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December 5, 2016

Submitted Electronically

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: RIN 1210-AB63
Annual Reporting and Disclosure
Room N-5655
US Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Proposed Revision of Annual Information Return/Reports (Form 5500 Series); RIN 1210-AB63

Dear Sir or Madam:

The Investment Company Institute¹ appreciates the opportunity to comment on the notice of proposed forms revisions (the “Proposed Revisions”) put forward by the Department of Labor (“DOL”), the Department of the Treasury, and the Pension Benefit Guaranty Corporation (collectively, the “Agencies”).² The Agencies have proposed significant changes to the Form 5500 series, citing five broad goals: to modernize financial reporting, to provide greater information regarding group health plans, to enhance data mineability, to improve service provider fee information, and to enhance compliance with the Employee Retirement Income Security Act of 1974 (“ERISA”) and the Internal Revenue Code (the “Code”). The Institute has long supported effective disclosure to plan fiduciaries that enables them to fulfill their duties under ERISA.³ As an organization with

¹ The Investment Company Institute (ICI) is a leading global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s members manage total assets of US\$18.2 trillion in the United States, serving more than 95 million US shareholders, and US\$1.6 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

² 81 Fed. Reg. 47534 (July 21, 2016).

³ For example, the Institute strongly supported DOL’s service provider disclosure initiative. See August 30, 2010 letter to DOL from Mary Podesta, in response to the 408b-2 Interim Final Rule; available at

established research capabilities⁴ and a user of Form 5500 data, the Institute is in a unique position to comment on this matter.

As an initial matter, we greatly appreciate the extension of time to provide comments on the Proposed Revisions.⁵ The extension provided much-needed additional time to analyze the Proposed Revisions with our members and to develop input, which we hope will be helpful to the Agencies. Even with this additional time, however, we believe that stakeholders may not have had sufficient opportunity to fully review the proposal. This is due to the extensive nature of the Proposed Revisions, the lack of mocked-up proposed forms to facilitate comparison, and the resources currently devoted to implementing the DOL fiduciary rule.

The Agencies' stated intention is to modernize the Form 5500 to create a more effective information collection tool. We generally support the Agencies' goals, including increased transparency of plan investments, harmonization of service provider reporting, and increased availability of information for policy makers and researchers. The Proposed Revisions however, are not always consistent with their purported goals and would impose a significant burden on plan sponsors and their service providers tasked with the completion of the Form 5500. Such burdens include both the systems overhaul necessary to implement the changes and the increase in time and cost that will be necessary to complete the forms each year. These burdens are in addition to the massive investments in systems that new regulation has required in recent years, including DOL's three fee disclosure projects (Schedule C, the 404a-5 disclosure to plan participants, and the 408b-2 disclosure to plan fiduciaries), and the significant time and cost outlays that members are currently expending to implement DOL's expanded fiduciary rule. We also have particular concerns with the administrative burden imposed on small plans by the Proposed Revisions and the impact that such burdens will have on efforts to increase plan sponsorship by small employers.

www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB08-2/00027.pdf

⁴ One of the major roles the Institute serves is as a source for statistical data on the investment company industry. With a research department comprising more than 40 professionals, including PhD-level economists, the Institute conducts public policy research on fund industry trends, shareholder characteristics, the industry's role in US and international financial markets, and the retirement market. For example, the Institute publishes reports focusing on the overall US retirement market, fees and expenses, and the behavior of defined contribution (DC) plan participants and individual retirement account (IRA) investors. The Institute relies on Form 5500 data for its analysis of the 401(k) and 403(b) plan markets, and to estimate total private-sector defined benefit plan assets and other private-sector DC plan assets.

⁵ On August 29, 2016, the Institute, along with American Benefits Council, the SPARK Institute, Inc., and Plan Sponsor Council of America, requested a 90-day extension of the comment period, which was scheduled to end on October 4, 2016. On September 20, 2016, DOL announced an extension of the comment period until December 5, 2016.

An executive summary of our comments is provided in Part I below, followed by our comments on the Agencies' Regulatory Impact Analysis in Part II. We discuss our more specific comments on proposed changes to Schedule C and to Schedule H, in Part III and Part IV, respectively. Finally, in Part V, we describe additional general concerns regarding the Proposed Revisions.

I. Executive Summary

We generally support the policy goals behind the Proposed Revisions, but it appears that little effort was made in prioritizing what new data the Agencies truly need and in assessing the burden that the changes will impose on plan sponsors and their service providers. As a result, the Proposed Revisions will create significant administrative burdens for employee benefit plan sponsors and service providers, unnecessarily increase the cost of operating employee benefit plans, and establish significant new disincentives for employers to sponsor or maintain plans. Such a result is hardly consistent with the purpose of the Form 5500.⁶ Given the scope and breadth of our concerns, as set forth below, we urge the Agencies to withdraw the Proposed Revisions and issue new proposed modifications consistent with the purpose of the Form 5500. More specifically,

- **The Agencies greatly underestimate the costs the Proposed Revisions will impose on plan sponsors.** DOL bases its cost estimates on survey data from 1999 with little explanation of how such data offers any relevance to current filing obligations or to the Proposed Revisions, which would require a significant increase in the quantity and complexity of the required information. Even taking DOL's estimates at face value, large plans will incur nearly a 25 percent increase in their cost of completing the Form 5500. In addition, the cost estimates are based on DOL's assumption that there would be no increase in the number of small plans that have to file the Form 5500 instead of the Form 5500-SF.
- **Small employers in particular would see significant increases in administrative burdens associated with plan sponsorship.** The Agencies must consider the costs and administrative burdens associated with the expansion of the Form 5500 burden of small plans and consider the implications for the common policy goal of expanding retirement coverage among small employers. The Proposed Revisions could cause many plans that currently file the Form 5500-SF to become ineligible for the short form. For the small plans that will have to file the Form 5500 as a result of the Proposed Revisions, the reporting burden will increase exponentially.

⁶ The Agencies jointly developed the Form 5500 series so employee benefit plans could utilize the Form 5500 series forms to satisfy annual reporting requirements under Title I and Title IV of ERISA and under the Code. The Proposed Revisions would arguably change the purpose of the Form 5500 from that of an annual reporting tool for use by plan sponsors to more of a road-map for use by the Agencies and the plaintiffs' bar in searching out potential compliance violations for enforcement and strike suit purposes.

According to DOL's own estimates, small plans that are not eligible to complete the Form 5500-SF would see their Form 5500 compliance costs rise nearly three-fold. With this increase, the cost of completing the Form 5500 could constitute more than 7 percent of a small plan's total costs.

- **Proposed changes to Schedule C fail to meet the goal of increased harmonization.** In proposing changes to Schedule C of the Form 5500, the Agencies cite a primary goal of harmonizing Schedule C with the required 408b-2 disclosures (fee disclosure information provided by service providers to plan fiduciaries). The Institute strongly supports this goal.⁷ Regrettably, many of the Proposed Revisions to Schedule C are inconsistent with the 408b-2 disclosure – for example requiring disclosure of indirect compensation as a dollar amount rather than a formula and requiring a separate Schedule C for each service provider (which should not be required in the case of bundled service providers or affiliated providers).⁸ Moreover, the Proposed Revisions would use different compensation thresholds for triggering Schedule C reporting and would require recordkeepers who do not charge a separate fee for recordkeeping to report an estimate of recordkeeping cost. These changes are inconsistent with a goal of harmonization with 408b-2 and would add significant new expense, without a corresponding benefit to plan sponsors. In addition, many of the changes are unclear and overly burdensome in their application and will not serve the Agencies' purported goals.
- **Proposed changes to Schedule H are unclear and incompatible with other regulatory obligations.** The Agencies' Proposed Revisions to Schedule H attempt to modernize the financial reporting on the Form 5500 so that the information reported better reflects the investment portfolios and asset management practices of retirement plans. We support the goal of increased transparency of plan investments, but many of the changes are either unnecessary in light of existing regulatory efforts or unclear. Many also make use of definitions that are inconsistent with other regulatory and accounting reporting requirements. Use of new definitions for characterizing assets, unique to the Form 5500, requires plans to separately track assets based solely on a unique regulatory regime, which increases accounting and recordkeeping burdens. Certain questions will not elicit helpful information. For example, the requirement to report service providers that have been terminated for a failure to meet the terms of a service agreement (line 6) and the requirement to report the number of uncashed checks and the related plan procedures (line 4z), serve little purpose and unnecessarily complicate the reporting burden of plan sponsors beyond the intended purpose of the Form 5500.

⁷ The Institute strongly supports efforts to harmonize and simplify completion of Schedule C and align the information on the Form 5500 with the information already being provided by service providers to plan fiduciaries.

⁸ 29 C.F.R. § 2550.408b-2(c)(1)(viii)(B).

- **The Agencies should modify or eliminate the numerous proposed changes that add complexity without clear benefits.** Many changes that appear relatively simple can be very complex and burdensome in application and should be significantly modified or eliminated. For example, identifying the number of participants making catch-up contributions, as required by line 25 of Schedule R, would require modifications to systems and data entry and monitoring protocols to implement. Plan sponsors cannot determine other required information with any certainty. This includes the number of participants who have not made any investment decisions and remain invested in the default investment, as required by line 24b(3) of Schedule R. In this respect, many participants will make an affirmative decision to remain invested in the default investment because they believe that the default investment is appropriate for them. Many more changes add similar complexity without tangible benefits.
- **The Agencies must provide significantly more time to meet the expanded reporting obligations.** In light of the extensive system changes and the development of data collection protocols that the Proposed Revisions would necessitate, the Agencies must allow at least two years between the time final form revisions are issued and the first due date. In addition, because the Proposed Revisions would require increased coordination in order to capture newly required information, the Agencies must allow plans to elect a six-month extension of the filing deadline rather than the 2½-month extension that is currently available.

II. Regulatory Impact Analysis

The Agencies propose a complete overhaul of the Form 5500 reporting obligations—requiring a substantial amount of new and difficult-to-gather information from large plans and extending the reach of the reporting obligations to many small plans. The Proposed Revisions would greatly increase the level of granularity of the data points reported, particularly on Schedule H⁹ and Schedule C.¹⁰ The

⁹ For example, the asset and liability statement and the income and expense statement on Schedule H have been modified to include much finer categories for grouping plan assets (for the reporting of plan assets in Part I, the proposal would triple the number of categories that must be considered, primarily due to new breakout categories). Schedule H also includes sub-schedule 4i, which requires the reporting of each asset held for investment purposes at the end of the plan year. The Agencies have removed almost all of the exclusions under sub-schedule 4i, which will require almost every plan investment to be separately listed. Under the current Form 5500, a number of types of assets may be excluded from this 4i sub-schedule (including registered investment companies, US debt securities, certain short-term CDs, securities purchased from a registered broker-dealer, or participations in a bank common or collective trust or an insurance company pooled separate account). Under the Proposed Revisions, only cash and cash equivalents may be excluded from this chart. New data points that must be listed on sub-schedule 4i include whether the asset is hard-to-value, what category from the asset and liability statement the asset represents, and an identification code or number.

