

**Douglas O. Kant**  
Senior Vice President &  
Deputy General Counsel

FMR LLC Legal Department

Mail: 200 Seaport Blvd., V7A, Boston, MA 02210  
Office: 245 Summer Street, 7<sup>th</sup> Fl, Boston, MA 02210  
Phone: 617-563-6645 Fax: 617-385-1862  
Email: doug.kant@fmr.com



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  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

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

Ladies and Gentlemen:

The U.S. Department of Labor, the U.S. Treasury Department and the Pension Benefit Guaranty Corporation (collectively, the "Agencies") published proposed changes to the regulations and forms for the annual return/reports for employee benefit plans (the "Proposal") in the Federal Register on July 21, 2016 (at 81 FR 47496 et. seq.). These comments on the Proposal are submitted on behalf of the group of financial service companies for which FMR LLC is the parent company and which is known as Fidelity Investments (collectively, "Fidelity").

Fidelity provides investment management, record keeping, communications and trustee/custodian services to more than 20,000 401(k), 403(b) and other individual account plans covering millions of participants and their beneficiaries. Fidelity also provides an array of recordkeeping and communication services for defined benefit pension plans and health benefit plans covering millions of participants and beneficiaries. Plan sponsors and administrators are heavily dependent on our information reporting services in order to satisfy their annual reporting obligations under ERISA. In addition, the administrative services provided by Fidelity include the preparation of Form 5500 annual returns/reports for review and submission by the plan administrators for many of these plans.

As an initial matter, we appreciate the extension of the Proposal comment period by the Agencies. The timing of the initial deadline would have made it extremely difficult for us to complete in a timely fashion a review of the extensive changes that would be compelled by the Proposal. The extension has allowed us to provide input to industry groups in which we participate and to prepare and submit our own comments as provided below.

The Proposal would require a substantial number of changes in almost all aspects of the annual reporting rules. The following discussion highlights a number of major concerns regarding the Proposal. Three Appendices – separating the comments for defined contribution, defined benefit and health benefit plans - provide a more detailed list of comments and recommended changes to the Proposal.

### **Resource and Cost Concerns**

The complexity of the proposed changes will require significant systems and personnel resource commitments across the benefits industry. There will be several key phases for service providers in particular once the requirements are finalized: (1) analysis of the impact on systems, processes and procedures, and the determination of the required funding of the changes, (2) development of new required processes, procedures and data elements to capture the new or changed requirements, and (3) development of compliance, monitoring and reporting tools. Realistically the regulatory changes must be finalized by June 30, 2017, in order to give service providers adequate time to complete and implement these phases before January 1, 2019. Otherwise, the effective date of the new requirements for the Form 5500 series of reporting forms should be delayed at least until plan years beginning on or after January 1, 2020.

Section 103 of ERISA sets forth the basic categories of information to be included in the annual report to be submitted to the Agencies. The preamble of the Proposal suggests that many of the revisions would be useful to the Agencies and other parties solely for purposes of policy deliberations, such as the new proposed plan feature or design questions regarding qualified designated investment alternatives, catch-up contributions, etc. (see 81 FR 47549). Although such information may be useful for researchers, these questions do not appear to be part of the core mission of these reports.

In addition, many new questions are compliance oriented, and compliance is clearly a goal of annual reporting, but the Proposal would impose new information gathering challenges on every plan that would normally only be imposed on a plan during an audit process. At least at the start of an audit, however, the plan administrator or other responsible party has the ability to work with the staff of the auditing Agency in order to determine the proper scope of the audit. Plans would not have that opportunity under the Proposal; that is, every plan would in effect incur the additional time and expense as if preparing for an audit.

Restructuring the Schedule C and other aspects of 5500 reporting for 2009 plan years was expensive and time-consuming. We believe that the changes included in the Proposal would be extremely more expensive for service providers and plans alike, although it was not possible to calculate a precise estimate by the comment deadline.

### **Reconciliation with the Section 408(b)(2) Requirements.**

A number of Proposal revisions are purportedly focused on “harmonizing” the annual reporting requirements with final regulations issued several years ago under Section 408(b)(2) of ERISA (see 81 FR 47538). The Proposal’s elimination of the approach for “eligible indirect compensation” on Schedule C [81 FR 47551] would be consistent with the absence of such an approach in the ERISA section 408(b)(2) regulations. However, the Proposal would require the reporting of a precise dollar amount for many fee, compensation or expense items, which is directly contrary to the approach adopted in the Section 408(b)(2) regulations. The Section 408(b)(2) rules specifically permit alternate methods for reporting compensation instead of reporting specific dollar amounts:

“A description of compensation or cost may be expressed as a monetary amount, formula, percentage of the covered plan’s assets, or a per capita charge for each participant or beneficiary or, if the compensation or cost cannot reasonably be expressed in such terms, by any other reasonable method. The description may include a reasonable and good faith estimate if the covered service provider cannot otherwise readily describe compensation or cost and the covered service provider explains the methodology and assumptions used to prepare such estimate.” [77 FR 5657]

As an example, the section 408(b)(2) regulations require that a plan record keeper provide a “proxy” estimate of the plan’s cost of record keeping services if the service provider does not charge a separate explicit record keeping fee. [81 FR 47552] Calculating that estimate as a dollar amount would imply more meaning than the record keeping proxy cost estimate number actually represents and will produce a number that is already aged by the time that one of the Agencies or another third party reviews the plan’s annual return/report.

