



December 5, 2016

The Honorable Phyllis C. Borzi  
Assistant Secretary  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Mr. Robert S. Choi  
Director  
Employee Plans  
Internal Revenue Service  
999 North Capitol Street, NE  
Washington, DC 20002

The Honorable W. Thomas Reeder  
Director  
Pension Benefit Guaranty Corporation  
1200 K Street, NW  
Washington, DC 20005

**Re: Proposed Rule on Annual Reporting and Disclosure and  
Proposed Revision of Annual Information Return/Reports  
(RIN 1210-AB63)**

Dear Assistant Secretary Borzi, Director Choi, and Director Reeder:

State Street Bank and Trust Company, the Bank of New York Mellon, the Northern Trust Company, and JPMorgan Chase Bank (the “Custody Banks”) write to respectfully submit comments to the Department of Labor (the “Department” or “DOL”), the Internal Revenue Service (“IRS”), and the Pension Benefit Guaranty Corporation (together, the “Agencies”) regarding the proposed changes to the Form 5500 and related regulatory changes (the “Proposed Changes”) published in the Federal Register on July 21, 2016.

As of September 30, 2016, State Street Bank and Trust Company had \$29 trillion in assets under custody and administration; the Bank of New York Mellon had \$30.5 trillion in assets under custody and administration; the Northern Trust Company and its affiliates had \$6.7 trillion in assets under custody; and JPMorgan Chase Bank had \$28.9 trillion in assets under custody and administration. Collectively, the Custody Banks hold over \$95.1 trillion in assets under custody and administration (approximately 63% of the over \$150 trillion global custody market) and provide a wide variety of services and products to institutional clients including plans subject to the Employee Retirement Income Security Act of 1974 (“ERISA”).

The Custody Banks appreciate the integral role the Form 5500 plays in enforcement, research, and policy formulation. Consequently, we appreciate the opportunity to provide comments on the Proposed Changes. Below, we first provide comments on the Proposed Changes generally and then offer comments on specific reporting requirements. Given the importance and complexity of the issues, we respectfully request that the Agencies hold a public hearing on the Proposed Changes and re-propose the Proposed Changes prior to finalizing the new rules.

### **General Comments**

The Custody Banks also fully support the Agencies' modernization efforts and concur that the Form 5500 simply has not kept up with the types of investments that are held by benefit plans, and an overhaul of the schedules is the right next step, to not only reflect the diversity of assets held today, but also to address information that has historically been collected but that has perhaps outgrown its usefulness.

However, the Custody Banks are concerned that the cost of implementing many of the reporting changes significantly outweighs the benefits. For example, we believe the following changes are particularly problematic:

- The elimination of the ability to disclose certain forms of indirect compensation in the form of a formula is extremely difficult, and in some cases, impossible to comply with the case of float and mutual fund compensation earned by trustees and custodians. In addition, disclosure in the form of a formula for some indirect compensation may be more meaningful and useful to plan fiduciaries when comparing service providers than dollar amount disclosures.
- The requirement to include contact information for each service provider to the plan as well as the plan's trustee should be eliminated as not providing appropriate information for use by either the Agencies, plan participants, and beneficiaries or researchers who review the Form 5500. Concerns for service providers include use of the information by the general public due to document accessibility. In addition, the usefulness and accuracy of this information for plan sponsors and regulators via the Form 5500 may be limited due to the timing of filing and review of the form.
- The requirement to report detailed asset-level information on both of the master trust's filing as well as the investing plan's filing, in the case of master trust DFE reporting, involves a costly expansion of the current Form 5500 reporting package provided by custody banks today and will not necessarily simplify the oversight process (as discussed below).
- The addition of a trustee signature line could be deemed to incorporate an underlying attestation as to the Form 5500 information; the trustee signature should be eliminated or its purpose should be clarified.
- The requirement to provide information regarding the "manner" in which assets are held in connection with the limited scope audit certification is difficult to interpret;

this requirement should be eliminated or without sufficient guidance should be provided as to what information is required.

