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Submitted Electronically – e-ORI@dol.gov

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

Re: Notice of Proposed Rule Annual Reporting and Disclosure; Notice of Proposed Forms Revisions (RIN 1210-AB63)

Ladies and Gentlemen:

The U.S. Chamber of Commerce (“Chamber”) appreciates the opportunity to comment on the Annual Reporting and Disclosure Proposed Rule¹ implementing the Notice of Proposed Forms Revisions² (collectively, the “Proposal”) published by the U.S. Department of Labor’s Employee Benefits Security Administration (“DOL” or the “Department”), the Internal Revenue Service and the U.S. Treasury Department, and the Pension Benefit Guaranty Corporation (collectively, the “Agencies”).

The U.S. Chamber of Commerce is the world’s largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America’s free enterprise system. More than 96% of the Chamber’s members are small businesses with 100 or fewer employees, 70% of which have ten or fewer employees. Yet virtually all of the nation’s largest companies are also active members. Each major classification of American business - manufacturing, retailing, services, construction, wholesaling and finance - is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees and task forces.

In light of the significance of the Proposal and the many technical and policy issues it presents, we commend the Agencies for their decision to extend the deadline for comment as we and others requested. Nonetheless, we remain concerned that there has not been enough time to

¹ 81 Fed. Reg. 47,496 (July 21, 2016).

² 81 Fed. Reg. at 47,534 (July 21, 2016).

thoroughly analyze the rule – in particular, the economic and administrative impact on plan sponsors.

General Observations and Concerns:

We support the goals of public disclosure on the Form 5500 and we recognize the necessity of capturing data for enforcement and research purposes. We also appreciate that the reporting and disclosure rules must take into account changes and trends in employee benefit plans and services that require periodic adjustments to the information collected.

However, the Agencies must also take into account the compliance burden presented by preparing and filing the Form 5500 and its associated schedules and attachments, in particular the burden it puts on small businesses. The remarkable expansion in the Proposal of the number of plans newly required to file, as well as the extraordinary increase in the amount of detailed information required by the Proposal significantly increases the amount of time and effort necessary to complete the form. We do not believe the depth and breadth of the additional burden resulting from these expanded requirements is justified by the limited gains in transparency and enforcement ability they provide. Even these gains are further limited by underlying problems with the required data.

The Agencies must acknowledge that they have an obligation to ensure they do not require the collection and reporting of ill-defined data that will give a confusing or inaccurate picture of employee benefits in general, and of specific plans in particular. Vague or overly broad definitions of key terms will result in data that can be misunderstood—or worse, intentionally misused—by researchers or private litigants. This confusion can result in a biased view of issues central to public policy decisions and private litigation.³

The proposal regarding recordkeeping fees is one such example. While the Department is, in one sense, trying to make the disclosure of recordkeeping fees less complex by proposing that the good faith estimate for recordkeeping costs on 408(b)(2) disclosures be reported on the Form 5500 where recordkeeping costs are not wholly paid by direct fees, the presentation of this estimate as the recordkeeping fee on the Form 5500 gives the very false impression that the amounts reported there are actually comparable. They are not. There is a wide disparity in what services may be included in the term “recordkeeping,” as well as a wide disparity in the methodologies used to calculate the estimate reported for 408(b)(2) purposes. This makes the Proposal’s reported fees for such “recordkeeping” extremely misleading. A higher fee for one plan might include services not provided to a different plan with a lower fee, or the higher fee may simply reflect a different estimate methodology for the same services.

This “apples to oranges” comparison in the reported data will result in a number of problems. First, researchers not fully understanding the differences will use the data for purposes like studying reasonable fees or constructing benchmarks, presenting false views of actual costs for services. Second, private litigants will use the data to support their claims of unreasonable fees,

³ In our comments, we highlight a specific concern with multiple employer plans; however, please note that this general concern applies to all retirement and welfare plans.

asserting that a particular plan's reported recordkeeping cost is unreasonable compared to similar plans, when the reported numbers are not, in fact, comparable, and the fees are not unreasonable.

For this reason, among others, we are very concerned that the enhanced public search capabilities of the new electronic filing system will result in even greater confusion and misuse of Form 5500 data, and search terms that appear to provide comparable data, but in fact do not exacerbate our concerns. This confusion will foster needless litigation and bad scholarship (which could in turn be used to support litigation).

Despite the Given Extension, the Comment Period Was Not Long Enough to Properly Analyze the Administrative and Economic Burdens of the Changes:

The Agencies have not adequately analyzed the small entity impact under the Regulatory Flexibility Act—specifically, the important question of the impact of the proposed lifting of the current exemption for welfare (e.g., group health insurance) plans with 100 or fewer participants. An important issue that must be addressed to analyze the small business impact is the extent to which the proposed new filing requirement burden will motivate small employers to discontinue existing health insurance and wellness plans. Even if the only element of the NPRM were the removal of the current exemption for small welfare plans, leaving the content of the current Form 5500 unchanged, it is reasonable to be concerned that adding this reporting burden will motivate a significant number of small employers with plans of less than 100 employees to discontinue their current plans. The additional burden of the proposed expansion of Form 5500 report contents will add further to the potential to motivate sponsors to discontinue affected welfare plans. Such an outcome of the proposed regulation will adversely affect both small employers and their employees.