The problem is inherent in many other Proposal revisions that would require the calculation of a dollar number where in fact the formula (basis points, etc.) would provide a better basis for comparison or perspective. The calculation of float income and soft dollar amounts are two examples where the Department of Labor has acknowledged the difficulty in trying to calculate a precise amount for any particular plan. Even if such a dollar amount could be calculated, however, it is difficult to understand why that would give the plan fiduciary useful information for purposes of a comparison.

### **Information Requiring a Subjective Determination**

We are also quite concerned about the subjective nature of certain new questions included in the Proposal. For example, revised Schedule H would require the disclosure of the termination of any service provider for a “material failure to meet the terms of a service arrangement or failure to comply

with Title I of ERISA.” [81 FR 47554] Our concern is based in part on adverse experience in the benefits industry with the Section 408(b)(2) regulation provision for plan sponsors to report service providers who have failed to satisfy their disclosure obligations. In fact we expect that little helpful information was obtained by the Agencies for enforcement purposes due to that provision because of the uncertainty among many plan sponsors regarding what information they were required to receive under the regulation.

The factors considered in the determination of whether a “material failure” has occurred may vary widely from plan administrator to plan administrator and color many decisions involving the replacement of a service provider. In many cases that may simply prompt requests from plan sponsors or administrators for guidance from the Agencies on specific fact patterns. In the alternative, plan administrators may feel compelled to seek legal advice from counsel, thus incurring additional time and expense.

The Proposal would require information from defined contribution plans about the number and aggregate amount of uncashed checks at year end so that the Agencies “can get better information about the magnitude of the problem” (at 81 FR 47547). The Proposal preamble discussion also presents this as a way to make plan fiduciaries aware of their responsibilities to locate missing participants in active as well as terminating defined contribution plans. The preamble also acknowledges (referring to a report of the 2013 ERISA Advisory Council) uncertainties regarding methods for determining the data in question. Rather than impose additional requirements on the plan administrator, we ask that the Department of Labor supplement its current guidance for terminating plans to apply to active plans as well.

The Proposal would retain the required disclosure of any unpaid benefit when due. This is somewhat surprising because we understand that the IRS Employee Plans Compliance Unit has an open project related in part to the determination of what scenarios are covered by the term “unpaid benefits”. It is unclear, for example whether the term would include uncashed checks that have been returned to the payer of benefits but that may still be in viable payment status.

In addition, the Proposal would require additional information in the annual report about transfers of assets and benefit obligations between plans. The purpose of such information is explained as follows:

“Although the question would not ask the filer to identify individual affected participants or beneficiaries, this requirement is designed to help missing participants locate information about their accounts, in some cases years after the plan termination when the plan or plan sponsor may no longer exist or have records of the accounts it established.” [81 FR 47547]

Unfortunately the quoted language only illustrates the basic problem - corporations or other business entities and the plans they sponsor often go through organizational changes that at some future date may obscure any attempt to identify where an individual's account balance now resides. The new information would not address the problem; that is, it would not give a participant any better ability to locate his or her lost account.

### **Proposed Schedule C Requirements**

The Proposal would require that a separate Schedule C be filed on behalf of each plan service provider. [81 FR 47552] This would be extremely complicated for affiliated service providers that work collaboratively to provide a range of services to the plan. For example, a bank trustee may be related by common ownership to the plan record keeper and to the adviser providing investment management services for one or more of the plan investment options. The services in such cases may be priced on a bundled basis so that there would be no separate fee for each provider. The status of the related companies with respect to the plan may also differ, with only some operating in a direct contractual relationship with the plan sponsor or plan administrator.

With respect to a defined contribution plan investment menu, the Proposal suggests that a plan using investment options managed by a number of different investment advisers would need to file a separate Schedule C for each adviser (service provider). Of course, only an adviser managing a fund subject to ERISA (generally a separate account or group trust portfolio) would be characterized as a plan service provider; a mutual fund adviser would not be properly characterized as a plan service provider and thus no Schedule C would be filed under the Proposal for that adviser. We strongly recommend that the Agencies retain an approach which is more consistent with the regulations issued under Section 408(b)(2) of ERISA.

### **Health Benefit Plan Claims Data**

New Schedule J contemplated by the Proposal would require a substantial amount of information regarding group health plans, in particular the disclosure of various types of health benefit claims data. [81 FR 47558-47559] The Proposal also states that the Department of Labor is considering a request for even more types of data regarding denied claims, although the Proposal preamble acknowledges that including such information on denied claims may involve definitional and data classification challenges.

The Proposal request for the array of claims data seems intended to provide information that may suggest whether a plan or its provider is handling claims inappropriately, but we doubt that such data will in fact be a useful tool in that regard. In addition, the suggested further breakdown of information

regarding the nature of claims (whether approved or denied) would be a complicated task at best. As acknowledged in part by the Agencies in the Proposal preamble discussion, much of the requested information would be subject to a diversity of possible interpretations.