- The requirement to identify individual investments as “hard-to-value” for purposes of Schedule H reporting will be difficult to comply with given the definition of this term, which should be made more consistent with “fair value” accounting rules.
- The requirement to identify assets for which “current value” is not being certified and the addition of impact of a trustee’s cautionary statement with regard to such assets may create confusion and should be revised to more effectively assist plan fiduciaries and auditors in identifying the assets for which the plan fiduciary may have an obligation to make its own “current value” determination.

The Custody Banks provide a wide variety of services to hundreds of thousands of clients, so the scale of the challenge of coming into compliance with new disclosure rules will be significant, especially taking into account administrative resources that have been allocated to analyze and ensure ongoing compliance with the Department’s fiduciary rule. While the Agencies provided a 12-page Technical Appendix discussing the Agencies’ view of the burden to filers and service providers, it is unclear what services or service providers were included in the analysis. The analysis does not seem to incorporate or address the custodial bank costs associated with the major overhaul of remapping assets and service provider codes, creation of programming logic to classify assets as hard-to-value (a designation which is not used in any other regulatory or financial reporting), and to prepare plan-level master trust or fee look-throughs. The difficulties of implementing the Proposed Changes will have very real costs well in excess of the Agencies’ estimates, and those costs will ultimately be borne by plan sponsors and participants. Until asset categorizations and other proposed changes are firmed up, custodian banks are not in a position to provide anything more than a rudimentary estimate of reprogramming costs

The costs of implementation could be *significantly* reduced through a collaborative process between the Agencies and the service provider community. The Agencies could also reduce costs by delaying implementation of EFAST 3 for two years after the date on which the changes are finalized and made public. Without enough time to develop the systems necessary to track the newly required information, the Custody Banks will be forced to use an *ad hoc* process to gather the required information, which will be costly, inefficient, and will yield inconsistent results (which is what the Agencies are trying to correct), and which will be labor-intensive. A delayed implementation period would give the Custody Banks the time necessary to develop the programming and new reporting output systems and to work with the Agencies to clarify outstanding interpretative issues, which would also improve the quality and consistency of the information being provided, and -- as importantly -- ensure that the information provided is in keeping with what the Agencies were expecting to see.

## Specific Comments

Below, we summarize our key concerns with specific provisions of the Proposed Changes and offer recommendations for improvement.

### I. Schedule C

- A. Elimination of “Eligible Indirect Compensation” Reporting. The Proposed Changes would eliminate the ability to disclose certain forms of indirect compensation (*e.g.*, float and mutual fund compensation) exclusively in a formula. The elimination of this ability to disclose a formula would raise a number of issues and does not align with the manner in which certain types of revenue are presently calculated and allocated. Specifically, trustees and custodians frequently receive float compensation as well as compensation from plan investments including mutual funds. It will take substantial resources, if it is even possible, to generate a reasonably accurate plan-level dollar amount disclosure that will accurately reflect the amount of float and mutual fund compensation received by trustees and custodians.

We urge the Department to allow covered service providers to disclose indirect compensation in the same manner and using the same methods as are permitted under the Department’s disclosure regulations promulgated under section 408(b)(2) of ERISA. Current guidance issued under section 408(b)(2) permits covered service providers to report indirect compensation using a dollar amount, formula, per capita amount, or any other reasonable method where no other method is possible. 29 C.F.R. § 2550.408b-2(c)(1)(viii)(B). Further, disclosure of float revenue using a formula is consistent with the methods permitted in the Department’s Field Assistance Bulletin 2002-3.

More specifically, in the context of mutual funds and collective funds, some forms of reportable indirect compensation are disclosed using basis points in lieu of a specific dollar amount, which allows for an “apples to apples” comparison between funds given that the dollar amount of compensation varies based on the amount invested. In this regard, the use of formulas or basis points to disclose certain types of indirect compensation is more feasible for custodians and other service providers because of varying interest rates and the absence of a specific plan-level dollar amount attributable to these types of compensation, which may be paid at an omnibus level. In addition, float revenue is imputed compensation, not actual compensation, as bank deposits are assets of the bank that can be used to fund general operations and may not necessarily generate any actual interest or other income. As such, calculating the “actual” dollar amount of float revenue on a per plan basis is not possible, and any attempt to do so would be nothing more than a highly imperfect guess that would not be meaningful. In the case of mutual fund fees and float in particular, we would argue that formulas actually provide a better basis for comparison of costs across service providers than an actual dollar amount.