¹⁰ The fact that a separate schedule C must be included for each service provider will result in a significant expansion of the reporting obligation. The threshold for including a service provider has essentially been lowered from \$5,000 to \$1,000.

proposal also adds a significant number of new compliance questions. The totality of these changes amount to a massive increase in the quantity of information that would be reported on the Form 5500. The proposal would require the collection, coordination, and reporting of data that the existing regulations and guidance do not require to be collected, monitored, maintained, disclosed, or reported. Compilation of the data points requested will in many cases require the retention of outside valuation experts and other professionals and, in many cases, legal experts to decipher what is actually required. Both the cost of the systems overhaul that would be needed and the ongoing cost of collecting the new information would be substantial. In light of the costs described above, we believe the Agencies have significantly underestimated the cost of the Proposed Revisions, much of which will ultimately be borne by plan participants.

DOL lists several benefits that the Agencies hope to gain from the Proposed Revisions. The Agencies seek to use the additional data: (1) to implement stronger enforcement programs and to focus oversight and enforcement resources; (2) to respond to inquiries from plan participants and beneficiaries, employers, other plan sponsors, and the public; (3) to develop and implement regulations and other compliance assistance guidance; and (4) to formulate policy.¹¹ DOL also notes in its Fact Sheet that the changes would enable private-sector data users to develop more individualized tools for employers and employees.¹²

While we support these general goals, we are concerned that these benefits come with significant costs of the new reporting regime, and question whether there are more cost-effective means of achieving them. We also are concerned that the changes proposed by the Agencies are not always consistent with their purported goals and would impose a significant burden on plan sponsors and their service providers tasked with the completion of the Form 5500. While we appreciate the Agencies' desire to improve their data gathering capabilities, it appears that little effort was made in prioritizing what new data are truly needed and in understanding the burden that the changes will impose on plan sponsors and their service providers.

The current Form 5500 provides a large quantity of qualitative and quantitative information, and a substantial amount of research and analysis can be done using the current version of the Form 5500. The Institute maintains an extensive research program on retirement security, and our researchers and economists are heavy users of Form 5500 data.¹³ Our research program also includes

¹¹ 81. Fed. Reg. 47538.

¹² See DOL Fact Sheet (July 11, 2016); available at www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/fs-proposal-to-modernize-and-improve-the-form-5500-filed-by-employee-benefit-plans.pdf.

¹³ For example, Form 5500 data are used to benchmark components of ICI's quarterly retirement market data. See Investment Company Institute, "The US Retirement Market, Second Quarter 2016" (September 2016); available at www.ici.org/info/ret_16_q2_data.xls. In addition, in a collaborative research effort, BrightScope and ICI analyze Form

studies focusing on retirement plan fees, plan design, and plan investments.¹⁴ As users of the Form 5500 data, the Institute recognizes the value of providing plan-level information to the public. Nonetheless, we question the benefit of the extent of the additional detailed data that the Agencies propose collecting on the Form 5500. We therefore request that the Agencies revisit the potential research benefits associated with the new requirements that it is proposing.

Based on discussions with our members, the Institute believes that there are significant costs associated with the collection of the additional data that the Agencies have not fully considered. For example, DOL states that it “has not attributed a recordkeeping burden to the 5500 Forms in ...[its] analysis because it believes that plan administrators’ practice of keeping financial records necessary to complete the 5500 Forms arises from usual and customary management practices that would be used by any financial entity and does not result from ERISA or Code annual reporting and filing requirements.”¹⁵

This assumption does not reflect the realities of how plan-level information is collected, processed, and stored. Much of the information that the proposal would require is not collected or is not collected in a form or in a database that is easily imported for use in the Form 5500. Many plan sponsors outsource much of the Form 5500 preparation, and there are many items that a service provider cannot answer for the plan sponsor. These service providers will need to make significant changes to their databases and other systems to comply with the new requirements, and collecting and reporting of the data will require more time, analysis and much greater coordination among different

5500 data for 401(k) plans. See BrightScope and Investment Company Institute, *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans*, 2013, San Diego, CA: BrightScope and Washington, DC: Investment Company Institute (2015); available at www.ici.org/pdf/ppr_15_dcplan_profile_401k.pdf. BrightScope and ICI also use the Form 5500 to analyze ERISA 403(b) plans. See BrightScope and Investment Company Institute, *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at ERISA 403(b) Plans*, 2013, San Diego, CA: BrightScope and Washington, DC: Investment Company Institute (2016); available at www.ici.org/pdf/ppr_16_dcplan_profile_403b.pdf.

¹⁴ The BrightScope/ICI analysis combines fee information from Morningstar and Lipper with asset information from the Form 5500 data to estimate fees paid on mutual funds held in plans by plan size. In addition, BrightScope uses fee information from the Form 5500 to estimate “total plan cost.” See BrightScope and Investment Company Institute, *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans*, 2013, San Diego, CA: BrightScope and Washington, DC: Investment Company Institute (2015); available at www.ici.org/pdf/ppr_15_dcplan_profile_401k.pdf. BrightScope and ICI also use the Form 5500 to analyze ERISA 403(b) plans. See BrightScope and Investment Company Institute, *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at ERISA 403(b) Plans*, 2013, San Diego, CA: BrightScope and Washington, DC: Investment Company Institute (2016); available at www.ici.org/pdf/ppr_16_dcplan_profile_403b.pdf. ICI also conducts an annual analysis of fees paid on mutual funds held in 401(k) plans. See Collins, Holden, Duvall, and Chism, “The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2015,” *ICI Research Perspective* 22, no.4 (July 2016); available at www.ici.org/pdf/per22-04.pdf.

¹⁵ 81 Fed. Reg. 47496, 47519 (July 21, 2016).

parties to obtain information and complete the form. In fact, some of the new questions will necessitate the engagement of additional consultants and legal experts (*e.g.*, determining whether a particular asset is hard-to-value).

These costs will be potentially greater than what DOL is estimating for large DC plans if the Agencies adopt the Proposed Revisions. As discussed, the Proposed Revisions would require a significant increase in the quantity and complexity of the information than what is currently collected. And DOL's cost estimates are based on a survey of filers that Mathematica Policy Research conducted in 1999, which DOL has adjusted "to account for changes to the forms and schedules and increases in the cost of labor and service providers" since the original survey.¹⁶ The changes to the survey have been quite substantial during the past 17 years, and it is unlikely that the current cost estimates accurately reflect the total cost of completing the Form 5500 and its associated schedules. DOL estimated changes in burden hours by simply "consulting with Departmental experts."¹⁷ Even taking DOL's quantitative estimates at face value, large plans will incur a nearly 25 percent increase in their cost of completing Form 5500: the average cost per large DC plan increases from an estimated \$1,756.21 currently to \$2,185.99 under the proposal (Figure 1).

Figure 1
Summary of DOL Regulatory Impact Analysis
for Large Non-ESOP Single-Employer DC Pension Plans

	Current	Proposed
Schedules	62,161	62,161
Total cost	\$109,167,810	\$135,883,253
Cost per plan	\$1,756.21	\$2,185.99

Source: ICI summary and tabulation from Tables TA_1, TA_2, TA_3, and TA_4 from US Department of Labor, Employee Benefits Security Administration, "Technical Appendix: Documentation of the Methodology Used to Calculate the Burden Associated with the Proposed Form 5500 21st Century Initiative;" available at www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/technical-appendices/documentation-of-the-methodology-used-to-calculate-the-burden-associated-with-the-proposed-form-5500-21st-century-initiative.pdf

¹⁶ *Id.* at 47518.

¹⁷ See US Department of Labor, Employee Benefits Security Administration, "Technical Appendix: Documentation of the Methodology Used to Calculate the Burden Associated with the Proposed Form 5500 21st Century Initiative;" available at www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/technical-appendices/documentation-of-the-methodology-used-to-calculate-the-burden-associated-with-the-proposed-form-5500-21st-century-initiative.pdf

Small plans may be disproportionately burdened if the Agencies adopt the changes in their proposed form. While we question the basis for its estimate, DOL itself asserts that small employers (those with fewer than 100 participants) that are not eligible to file a Form 5500-SF would see their cost of compliance rise nearly three-fold from \$463.46 a year to \$1,297.35 per year (Figure 2). Given that the average small DC plan has \$1.335 million in assets,¹⁸ the cost of filing a Form 5500 would rise on average from 3.5 basis points to 9.7 basis points per year—a substantial increase in a market where the average fees for a small plan are about 1.32 percent of plan assets.¹⁹ If DOL’s estimate is correct, the cost of simply completing the Form 5500 could constitute more than 7 percent of a plan’s costs.

DOL also assumes that no small plans that currently file Form 5500-SF would have to file a Form 5500 and its ancillary schedules. As we have discussed, the form and instructions as written likely will require many small plans currently filing Form 5500-SF to file the longer form. The cost impact on these plans will be significant, rising from an average of \$289.29 per year to \$1,297.35 a year on average, based on DOL’s estimates. For the average-size small DC plan that once completed the short form and now must complete the long form, the additional cost of compliance would equal an increase of more than 7 basis points of plan assets. This will increase cost burden for plan participants and plan sponsors.

Figure 2
 Summary of DOL Regulatory Impact Analysis
 for Small Non-ESOP Single-Employer DC Pension Plans

Eligible to file Form 5500-SF		
	Current	Proposed
Schedules	580,703	580,703
Total cost	\$167,991,237	\$188,002,756
Cost per plan	\$289.29	\$323.75

¹⁸ ICI calculations based on data reported in Tables E2 and E11 in US Department of Labor, Employee Benefits Security Administration, *Private Pension Plan Bulletin Historical Tables and Graphs 1975-2014* (Version 1.0; September 2016); available at www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf.