Finally, the Proposal would require information that only the insurance company in question would possess. Examples are the insurer's EIN and national insurance product registry number and whether it is using a prototype/off-the-shelf insurance product and (if so) the relevant unique identifying information (such as a state assigned policy identification number). The Proposal should be revised to require the insurer to provide such information to the plan administrator or other person contractually obligated to prepare the Form 5500 return/report on behalf of the administrator.

\* \* \* \* \*

Our own review and participation in the review by and group discussions of several industry groups leads to the conclusion that the Agencies would benefit from more interaction with the employee benefits community before any attempt to move to final guidance. Such interaction could take the form of a public hearing or a less formal public forum with a broad cross-section of industry participants. We also recommend that the Proposal be revised and repropose for public comment.

In conclusion, we appreciate your consideration of the enclosed comments and suggested changes to the Proposal. We would be happy to respond to any questions or discuss any aspects of our comments at your convenience.

Sincerely,



Douglas O. Kant  
Senior Vice President and Deputy General Counsel

DOK/sms

cc: Ralph Derbyshire

## APPENDIX ONE

### DEFINED CONTRIBUTION PLANS

#### Form 5500 (Annual Return/Report of Employee Benefit Plan)

- **Line 7g(1) [New] - Number of participants with account balances as of the beginning of the plan year**
  - **Comment** - The current reporting requirements to determine a “large” or “small plan” includes participants who are eligible to participate in the plan but do not have account balances. We agree with the Proposal to use the number of participants with account balances at the beginning of the year, which is essentially the number of participants on the last day of the prior plan year. However, the instructions should explain how to determine if participants have account balances as of plan year-end. For example, assume a plan is using the cash basis of accounting and the plan sponsor makes a profit sharing contribution that is funded after the plan year end for eligible participants that do not have account balances at that time. Should those participants be treated as having an account balance as of year-end?
  - **Recommendation** – Clarify in the instructions that year end/beginning of the year account balances only includes participants with existing account balances and excludes any accruals to be funded at a later date.
  
- **9a(10) [New] - Is this a participant-directed defined contribution pension plan? If you check this box, enter the number of participants using the participant-directed brokerage account(s)**
  - **Comment** – The agencies would like to determine the number of participants using brokerage accounts during the plan year. The instructions require the reporting of the number of participants who used a plan brokerage account during the plan year on Line 9a(10) but it is also being requested on Schedule H, Line 4r.
  - **Recommendation** – Remove the requirement to report the number of participants using a brokerage account on Line 9a(10) since it is a duplication of the information on Schedule H, Line 4r.
  
- **Schedule A (Insurance Information) – [Current] General Comment**
  - **Comment** – Currently Schedule A must be attached to the Form 5500 filed for every defined benefit pension plan, defined contribution pension plan, and welfare benefit plan required to file a Form 5500 if any benefits under the plan are provided by an insurance company, insurance service, or other similar organization (such as Blue Cross, Blue Shield, or a health maintenance organization). The reporting of most of the Schedule A information could be moved to other Schedules to create reporting efficiencies.
  - **Recommendation** - Schedule A should include only those plans with health and welfare benefits to provide for better efficiency and harmonization between the

fees and financial reporting requirements while still maintaining the integrity of the information,. This can be accomplished by:

- Moving the current Part I (*Information Concerning Insurance Contract Coverage, Fees, and Commissions*) to Schedule C
- Moving the current Part II (*Investment and Annuity Contract Information*) to Schedule H.

- **Schedule C (Service Provider Information) – General Comments -**

**Multiple Schedule Cs [New] -**

- **Comment** – The current Schedule C allows the reporting of multiple service providers on a single Schedule C but the Proposal requires a separate Schedule C for each service provider. It's not clear whether a separate Schedule C must be filed for each investment vehicle (current eligible indirect compensation). Would the investment-related information (i.e. the expense ratio amount information) be reported on a Schedule C for each investment? Also, it would be easier to compare all of the relevant similarities and differences among the service providers if they were all included on only one Schedule C.
- **Recommendation** – Multiple Schedule Cs will be burdensome to complete and difficult to compare the relevant information for all of a plan's service providers. Preparing and reviewing multiple Schedule C's will add time and complexity, which may lead to an increase in the number of errors. We recommend the agencies continue to allow all of a plan's service providers to be listed on one Schedule C. There doesn't appear to be any efficiencies gained or benefit for using a separate Schedule C for each provider.

**Indirect Compensation [New]**

- **Comment** - The Agencies are proposing various changes to the Schedule C to better harmonize it with the fee disclosure requirements under 29 C.F.R. § 2550.408(b)-2. Fee transparency has been dramatically increased since the implementation of 29 C.F.R. § 2550.408(b)-2 and 29 C.F.R. 2550.404c-1. However, Schedule C imposes a requirement to specify the dollar amount of any indirect compensation. The exact dollar amount of the current eligible indirect compensation would be based on an estimated calculation and may not be an accurate depiction of the indirect compensation. Attempting to quantify indirect compensation as a flat dollar amount may be misleading since service providers may use different methodologies to calculate it.
- **Recommendation** – We agree with the Proposal to eliminate the concept of eligible indirect compensation to the extent that it would create any inconsistencies between the Schedule C and the 29 C.F.R. § 2550.408(b)-2 requirements. The reporting of investment-related disclosures are included on Schedule C so it would be more meaningful and comparable with 408(b)(2) to include the expense ratios and/or formulas in place of the amount of any indirect

compensation. Also, we recommend that the Agencies be actively involved in the creation and development of educational material for Schedule C for plan sponsors and preparers.

