suggest that the guidance from the Advisory Opinion 93-21a and the 2002 Information Letter be incorporated into the regulations. Further, we feel that the regulations could be improved by further clarifying what it means for a bank or insurance company to “hold” assets. Such clarification would aid in more consistent application of the regulations and leave less up to individual interpretation. Currently, the regulations have not kept pace with the developments in the investment market, including the following:

- Investments are often no longer physically held by trustees or custodians. Rather the investments are held by a separate sub-custodians or the investments are held in a separate or omnibus accounts.
- In many cases there is no investment physically held any longer, and instead the investment is “held” electronically.
- There has been an increased use of “alternative investments” including private equity funds, real estate funds, venture capital funds, commodity funds, and nonmarketable derivatives in benefit plans. Typically these investments are not “held” by the trustees or custodian in the traditional sense. In many cases, the trustee or custodian is not involved in and does not perform procedures regarding the accuracy of the value of these investments being reported to them by the individual investments.

These developments in the investment market have caused confusion among plan administrators and auditors about whether certifying institutions actually “hold” the plan assets in accordance with ERISA which has resulted in differences in practice regarding what investments are or are not considered covered under a limited scope certification. Additionally, we have encountered “certifications” that initially appear appropriate, however, upon investigation it was determined they were provided by entities that did not qualify to issue the certification or did not have the necessary agreements in place (with the investment custodian).

The importance of the certification will be further elevated if required to be attached to the Form 5500, as is currently proposed. As a result, the regulations should be expanded to further describe and clarify the following:

- Acceptable form and content of the certification,
- Definition of the terms “complete and accurate”,
- Clarify specifically what type of “caution” should be included if the certification is not certifying current value information. Also, clarify where the caution should be located. For example, should the caution be included on the certification itself, or would a footnote to the investment statements be sufficient?
- Clarify what is being requested when asked to “describe the manner in which the bank or insurance company is holding the assets covered by the certification”.

In current practice, there are many differences in understanding and practice regarding what assets are and are not covered by a limited scope certification. To add clarity and consistency in application and practice regarding what is considered covered by a certification (and what is not), we would recommend that the regulations be further expanded to require the certification include the following:

- A reference to which schedules or reports are being certified or a listing of investments that are covered by the certification.
- A reference to the name of the plan, period covered by the certification.
- A reference to the method of accounting for investments (fair value/current value, contract value or other).

Master Trust and Plan Year Ends

Section 2520.103-1 of the proposed regulations indicates “[i]n order to improve the transparency of reporting for plans that participate in a master trust, the proposal would require that master trusts operate either on a calendar year basis or on the same fiscal year as all the plans that participate in the master trust.” It is our understanding PBGC premiums are due based on the end of the year date (with different due dates for short plan years). The PBGC premium is generally considered to be an “annual” premium. As a result of the proposed regulation, there would be a requirement to pay the PBCG premium twice in one year for plans that decide to change their plan year ends to align with their master trust year end(s). For instance, there are some plans that may only need to change by a day and thus they would pay two sets of premiums in 366 days. While we understand the master trust year end could be changed to align with the plans (to avoid the PBGC issue), there could be reporting issues for a calendar year master trust to change to non-calendar year end.

We believe the proposed regulations should be changed such that in the year of a change in year there is transitional relief for defined benefit plans (in a master trust) such that the PBGC premiums were prorated for the period of the short plan year (whether it is rounded up to the nearest month or some other way).

December 2, 2016

Thank you again for the opportunity to comment on the Proposed Revisions to DOL Reporting Regulations (RIN 1210-AB63) issued in the July 21, 2016 *Federal Register*. We appreciate your consideration of our recommendations and would be pleased to respond to any questions the Administration may have about these comments. Please direct any questions to Theresa Banka at 248-223-3572 or theresa.banka@plantemoran.com or Laura Taylor at 616-643-4025 or laura.taylor@plantemoran.com.

Very truly yours,

PLANTE & MORAN, PLLC