Small employers who are forced by the excessive new reporting burden to abandon current welfare plans will be put at a competitive disadvantage in the product and labor markets in which they compete. Employees with access to health insurance and wellness benefits are more productive at work and lose fewer days because of sickness or injury. Small employers who are forced to eliminate these plans because of the untenable new reporting burden will lose the benefits of productivity enhancements that they now derive from being able to offer such plans. They will also lose the ability to attract and retain the most talented and productive workers in the labor market, further eroding their current competitive advantages. Their employees also may be harmed by the proposed rule if it has the effect of reducing the extent to which such benefits are offered.

The size of the disincentive effect on plan offerings by small employers is a critical parameter of the regulatory impact analysis for this proposed rulemaking. The Agencies should have conducted research to survey potentially impacted small entities to estimate the size of this effect. Instead, the Agencies have ignored this potentially significant element in its analysis under the Regulatory Flexibility Act. Without the benefit of a survey or other empirical research addressing this critical parameter, the Chamber and others cannot comment cogently on the issue. An extension of the comment period for at least an additional sixty days will enable the Chamber and others to conduct their own surveys of affected small business employers to

address this question. It should be noted that the Chamber and others have previously requested extensions of the original comment period by 120 to 180 days. If such extension had been granted earlier, it would be possible to for public commenters to collect the needed data without requesting further extension. The Department granted only a 60 day extension, which is inadequate to plan and implement the needed survey. We have now been able to identify the questions that need to be asked and the sample frame for implementation of the necessary survey, but it will require an additional 60 days to conduct the survey and tabulate the results. Without such a survey it is not possible to say whether or not the proposed rule will have a significant adverse impact on a substantial number of small entities as required by the Regulatory Flexibility Act.

Issues Related to Pension Plan Reporting and Disclosure:

While most of comments below address our serious concerns about the scope, burden, and granularity of the revised form in the Proposal, we do recognize that the Agencies have made an effort to improve certain previously identified problems. We believe these following changes should be retained in the final rule:

- **Small Plan Audits**—The revision to the small plan audit exemption (as applied to defined contribution plans), which would define the 100-participant eligibility threshold according to participants with account balances at the outset of the plan year (rather than all participants), is a sensible and welcome change. Requiring inclusion of merely eligible employees who have no retirement savings in a defined contribution plan is less true to the ERISA statute and its policy requirements, particularly given the purpose of the financial audit requirement. Including only participants with account balances is a positive change that will reduce the filing burden for a number of small plans.
- **Indirect Compensation**—We commend the Agencies for their efforts to align the reporting rules pertaining to indirect compensation with those set forth under ERISA Section 408(b)(2), including the elimination of the alternative reporting rules for so-called “eligible indirect compensation” or “EIC”. Despite best intentions, the current regime not only creates unnecessary confusion and cost for millions of plan sponsors and their vendors, but its incongruence with the requirements imposed on “responsible plan fiduciaries” under 408(b)(2) carries the potential for inadvertent missteps under both sets of rules.
- **Master Trusts**—The simplification of the reporting requirements for master trusts, including the elimination of the “Master Trust Investment Account” or “MTIA” concept, is a beneficial change. The concept of the MTIA – which has no apparent material, real-world application outside of disclosure purposes – is an unnecessary complication that is best discontinued.

The Proposal Does Not Properly Balance the Reporting Burden with Legitimate Enforcement and Research Needs:

Historically, the scope and breadth of the Form 5500 Series requirements have been defined carefully to strike a balance between public disclosure and enforcement needs on the one hand and administrative burdens and costs on the other. Given that these costs are typically borne by the plan participants, and given that the administrative burdens can be especially daunting for small plan sponsors, special consideration historically has been afforded to the needs and

limitations of small businesses and their participants. Obvious examples include the Form 5500-SF option and the small plan audit exemption, providing relief to help encourage plan sponsorship. This balance is necessary given that compliance and administrative burdens are one of the reasons that large businesses are about three times more likely to offer retirement benefits than small businesses.⁴

Unfortunately, despite the improvements in the Proposal noted above, the overall effect of the regulation in its current form would be to significantly increase the disclosure-related costs and burdens for plan sponsors of all sizes and types. In our view, the Proposal's benefits are far outweighed by its costs.

Implementing systems to deal with the numerous changes will often be the responsibility of plan recordkeepers and TPAs, but ultimately these costs will be passed through to plan participants (a cost that may, under DOL guidance in Field Assistance Bulletin 2003-03, be allocated on a per capita basis).⁵ The Proposal would undoubtedly require plan sponsors to engage in much more research and information gathering than is currently necessary, particularly in the face of the significant penalties associated with disclosure failures, as well as the potential for enforcement scrutiny and private litigation. The effect will be disproportionately felt by small businesses for which resources are most scarce.