**Non-covered Service Provider Compensation [New] -**

- **Comment** – The current instructions requires a service provider to be listed only if they receive \$5,000 or more of total direct and indirect compensation. The Proposal has separate reporting requirements for amounts for covered and non-covered service providers as it requires one amount for covered service providers, \$1,000, and another amount for non-covered service providers, \$5,000. Having two different requirements is confusing and may create inconsistent reporting on Schedule C.
- **Recommendation** – Consider having one threshold for both covered and non-covered service providers to minimize confusion and increase transparency.

**ERISA Accounts [New] -**

- **Comment** – The Proposal includes the question “1f - Did the service provider arrangement include use of an ERISA recapture, ERISA budget, or similar account during the plan year?” The proposed Schedule C instructions allows filers to offset amounts received from an ERISA recapture, ERISA budget account or similar account from the total amount of direct compensation to report the net amount. A service provider may allocate any excess ERISA account revenue to participants’ accounts when the revenue received exceeds the agreed-upon compensation. There may be inconsistencies in the reporting of this information on Schedule C so it may be more appropriate to either clarify the question or add a new line to the Schedule C.
- **Recommendation** – Consider revising the question for the ERISA account to “Was any direct or indirect compensation offset by an amount from an ERISA recapture, ERISA budget or similar account during the plan year?”

**Service Provider Contact name/address –**

- **Comment** - The Proposal requires the identification of the name and address of an individual or office at the service provider to contact for further information about the service arrangement.
- **Recommendation** - Plan sponsors have written agreements with the service providers to provide various plan services and the Department of Labor can contact a plan sponsor to obtain the relevant contact information. If the information is intended solely to enable Regulators to contact a service provider, then it should be masked in the EFAST2 system so that it is not available for public consumption.

**Line 1e [New] – Was the person identified in Line 1a also identified on Schedule A filed for this plan year as having received insurance fees and commissions?**

- **Comment** – The Schedule would be checked “yes” if the person identified on Line 1a of the Schedule and was also identified on Schedule A if they received insurance fees and commissions. Thus reporting this information on both Schedules is redundant.
- **Recommendation** - We recommend moving the current Part I (*Information Concerning Insurance Contract Coverage, Fees, and Commissions*) from Schedule A to Schedule C to provide for more efficient reporting.

**Line 1g(1) – [New] Did the service provider arrangement include recordkeeping services?**

- **Comment** – This new question requires checking a box if the service provider arrangement includes recordkeeping services to a pension plan without explicit compensation for some or all of such recordkeeping services, or with compensation for such recordkeeping services offset or rebated in whole or in part based on other compensation received by the service provider, or an affiliate or subcontractor. “Recordkeeping services” is not defined in the instructions and it could be broadly or narrowly interpreted throughout the industry creating inconsistencies across the industry.
- **Recommendation** – Include the definition of “recordkeeping services” from 29 C.F.R. § 2550.408(b)-2(c)(1)(viii)(D) in the Form 5500 instructions, “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.”

• **Schedule D (DFE/Participating Plan Information)**

**Line 1d – [New] Dollar value of investing plan/DFE interest at end of reporting DFE year**

- **Comment** – The Proposal requires the dollar value of each plan’s interest in the DFE as of the end of the DFE year. It is not clear what amount should be reported for stable value funds. Typically, they are fully-benefit responsive and the underlying plan is record kept at contract value, however, the DFE would report the underlying holdings at fair value.
- **Recommendation** – Clarify the Form 5500 Schedule D instructions to be consistent with Financial Accounting Standards Board Accounting Standards Codification Fair Value Measurement Topic 820 so that fully benefit responsive stable value funds may be reported at contract value. Also, include a definition of

“current value” that is consistent with current accounting standards. We recommend the use of the fair value definition from Topic 820 and how to determine fair value for investments valued at net asset value or its equivalent. The Financial Accounting Standards Board has provided the appropriate standards for defining the best practice to determine the fair value. In addition, the American Institute of Certified Public Accountants has provided additional information about best practices.

- **Schedule H (Financial Information)**

**General Comments** – There are many new assets classification lines with “Other (Describe)” that include text boxes on Schedule H. Allowing “free form” entries may provide more details for the Regulators but they will result in inconsistent reporting across the industry. Consider either better specificity about the information being requested or eliminate the question.

**Part I (Asset and Liability Statement)**

**Line 1a(3) – [Current 1c(8)] Notes receivable from participants (participant loans)**

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- **Comment** - The current and proposed instructions states "Include the sum of the value of the unpaid principal balances, plus accrued but unpaid interest" for participant loans, inferring that they should be reported on an accrual basis. The Schedule H instructions states that the cash, modified cash, or accrual basis of accounting may be used for recognition of transactions in Parts I and II, as long as one method is used consistently.
- **Recommendation** – We recommend removing the "plus accrued but unpaid interest" from the instructions to be in line with the rest of the Schedule.