¹⁹ A Deloitte/ICI survey of plan sponsors that captured information to calculate the “all-in fee” for 401(k) plans found that the average all-in fee for plans with less than 100 participants was 132 basis points in 2011. *See* Exhibit 30 in Deloitte and Investment Company Institute, *Inside the Structure of Defined Contribution/401(k) Plan Fees: A Study Assessing the Mechanics of the ‘All-In’ Fee*, New York: Deloitte Consulting and Washington, DC: Investment Company Institute (2011); available at www.ici.org/pdf/rpt_11_dc_401k_fee_study.pdf. This likely overstates small 401(k) plan fees because fees have trended down over time (*see* Collins et al. 2016, *op. cit.* note 14; and BrightScope and Investment Company Institute 2015, *op. cit.* note 14).

Ineligible to file Form 5500-SF		
	Current	Proposed
Schedules	21,473	21,473
Total cost	\$9,951,850	\$27,857,998
Cost per plan	\$463.46	\$1,297.35

Source: ICI summary and tabulation from Tables TA_1, TA_2, TA_3, and TA_4 from US Department of Labor, Employee Benefits Security Administration, "Technical Appendix: Documentation of the Methodology Used to Calculate the Burden Associated with the Proposed Form 5500 21st Century Initiative;" available at www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/technical-appendices/documentation-of-the-methodology-used-to-calculate-the-burden-associated-with-the-proposed-form-5500-21st-century-initiative.pdf

A primary goal of the retirement policy community is to expand coverage, and there is agreement that small employers sponsor retirement plans for their employees at lower rates than large employers.²⁰ A number of proposals have been introduced with the goal of reducing the burden associated with plan sponsorship on small employers.²¹ This proposal would have the opposite effect and significantly increase the burden and cost of plans, making plan adoption more difficult and less likely for small employers.

For example, under current rules, small plans covering fewer than 100 participants may file the simpler Schedule I (Financial Information – Small Plan) and are not required to complete Schedule

²⁰ For a discussion of how pension coverage varies by plan size, see Brady and Bogdan, "Who Gets Retirement Plans and Why, 2013," *ICI Research Perspective* 20, no. 6 (October 2014); available at www.ici.org/pdf/per20-06.pdf. The Bureau of Labor Statistics National Compensation Survey (NCS) also finds that retirement plan coverage varies with plan size. For the most recent NCS data, see "Table 2. Retirement benefits: Access, participation, and take-up rates, private industry workers, March 2016;" available at www.bls.gov/ncs/ebs/benefits/2016/ownership/private/table02a.pdf.

²¹ For example, recognizing the administrative burden associated with plan sponsorship and the disincentive that such burdens have in fostering plan formation, a number of Senators and Representatives have introduced legislation that would encourage the use of multiple employer plans as way of giving small employers access to the benefits of economies of scale. See the Small Businesses Add Value for Employees (SAVE) Act of 2015 (H.R. 4067), Retirement Security Act of 2015 (S.266). Senator Hatch, Chairman of the Senate Finance Committee has proposed a Starter 401(k)—a new type of safe harbor 401(k) that (1) allows only employee deferrals, with a contribution limit of \$8,000 (indexed for inflation), and catch-up contributions, (2) requires automatic enrollment at a rate between 3% and 15%, and (3) would allow simplified reporting. See the Secure Annuities for Employee ("SAFE") Retirement Act of 2013 (S.1270).

C.²² Under the Proposed Revisions, any small plan that is not eligible to complete the Form 5500-SF²³ would be required to complete both Schedule H and Schedule C. It is unclear whether a small plan could use the Form 5500-SF if its assets include any governmental security other than a US government or state government security. In this respect, a small plan holding municipal bonds would not be permitted to use the Form 5500-SF. Many employers sponsoring small plans may choose to limit their investment options available through the plan to mutual funds with the sole exception of a separate account used as a managed account default option for the plan or a stable value investment option. Based on the investments used in the separate account,²⁴ the small plan may be ineligible to use the Form 5500-SF and instead be regulated to completing both Schedule H and Schedule C – a costly and arguably harsh result. Of course, the Form 5500-SF itself includes a number of additional questions, although the changes to that form are not as extensive as those in the full Form 5500.

Before finalizing any changes to the Form 5500, the Agencies should carefully weigh the benefits of collecting this information against the costs which will be ultimately borne by plan participants.²⁵ The Agencies have noted tangential benefits that the Proposed Revisions would bring to plan participants. For the most part, however, any benefits would inure to the Agencies and to third

²² When Schedule C was finalized in 2007, DOL noted that “the Department does not believe expanding the Schedule C annual reporting requirements to small pension plans would be consistent with the direction from Congress in the PPA [Pension Protection Act] for the Department to simplify the annual report for plans sponsored by small businesses.” *See* 72 Fed. Reg. 64731, at 64738 (November 16, 2007).

²³ Under the current rules, a plan may file the Form 5500-SF (a simplified annual return) if it meets the following requirements: (1) it covers fewer than 100 participants at the beginning of the year; (2) it is exempt from the audit requirement; (3) it invests 100% of assets in certain secure investments with a readily determinable fair market value; (4) it does not hold employer securities; and (5) it is not a multiemployer plan or MEWA. The Agencies propose to change these provisions very little with respect to retirement plans. Under the current rules, a plan can only file the Form-SF if all of its assets are “eligible plan assets,” a non-exclusive list of asset types described in the instructions to line 6a. Under the Proposed Revisions, any plan that has any investment that is not included on an exclusive list of assets may not file the short form. CCTs and PSAs can be eligible plan assets. However, the proposed instructions to the Form 5500-SF now provide “To be eligible plan assets for Form 5500-SF reporting purposes, a bank or insurance company contract, including a CCT or PSA must not only be valued at least annually, but must itself be invested primarily in readily marketable assets.” *See* Instructions to Lines 11(a)-(i), at 81 Fed. Reg. 47674.

²⁴ Plans invested in pooled separate accounts or common and collective trusts may only file the short form if the CCT or PSA is itself “invested primarily in readily marketable assets” (*op. cit.* note 23). For a large number of small plans, their ability to file the short form will depend on how this provision is interpreted. For example, many stable value funds may not meet this bar. It is common that CCTs and PSAs are invested in other CCTs and PSAs. Some CCTs and PSAs are designed to track investments in a given mutual fund. There is much uncertainty about the effect of this provision on small plans.

²⁵ In the preamble to the 2007 revisions to the Form 5500, the Agencies noted “inasmuch as plan administrative costs are being passed on to plan participants with increasing frequency, it is critical to ensure that the benefits of any new annual reporting requirement outweigh the attendant compliance costs—costs that may ultimately reduce retirement savings.” *See* 72 Fed. Reg. at 64738.

parties in the form of improving enforcement and data-mining capabilities. We question whether the Agencies, rather than seeking to improve their enforcement capabilities, would better serve plan participants by providing more compliance assistance to plan sponsors to better ensure they are equipped to meet their compliance responsibilities associated with plan sponsorship. Given the scope and breadth of our comments, we encourage the Agencies to withdraw the Proposed Revisions and issue new proposed modifications consistent with our comments and the purpose of the Form 5500.

III. Schedule C Comments

The Proposed Revisions would expand significantly the granularity of information required to be reported on the Form 5500, Schedule C, including changes that are intended to harmonize Schedule C reporting with DOL's 408b-2 disclosure regulations. We support the Agencies' effort to harmonize Schedule C reporting with DOL's 408b-2 disclosure rules. The Proposed Revisions, however, include a number of changes that are inconsistent with the 408b-2 disclosure regulations and will create massive and costly compliance challenges for plan sponsors and service providers. Our more specific comments with regard to the Proposed Revisions to Schedule C to the Form 5500 are set forth below.

1. The Agencies should allow indirect compensation to be reported on Schedule C in the same manner as the 408b-2 regulation.

The Proposed Revisions would require plans to report indirect compensation paid to service providers assigning a dollar amount, rather than a formula, to estimate the compensation. The elimination of the use of formulas as a method of disclosing certain forms of indirect compensation, and the requirement to report all indirect compensation in the form of a dollar amount on a per plan basis (or an estimated dollar amount) runs contrary to the Agencies' efforts to harmonize Schedule C reporting with DOL's 408b-2 disclosure regulations.

The Agencies must eliminate this change and allow covered service providers to disclose indirect compensation by the same methods as permitted under the DOL's 408b-2 regulation. In this regard, the 408b-2 regulation permits covered service providers to report indirect compensation using a dollar amount, formula, percentage of assets, per capita charge, or, where the compensation cannot be expressed in such terms, by any other reasonable method.²⁶ This was a deliberate and carefully

²⁶ 29 C.F.R. § 2550.408b-2(c)(1)(viii)(B). In the preamble to the Interim Final 408b-2 regulation, DOL states "The disclosure of indirect compensation and certain compensation paid among related parties serves two purposes. First, the disclosures are intended to enable plan fiduciaries to better assess the reasonableness of the compensation paid for services to the plan by taking into account all of the compensation being received in connection with such services. Second, the disclosures are intended to enable plan fiduciaries to assess actual or potential conflicts of interest that may impact the quality of services provided to the plan." 75 Fed. Reg. 41600 at 41609 (July 16, 2010). In the preamble to the Final 408b-2 regulation, DOL confirmed its belief that disclosure of expected compensation in the form of known ranges can be a

considered determination made by DOL pursuant to a lengthy notice and comment process for the 408b-2 regulations. This outcome reflected a public record recognizing the difficulty in developing dollar amounts in the case of some forms of indirect compensation.

As recognized by DOL in its consideration of its 408b-2 regulation, certain forms of compensation are not adaptable to quantification as a specific dollar amount. An example of compensation that is widely understood to be impossible to allocate down to a per-plan dollar amount is float. In many cases, float revenue is not actual compensation earned by a bank or trust company. Instead, the bank typically develops “float” by using bank deposits (which are assets of the bank) overnight to fund the bank’s operations. In many cases the use of these deposits does not raise any actual income or interest. In other cases, banks may use a wide variety of strategies to invest bank deposits overnight, earning a wide variety of returns. Many banks also invest deposits overseas, and therefore may earn float in a variety of markets, each of which may generate different interest rates based on the economic characteristics of various global markets. As a result, calculating a dollar amount on a per-plan basis, rather than describing applicable interest rates, significantly increases the difficulty and expense of providing Schedule C information, if it is even possible. Banks and other parties earning float have relied on the DOL’s Field Assistance Bulletin regarding float (DOL FAB 2002-03), as well as on the “eligible indirect compensation” disclosure rules to disclose float by means of a narrative and formula since 2002.²⁷

Another example is research and other brokerage services that investment advisers and managers may receive from broker-dealers under section 28(e) of the Securities Exchange Act of 1934, which is widely understood to be virtually impossible to allocate to a per plan basis, and quantify in a dollar amount. Commonly known as “soft dollar” products and services, these soft dollar arrangements between brokers and advisers take many forms. Some arrangements are formalized agreements where the adviser and broker agree on certain “ratios” that identify the amount of commissions the adviser must generate by trading through the broker in order to receive products or services of a particular value. For example, for every \$1 received by the broker in commissions, the adviser could receive a credit of \$0.05 worth of products and services from the broker. These arrangements often involve tracking and reconciliation over time to ensure that the commissions generated are sufficient to compensate the broker for the products and services provided by the broker. Other soft dollar arrangement are less formal, and do not involve specific ratios or the tracking of “credits” over time. In these arrangements, the broker will expect the adviser to generate a sufficient amount of client

“reasonable” method for purposes of the final rule. 77 Fed. Reg. 5632, at 5645 (February 3, 2012). We continue to believe that the use of a formula or other reasonable method will meet both of these goals of disclosing compensation.