Overly Broad Schedule H Requirements:

We believe the very broad expansion of the data reported in Schedule H would create costs and complexities disproportionate to the likely benefits, as well as additional liability risks. We are especially concerned about the impact of these expanded disclosures on small plans not eligible for the Form 5500-SF. Specifically, we question the necessity of the following elements of the Proposal:

- Differentiation between such categories as “exchange traded notes” and “asset-backed securities (other than real estate);”
- Breaking out assets held in insurance company general accounts according to several categories;
- Breaking out joint venture/partnership interests among several categories such as limited partnerships, venture capital operating companies (“VCOCs”), private equity, hedge funds and “other,” especially as these categories are not always mutually exclusive and in some cases do not have a clearly-prescribed definition;
- Separately sum holdings in “plan asset” funds versus others, a status which can (and does) change over time and would require ongoing monitoring as to such technical and fact-specific matters as what percentage of “benefit plan investor” assets are held at a given point

⁴ “Employer-Based Retirement Plans: Access Varies Greatly,” The Pew Charitable Trusts, May 27, 2016. Surveys show “...only 22 percent of workers at companies with fewer than 10 employees report having access to workplace retirement plans, compared with 74 percent of workers at businesses with at least 500 employees.”

⁵ “A per capita method of allocating expenses among individual accounts (i.e., expenses charged equally to each account, without regard to assets in the individual account) may also provide a reasonable method of allocating certain fixed administrative expenses of the plan, such as recordkeeping, legal, auditing, annual reporting, claims processing and similar administrative expenses.” Field Assistance Bulletin 2003-03.

in time and whether the fund qualifies as a VCOC or real estate operating company (“REOC”);

- Breaking out the (itself new) category of “derivatives” into holdings of futures, forwards, options, swaps and “others,” which again would involve highly-technical inquiries and may not be clearly defined in many cases; and
- Separately sum assets held separately in participant-directed brokerage accounts among several categories, despite the fact that such assets are not “designated investment alternatives” and their selection does not generally implicate fiduciary responsibilities of the plan sponsor.

This level of granularity falls well outside any reasonable balance between burden and possible enforcement value, and raises significant compliance concerns due to vague and ill-defined differences between investment types. Like many other requirements in the Proposal, these queries are not suggestive of a reasoned and balanced disclosure regime – rather, they appear to constitute a “regulatory wish list” of items without adequate consideration of the enormous burdens and costs created.

Increasing Liability Risk for Plan Sponsors:

We are quite concerned about the potential risks to plan sponsors presented by the Proposal’s new reporting requirements regarding terminated service providers. We believe this could expose plan sponsors to legal liability in cases where no malfeasance has likely occurred. The Proposal requires disclosure of provider terminations for all accountants, enrolled actuaries and the traditional “gatekeepers” of financial fidelity, but it goes even further, applying to many other types of service providers, and mandating a description of any alleged “material failure” to comply with a service agreement. The requirement to furnish the name and identifying information for a terminated vendor, along with an affirmative statement regarding its purported “material failure” (i.e., failure to perform contractual duties or to provide certain required disclosures under 408(b)(2)) has the potential to lead to direct liability for plan sponsors who make such publicly-available representations, particularly in situations where a disagreement about the alleged failure exists. The new requirement would place plan administrators in a very difficult position in trying to decide when reasons for terminating a service provider rise to the level of a reporting obligation.

We are also very concerned about the granularity of the Schedule H in combination with the expanded public search aspects of the Proposal. While we recognize the Agencies’ clear interest in investment and fee-related matters, the proposed reporting requirements – which include the requirements to report investments in a “searchable” format and including CUSIP and similar identifiers – read like a discovery request from the ERISA plaintiff’s bar.

Plan sponsors of all sizes are already faced with the specter of possible litigation for every perceived misstep. Profiteering plaintiff’s firms drive this trend through such practices as taking out newspaper articles purporting to be “investigating” employer plans with the hope of signing up clients with no apparent existing dissatisfaction as to their plan offerings, and then filing “boilerplate” lawsuits that often do not differ substantially from case to case. Often, these suits allege violations for incurring plan expenses perceived to be excessive in light of simple factors

such as plan size, with no understanding or analysis of the fiduciary process utilized in selecting providers, or the quality or quantity of services provided for the fees.

The requirement to report investments in a “searchable” format will serve to make these practices even easier to carry out – armed with additional but still fundamentally incomplete information, profit-motivated attorneys will be able to bring even more lawsuits with even less up-front costs.

Any plan perceived to have above average fees may be at risk to face sizable litigation costs even in the absence of any breach. Small and mid-sized businesses lacking the resources to defend their rights and practices would be particularly vulnerable. Further, the Proposal’s disclosure requirements themselves seem to collect data in categories that support plaintiff’s groundless legal theories—for example, the requirement to separately identify the number of a plan’s designated investment alternatives that are “index funds” versus those that are not. This distinction has no meaning with respect to a fiduciary decision about prudent investments—actively and passively-managed investment vehicles are both prudent choices for plan fiduciaries. We would respectfully point out that it is not the job of the Agencies to make sweeping or normative judgments about such complex and multi-faceted fiduciary matters, and any regulation that contains a contrary implication should be subjected to the utmost scrutiny.