**Line 6(A) and 6(B) for PSA and CCT –**

- **Comment** We agree with this change to report a plan’s interest in a CCT on one line regardless of whether the CCT or PSA has filed its own Form 5500 Annual Return/Report.

**Line 14 (g) (Other) [New]**

- **Comment** – Line 14(g) is used to report the plan assets held in participant-directed brokerage accounts on one line, with a few exceptions. These assets are classified as “other” and include cash/cash equivalents, registered investment companies, corporate equities, and corporate debt instruments. There does not appear to be a similar “aggregate” line in the income section which creates a mismatch between

the assets classification and income items when a plan has self-directed brokerage accounts.

- **Recommendation** - We suggest adding a combined brokerage income line item to match brokerage assets to the income.

**Part II (Income and Expense Statement) - General Comment –**

- **Comment** –There is a misalignment of the order of the line item information in Part I (Asset and Liability Statement) with Part II (Income and Expense Statement), which will make the preparation of the Form 5500 more difficult. We have illustrated the current order in the table below.
- **Recommendation** – Mirror the order of all line item descriptions in the Asset section with the Income section in Part I and Part II. We have an example illustration of the proposed order in the table below.

Current Order	Current Order
<b>Asset</b>	<b>Income</b>
(6) [New breakout] Eligible Pooled Investment Vehicles (other than registered investment companies)	(6) Pooled Investment Vehicles
(A) [Current 1c(10)] Total value of interest in pooled separate accounts (PSA)	(A) Net investment gain (loss) from common/collective trusts
(B) [Current 1c(9)] Total value of interest in common collective trusts (CCT)	(B) Net investment gain (loss) from pooled separate accounts
(C) [Current 1c(12)] Value of interest in 103-12 investment entities (103-12 IEs) (See instructions)	(C) Net investment gain (loss) from master trusts
(D) [Current 1c(11)] Total value of interest in master trusts	(D) Net investment gain (loss) from 103-12 investment entities
Recommended Order	Recommended Order
<b>Asset</b>	<b>Income</b>
(6) [New breakout] Eligible Pooled Investment Vehicles (other than registered investment companies)	(6) Pooled Investment Vehicles
(A) [Current 1c(10)] Total value of interest in pooled separate accounts (PSA)	(A) Net investment gain (loss) from pooled separate accounts
(B) [Current 1c(9)] Total value of interest in common collective trusts (CCT)	(B) Net investment gain (loss) from common/collective trusts
(C) [Current 1c(12)] Value of interest in 103-12 investment entities (103-12 IEs) (See instructions)	(C) Net investment gain (loss) from 103-12 investment entities
(D) [Current 1c(11)] Total value of interest in master trusts	(D) Net investment gain (loss) from master trusts

**Line 2b (1) and 2b(2) for participant loans – [Current 2b(1)(E) with new breakouts]**

- **Comment** - The Proposal requires that interest on notes receivable from participant loans be detailed between “Received in cash” and “Receivable in cash.” The information is being reported on two separate lines.
- **Recommendation** – The information should be consistent with the contributions line, which includes the total of “Received or receivable” and reported on one line.

**Line 2c(5)(E) and (G) - Earnings on Employer Securities and Employer Real Property**

- **Comment** – Direct filing entities, other than master trusts, are not required to report employer securities and employer real property in their assets set forth in Part I and should likewise be excluded from the requirement to report investment earnings on employer securities and employer real property separately from other securities in the Income set forth in Part II.
- **Recommendation** – Eliminate the employer-related asset income reporting breakout for CTAs, PSAs, and 103-12 IEs.

**Line 4k - [Current Line 4l] Has the plan failed to provide any benefit when due under the plan?**

- **Comment** – There has been very little guidance around this question since it was added to Schedule H in 2009. This question has been inconsistently answered across the industry since it was originally added to Schedule H. The IRS Employee Plans Compliance Unit has an open project related to address this issue but more guidance is needed.
- **Recommendation** – More guidance should be issued and included in the Form 5500 instructions to clarify what is required. In addition, participants typically initiate their distributions in defined contributions plans so the instructions should be modified to only require this information for defined benefit plans.

**Line 4u – [New] Did any employer sponsoring the plan pay any of the administrative expenses of the plan that were not reported on Schedule H, Line 2i?**

- **Comment** - The information is not reportable on the Schedule C if the plan sponsor directly pays a third party service provider. This new line would require the plan to check “yes” or “no” to indicate whether the plan sponsor paid the fees. We are not sure how useful this information would be to the Regulators or anyone if the plan sponsor answers "yes". What would be the follow up? Would this include fees related to the Affordable Care Act for health and welfare plans?
- **Recommendation** – We would recommend removing this line.

**Line 4x – [New] Did the plan sponsor or its affiliates provide any services to the plan in exchange for direct or indirect compensation?**

- **Comment** – Direct and indirect compensation are reported on the Schedule C so including it in Schedule H is redundant.
- **Recommendation** – We recommend removing this question from the Schedule H.

