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October 4, 2016

Joe Canary, Director
Office of Regulations and Interpretations,
Employee Benefits Security Administration,
Attn: RIN 1210-AB63
U.S. Department of Labor
200 Constitution Avenue NW.
Washington, DC 20210
Email: e-ORI@dol.gov

Re: Proposed Collection: Comment Request for the
Annual Return/Report of Employee Benefit Plans
RIN 1210-AB63, OMB Number: 1545-1610 (81 Fed. Reg. 18687)

Dear Mr. Canary:

Keller Rohrback once again appreciates the opportunity to comment on the proposed revisions to Form 5500 and its related schedules. By letter dated May 31, 2016, we commented on the previous version of the proposed revisions (“May 31 Comment”). For your convenience, we are attaching a copy of our May 31 Comment.¹

¹ In the May 31 Comment, we explained the basis for our knowledge as follows: “Attorneys at Keller Rohrback are dedicated to ensuring that ERISA protects the interests of participants and beneficiaries. Our lawyers have testified before Congress, served as editors of numerous employee benefits books and manuals, and written scholarly ERISA articles and amicus briefs. We frequently are invited to make presentations at national legal education seminars on employee benefit class actions and ERISA. We have represented numerous ERISA plan participants and beneficiaries in both class and individual actions—and frequently gets calls from plan participants or referring attorneys asking if an issue with an ERISA plan arises to the level of violating the statute.”

October 4, 2016

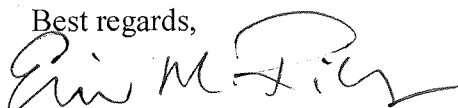
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Keller Rohrbach continues to support the proposed changes from the current 5500 form – both those reflected in the original proposed version and those in the more recent version of the proposed form. We recognize that the current proposed version addresses some of the concerns as to the prior version that were expressed by us and others who represent and advocate for plan participants. However, we urge the agencies to incorporate the rest of the proposals made by us.

Rather than reiterating all of them, we want to focus in this Comment on one in particular: the identification of fiduciaries. In our May 31 Comment, we proposed that Form 5500 include disclosure of the names and terms of service of all known fiduciaries of the plan. As you know, many plan documents designate as a named fiduciary either a committee, the sponsoring employer itself, or a particular officer of the sponsor by title (e.g., VP for Human Resources). Plan participants should be entitled to know the identities of the actual people “with whom the buck stops” regarding their plans. Thus, we strongly urge you to add a requirement that where a named fiduciary is other than a named individual (i.e., a committee, entity, or position) that the names and corporate positions of the individual person(s) be disclosed on Form 5500. This would include, in the case of a corporation or other non-committee entity that is the named fiduciary, disclosure of the identities of all individuals who have been formally delegated (e.g., by Board of Directors resolution) any fiduciary responsibilities by the entity. To be clear, we are not proposing that plan administrators make determinations as to who is a fiduciary solely by reason of meeting the functional definition set forth in ERISA Section 3(21)(A), 29 U.S.C. 1002(21)(A).

Keller Rohrbach again appreciates having the opportunity to provide its views on revisions to the Form 5500.

Best regards,



Erin M. Riley
David S. Preminger
Jeffrey Lewis
Gretchen S. Obrist

cc:

Tuawana Pinkston
Internal Revenue Service
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Christopher Bone
Director of Policy, Research, and Analysis Department
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⑱ NOT ADMITTED IN WASHINGTON

May 31, 2016

Tuawana Pinkston
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Email c/o: Martha.R.Brinson@irs.gov

Re: Proposed Collection: Comment Request for the
Annual Return/Report of Employee Benefit Plans
OMB Number: 1545-1610 (81 Fed. Reg. 18687)

Dear Ms. Pinkston:

Keller Rohrback appreciates the opportunity to comment on information that plan sponsors should report on the Form 5500 and its related schedules to the Department of Labor, the Internal Revenue Service, and the Pension Benefit Guaranty Corporation.

Attorneys at Keller Rohrback are dedicated to ensuring that ERISA protects the interests of participants and beneficiaries. Our lawyers have testified before Congress, served as editors of numerous employee benefits books and manuals, and written scholarly ERISA articles and amicus briefs. We frequently are invited to make presentations at national legal education seminars on employee benefit class actions and ERISA. We have represented numerous ERISA plan participants and beneficiaries in both class and individual actions—and frequently gets calls from plan participants or referring attorneys asking if an issue with an ERISA plan arises to the level of violating the statute.