Multiple-employer Plan Reporting Could Unduly Harm the Plan and Plan Participants

In 2014, the Labor Department issued an interim final rule⁶ implementing an amendment to ERISA section 103(g) made by legislation enacted in 2014 (Public Law 113–97) to change the annual reporting requirements with respect to multiple-employer plans.

As a result of the interim final rule, any plan that checks the “multiple-employer plan” box is now required to list each of its participating employers during the plan year by name and employer identification number (“EIN”) and include a good faith estimate of the percentage of total contributions made by each participating employer during the plan year. Because Form 5500 information is typically available to the general public, this participating employer information is accessible by competitors of any association, financial institution, or other entity sponsoring a multiple-employer plan.

The proposed rule states that the Labor Department intends that the reporting changes in the interim final rule will be made final effective with the implementation of final forms revisions in the proposed rule.

The Agencies should revise the proposed rule to give multiple-employer plans the option of separately submitting their lists of participating employers and estimates of the percentage of total contributions in a manner that keeps such information confidential. A multiple-employer plan that has no objection to publicly disclosing this information could file it as an attachment to the Form 5500 consistent with the current reporting requirement. However, a multiple-employer plan that determines that publicly disclosing this information could cause harm to the plan and participants should have the option of indicating in the Form 5500 filing that it will be disclosed

⁶ 79 Fed. Reg. 66617 (Nov. 10, 2014).

to the Department in a separate mailing, and the ability to mail the information to the Department under separate cover, outside of the Form 5500 filing itself.

We believe this alternative method of filing provides the Department with the information it wants to receive about participating employers, while allowing multiple-employer plans to protect themselves from competitors if they determine hardships could result. Keeping the participating employer information private is in the interest of plan participants, who could suffer adverse consequences and increased administrative fees if their employers switch between plans as a result of the lists being published. The Department has ample authority to provide alternative methods of compliance with this reporting requirement. And, if the information is not provided, the Department would have the ability to reject the filing as incomplete and seek civil penalties under ERISA section 502(c)(2) through its administrative civil penalty process.

Welfare Plan Reporting Requirements:

Our members are very concerned about the scope and burden presented by the Proposal's sweeping changes in health and welfare plan reporting. The broad scope of these questions is remarkably similar to those in a typical DOL subpoena issued to a plan sponsor whose welfare plans are under DOL investigation. We are quite surprised and concerned that the Agencies seem to believe it appropriate to require, on an annual basis, plans to report information at a level of detail consistent with targeted investigations. The burden associated with doing so is much more significant than the Agencies appear to believe. Further, as discussed in detail below, eliminating the reporting exemption for small health plans and attempting to use the Form 5500 for unrelated Patient Protection and Affordable Care Act of 2010 (ACA) disclosure requirements directed to the Secretary of Health and Human Services ("HHS") present significant policy and legal questions, as well as significantly increasing the reporting burden on thousands of plans.

Our comments on health and welfare plan reporting are detailed below.

Small Plan Reporting

The proposed rule eliminates the reporting exemption for small welfare plans (*i.e.*, fewer than 100 participants) that provide group health benefits. The Chamber is concerned that requiring reporting from small health plans that are fully insured, fully self-funded or partially insured and partially self-funded will create a significant new burden for small employers that may result in such employers eliminating benefits.

Moreover, the focus of the new collection from small plans is on group health plans subject to the ACA. As such, the exemption from filing Form 5500 should remain in place for other small health and welfare plans (including health plans that qualify for the small plan exception (*e.g.* retiree medical plans), and those that are excepted benefits under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") (*e.g.*, dental, vision, and health flexible spending accounts)). Such exemption should apply even when such a health or welfare plan is part of a wrap plan with a group health plan.

Schedule J - Disclosures

- **Generally** – The Chamber is concerned about the significant increase in information requested on Schedule J. The Chamber believes the additional time and effort to prepare Schedule J will be substantial, and much higher than the time estimated by the DOL. Such a burden may force employers to cut back on the types of benefits they offer to employees or eliminate health and welfare benefits altogether. The additional information requests in the Form 5500 are overreaching in asking for information that is not needed for the Agencies’ purposes.

In the Preamble of the Annual Reporting and Disclosure Proposed Rule, the Agencies state that the collection of the data on Schedule J will “lead to greater transparency for consumers, which may assist them in making a decision whether to elect the coverage or opt for another plan.”⁷ Also in the Preamble, the Agencies suggest that plan participants and beneficiaries and the general public will use the information to “monitor the operations of employee benefit plans.”⁸ It is misguided to collect information for these purposes when both the DOL and the IRS have multiple, current disclosure and reporting requirements for these same purposes, including:

- Summary Plan Descriptions,
- Summaries of Benefits and Coverage,
- ACA Section 6055 and Section 6056 Reporting,
- W-2 health care coverage reporting, and
- Form 8928 reporting

Forms 5500 are not distributed to participants, and are not currently in a format (and are not proposed to be in a format) that is useful for individuals to assess plan options. As detailed further below, the Chamber feels that many of the new information requests do not further the DOL’s stated purpose of effective and efficient protection of employee health benefits.