**Line 4z – [New] If this is an individual account plan, were there any checks to participants or beneficiaries that were uncashed as of the end of the plan year?  Yes  No. If “Yes,” complete 4z(1)-(4).**

- **Comments** – The Proposal requires a plan sponsor to indicate if there were any uncashed checks at the end of the plan year, and if so, provide information on the number and dollar value of the uncashed checks. Uncashed checks that are stopped and re-deposited into a participant’s account before the end of the plan year will not be reported based on this question. Thus only those checks that are truly outstanding would be reported. While it would certainly be the easy answer, it seems to circumvent what we think the intent of the proposed reporting requirement – which, in part, is to provide the Regulators “... better information about the magnitude of the problem ...”. If stopping and re-depositing uncashed checks eliminates the requirement to report benefit payments that have not been cashed, it would seem that you should track both (i) uncashed checks that were re-deposited into the plan and (ii) those re-deposited checks that are subsequently and successfully paid to the participants. In addition, we will need the ability to report the number and dollar value of the re-deposited amounts that continue to be held in the plan as of the end of each plan year. We will need clarification on the type(s) of verification procedures that will be considered reasonable. Also, if this information is reviewed by the Regulators, will they be determining if the procedures are reasonable? Should there be a limit on how old a check should be before it’s considered uncashed? E.g., a check issued a couple of weeks before the end of the plan year isn’t something that would seem to be of interest to the regulators.
- **Recommendation** – We recommend that this requirement be limited to terminated plans to locate missing participants or those whose participant checks were issued but uncashed.

**Part VI Plan Termination Information [Revised to ask about any resolution to terminate regardless of when adopted]**

- **Comments** – Currently Line 5a requires the plan administrator to check “yes” if a resolution to terminate the plan was adopted during this or any prior plan year. The Proposal adds additional data elements; effective date of plan termination, year the plan assets were distributed, etc. and requests answers on Lines 7a, 7b(3) and 7c(3).
  1. Line 7a - Check “yes” if a resolution to terminate the plan was adopted during this or any prior plan year, unless the termination

was revoked and no assets reverted to the employer. Would “no” be selected in the event of a merger, consolidation, or spinoff”?

2. Line 7b(3) and 7c(3) date of transfer- Is this legally or the physical transfer date for a merger, consolidation, or spinoff? Many times the date of the legal transfer of assets in the resolution is later than the administrative transfer date.
- **Recommendation –**
    1. Make a distinction between Form 5310 and 5310-A for this section and when to complete Lines 7a, 7b and 7d. The Form 5500 instructions should clarify that the "effective date of plan termination" is either the date specified in the resolutions terminating the plan or the date when all checks (or electronic transfers) clear.
    2. Include information in the Form 5500 instructions for Lines 7b(3) and 7c(3) to specify that the date of transfer is the date the plan assets were legally transferred to the control of another plan instead of the actual date the assets were physically transferred to another plan.

#### **Part VI – Trustee Information [New]**

- **Comment -** The Proposal requires a trustee or custodian signature on the Schedule H. The plan’s trustee or custodian may electronically sign this schedule, attach it to the Form 5500, or provide an electronic reproduction of the Schedule H that is signed by the plan’s trustee to start the statute of limitations under Code Section 6501(a). Many large plan filers qualify for the limited scope audit under 29 CFR 2520.103-8 and receive the required certification from the custodian or trustee under 29 CFR 2520.103-5. Thus the trustee or custodian is already providing a signature on their certification so requiring another signature is redundant. In addition, the certification is now required to be attached to the Form 5500 on Line 3b.
- **Recommendation –**
  1. Plans that attach a signed trustee or custodian certification based on Line 3b for the limited scope audit should skip this line.
  2. Plans that perform full scope audits can either attach a trustee or custodian certification, if one is provided, or provide a trustee signature on a blank copy of the Schedule H to be attached.
  3. Provide guidance on how this process would work if there are multiple custodians and/or trustees for a plan.

#### **Line 8(A)(ii) and Line 9(F) – VCOCs and REOCs**

- **Comment –** Plans and DFEs may not track whether entities are qualified as venture capital operating companies (VCOCs) and real estate operating companies (REOCs) and the status of a REIT as a REOC may be unknown to an investor. Separate line items for VCOCs and REOCs may result in double counting of assets as private equity funds (reported

on Line 8(A)(iii) may also be VCOCs and non-publicly traded REITs (reported on Line 9(D)) may also be REOCs.

- **Recommendation** – We recommend eliminating the reporting requirement.

### **Schedule H (Financial Information) Attachments**

#### **Assets Held Directly by the Plan (Same can be applied to investments in PSAs and CCTs)**

- **Comment** – There is confusion about the definitions and proper use of the terms for these three elements:
  1. Element (a)(ii) – [current] Issuer, borrower, lessor or similar party is party-in-interest
  2. Element (a)(iii) – [New] Hard-to-value assets.
  3. Element (a)(iv) – [New] CUSIP, CIK, LEI, NAIC

Element (a)(v) – [Revised] Cost (vii) requires the cost of the holding but “cost” is not relevant for an employee benefit plan since the assets are valued based on fair market value. The cost would not reconcile to the information on Schedule H.

- **Recommendation**- Review the requirements for all of these lines and provide relevant definitions in the Form 5500 instructions to clarify the requested information.