²⁷ In Q12 of DOL’s FAQs about the 2009 Form 5500 Schedule C, available at www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/schedulec.pdf, DOL states that “disclosure of float income sufficient to satisfy the guidance under Field Assistance Bulletin 2002-03 will generally be sufficient to satisfy the disclosure requirements for the Schedule C alternative reporting option.”

transactions through the broker over a particular time period and will provide a certain value of research or other services to the adviser. Still other full-service brokers provide unsolicited research to advisers that trade through the broker without any specific arrangement for the research at all. Many advisers lack the ability to “turn off” their receipt of soft dollars from particular brokers, or to cancel their receipt of soft dollars for trades executed for certain clients, or certain categories of clients, such as retirement plans. DOL itself has acknowledged that it may not be practicable to provide an estimate of the value of “soft dollar” arrangements and that a description sufficient to allow a plan fiduciary to evaluate them for reasonableness and potential conflicts of interest should suffice.²⁸

The Agencies should amend the Proposed Revisions to provide for the reporting of indirect compensation earned by covered service providers under the same methods that are permitted under the 408b-2 regulation, particularly in the case of soft dollars, float and other forms of indirect compensation. This modification would be consistent with DOL’s stated goal of harmonizing Schedule C reporting with the 408b-2 disclosure requirements. Moreover, covered service providers spent millions of dollars leading up to the effective date of the 408b-2 regulation in 2012 to develop disclosures that satisfied the requirement of the 408b-2 regulation. If the Agencies do not allow these same disclosures to be used to satisfy the Schedule C requirement, the Agencies would, in effect, be asking the same providers to spend millions more to redraft these same disclosures, translating them into estimated dollar amounts for Schedule C reporting. Put differently, the Agencies would be requiring covered service providers to do something that DOL itself has concluded would not elicit meaningful information for plan sponsors.

2. The Agencies should not require service providers to report the recordkeeping cost estimate provided under the 408b-2 regulation.

The Proposed Revisions to Schedule C include two new lines that relate to disclosures that are currently required to be made under the 408b-2 Regulation by some recordkeepers. Specifically, a new line has been added to Schedule C that requires the plan administrator to indicate whether the services arrangement includes recordkeeping services provided to the plan without explicit compensation for recordkeeping or where compensation for recordkeeping has been offset (or rebated) based on other compensation received by the recordkeeper (or an affiliate) (line 1g(1)). If the administrator checks “yes,” he or she must enter the total amount of compensation received by the provider for recordkeeping services, using the same methodology that the provider used to develop its cost estimate (line 1g(2)).

²⁸ 72 Fed. Reg. at 64742.

The Agencies should remove these lines from Schedule C because this information does not further the purposes of Schedule C and will only needlessly complicate Schedule C. Under ERISA, the purpose of Schedule C, is to report —

the name of each person...who received directly or indirectly compensation from the plan during the preceding year for services rendered to the plan or its participant, the amount of such compensation, the nature of his services to the plan or its participants, his relationship to the employer or the employees covered by the plan, or the employee organization, and any other office, position, or employment he holds with any party in interest.²⁹

Virtually every retirement plan recordkeeper that receives indirect compensation will be considered a covered service provider for purposes of the 408b-2 regulation, and will be subject to reporting on Schedule C. On Schedule C, plans will report both the direct and indirect compensation that the recordkeeper actually received during the plan year on lines 2 and 3. Because direct and indirect compensation actually received by the recordkeeper over the plan year will appear on Schedule C, the recordkeeping cost estimate will not add any information to Schedule C that ERISA itself authorizes Schedule C to collect.

Moreover, DOL permits recordkeepers to develop recordkeeping cost estimates under the 408b-2 disclosure regulation by using one of three permissible methodologies -- by taking into account the rates that the recordkeeper would charge, rates that other plans would pay, or prevailing market rates for similarly situated plans.³⁰ When recordkeepers were developing the systems necessary for providing recordkeeping cost estimates in 2012, recordkeepers used a variety of approaches for developing these estimates. In many cases the cost estimate provided does not reflect what the plan in fact actually pays for recordkeeping services. For example, a recordkeeper may develop an estimate based on the market price for recordkeeping for a specific size plan, but the plan in fact pays less because the recordkeeper is giving the plan a fee break.

The recordkeeping cost estimate serves a purpose under the 408b-2 regulation that does not apply to Schedule C. In this regard, the 408b-2 disclosure is a forward-looking disclosure of expected compensation, required to be provided in advance of when a services contract is entered into or renegotiated. For purposes of comparing competing providers for the plan's business (or evaluating compensation charged under a renegotiated agreement), the cost estimate could be a useful cost comparison tool. Because Schedule C is a backward-looking report of compensation that the recordkeeper actually earned during the year, it serves no purpose on Schedule C, and will only cause confusion for the plan sponsor.

²⁹ ERISA section 103(c)(3).

³⁰ See 29 C.F.R. 2550.408b-2(c)(1)(iv)(D).

Because this reporting requirement will needlessly complicate Schedule C, and because direct and indirect compensation earned by a recordkeeper will already appear on the plan's Schedule C, we urge the Agencies to eliminate these lines.

3. The Agencies should clarify that recordkeeping for purposes of Schedule C does not include the recordkeeping that a mutual fund company does for its funds.

As discussed above, a number of the Proposed Revisions to Schedule C relate to recordkeepers. For purposes of the proposed Schedule C as well as the 408b-2 regulations, a covered service provider includes “persons who provide recordkeeping or brokerage services to a participant-directed individual account plan in connection with designated investment alternatives (*e.g.*, a ‘platform provider’).”³¹ A similar provision is included at §2550.408b-2(c)(1)(iii)(B). The 408b-2 regulations further define “recordkeeping services” as follows:

“Recordkeeping services” include services related to plan administration and monitoring of plan and participant and beneficiary transactions (*e.g.*, enrollment, payroll deductions and contributions, offering designated investment alternatives and other covered plan investments, loans, withdrawals and distributions); and the maintenance of covered plan and participant and beneficiary accounts, records, and statements.³²

The Agencies should clarify that recordkeeping for purposes of Schedule C does not include the “recordkeeping” that mutual funds do for all of the investors in their funds. Mutual fund “recordkeeping” is generally unrelated to the recordkeeping that must be done for plan purposes. Mutual funds use transfer agents to track fund ownership, process trades into and out of the fund, pay dividend and capital gains distributions, and to maintain various other fund related records. These actions must be done for every fund, whether investors own the fund shares in a taxable account, an IRA, or a participant-directed individual account plan. This fund-level recordkeeping is not a replacement for plan account level recordkeeping. While we do not believe that the Agencies intend for these transfer agent services to be included in recordkeeping services for Schedule C purposes, such a clarification is needed to avoid confusion.

³¹ 81 Fed. Reg. 47577.

³² §2550.408b-2(c)(1)(viii) (D).

4. The Agencies should not require specific contact information for each plan service provider that is reported on Schedule C.

The Proposed Revisions to Schedule C require the identification of a specific contact person (or office) and address for each service provider that is not an individual. The Agencies should remove this requirement, because we cannot envision a legitimate purpose that this contact information would serve on the Form 5500. Broadly speaking, responsibility for the overall administration and maintenance of the plan lies with a combination of the plan administrator, the named fiduciary and the plan sponsor, while the Form 5500 is the responsibility of the plan administrator. Under the Proposed Revisions, the plan administrator, plan sponsor, and named fiduciary would be identified by name and address, including a telephone number, on the Form 5500. To the extent that the Agencies, plan participants, or researchers have questions or concerns about the plan and its arrangements with service providers, these parties should contact the plan administrator, the named fiduciary or the plan sponsor, but they should not contact the service provider directly. Service providers (other than those specifically hired to interact with participants) are not necessarily prepared or equipped to handle inquiries from plan participants or federal agencies regarding their arrangements with particular ERISA plans, and would not be authorized under the terms of their agreements with their plan clients to provide any information to these parties. In addition, to the extent that the Agencies have questions regarding the Form 5500 itself and its contents, service providers would not typically have a power of attorney authorizing them to discuss the contents of the Form 5500 with the agencies involved in enforcing the Form 5500 rules. We note that ERISA plan administrators will already have service provider contact information, and have no need to report this on the Form 5500, where it will be publicly available.

Moreover, under section 504 of ERISA, DOL has broad authority to request documents and records related to the plan's service arrangements at any time, which effectively gives DOL the ability to gather service provider contact information at any time outside of the Form 5500 reporting process. Because DOL has access to plan information regarding service providers at any time under ERISA section 504, it should not require service provider contact information to appear on a publicly available document.

For these reasons, the Agencies should eliminate the requirement to identify specific contact information by name and address for each reported service provider.

5. The Agencies should clarify how to report multiple service providers that are affiliated and provide a joint 408b-2 disclosure.

Under the Proposed Revisions to Schedule C, a separate Schedule C must be completed for each service provider reported. This change presents special reporting challenges when multiple related

entities provide several different services to the plan. In many cases, where service providers are related by ownership or otherwise through an “alliance” offered to plan customers, they may determine to provide their 408b-2 disclosures in a single consolidated document.

For example, in the context of recordkeeping services provided to a 401(k) plan, it is common that several different plan services are provided by affiliated entities within a large financial institution’s controlled group. For example, recordkeeping may be provided by one entity, while directed trustee services are provided by an affiliated trust company, and brokerage services (for the plan’s brokerage window option or otherwise) are provided by an affiliated broker-dealer. Still other related entities may provide investment management services and participant-level advisory services. In these multiple-entity arrangements, it is common that some entities may not earn a direct fee of their own; for example, the directed trustee in this kind of bundled arrangement may not earn a discrete trustee fee from the plan.³³ Collective trust investments present another example. For example, the plan may enter a participation agreement with the entity that serves as trustee of the collective trust, and may also enter an agreement directly with an investment manager for management services provided through the trust. In many of these cases, the affiliated group will provide the plan with a single 408b-2 disclosure that is intended to provide all disclosures required for each member of the group.