- **Scope of Schedule J** – The Chamber is concerned that the Proposal will result in plans providing one Schedule J for all the health benefit coverages they offer. Combining information from multiple types of health benefit plans on Schedule J will make the information unusable. If Schedule J is added to the Form 5500, the Chamber suggests applying it only to group health plans subject to the ACA market reform mandates.
- **Schedule J, COBRA information (Lines 6a, 6b, 6c)** – It is not necessary to separately identify COBRA beneficiaries and coverage information. These lines should be deleted.
- **Schedule J, Health Benefit Claims Data** – The Chamber does not believe that the collection of claims data is within the Agencies’ authority under ERISA. Further, to record and maintain claims data in the requested format will be extremely costly and burdensome on plans, and the Chamber does not understand how this aggregate collection of claims data will aid the DOL in protecting employee health benefits.

⁷ 81 Fed. Reg. at 47,500.

⁸ *Ibid.*, at 47,506.

If the Agencies proceed with including claims data on Form 5500 despite the lack of authority for such data collection in ERISA, the terms must be substantially rewritten to clarify the meanings of “denial,” “post-service claim,” “pre-service claim,” “appeal,” “upheld upon appeal,” and “payable after appeal.”

- **Schedule J, General Disclosure Compliance** – On Schedule J, health plans are to indicate whether SPDs, SBCs, SMMs and SARs are in compliance with the applicable content requirements. Given that the plan administrator has a significant legal obligation in signing the Form 5500, and given the expanded scope of the information addressed by this requirement, the Chamber is very concerned that it is not clear what the plan administrator is attesting to in marking the applicable box “yes” or “no.” Is this suggesting an annual review of every document for full compliance by the plan administrator? Can the plan administrator rely on service provider representations? Finally, what is the real value of including these questions for enforcement purposes? Subtle errors in the disclosure requirements will not be revealed by these questions in any event. These simplistic questions add no value and should be removed from the Final regulation.
- **Schedule J, Health Benefit Compliance** – The proposed rule asks group health plans to broadly attest to compliance with the following rules:
 - HIPAA portability
 - GINA
 - MHPAEA
 - NMHPA
 - WHCRA
 - Michelle’s Law
 - ACA

As with our concerns expressed above, filling out the form with a blanket “yes,” “no,” or “not applicable” fails to recognize the complexity of the above laws or explain the scope of the duty of the plan administrator to assess and attest to compliance. Moreover, adding a reporting requirement to the Form 5500 is duplicative and unnecessary. An excise tax already applies under Section 4980D of the Internal Revenue Code for health plans that fail to comply with the above laws, and violations must be reported annually on IRS Form 8928. These simplistic questions add no value and should be removed from the Final regulation.

- **Schedule J, Reporting Service Provider Information** – The Proposal adds a new compliance question asking whether the employer sponsoring the plan paid administrative expenses that were not reported as service provider compensation on Schedule C or a plan administrative expense on Schedule H. Currently, when the only compensation received by a service provider in connection with a plan is direct payment from the plan sponsor, the information is not required to be reported on Schedule C. When the expenses of a plan are paid from the general assets of the plan sponsor, and not from plan assets, the Agencies have a significantly reduced interest and jurisdiction over those payments. The Chamber does not believe that the identity of such service providers to a health plan is needed to carry out the Agencies’ responsibilities, and thus should be

excluded from a final rule. If the Agencies persist in collecting data for which they have little to no use and over which they have little to no jurisdiction, there should be a minimum annual expense threshold for reporting to reduce the compliance burden, such as \$10,000 or more.

- **Schedule J, Stop Loss Coverage** – Plan sponsors that self-fund their health plans may also purchase stop loss coverage to provide the plan sponsor with financial protection in the event of large claims. Still, the employer self-funds the underlying health plan and participants look to the employer to pay benefits, for which the employer is fully liable. Such stop loss coverage is typically not an ERISA-covered benefit. Information on the premiums paid, attachment points and claim limits for the stop loss coverage is proprietary to a plan sponsor, and is not information that the Agencies need to protect employee benefits. This request should be removed from the final rule.
- **ACA Sections 2715A and 2717 Reporting** – The Chamber believes that the Agencies are asking health plans to provide significant, additional information on the Schedule J under the “authority” of health plan reporting satisfying ACA Sections 2715A and 2717. The collection of data creates a significant burden for group health plans, many of which are not subject to the aforementioned ACA reporting. For example, the reporting does not apply to grandfathered major medical plans, health plans that qualify for the small plan exception (e.g. retiree medical plans), or to other excepted benefits under HIPAA (e.g., dental, vision, and health flexible spending accounts). Nonetheless, all of the aforementioned group health plans would be required to provide the information requested on Schedule J. The Chamber strongly believes that plans not subject to ACA Sections 2715A and 2717 should not be subject to reporting the information specifically requested to satisfy those Sections.

Further, ACA Sections 2715A and 2717 both provide that the Secretary of HHS is to develop reporting requirements, and annual reporting is to be made to the Secretary of HHS. Accordingly, we do not believe the Agencies have the authority under ERISA or under the ACA to require such reporting on the Form 5500. Such ACA reporting rules should either be a regulatory project for HHS alone, or for a joint rulemaking between the relevant agencies under the ACA. Regardless, these reporting requirements should be removed from the Final regulation related to the Form 5500.