Keller Rohrback supports the proposed changes to the Form 5500, but believes that additional amendments to the form would further improve its usefulness to participants and the agencies. Accordingly, we propose amendments that would provide additional useful information on the following: plan investments; fees to service providers; service providers; plan fiduciaries; and fiduciary liability insurance.

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Plan Investments

The Form 5500 should include, among other information, the name and types of plan investments, underlying holdings of plan assets, and plan investment performance and benchmarks. For example, trust investments should be specifically identified (rather than lumped together as they now are) and separated in a way that provides more transparency concerning their performance.

Additionally, alternative investments, including hedge funds, derivatives, swaps, and private equity investments, should be itemized within their own separate category of “alternative investments” with subcategories of each of the above (*i.e.*, hedge funds, derivatives, swaps, private equity).

Many alternative investments and employer stock plans have no readily ascertainable value because they are not publicly traded. The Form 5500 instructions should clarify which fiduciary has the responsibility for making the good faith determination of the fair or current value of assets where there is no readily ascertainable value and the methodology for making this determination.

In addition, the designers of the revised Form 5500 should consider requiring information concerning indirect investments so that the underlying investments can be monitored for diversification, performance, and fees.

Moreover, with the recent changes to the definition of fiduciary, all investments that are affiliated with the plan sponsor, any fiduciary, or any service provider—that is, proprietary investments of any kind—should be identified as such.

Fees to Service Providers

Any fees and compensation paid to service providers should be disclosed on the Form 5500.

Service provider fees should be disclosed in a format that is consistent with section 408(b)(2) disclosure requirements so that the information can be consistently tracked. Consequently, we suggest that the Form 5500 should require a total of the amount of compensation paid to a service provider with subtotals of eligible indirect compensation, reportable indirect compensation, and direct compensation. The instructions should clarify which type of compensation falls into which grouping and which expenses may be deducted from investment returns to determine net returns. Both the 408(b)(2) disclosures and the Form 5500 should include reporting of performance and expense ratios, as well as any flat dollar or asset-based fees that are levied on a per-participant basis.

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Service Providers

The Form 5500 should require the plan administrator to provide better information as to service providers' specific service to the plan and the method of compensation for specific services. The more detailed the reporting, the more useful the information will be. The current codes are not consistently used. At a minimum, they should be updated to better reflect the current state of the industry and ideally, they should be accompanied by a short narrative description of the service actually performed by the service provider.

In particular, one question should ask whether the compensation includes revenue sharing and if so, describe the revenue sharing's purpose. Another method for ascertaining this information might be, for example, that the reporting plan could check boxes to report whether a third party 401(k) plan administrator provides advice on choosing a platform, the types of investment categories, recordkeeping, and the like. For each provider, the Form 5500 could have a list of potential services that the plan administrator checks off.

Plan Fiduciaries

The plan administrator should report the names, terms of service, and contact information of all known fiduciaries of the plan, including any persons who served on any committees with fiduciary responsibility and any Section 3(21) or 3(38) fiduciaries. This information should be provided for all individuals who are fiduciaries at the time the 5500 is filed as well as for anyone who was a fiduciary at any time in the prior five years.

Insurance

The Form 5500 should require the plan administrator to disclose information on fiduciary liability insurance, including limits per claim and per policy, the claim period, the insurance carrier(s), whether the insurance policy is a wasting policy, and whether there is a self-insured retention or other deductible—and, if yes, the amount thereof, as well as any tail policy.

Data Linkage

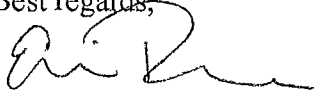
Finally, it would be helpful for users of Form 5500 data to know if the same plan previously filed under different EINs, for example due to plan mergers or other structural events. Identifying predecessor and successor plans would be easier with a field for EINs that also may be associated with the same plan.

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May 31, 2016
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Keller Rohrbach appreciates having the opportunity to provide its views on revisions to the Form 5500.

Best regards,



Erin M. Riley
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Jeffrey Lewis
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