The final revisions to Schedule C should acknowledge these arrangements and permit the reporting of multiple related entities on a single Schedule C.³⁴ To allow this, the Agencies should add additional lines to Schedule C that ask “Are there other service providers whose compensation was disclosed to the plan on a single regulatory 408b-2 or Schedule C disclosure?” If the answer is “Yes,” the filer could identify these additional providers by name on additional lines.

6. The Agencies should clarify that the \$250 reporting threshold for non-monetary compensation is measured on an annual basis.

We appreciate that the Agencies have increased the *de minimis* threshold for reporting non-monetary compensation from \$100 to \$250 for consistency with the 408b-2 disclosure rules. Nonetheless, the Agencies should make clear that the \$250 *de minimis* threshold may be measured on a

³³ Under the 408b-2 regulation, the provider of bundled services must make the prescribed disclosure, regardless of who actually performs the services. Generally the bundled provider is required to break down the aggregate compensation among the individual services comprising the bundle only when the compensation is separately charged against the plan’s investment or is set on a transaction basis. The requirement that each service provider file a separate Schedule C seems to require unbundling. In its discussion of regulatory alternatives in the preamble to the 408b-2 Interim Final rule, DOL concludes that “requiring a comprehensive line-item breakdown of the price of bundled services might not produce benefits that would justify the associated cost.” 75 Fed. Reg. 41620.

³⁴ DOL previously acknowledged that it should be sufficient for Schedule C reporting purposes to treat an affiliate group as a single person. See 72 Fed. Reg. at 64741.

“plan year” or “calendar year” basis. In this regard, under the 408b-2 regulation, non-monetary compensation need not be disclosed by a covered service provider to the extent that the provider does not reasonably expect to receive more than \$250 in non-monetary compensation *over the term of the arrangement*.³⁵ Because on Schedule C plans report only direct and indirect compensation received during the previous plan year, the Agencies should clarify that the \$250 threshold may be measured on a plan-year or calendar-year basis, but is not measured over the term of the contract or arrangement with the provider.

7. The Agencies should not lower the Schedule C filing threshold for covered service providers to \$1,000, which could burden small plans.

Under the Proposed Revisions, a covered service provider who receives \$1,000 or more in total direct and indirect compensation during the plan year would be required to be reported on a Schedule C. Particularly in the small plan market, this reduced compensation threshold from \$5,000 to \$1,000 triggering a Schedule C filing is problematic, because it is inconsistent with both the existing Schedule C threshold and the 408b-2 regulation.

First, covered service providers have fully developed systems that generate a Schedule C disclosure for their ERISA plan customers only where they have earned \$5,000 or more in total compensation during the preceding year. These systems have been developed to match the current Schedule C filing threshold of \$5,000 or more. Secondly, under the 408b-2 regulation, a 408b-2 disclosure is required to be provided by a covered service provider when the provider reasonably expects to earn more than \$1,000 in total compensation *over the term of the arrangement* (not over one year). Because most covered service providers anticipate that their arrangements will last multiple years, virtually no covered service providers of which we are aware avoid providing a 408b-2 disclosure based solely on the \$1,000 compensation threshold. Therefore, the lowering of Schedule C reporting threshold from \$5,000 to \$1,000 for covered service providers will capture a larger group of covered service providers than those who have been previously reported on Schedule C. And some providers who provided a 408b-2 disclosure will not appear on a Schedule C because they did not actually earn \$1,000 or more during the prior year.

Certain providers in the small plan market earn primarily indirect compensation. For example, the plan’s recordkeeper may provide services the costs of which are paid solely through 12b-1 or shareholder servicing fees associated with the plan’s mutual fund investments. For these providers, in many cases it is difficult to measure whether or not they may have exceeded the \$1,000 threshold in any given year, and many of them will not. Systems that are currently in place for generating Schedule C disclosures would have to be modified to account for the new lower \$1,000 threshold in order to

³⁵ 29 C.F.R. § 2550.408b-2(c)(1)(viii)(B).

capture these entities that earn very small amounts of indirect compensation. The systems changes associated with this modification will be significant, and will increase the costs for plans.

Another change in the Proposed Revisions that will result in inefficiencies and corresponding cost increases is the requirement to file a Schedule C for all small retirement plans, unless the plan qualifies to file a Form 5500-SF. In many cases small retirement plans are aggregated together with other related plans for purposes of services agreements with providers. In these cases it may be difficult to identify whether and when a provider earned more than \$1,000 in direct and indirect compensation in connection with a small plan that is bundled together with other related plans for services agreements.

For all of these reasons, the Agencies should revise the eligibility rule for filing a Schedule C to provide that only covered service providers who earn more than \$5,000 in total direct and indirect compensation during the plan year must be reported on Schedule C.

8. The Agencies should clarify what is intended by the “Information technology/computer support” service code.

The Proposed Revisions include a new services code labeled “information technology/computer support.” The instructions require the plan administrator to check each services code box that applies to the provider. Nearly every provider will include within the range of services provided some sort of information technology and computer support. For example, when a plan invests in mutual funds, the transfer agent (or the plan’s recordkeeper acting as subtransfer agent) for the mutual fund will necessarily use information technology in order to keep records related to the plan’s ownership of mutual fund shares. The Agencies should make clear that this box is not intended to be checked where a provider provides investment management, trustee, or recordkeeping, or administrative services where information technology is provided that is incidental to the provision of these services.

9. The Agencies should clarify that the “relationship” line (line 1b) need not be completed when the provider’s only relationship to the plan is as a recordkeeper, investment manager, or fiduciary.

The Proposed Revisions to Schedule C contain an expanded line 1b for reporting the service provider’s relationship to the plan. A number of boxes are provided to identify whether the service provider is the “employer,” “plan sponsor,” “named fiduciary,” or other party related to the plan. In addition, a catch-all box entitled “other party-in-interest” (box 1b(7)) includes a line that asks the plan administrator to identify other types of parties in interest with respect to the plan. The proposed instructions to this line provide examples of types of providers that must be specifically called out on

the “other party in interest” line (box 1(b)(7)), including recordkeepers, fiduciaries, and investment managers.³⁶

The Agencies should remove the portion of the instructions to line 1b(7) that specifically requires the plan administrator to complete line 1b(7) (“other party-in-interest”) for recordkeepers, investment managers and fiduciaries. First, fiduciaries to the plan will already be identified in the separate box on Schedule C for specifically identifying fiduciary service providers (box 1d). In addition, recordkeepers and investment managers will already be clearly identified by appropriate boxes checked on line 1c. Because identifying these providers on the “other” line of 1b(7) would duplicate information that will appear on other lines of Schedule C, the Agencies must modify the instructions to line 1b(7) to eliminate the requirement to identify fiduciaries, investment managers, and recordkeepers as “other parties in interest.”

10. The Agencies should provide a more objective test for determining when the reporting of trustee and employee expense reimbursements is required.

Under the Proposed Revisions, reimbursements paid to trustees and employees for meals, education, conferences, and travel are reportable on Schedule C only if the amounts are taxable income to the employee or trustee.³⁷ In general, this is a very helpful change to the reporting standard previously articulated by the DOL for trustee and employee reimbursements in FAQs.³⁸ Nonetheless, more objectivity around when this reporting requirement applies would greatly facilitate compliance. Specifically, the Agencies should provide guidance that would specifically tie this Schedule C reporting requirement to another reporting standard, as described below.

The Agencies should clarify that employee and trustee expense reimbursements are reportable on Schedule C only to the extent that these expense reimbursements are reported as income on a Form W-2 (for an employee) or a Form 1099-MISC (for an independent contractor) filed with the Internal Revenue Service. In this regard, whether work-related expense reimbursements are “taxable income” to an employee (or other recipient) involves a complicated analysis that turns on a number of factors, including whether (1) the employer maintains an “accountable” or “non-accountable” plan for employee expense reimbursements under the Code and the recipient substantiates the expense, (2) the reimbursements falls within the parameters of a working condition or *de minimis* fringe benefit under Code section 132(d) or 132(e), (3) the expense constitutes an ordinary and necessary trade or business expense under Code section 162, (4) the expense is subject to the deduction limitations of Code section

³⁶ See 81 Fed. Reg. at 47617.

³⁷ 81 Fed. Reg. at 47553.

³⁸ See Supplemental Frequently Asked Questions about the 2009 Form 5500 Schedule C, Q29 & Q30.

274 (*e.g.*, 50% limit on meals), and (5) the recipient files Schedule A of Form 1040 to claim itemized deductions from his or her adjusted gross income. For example, under an “accountable plan,” the employer's reimbursement or allowance arrangement must include all three of the following rules:

- (1) The employee must have paid or incurred expenses that are deductible while performing services as an employee;
- (2) The employee must adequately document its expenses to the employer within a reasonable time period; and
- (3) The employee must return any excess reimbursement within a reasonable time.

If the employer's plan meets each of the above conditions (and the employee acts consistent with these rules), expense reimbursements made through the accountable plan will not be subject to taxation or wage reporting on the employee's Form W-2. If the employer's plan does not meet these rules, however, any expense reimbursement made to employees generally must be reported as income on the employee's Form W-2. But whether the employee has “taxable income” involves still a further review of the employee's Form 1040 (a confidential tax document), as the amount may still be deductible, depending upon the nature of the expense, whether he or she itemizes deductions, and the employee's unique tax situation. The plan administrator cannot reasonably be expected to request an employee's Form 1040 (a confidential document) in order to determine whether the employee's reimbursement in fact was taxable to the employee, and therefore subject to Form 5500 reporting.

To ensure consistency in reporting, the Agencies should clarify that the plan administrator is permitted to base its Schedule C reporting determination on whether such trustee or employee expense reimbursements were reported on a Form W-2 or Form 1099-MISC for the recipient. Pointing the plan administrator to an objective standard (that does not involve a review of unavailable and confidential tax information), such as whether the amounts were reported on a Form W-2 or Form 1099-MISC, will substantially facilitate compliance with this reporting requirement.

IV. Schedule H Comments

The Proposed Revisions make a number of changes to Schedule H, including requiring much more granular reporting on the Schedule H balance sheets, with new asset classifications, new compliance questions, and new reporting protocols for direct filing entities (DFEs). Many of these changes will increase administrative burdens and cost with little perceptible benefit, including to plan participants by whom the cost will ultimately be borne. The proposed changes should be eliminated or significantly modified. Our specific comments with regard to the Proposed Revisions to Schedule H to the Form 5500 are set forth below.