In addition, many clients invest globally and maintain small deposits in a number of different markets and currencies. For these clients, calculations of a dollar amount for float revenue would need to be performed in each market in which the client maintains

deposits based on the cash value of the deposit and the applicable interest rate in each market. Calculating a dollar amount on a per plan basis, rather than describing the interest rate, significantly increases the complexity of reporting with little to no corresponding benefit, especially in the case of float, given the current interest rate environment.

We respectfully request that the Department permit indirect compensation earned by covered service providers to be disclosed via the same disclosure methods that are permitted under ERISA section 408(b)(2). This is consistent with the Department's stated goal of harmonizing Schedule C reporting with the section 408(b)(2) disclosure requirements. Moreover, covered service providers spent vast resources in the form of staff time and systems development just over four years ago in order to develop the disclosures provided pursuant to ERISA section 408(b)(2). The Department should not ask these same providers to spend even more resources to retool those same disclosures into dollar amounts, as these costs will be passed directly on to plan customers.

- B. Service, Compensation and Relationship Codes. The Proposed Changes would separate the existing compound question pertaining to service and fee codes into two separate lines, one to indicate service codes and the other to indicate compensation types. However, the Proposed Changes do not clearly define the new service provider codes and compensation codes, and they do not explain how existing codes relate to the new codes. We note that on the existing Schedule C, there are 24 compensation codes; however there are only 18 compensation boxes on the proposed form. Moreover, there are two new services types, one for Form 5500 preparation and another for IT support.

We request the Department to clarify how existing compensation codes can be mapped to the new coding schema, and explain how existing codes relate to the Administrative Expenses subcategories to be reported on the Schedule H. Mapping from existing codes to the new coding schema will require custodian databases to be recoded or new databases to be developed, and custodians must determine how to map existing codes to the new schema in the absence of more explicit guidance from the Department. Moreover, it is unclear how the new compensation codes will yield better comparative fee data, or be used by the Agencies to support their enforcement efforts. Given that the new compensation codes will require costly new coding and mapping systems, we question whether the revisions to these codes are useful enough to justify the costs associated with implementing them.

If Department's intent is to make the service provider codes and compensation codes clearer and more comparable, then it is uncertain whether this goal has been achieved by the Proposed Changes.

Moreover, the addition of "IT support" as a new category is problematic. Almost every provider to a plan includes some level of IT support in the services that it provides to the plan. Because the instructions state to indicate all services that apply, the box should probably be checked frequently when some other type of plan-level services is primary, such as investment management, recordkeeping, or trustee/custodial services. The

Department should clarify that this box should be checked only when the provider is hired to provide IT services directly to the plan without any other primary type of services as defined in the other services codes.

Further coding will be necessitated by the revision of the existing question related to reporting the “relationship to the plan sponsor” to “relationship to the plan.” We note that the instructions to this line indicate that the “other” line (line 1(b)(7)) should be checked, and the line filled out, if the provider serves as the “recordkeeper,” “fiduciary,” or “investment manager” to the plan. These three statuses will already be indicated on lines 1c(6) for recordkeeping, line 1c(5) for investment management, and line 1d to indicate a fiduciary provider. Because there will be programming and costs associated with service providers providing this information, we ask that the instructions indicating that line 1b(7) must be revised to eliminate the requirement to indicate a recordkeeper, investment manager, or fiduciary on line 1b(7).

- C. Service Provider Contact Information. The Proposed Changes would require plans to report contact information for each service provider that is not a natural person. Filers would be required to identify a person or office, including contact information, that the plan administrator may contact regarding the information required to be disclosed on the Schedule C. We do not understand why the Department would require this information to be reported in a publicly disclosed manner.