### **Form 5500-SF (Annual Return/Report of Small Employee Benefit Plan)**

#### **Line 9 - Plan Assets and Liabilities – [Current]**

- **Comment** – Line 9 does not include the breakdown of receivables in the asset section. Line 10a(1) requires the reporting of contributions received or receivable. It would be helpful to include receivables in the asset section to help preparers identify prior year contribution accruals.
- **Recommendation** – Add a separate line for employer and employee receivables.

#### **Line 11 – New Specific Assets – [New]**

- **Comment** -This line requires an expanded breakout of the asset classifications. However, it does not allow the user to report the participant directed brokerage accounts that are being reported on Schedule H, Line 14. Having different reporting requirements on Form 5500-SF will require separate programming and information for smaller plans with the self-directed brokerage option.
- **Recommendation** – Add a new line to Form 5500-SF that is similar to the one for Schedule H, Line 14.

## **Schedule R**

### **Part VII – [New] Participation Information in Defined Contribution Pension Plans (Only defined contribution pension plans must complete this Part.)**

- **Comment** - The Proposal adds a section requesting information on participating employers, employer contribution calculations, employer matching contributions, etc. These questions may be helpful to establish future policies, however, they do not appear to fit with the overall objective of the 2019 changes to improve financial transparencies, fee harmonization with fee disclosures, fiduciary compliance, and government enforcement.
- **Recommendation** - It would be beneficial to discuss these items in a public forum to gain a better understanding of why this would be helpful to the Regulators and give service providers a chance to comment on the benefits of the relevant information.

## APPENDIX TWO

### DEFINED BENEFIT PLANS

#### **Schedule SB (Single-Employer Defined Benefit Plan Actuarial Information)**

##### **New Line 30 - Projection of Expected Benefit Payments**

- **Comment** – This question asks for a ten-year projection of expected benefit payments. Most pension plans already need to do a 10-year projection of expected benefit payments for Financial Accounting purposes. This projection would be on a different mortality table, and perhaps use different assumptions of future retirement benefits for current active employees. Pension plans that offer a lump sum option often reflect the expected lump sums in the Financial Accounting projection. For IRS funding purposes, often the lump sum participants are assumed to elect an annuity with the same present value as a lump sum (the “annuity substitution method.”)
- **Recommendation** – The instructions should be clear about whether the expected lump sum elections should be shown as a lump sum or as an equivalent stream of annuity payments.

#### **Schedule R (Retirement Plan Information)**

##### **New Line 21 - If this is a defined benefit pension plan, does the plan comply with Code section 401(a)(26) participation requirements?**

- **Comment** – This question asks whether the plan has passed the minimum participation test. (A plan must benefit at least 50 participants, or 40% of the employees, if less). This question asks whether the plan complies with the law, yes or no. What does a “no” answer imply? The other questions in this section ask the type of test that was used rather than asking whether the plan failed the test.
- **Recommendation** – There should be a different approach for asking enforcement questions when a “no” answer is an admission that the plan may be violating a plan qualification regulation. The plan may have failed the test but taken the appropriate action to correct it. Thus there should be a follow up question asking “Did the plan sponsor take the appropriate action to correct the failure?”

**New Line 24 - Were required minimum distributions made to 5% owners who have attained age 70 ½ (regardless of whether or not retired) as required under section 401(a)(9)(C)?**

- **Comment** – This is another enforcement question, when a “no” answer is an admission that the plan may be violating a plan qualification regulation. This question asks whether the plan complies with the law, yes or no. What does a “no” answer imply? In the March 31, 2016, “Proposed Collection; Comment Request for the Annual Return/Report of Employee Benefit Plan”, the IRS claimed, “This information identifies plans to which special rules apply that require minimum distributions to a participant regardless of whether he or she continues employment. The information will assist the IRS to monitor plan compliance.” However, this is really an enforcement question.
- **Recommendation** – There should be a different forum for asking enforcement questions when a “no” answer is an admission that the plan is violating a law or related regulations.

## APPENDIX THREE

### HEALTH AND WELFARE PLANS

**Schedule J (Group Health Plan Information) – This Schedule should be specific about which plans/types of plans are included and excluded from reporting**

#### **Part I – Group Health Plan Characteristics**

**Line 4a(1)(a) - Health insurance issuer. Enter name, EIN, and National Insurance Product Registry Number of carriers providing benefits under plan.**

- **Comment** – The insurance carrier has this information and it is at times difficult for the person completing the Form 5500 to obtain it.
- **Recommendation** – The insurance carrier should be required to provide this information to the plan administrator.

**Line 4a(1)(b) – If funding/benefit arrangement is through prototype/off-the-shelf insurance product, enter ID number of the product.**

- **Comment** – The insurance carrier has this information and it is at times difficult for the person completing the Form 5500 to obtain it.
- **Recommendation** - The Form 5500 instructions should define what is meant by a prototype/off the shelf plan for health and welfare purposes. The insurance carrier should be required to provide this information to the plan sponsor.

**Line 6a – How many persons offered COBRA benefits during the year?**

- **Comment** – COBRA notices generally are “sent to” one individual, with multiple individuals included (e.g., sent to the employee for the entire family). Systems effort and cost to report the number of individuals included versus the number of COBRA notices sent would be significantly greater.
- **Recommendation** – We recommend the required reporting reflect the number of COBRA notices sent as opposed to the number of individuals offered COBRA.