1. The Agencies should remove the question regarding service provider termination reporting.

The Proposed Revisions to Schedule H include a new line (line 6) that asks whether a service provider has been terminated for failing to meet the terms of a service arrangement or to comply with Title I, including failing to provide a 408b-2 disclosure. Service providers are terminated in connection with services provided to ERISA plans routinely and for many different reasons. For example, an investment manager may be terminated because it failed to meet the plan sponsor's performance expectations (*e.g.*, failing to meet a benchmark consistently or to stay in the top half of a particular peer group). Other service providers may be terminated because they failed to meet particular service standards, or the standard of care, set forth in the services agreement. Still other service providers may be terminated because the plan sponsor, exercising its fiduciary duties with respect to the plan, determines that a more favorable arrangement is available elsewhere. In some cases, the plan sponsor and provider may have a good faith disagreement as to the scope of the 408b-2 disclosure. The plan administrator should not be required to look back over the plan year and struggle with determining which service provider terminations involved a "material failure" and should, or should not, be reported on this line. Moreover, we note that the plan administrator is unlikely to be in a position to judge whether a service provider's conduct rose to the level of a "material" failure, and may require an opinion of counsel. This question should be eliminated on the basis that it adds to the complexity associated with completing Schedule H while providing no useful information to the Agencies. Alternatively, if the Agencies determine to retain this question, they should clarify the instructions to make explicit that a termination of an investment manager on the grounds of investment performance should not trigger a requirement to complete this line.

2. For purposes of the schedule of assets disposed of during the plan year, the Agencies should remove the box for indicating whether a security was acquired during the plan year.

Under the Proposed Revisions to Schedule H, plans must report all sales of assets during the plan year on a revised schedule to line 4i (formerly this schedule reported assets acquired and sold within the same plan year on the attachment). The revised schedule includes a box that asks the plan administrator to report whether the asset was acquired during the plan year (box (c)). In many cases, assets may be purchased or sold in batched blocks, or tranches that occur over time, so it may be difficult to determine a precise date for some asset purchases and sales. Moreover, in the case of a 401(k) plan that offers designated investment alternatives that are registered investment companies, the plan will constantly purchase and sell shares in aggregated block trades. Therefore, determining precise purchase and sale dates will not be clear for every asset in every case. This determination will be difficult, or subject to interpretation, in many cases, unless the Agencies provide some guidance for how to determine purchase and sale dates for assets sold or acquired in blocks or tranches. Moreover, because the schedule no longer reports only those assets acquired and sold during the plan year, the box for indicating whether the asset was acquired during the plan year should be eliminated as unnecessary.

In addition, the Agencies should clarify that for assets that are purchased in aggregated blocks or over time, plan administrators may use a first in/first out, or last in/first out method, at their discretion, for determining purchase and sale dates in order to complete the schedule of assets sold during the plan year.

3. The Agencies should use existing definitions.

The Proposed Revisions to Schedule H include a number of new terms that have not previously been used on the Form 5500. The Agencies should use definitions for these terms that already exist for other regulatory and accounting purposes. For example, line 1b(8)(A)(iii) and (iv) require reporting of amounts invested in private equity and hedge funds. The instructions provide that “Private equity fund’ is commonly used to describe privately managed pools of capital that invest in companies that typically are not listed on a stock exchange” and “[t]he term ‘hedge fund’ is commonly used to describe pooled investment vehicles that are privately organized and administered by professional managers who engage in active trading of various types of securities, commodity futures, options contracts, and other investment vehicles, including relatively illiquid and hard-to-value investments.”³⁹ Instead, the instructions could refer to the SEC’s Form PF,⁴⁰ on which hedge funds and private equity funds are currently reported. This will simplify the required tracking by reducing the likelihood that an entity will have to track one reporting category for the Form 5500 and a separate category for reporting in another context (such as for the Form PF). Similarly, line 1b(11)(A) through (D) requires reporting of amounts of futures, forwards, options and swaps. The instructions do not define these terms, but the instructions could be modified make use of the definitions of these terms used by the CFTC.⁴¹

Finally, the term “hard-to-value” now appears on the proposed Schedule H, in Schedule 4i(1). The instructions provide that:

Assets that are not listed on any national exchanges or over-the-counter markets, or for which quoted market prices are not available from sources such as financial publications, the exchanges, or the National Association of Securities Dealers Automated Quotations System (NASDAQ), are required to be identified as hard-to-value assets on the Schedule of Assets Held for Investment at End of Year. Bank collective investment funds [CCTs] or insurance

³⁹ 81 Fed. Reg. 47623.

⁴⁰ The Form PF is the reporting form for investment advisers to private funds and certain commodity pool operators and commodity trading advisors and is available here: www.sec.gov/about/forms/formpf.pdf.

⁴¹ The US Commodity Futures Trading Commission (CFTC) provides a guide to terms used in the futures industry through a glossary available at www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/index.htm. Also see the Commodity Exchange Act definition section, sections 1a(47) for swap and 1a(36) for option. We note that the glossary does not capture certain nuances, such as that only non-deliverable currency forwards are considered swaps.

company pooled separate accounts [PSAs] that are primarily invested in assets that are listed on national exchanges or over-the-counter markets and are valued at least annually need not be identified as hard-to-value assets. CCTs or PSAs invested primarily in hard-to-value assets must also be identified as a hard-to-value asset. A non-exhaustive list of examples of assets that would be required to be identified as hard-to-value on the proposed schedules of assets is: non-publicly traded securities, real estate, private equity funds; hedge funds; and real estate investment trusts (REITs).⁴²

The Agencies should instead define hard-to-value by reference to Level three of the GAAP fair value hierarchy. GAAP requires all issuers that value assets at fair value to provide disclosure on how the assets were valued. Level three refers to assets for which there are no market prices or observable inputs. Instead, the company values the asset through its own internal assumptions about the amount for which it could be sold. This would be helpful in facilitating the reporting contemplated by the Proposed Revisions because accountants are already familiar with this definition and its application.

Finally, the instructions should clarify that a registered mutual fund, which is required to be valued daily,⁴³ will never be considered hard-to-value, regardless of the underlying investments. While mutual funds appear to be excluded from the definition of “hard-to-value” created by the Agencies, not all mutual funds disseminate their prices through NASDAQ,⁴⁴ potentially creating a degree of uncertainty regarding the coverage of the definition. Plan sponsors and their service providers would benefit by a clear statement that mutual funds subject to regulation by the Investment Company Act of 1940 are not “hard-to-value” assets.

4. The Agencies should clarify when a CCT or PSA is “primarily” invested in hard-to-value assets.

Under the Proposed Revisions, the Agencies have specifically stated that a common collective trust (“CCT”) or pooled separate account (“PSA”) that is “primarily” invested in hard-to-value assets must itself be identified as a hard-to-value asset, regardless of whether it is valued at least annually.⁴⁵ However, the Agencies provided no guidance for evaluating whether a CCT or PSA is “primarily” invested in these assets. We request that the Agencies provide an objective test for determining whether a CCT or PSA will itself qualify as a “hard-to-value” asset. We recommend that the Agencies clarify in the instructions that a CCT or PSA will qualify as a hard to value asset only if 80% or more of

⁴² 81 Fed. Reg. 47630-1.

⁴³ The Investment Company Act of 1940 requires that each business day a fund calculate its net asset value per share based on the current value of all the fund’s assets.

⁴⁴ While not required, the vast majority of mutual funds do release their daily share prices through NASDAQ.

⁴⁵ See 81 Fed. Reg. at 47544.

the CCT or PSA is invested in “hard-to-value” assets, measured as of the end of the CCT or PSA fiscal year.⁴⁶

5. The Agencies should clarify whether the value of derivative holdings should be their fair market value or notional (book) value.

As described above, the Proposed Revisions to Schedule H would require the reporting of derivative holdings, including futures, forwards, options and swaps. It is not clear from the proposal whether these amounts would be reported at their fair market value or their notional or book value. For accounting purposes, these amounts have become more likely to be reported at their fair market values than their book values (which previously was the reporting norm).

We also question the value of reporting these amounts (using either fair market value or book valuations) on the Form 5500. Because these investments are used for hedging purposes, their real value may not be accurately reflected at a given moment in time. We also note that the GAO report on which this change was based did not actually recommend that these amounts should be reported on the Form 5500.⁴⁷

6. The Agencies should clarify securities lending question.

Line 4w of the revised Schedule H contains a new question relating to leveraged investments, including assets subject to collateralized lending activities. The instructions are not clear as to whether this line applies only to securities lending arrangements engaged in directly by the plan or to securities lending arrangements that are engaged in by collective funds in which plans may invest, including collective trusts, pooled separate accounts, mutual funds or other pooled investment vehicles. And certain mutual funds, CCTs, PSAs, and other pooled investment vehicles in which plans may invest may engage in securities lending under the terms of the investment fund. The Agencies should make clear in the instructions that this line must be completed only to report securities lending activities that are engaged in by the plan directly, and not securities lending that may be engaged in by the pooled investment funds in which the plan holds an interest, even if the pooled fund itself is subject to ERISA (such as in the case of a PSA, CCT or a 103-12 entity).

⁴⁶ Using 80% would follow the naming rules that apply to mutual funds. SEC’s Rule 35d-1 under the Investment Company Act requires that a registered investment company with a name suggesting that the company focuses on a particular type of investment to invest at least 80% of its assets in the type of investment suggested by its name.

⁴⁷ US Government Accountability Office, “Defined Benefit Plans: Guidance Needed to Better Inform Plans of the Challenges and Risks of Investing in Hedge Funds and Private Equity,” *Report to Congressional Requesters*, GAO-08-692 (February 2012); available at www.gao.gov/assets/280/279601.pdf.

7. The Agency should modify instructions regarding the categorization of corporate debt instruments as investment-grade versus high-yield.

Line 1b(3)(C) requires reporting of the value of corporate debt instruments (other than employer securities), and these amounts must be subcategorized into investment-grade and high-yield debt amounts. The instructions relating to this line generally are taken from the current instructions for Schedule R, line 19a.⁴⁸ They provide that investment-grade debt-instruments are those with an S&P rating of BBB—or higher, a Moody’s rating of Baa3 or higher, or an equivalent rating from another rating agency. High-yield debt instruments are those that have ratings below these rating levels.⁴⁹ The instructions provide additional guidance on determining which category is appropriate; however, it would be helpful if three additional points were clarified.