- **Schedule J, Denied Claims Data** – The Proposal indicates that the Agencies are considering, in addition to the information requested in the new Schedule J, whether to require plans to report more information on denied claims, such as the dollar amount of claims that were denied during the plan year, the denial code, and/or whether the claims were for mental health and substance use disorder benefits or for medical/surgical benefits. The Preamble states that the DOL may propose collecting additional data in the future.

The DOL’s contemplation of collecting such claims data suggests that an “all payer” claims database is to be created. All payer claims databases are large repositories of healthcare claims data intended to help advance health policy making and analysis. To

that end, the DOL is specifically seeking public comments on the “proposed annual reporting requirements for plans that provide group health benefits, including the new Schedule J, in light of the Supreme Court’s recent decision in *Gobeille v. Liberty Mutual Insurance Co.*, 136 S.Ct. 936 (2016).”⁹

As stated earlier, the Chamber does not believe that the collection of claims data, much less an expansive collection of claims data, is within the Agencies’ authority under ERISA. To that end, the DOL itself filed amicus briefs at various stages of the *Gobeille* case in support of states’ authority for public health and to create all payer claims databases. In discussing Vermont’s attempt to create an all payer claims database, the DOL disclaimed its own authority, stating that an all payer claims database “operate[s] in an area of traditional state regulation that is remote from the basic purposes of ERISA,” and that, through the all payer claims database, Vermont law “promotes the state’s legitimate interest in gathering information on the provision of health care to its citizens and other residents.” Collecting data from health plans to support an all payer claims database is not within the DOL’s authority, and we strongly urge the Agencies not to adopt any such provisions in the final regulation.

The Department also requested comment in the Preamble on other issues. One about which the Chamber is very concerned is using the Form 5500 to collect information on investments motivated by non-economic factors.

The Agencies Should Not Expand the Form 5500 to Collect Information Regarding ETI / ESG Investment Activities of ERISA-Covered Plans:

In recent years, investment strategies that take into account economically targeted investing (“ETI”) and environmental, social, and governance (“ESG”) factors have become an important issue for ERISA plan fiduciaries, with increasing pressure for these fiduciaries to consider investment criteria that extend beyond expected returns and other wholly economic factors. This comes despite ERISA’s clear mandate that a fiduciary act *solely* in the interest of plan participants and beneficiaries¹⁰ and the statute’s added requirement that the “assets of a plan . . . shall be held for the exclusive purposes of providing benefits” to these participants and beneficiaries.¹¹ In addition to the concerns we have raised in previous letters regarding economically targeted investing,¹² we believe that expanding the Form 5500 to include information regarding ETI / ESG investment activities would be problematic for a number of reasons.

- **Including ESG Investment Information on Form 5500 Would Create a Misleading Impression of How ESG Factors Should be Considered**

⁹ Ibid., at 47,559.

¹⁰ Employee Retirement Income Security Act of 1974, § 404(a)(1)A (1974) [hereinafter “ERISA”].

¹¹ ERISA, *supra* note 1, at § 403(c)(1).

¹² See, e.g., Letter to the Hon. Thomas Perez Re: “Impact Investing” and Interpretive Bulletins 2509.08-1 and 08-2 (Nov. 11, 2014), available at <http://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/2014-11.11-Letter-to-DOL-EBSA.pdf>.

In furtherance of the shift toward increased ETI and ESG investment activities, the Proposal requests comment on “whether collecting information related to [these activities] of ERISA-covered plans on the Form 5500 . . . would allow ERISA fiduciaries to more easily consider the role ESG factors could or should play in their investment decisions.”¹³ We believe that going down this road is a mistake, however, to the extent that using Form 5500 to collect ESG investment information could create the impression that the use of ESG factors is required or expected when making investment decisions under ERISA.

Specifically, the Proposal makes reference to the Securities and Exchange Commission’s (“SEC”) disclosure requirements regarding material risks, suggesting that these mandatory SEC disclosures could ultimately be used as a “basis” for potential ESG disclosures on Form 5500.¹⁴ This is especially troubling given that the proposal makes clear that the Form 5500 is “essential” to the Agencies’ enforcement programs.¹⁵ As a result, and at the very least, the form and its instructions must be enhanced to clarify that ESG-related disclosures need only be made in the eventuality that ESG factors are used. Given that Form 5500 is used for enforcement purposes, ESG-related disclosures should only be collected as a prophylactic against improper use rather than as a means of encouraging plans to consider ESG factors in every instance.

▪ **DOL’s Current Guidance Regarding ETI / ESG Factors in ERISA Plan Investments is Incomplete**

Although DOL recently attempted to clarify its view of ETI / ESG considerations with its October 2015 Interpretive Bulletin (“IB”) 2015-1,¹⁶ this guidance instead created additional uncertainty as to how the Department intends for these considerations to be utilized and evaluated. The Proposal, to the extent it is built upon IB 2015-1, would exacerbate this problem.