**Line 6b – Of persons in 6a, how many elected COBRA?**

- **Comment** – Typically, one person makes the COBRA election for the entire family, when applicable.
- **Recommendation** – Revise the question if it is actually asking for the number of people for whom COBRA was elected.

**Line 6c – How many persons were receiving coverage under COBRA during the plan year?**

- **Comment** – Clarification is needed:
  - How to determine who was receiving COBRA coverage during the year. For example, does that include every person who had COBRA coverage even for just one day in the year?
  - How to include individuals who are in the election period, especially when it crosses plan years?
- **Recommendation**-The Form 5500 instructions should clarify the information being requested. If the coverage headcounts are being provided to the plan sponsor by the insurance carrier, you should require that COBRA Qualified Beneficiaries are broken out into a separate category from other plan participants.

**Line 7a – Did the plan/plan sponsor receive rebates, reimbursement, or refunds other than those reported on Schedule A from service providers during the plan year? If yes, complete line 7b.**

- **Comment – Comment** – It is not clear what types of rebates, etc. would be included above and beyond what is included in Schedule A.
- **Recommendation**- Clarify the types of payments that would be included here.

**Part III - Financial Information (skip this section if plan completes Schedule H)**

**Line 16a - Contributions received during the plan year or receivable as of end of the plan year:**

**(a) Employer contributions received**

**(b) Employer contributions receivable**

**(c) Participant contributions received**

**(d) Participant contributions receivable**

**(e) Other contributions received or receivable (including non-cash)**

**(f) Total contributions (sum of a – e)**

- **Comment** – How are employer contributions “received”/“receivable” for self-funded plans when the plan is funded from the general assets?
- **Recommendation** – There should be an option for “not applicable” for those plans.

**Line 17 - Was there a failure to transmit to the plan any participant contributions or repayments as of the earliest date on which contributions could reasonably be segregated from the employer’s general assets (29 CFR 2510.3-102)?**

- **Comment** – This question does not apply to self-funded plans that are being paid from the plan sponsor’s general assets.
- **Recommendation** – There should be an option for “not applicable” for plans.

## **Part IV – Health Benefit Claims Processing and Payment**

### **Line 18a - Number of post-service claims submitted during the plan year:**

#### **(1) how many were approved during the plan year**

#### **(2) how many were denied during the plan year**

#### **(3) how many were pending at end of the plan year**

- **Comment** – Clarify when a claim is deemed to be “submitted”? In addition, most plan sponsors do not have information on numbers of claims, and may not have information on costs specifically paid for claims.
- **Recommendation** – The Department of Labor should require carriers, administrative organizations and the like to provide the required data to the plan sponsors in a standardized/uniform format for easier use when completing Forms 5500, since many employers will be getting the data from multiple carriers/sources. This recommendation applies to all claims-related data being requested, including numbers of claims, claims approved and denied, claims dollars, and appeals-related activity.

### **Line 18b - Number of post-service denials that were appealed during the plan year:**

#### **(1) Number upheld as denials during the plan year**

#### **(2) Number overturned and approved during the plan year**

- **Comment** - Some employers have multiple levels of appeals.
- **Recommendation** – Clarify how to count appeals that are submitted more than once for the same claim.

### **Line 18c - Number of pre-service claims appealed during the plan year:**

#### **(1) number upheld as denials during the plan year**

#### **(2) number approved during the plan year after appeal**

- **Comment** - There may be a disconnect for claims and appeals between the number submitted in any given year and number responded to in that year, in particular for claims incurred/appealed towards the end of the plan year. We are not sure of the implications if there is a disconnect as we are unsure of how the requested information will be used.
- **Recommendation** – The Form 5500 instructions should clearly define the specific information they are requesting.

### **Line 21 – Total dollar amount paid pursuant to claims during the Plan Year.**

- **Comment** – If is unclear whether this refers to dollars paid during the Plan Year (regardless of when the claim was incurred or submitted), or to claims during the Plan Year (and if so, incurred or submitted).
- **Recommendation** – Clarify the information that is being requested.

**Part V – Compliance Information. [Current Form 5500 Part III; the move limits plans required to complete this part to those providing health benefits] Plans that file Form M-1, skip questions 24-30**

**Line 22a - Were all plan assets held in trust, by an insurance company qualified to do business in a State, or as insurance contracts/policies issued by such an insurance company? (Section 403 of ERISA and 29 CFR 2550.403a-1 and 2550.403b-1). If no, complete line 22b.**

- **Comment** – Service providers are not always able to obtain this information from the plan sponsor.
- **Recommendation** – We recommend that the Department of Labor consider require the insurance companies to provide the plan sponsor with a certification attesting to this requirement.

**Line 22b - Check those that apply and include explanation for “other”. Plan assets not held in trust based on reliance on Technical Release 92-01 - Other (explain)**

- **Comment** - Technical Release 92-01 exempts welfare plans from the requirement to have employee contributions held in a trust, and allows three months to use the employee contributions to pay for plan benefits.
- **Recommendation** – Eliminate this question.