It is not uncommon for ratings to differ between ratings agencies, including between Moody’s Investors Service and Standard & Poor’s Corporation, often due to differences in the methodology used. The instructions should clarify that in the case of a debt instrument with a split rating (for example, a debt instrument that has an S&P rating of BBB+ and a Moody’s rating of Ba1), the debt instrument may be reported in the investment-grade category, in accordance with the higher rating. This is sometimes referred to as a “split higher” rating approach.

The instructions provide that if the debt does not have a rating, it should be included in the “high-yield” category if it does not have the backing of a government entity. In the case of new issue corporate debt, the ratings agencies sometimes issue an anticipated rating, based on information provided by the corporation before the debt is issued. The instructions should confirm that anticipated ratings may be used in the case of new issue corporate debt.

The instructions require that the ratings in effect as of the beginning of the plan year be used. Currently, funds do not track the rating that was in effect as of the first day of the plan year. Rather, they track the rating that was in effect at the time of purchase and the current rating. Therefore, it would be less burdensome if the instructions would allow the use of ratings in place at the end of the plan year. For the following year’s reporting of assets, the year-end rating from the prior year can serve as the beginning of year rating.

⁴⁸ Line 19a applies to defined benefit pension plan and requires information on the plan investments, as a percentage of plan assets.

⁴⁹ 81 Fed. Reg. 47622.

8. The Agencies should clarify that plans investing in municipal bonds may file the Form 5500-SF.

The categories provided on the asset and liability statements for government securities differ on Schedule H of the Form 5500 versus the Form 5500-SF. In particular, we note that on Schedule H, under the category of Debt Interests/Obligations, there are subcategories for US government securities, other government securities, corporate debt instruments, exchange-traded notes, asset-backed securities, and other debt instruments. Under the Form 5500 SF, as revised, there is only one line for government securities, labeled “Government Securities Issued by the United States or a State.” The Agencies need to clarify whether this indicates that the Form 5500-SF would be unavailable for a small plan that invests in municipal bonds. If the Form 5500-SF would be available to a small plan that invests in municipal bonds, the Agencies need to extend line 11c of the Form 5500-SF to include all government securities, which would include all securities that would be permitted under lines 1b(3)(A) and (B) of Schedule H. Further, municipal bonds appear to meet the definition of “eligible plan asset,”⁵⁰ and therefore we do not believe that investment in a municipal bond should cause a small plan to lose its eligibility to file a Form 5500-SF.

9. The Agencies should include a reference to ETFs in Schedule H and in the instructions.

Line 1b(5) of the Asset and Liability Statement requires reporting of the value of registered investment companies. Both the proposed Schedule H and the Instructions specify that mutual funds, unit investment trusts, and closed-end funds are to be included in this category. Exchange-traded funds (ETFs)⁵¹ are not mentioned here, nor anywhere else in the form or the instructions. ETFs are gaining in popularity, and they have begun to be used in defined contribution (DC) plans. It would be helpful if the form or the instructions mentioned them.

An ETF that primarily invests in securities, as opposed to other assets such as physical commodities or currencies, must register as an investment company. The vast majority of ETFs are registered investment companies.⁵² In addition to ETFs that are structured as registered investment

⁵⁰ Municipal bonds have a readily determinable fair market value, are not employer securities, and are held by a qualified custodian (which will be a regulated financial institutions listed in the definition of “eligible plan assets” in the instructions to line 8a of the Form 5500-SF). 81 Fed. Reg. at 47672.

⁵¹ An ETF is an investment, typically a registered investment company, whose shares are traded intraday on stock exchanges at market-determined prices. Most investors buy or sell ETF shares through a broker just as they would the shares of any publicly traded company.

⁵² As of September 2016, 96 percent of the total number of ETFs were registered investment companies; as a percentage of total net assets, 97 percent of ETFs were investment companies. The majority of these are structured as open-end funds; however, there are currently eight ETFs structured as unit investment trusts. For additional data on ETFs, see Investment Company Institute, “Monthly Exchange-Traded Fund Data;” available at www.ici.org/research/stats/etf. For additional

companies, there also are ETFs that are structured as limited partnerships, grantor trusts, or exchange-traded notes (ETNs).

We suggest that line 1b(5) be revised to include “ETFs” within the parenthetical. The instructions that relate to this line could be modified to include the following: “The vast majority of ETFs (including all ETFs that primarily invest in securities) are structured as registered investment companies and should be included in this line. However, EFTs that are structured as limited partnerships, grantor trusts, or exchange-traded notes should be reported in accordance with their structure, as appropriate.”

10. The categorization for mortgage-backed securities is inappropriate.

Schedule H has been modified to incorporate several new asset subcategories under the category of “Real Estate Investments (other than employer real property and foreign investments).” One of the subcategories, “Mortgage-Backed Securities (Including Collateralized Mortgage Obligations)” should not be included under the category of real estate investments. Mortgage-backed securities are not treated similarly to real estate investments for valuation purposes or in any other context of which we are aware, and should be set forth in their own category on Schedule H asset and liability statement. We would recommend including a separate asset category for structured investments, which could include asset-backed securities, mortgage-backed securities and collateralized mortgage obligations. Industry reporting of such securities in financial statements, client reports, and fund characteristic reports, consistently groups structured fixed-income securities together, apart from corporate debt, but included in the overall category of debt investment.

11. The Agencies should clarify the purpose of the trustee signature.

Under the Proposed Revisions, a trustee’s signature would be added in the trustee information section on Schedule H and Form 5500-SF. Many trustees are concerned that their signature on the Form 5500 incorporates some level of attestation as to the accuracy and completeness of the Form 5500 as a whole, and that the form would be signed by the trustee under penalty of perjury. This is particularly troubling because many trustees serve in the capacity of directed trustee, and have very limited fiduciary and discretionary authority in connection with the plan. While trustees are concerned as to the significance of their signature on the Form 5500, plan sponsors are concerned about the logistical challenges associated with acquiring a trustee signature on Schedule H or Form 5500-SF under circumstances where the forms are not prepared by the trustee. Moreover, in the case of a plan

discussion of ETFs, *see* Antoniewicz and Heinrichs, “Understanding Exchange-Traded Funds: How ETFs Work,” *ICI Research Perspective* 20, no. 5 (September 2014); available at www.ici.org/pdf/per20-05.pdf.

that attaches the trustee's certification for purposes of the limited scope audit rules, the trustee's signature will already appear on that document.

The Agencies should clarify and confirm that the sole purpose of requiring trustee information, including a signature, is to start the statute of limitations under Internal Revenue Code ("Code") section 6501(a) for a trust described in Code section 401(a) that is exempt from tax under Code section 501(a). This was the stated purpose behind the filing of Schedule P, eliminated from the Form 5500 several years ago. If this is indeed the sole purpose of the Trustee information on Schedule H, the Agencies should consider whether a signature is in fact required in order for the statute of limitations to run under section 6501(a) of the Code. In the interest of modernizing the Form, the Agencies should consider whether a trustee signature makes sense at all, given that the vast majority of ERISA trustees are entities and not individuals. It should be sufficient that the trustee's information is provided on the Form 5500, without a signature, in order to start the statute of limitations running under the Code. If there is another purpose that the trustee's signature is to serve, that should be identified by the Agencies in the final package. Further, because the trustee signs the limited scope audit certification, which will be attached, the Agencies should eliminate the requirement of a trustee signature where the limited scope audit certification is attached to the Form 5500.

12. The Agencies should eliminate the requirement to attach the participant disclosure (or regulatory "section 404a-5") chart.

The Proposed Revisions require plans to attach a participant disclosure, or regulatory section 404a-5 "comparative chart" containing plan fee and designated investment alternative information, to the Form 5500 and to the Form 5500-SF. The attachment of the chart will unnecessarily complicate the process of achieving a complete filing, particularly in instances where a plan service provider completes the Form 5500 for the plan administrator. We urge the Agencies to not require the addition of this, or any, attachment to the Form so as not to unreasonably bog down and complicate the Form 5500 completion process. As an alternative, the Agencies could instead include a "yes" or "no" compliance question that simply asks whether the plan administrator complied with the participant disclosure obligations under DOL regulations at 29 C.F.R. 2550.404a-5. A simple "yes" or "no" compliance question would be consistent with the Agencies' existing compliance questions, such as the question asking whether ERISA's "blackout notice" requirements have been satisfied.

In addition, the Agencies have requested comment on whether there would be additional burdens associated with entering the data appearing on the 404a-5 disclosure onto the Form 5500 in a structured format. We urge the Agencies not to require that the 404a-5 chart be entered onto the Form 5500 in any kind of structured format. The costs of inputting the detailed information that appears on the 404a-5 chart into any kind of structured format will add enormous costs (running into millions of dollars in costs) to the Form 5500 process, both in terms of the time necessary to design and

create a fillable form and the staff time necessary to enter the data. Moreover, we are aware that there are service providers in the industry that aggregate 404a-5 disclosure data for hundreds (if not more) mutual funds and other investments that are common investments for ERISA participant-directed individual account plans, to facilitate data comparisons and creating the 404a-5 comparative charts (Morningstar is an example). If the Agencies determine to require a structured format for inputting 404a-5 chart data, the Agencies should work with these service providers to facilitate creating a workable data aggregation solution.

13. The Agencies should eliminate uncashed check reporting.

Line 4z of Schedule H requires the reporting of detailed information regarding any uncashed checks issued by the plan, including the number of uncashed checks and the total amount. Plans may have many uncashed checks at any given time that arise for a variety of reasons.⁵³ In many cases these checks are for very small amounts (often less than \$5, and many are for significantly less than \$5). In many cases there may be a dividend paid on a mutual fund or company stock investment, or some other small refund or interest amount due to a participant based on his or her plan investments, which has been distributed to the participant but remains uncashed. Information on uncashed checks has never been required for purposes of the Form 5500 and there will be substantial costs incurred by recordkeepers to develop the systems capability to provide a number and total amount of uncashed checks. Particularly in the case of very small checks, which make up the majority of uncashed checks for the vast majority of plans, we believe this information will cost more to develop than any value that would be realized by including the information on the Form 5500. We strongly ask that this information not be required to be consolidated on the Form 5500 as we strongly believe that the costs associated with gathering this information will far outweigh the usefulness of the information.

In addition, under the Proposed Revisions, the plan administrator must report, in a narrative description, the plan's procedures regarding verifying addresses, and monitoring of uncashed checks. This narrative information seems likely to bog down reporting without providing information useful to the Agencies from an oversight perspective. The Agencies should remove these narrative response boxes entirely.