In reversing DOL’s 2008 guidance that consideration of noneconomic, collateral factors in selecting plan investments should be rare,¹⁷ IB 2015-1 essentially reinstated the Department’s earlier position outlined in 1994 guidance¹⁸ that if two investments are equal in their expected rate of economic returns, considerations including ESG factors could serve as “tiebreakers” in determining which investment to make. According to the DOL, however, IB 2015-1 goes even further in establishing that ESG factors may have a “direct relationship” to the value of an investment and, when this direct relationship exists, ESG factors “are more than just tiebreakers but rather are proper components of the fiduciary’s analysis of the economic and financial merits of competing investment choices.”¹⁹

¹³ Proposed Revision of Annual Information Return/Reports, 81 Fed. Reg. 47,533, 47,564 (July 21, 2016).

¹⁴ *Id.*

¹⁵ *Id.* at 47,535.

¹⁶ Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 80 Fed. Reg. 65,135 (Oct. 26, 2015) [hereinafter *IB-2015-1*].

¹⁷ Interpretive Bulletin Relating to Investing in Economically Targeted Investments, 73 Fed. Reg. 61,734 (Oct. 17, 2008).

¹⁸ Interpretive Bulletin Relating to the Employee Retirement Income Security Act of 1974, 59 Fed. Reg. 32,606 (June 23, 1994).

¹⁹ IB 2015-1, *supra* note 4, at 65,136.

This expansive view of ESG considerations, especially in conjunction with potential reporting on Form 5500, is problematic for a number of reasons. First, the DOL has failed to provide any sample criteria that ERISA fiduciaries might look to in evaluating relevant ESG factors. In addition, neither IB 2015-1 nor the proposed rule provide any insight on steps fiduciaries might take to safeguard against the probability that consideration of ESG factors as “more than just tiebreakers” could significantly increase risk, reduce diversification, and lower returns on plan investments. From a narrower recordkeeping standpoint, IB 2015-1 expresses DOL’s view that investments of plan assets should be accompanied by records sufficient to demonstrate compliance with ERISA’s fiduciary requirements.²⁰ Although the guidance states that the appropriate level of documentation depends on the facts and circumstances surrounding a particular investment,²¹ DOL has failed to provide any description of the materials that the government would find satisfactory in reviewing a plan fiduciary’s assessment regarding the consideration of ESG factors. In sum, it is impossible to fathom that any value could be derived from collecting ETI / ESG information on Form 5500 when DOL’s underlying guidance on the subject is so unclear.

▪ **The Performance of ESG-Related Investments Does Not Comport With ERISA’s Fiduciary Requirements**

In addition to basic concerns over the shortcomings in IB 2015-1, the Agencies’ approach to consideration of ESG factors has the potential to more broadly undermine ERISA’s mandate that trustees invest plan assets “solely” in the interests of plan participants.²² As described above, economic return should be the primary consideration for an ERISA fiduciary and evidence suggests that investments made with eye toward ESG considerations undermine this basic premise.

Recent research indicates a negative relationship between social-issue activism and investment valuation. One study found that S&P 500 firms targeted by the New York State Common Retirement System with social-issue shareholder proposals subsequently had a 21 percent lower firm value, and a 91 percent lower industry-adjusted firm value, than other companies.²³ A similar study determined that a recent push for “socially responsible” investing caused CalPERS’ sluggish 0.6 percent growth in the fiscal year ending June 30, 2016, as opposed to a 7.8 percent average return over the previous 20 years.²⁴ The average 20-year return for all public pensions was recently estimated at 7.5 percent for the 2016 fiscal year.²⁵ Accordingly, it is clear that

²⁰ *Id.*

²¹ *Id.*

²² ERISA, *supra* note 1, at § 404(a)(1)A.

²³ Tracie Woidtke, *Public Pension Fund Activism And Firm Value: An Empirical Analysis*, MANHATTAN INST. LEGAL POLICY REPORT (Sept. 2015), at 5.

²⁴ Diana Furchtgott-Roth, *There’s Nothing “Socially Responsible” About Low Pension Returns*, ECONOMICS21 (July 22, 2016), available at <http://economics21.org/html/theres-nothing-socially-responsible-about-low-pension-returns-1972.html>; see also Steven Malanga, *The Pension Fund That Ate California*, CITY JOURNAL (Winter 2013), available at <http://www.city-journal.org/html/pension-fund-ate-california-13528.html> (adding that “[n]ot only were [CALPERS] ‘socially responsible’ investments imprudent, but CalPERS funneled billions of dollars into politically connected firms”).

²⁵ Amy Scott, *Public pension returns could be worst in 15 years*, MARKETPLACE (July 27, 2016), available at <https://www.marketplace.org/2016/07/26/world/public-pension-returns-could-be-worst-15-years> (citing evidence from the Wilshire Trust Universe Comparison Service).

consideration of noneconomic, ancillary issues, including ESG factors, often reduces returns on underlying investments and harms plan beneficiaries. It is counterintuitive that an investment activity could serve plan participants and satisfy ERISA while that same activity adversely affects returns.