Part of the difficulty with respect to describing the plan's procedures for verifying addresses and steps taken to locate missing participants is that the DOL's most recent guidance with respect to locating missing participants explicitly applies only in the context of terminating plans.⁵⁴ It would be very helpful if the Agencies would confirm that the procedures described in FAB 2014-01 for locating

⁵³ To the extent that the reason might be a service provider that hasn't cashed a check, it does not represent monies that should be in participants' hands and we question the Agencies' need to gather such amounts.

⁵⁴ See DOL FAB 2014-01 (Aug. 14, 2014).

missing participants may also be relied upon as valid procedures for locating unresponsive participants in an ongoing plan.⁵⁵ Finally, as an alternative to the current narrative descriptions included in line 4z related to uncashed checks, the Agencies should instead include a single “yes” or “no” question similar to the following: “Does the plan comply with the procedures set forth in FAB 2014-01 for locating missing participants to whom uncashed checks are owed?”

V. Other Comments

The following additional comments, which arise outside of Schedule C or Schedule H, focus on additional areas where the Agencies need to make changes. In particular, we have identified Proposed Revisions which ask for reporting of information that is unavailable or will unnecessarily require costly system changes to retrieve. We also encourage the Agencies to provide a more rational time table for implementing all of the changes contemplated by this significant expansion of the Form 5500.

1. The Agencies should simplify Schedule R reporting of participants who are invested in the plan’s default fund.

Question 24(b)(3) on the revised Schedule R requests the number of participants that have not made any investment decisions and remain in the plan’s default investment account. There are a number of problems with this reporting requirement. The vast majority of plan recordkeepers do not maintain recordkeeping systems that would support a calculation of how many participants remain invested in the plan’s default investment and have not made an investment decision. The majority of plans that offer a default fund have designated a target date fund as the plan’s default fund.⁵⁶ In these plans, for example, it is reasonable to assume that there are participants who invest in the target date fund because they have been defaulted there and have not changed that investment, and there are other participants in the target date fund who have affirmatively chosen that option. Plan recordkeepers simply have no ability to distinguish between these two groups in the absence of interviewing each participant invested in the default fund. This question is further complicated by the fact that some participants who have been defaulted into the default fund have doubtlessly reviewed the plan’s QDIA notice and determined that the default fund is in fact their affirmative investment choice for their account. Moreover, DOL has itself made clear by interpretation that if a participant directs a portion

⁵⁵ Note that this was also a recommendation of the 2013 ERISA Advisory Council. In its 2013 report on “Locating Missing and Lost Participants,” the Council recommended that DOL “issue guidance addressing plan fiduciary obligations to locate missing and nonresponsive participants and beneficiaries in active and frozen DC plans that parallels the guidance for terminated plans in FAB 2004-02 [the predecessor to FAB 2014-01].”

⁵⁶ For example, see Plan Sponsor Council of America, *58th Annual Survey of Profit Sharing and 401(k) Plans: Reflecting 2014 Plan Experience*, Chicago, IL: Plan Sponsor Council of America (2015), which finds that three-quarters of the 401(k) plans with automatic enrollment in their survey used target date funds as the default investment.

of his or her account away from the default fund, but leaves a portion invested in the default fund, that participant may be considered to have affirmatively selected the default fund.⁵⁷ For these reasons, plan recordkeepers would not be able to identify those participants who are invested in the plan's default fund because they have not made an affirmative investment election. Accordingly, this reporting requirement should either be eliminated, or revised to require the reporting of simply the number of participants who have account balances invested, in whole or in part, in the plan's default fund as of the end of the plan year.

2. The Agencies should eliminate the question regarding catch-up contributions.

Revised Schedule R contains a new question asking the plan administrator to enter the number of participants making catch-up contributions (line 25). Although this may appear to be readily collectable data, for many of our members, this data point will take significant effort to retrieve. This is because the source code used by the recordkeeper often only indicates that the amount is an elective deferral. For the recordkeeper's purposes, there is not a reason to track catch-up contribution amounts separately in its system. Rather than track catch-up contributions, such amounts are often tested at the end of the year when the testing for 402(g) and 415 limits is performed. The employer's payroll system may permit eligible participants to make catch-up contributions and when a participant has "excess" contributions, the recordkeeper will then confirm that the participant is eligible for catch-up contributions. Further, some catch-up contributions may be based on a plan-imposed limit (rather than solely based on the 402(g) and 415 limits), which recordkeepers do not separately track. As a result, the process of providing these data to sponsors will involve significant costs that will be passed on to plan. We believe the costs of retrieving this data point will exceed the usefulness of the information. This question should be removed from Schedule R, or, if it is not removed, the Agencies should identify the reason this data point is necessary to include on the Form 5500.

In addition, we note that many of the questions included in revised Part VII of Schedule R are not specific as to the timeframe to which the question relates. The instructions to Part VII should make clear that the questions are seeking data as of a specific point in time, such as at the end of the plan year.

3. The Agencies should eliminate or clarify the question regarding employer matching contributions.

Revised Schedule R contains a new question asking whether the employer provides a matching contribution, and if so, at what level (line 23). The information requested on line 23 is already provided in detail in the audited Form 5500 reports filed by large DC plans. If the Agencies decide to

⁵⁷ See Preamble to Final QDIA Regulation, 72 Fed. Reg. 60452, 60465 (Oct. 24, 2007).

retain this question on Schedule R, then they should reconsider the instructions and examples provided. In example 1, the Agencies request that an employer that provides a 50% match on a participant's contributions up to 6% of the participant's compensation should report: "% of a participant's contribution up to a limit" and enter 50 and then the maximum employer match of 3. We are concerned that the more common approach to describing this formula is 50 and 6, and would suggest that if this information is to be collected that it be collected that way.

In example 2, if we are reading the example correctly, the proposed wording is not going to collect accurate information. In example 2, the employer matches a percentage up to a specific dollar amount (rather than up to a percentage of participant's compensation): 50% match up to a participant's contribution of \$3,000. The instructions appear not to collect this information, rather jumping to capturing "\$ per participant" and the maximum amount of \$1,500. This poses two problems. First, it looks as if the contribution is a fixed dollar amount. Second, it looks as if each participant received \$1,500, when participants not reaching a \$3,000 contribution amount would not get the full \$1,500. If this information is to be collected, the Agencies should use a structure parallel to our proposed example 1, where the plan sponsor can put in a percentage (50% in the example) and the contribution amount up to which they match (\$3,000 in this case).

Although example 3 does not spell out how the plan sponsor is to report their tiered match formula, it is likely that the results in this field will be confused between the example 1 reporting and the way that we've typically seen these formulas discussed. For the example given, it appears that the plan sponsor should write 100% up to the first 3%, and 50% on the next 2%. This reporting is in line with our suggested change for example 1 (and similarly for example 2, if there are tiers with respect to dollar amounts).

BrightScope and ICI analysis of employer contributions provided in the audited Form 5500 reports filed by large DC plans finds that plan sponsors use a wide variety of approaches.⁵⁸ In addition, in categorizing the underlying data, we found that employers may have different formulas for different divisions within the company or different groups of workers.

4. The Agencies should allow a generous extension of time for the first years the Proposed Revisions are effective.

By filing the Form 5558, plan administrators are entitled to a one-time extension of time to file Form 5500. Under certain circumstances in prior years the Agencies have granted additional

⁵⁸ See Chapter 2 in BrightScope and Investment Company Institute, *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans*, San Diego, CA: BrightScope and Washington, DC: Investment Company Institute (2014); available at www.ici.org/pdf/ppr_14_dcplan_profile_401k.pdf.

extensions for other reasons, such as in case of Hurricane Katrina and more recently in the case of Hurricane Matthew. The Proposed Revisions to the Form 5500 add literally scores of new questions, and will require plan administrators to coordinate with several different service providers to obtain the information they need in order to file a compliant and complete Form 5500. Many large plan sponsors will have to hire new staff in order to complete these dramatically more complex reports. As a result, the process of completing the Form will take substantially longer than it does today, particularly in the first few years that the Form revisions are effective. Moreover, service providers will need to expend substantial resources in order to develop the systems necessary to compile and report the new information to their plan administrator customers.

For these reasons, the Agencies should use their authority to grant an additional extension of time to file the Form 5500 in the first few years that the final form revisions are in effect in light of the extensive additional information that will be required to be reported going forward. During this period, a six-month extension of time should be made available to those plan sponsors that have every intention of complying with the new reporting requirements but simply need more time to compile the additional information. The availability of this longer extension of time is particularly important to plan sponsors in light of the fact that the maximum civil penalty that may be imposed in the case of late or deficient filings under ERISA section 502(c)(2) was recently nearly doubled.⁵⁹

5. The Agencies should provide relief regarding the matching of year-end values and opening values in the year of transition.

The Proposed Revisions change the way many values on the Form 5500 are calculated and reported. For this reason, in the first year under the newly finalized form, the opening values may not match the year-end values from the prior year, which is normally required. The Agencies should specifically address this anomaly and provide relief when opening amounts do not match the prior year-end amounts when caused by changes to the form or instructions.

6. The Agencies should allow at least two years between the time final form revisions are issued and the first due date.

Finally, in light of the extensive system changes and procedures that must be developed by both service providers and plan sponsors under the Proposed Revisions, the Agencies must provide the regulated community at least two full years between the time that final Form 5500 revisions are released and the first date that revised filings are due. It will take at least two years for service providers to develop systems necessary to provide the new information to the plan administrators, and for plan

⁵⁹ See 81 Fed. Reg. 43430, 43454 (Jul. 1, 2016) (Maximum civil penalty for late or deficient Form 5500 filings is increased to \$2,063 per day for civil penalties assessed after August 1, 2016).

administrators to revise their Form 5500 procedures. For example, if the final Form revisions are issued in 2018, those revisions should be effective for plan years beginning no earlier than January 1, 2020. The Agencies should also build in enough lead time so that the new reporting systems used to implement the revised Form 5500 filings may be thoroughly beta tested by members of the regulated community before the new systems are relied upon during a Form 5500 filing cycle.

* * * *

Thank you for the opportunity to provide our comments on this matter. The Institute is available to provide additional information and clarification regarding these issues and would welcome the opportunity to meet with the Agencies to discuss our comments. Please do not hesitate to contact the undersigned at (202) 326-5920 or david.abbey@ici.org, or Shannon Salinas, Assistant General Counsel – Retirement Policy, at (202) 326-5809 or shannon.salinas@ici.org, or Sarah Holden, Senior Director, Retirement and Investor Research, at (202) 326-5915 or sholden@ici.org.

Sincerely,

/s/ David M. Abbey

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Deputy General Counsel – Retirement Policy