Inadequate and Incomplete Analysis of Regulatory Impacts and Burdens under Executive Order 12866, the Regulatory Flexibility Act and the Paperwork Reduction Act:

The Agencies recognize that the proposed rulemaking and revision of Form 5500 will have a significant impact on the economy, but the published estimates of a net additional 2.9 million paperwork burden hours and an additional \$328.8 million in additional annual compliance costs contain errors and omissions that understate the full economic impact of the proposed rule changes and reporting form revisions. Correcting for all the errors and omissions found in the analysis could result in significantly higher costs. This is a concern because the Agencies have not provided any quantitative estimates of the benefits of the proposed rule. Benefits are addressed only in vague terms. There is no basis for confidence that the benefits of the proposed changes in the rules and forms will outweigh even the attenuated cost estimates proffered by the government. Consideration of the errors and omissions in the government cost estimates and of the likelihood that full costs may be higher casts more doubt on the claim that the proposed rule changes will yield a net benefit to society.

- **The Costs and Benefits of the Proposed Changes Must be Calculated Separately**

The proposed rulemaking is composed of many parts, including additions to reporting requirements for plans already subject to Form 5500 filing requirements, removal of exemptions from the filing requirement for several million small plan sponsors, and additions to the required secondary schedules that some Form 5500 filers are required to attach. Each of the separate new or changed requirements carries with it distinct costs and benefits.

It is a major error to lump all of the changes together rather than to consider the costs and benefits of each component separately. This aggregation is especially a problem given the likelihood that the aggregate costs may exceed the aggregate benefits. By breaking down the analysis to consider separately the costs and benefits of each major component, the agencies identify components that clearly yield benefits commensurate with costs and discard from the proposal components which carry high costs but yield doubtful benefit. The aggregated analysis that Agencies have presented may disguise an excessively costly component that yields little or no benefit. In particular, the Agencies should examine separately the costs and benefits of the proposed elimination of the current exemption from Form 5500 reporting for small (under 100 participants) plans.

Also, the Department should compare the costs versus benefits of annual reporting versus reporting on other time period schedules, such as every two or five years. Less frequent filing would significantly reduce reporting and processing costs for both filers and the government, and the analytical question that the Department should consider is whether and how much the benefit of the information to the government would be affected?

- **The Regulatory Flexibility Act Analysis is Deficient**

The Agencies' analysis of economic impact under the Regulatory Flexibility Act does not adequately consider the effect of the proposed changes on the decisions of small entities to offer covered benefits. For smaller plans, the increase in cost for filing the proposed new forms may likely be greater relative to revenues and profits than will be the increase for larger firms. This is the sort of disparity between smaller and larger entities that the Regulatory Flexibility Act intends for agencies to investigate, consider, and mitigate in their rulemaking decisions. The Department has not conducted adequate research to address this issue. In particular, the Department has not conducted surveys of potentially affected small employers or other field research to determine whether the proposed elimination of the filing exemption for insured health plans with fewer than 100 participants will motivate employers to discontinue existing plans or dissuade them from adopting new plans in the future. Such incentives resulting from the proposed regulations would have adverse impacts on the competitiveness of small businesses and on their employees.

- **The Agencies' Estimates are Based Upon Obsolete Information**

The Agencies' analysis of the information collection burdens of the proposed changes in the content and applicability of Form 5500 and its associated schedules is seriously flawed by reliance on obsolete estimates of the time parameters for completion of the various items. The empirical study by Mathematica on which the Agencies rely was completed in 1999 and was based on 1997-1999 data. This data is now nearly 20 years old, and it does not reflect the complex changes and new items being proposed. The data does not even reflect the changes made in the 2008 revisions of the forms.

The Agencies' information collection burden estimates depend on 70 distinct completion time parameters presented the joint notice.²⁶ Even small changes in any of these parameters, when multiplied across the millions of report filings involved, may have large impacts on the hours of reporting burden and the economic cost impact of the proposed rule changes. Reliance on empirical data that is outdated and that does not address the new reporting elements being proposed is not an acceptable basis for assessing the cost of the proposed regulation. Such reliance creates a serious risk of a wrong rulemaking decision and the results presented are not reliable. Consequently, we recommend that the Agencies defer any changes until they are able to conduct new surveys and research to provide current data regarding the information collection burden of contemplated changes in the Form 5500 reporting requirements.

Conclusion:

For all of the reasons stated above, we have substantial concerns with the Proposal. It improperly seeks to collect data for purposes of the ACA that the Agencies lack authority to require on the Form 5500. It imposes a significant new burden on health and welfare plans, eliminating long-established reporting exclusions and requiring vaguely defined but quite

²⁶ 81 Fed. Reg. at 47568-47569.

significant attestations of compliance with a variety of Federal laws. Finally, it significantly expands the disclosure requirements for pension plans, increasing the burden without a corresponding increase in benefit, and fostering further confusion about reasonable fees and other issues by compelling reporting of data elements that are not comparable.

We look forward to meeting with the Agencies to discuss these and other issues as you work towards developing the new content and filing system for the Form 5500.

Sincerely,

A handwritten signature in black ink, appearing to read "Randel Johnson", with a large, sweeping flourish underneath.

Randel Johnson
Senior Vice President
Labor, Immigration &
Employee Benefits
U.S. Chamber of Commerce