This new requirement is problematic for several reasons. First, primary reporting responsibility for the Form 5500 lies with the plan administrator, not service providers. To the extent that the Department or plan participants have questions about the services arrangement, they should reach out to the entity responsible for reporting, the plan administrator. The Form 5500 will already show contact information for the entities primarily responsible for the administration of the plan, including the plan administrator, sponsor, and named fiduciary. Moreover, contact persons at institutions will be subject to change from time to time, so this information will become stale quickly in many cases. The plan sponsor will indeed already have contact information for each of the plan’s service providers by dint of the day to day services relationship, and has no need to use the Form 5500 as a repository for service provider contact information. Finally, we note that having the names of potentially hundreds of bank officers in a public data repository could open up a potential for fraud. Accordingly, we urge the Department to remove this new requirement and not make publicly available contact information for individuals employed by service providers.

Further, to the extent that the Department or IRS intends to contact the service provider for information regarding the Form 5500, the service provider will not be able to provide the requested information, as it may not have a power of attorney authorizing it to speak on this matter. Public disclosure further runs the risk of confusing plan participants and beneficiaries as to who is actually responsible for administering their retirement plans. In addition, the accuracy of this information on the Form 5500 may be limited due to the time between year-end and the timing of the Form 5500 filing and subsequent use of this information by the Department or IRS.

We understand that the Agencies may desire to have service provider contact information in the event that they have concerns about the service provider from an enforcement perspective. The vast majority of service providers have good relationships with their ERISA clients and work with their customers to give them all the information that they need to comply with ERISA. Moreover, we note that the DOL has authority under section 504 of ERISA to request service provider contact information from the plan sponsors at any time for those service providers that may cause concern. Because the DOL may request this information at any time from plan sponsors, the DOL should not require contact information to appear on the Form 5500 for each and every service provider.

As an alternative to requiring service provider contact information for each and every service provider on the Schedule C, the Agencies could instead require specific service provider contact information to be provided only for those service providers who are (1) identified on Schedule C, line 4 as a non-responsive service provider, or (2) any service provider identified on Schedule H as terminated for a failure to comply with ERISA or section 408(b)(2).

## **II. Schedule D**

- A. Line 1a. The Proposed Changes would continue to require filers to name each plan that invested or participated in a direct filing entity (“DFE”) at any time during the DFE year. A separate line would need to be completed for each plan investing or participating in the DFE. This requirement means that common/collective trusts (“CCTs”) must store names and employer identification numbers (“EINs”) of plans that terminated prior to the end of the DFE year and provide the market value of a terminated participants’ interest (which will be \$0 in each case). As this requirement results in significant administrative burden, we urge the Department to make clear that the Schedule D reporting requirement does not apply to plans that terminated prior to the end of the DFE year.
- B. Line 1d. The Proposed Changes would require filers (except group insurance arrangements (“GIAs”)) to enter the dollar value of each investing plan’s interest in the DFE as of the end of the DFE year. A separate line would need to be completed for each plan investing or participating in the DFE. The main issue with this requirement is that, to the extent that a fund and plan have different fiscal years, the market value as of the end of the plan year and fund year may not align, resulting in an inconsistency between the plan’s filing and the DFE filing. Even if the year-ends do align, populating this information for each DFE investor – for example, in the case of a STIF vehicle – involves a substantial amount of work. Given that the plan’s Form 5500 will show the value of the plan’s interest as of the end of the plan year, we ask DOL to eliminate the requirement to report the value of the plan’s interest at the end of the DFE year on the Schedule D filed for the DFE. This approach will greatly simplify the filing and disclosure obligation of DFEs while providing the DOL with the information that it needs for its oversight purposes at the plan level. If this requirement is retained, the Department should explain how it is going to use this duplicative DFE-level information and how it aids the

Department in its enforcement efforts to justify the significant expense associated with this reporting.

- C. Line 1e. Under the Proposed Changes, if a DFE has investors other than ERISA plans that are required to file the Form 5500 or Form 5500-SF, such as governmental plans, one-participant plans, or non-plan investors, the DFE would be required to indicate this by checking the box in line 1e. This information should not be needed by the Department as the purpose of the DFE filing is to gather information on ERISA-covered plan investors. As such, we urge the Department to delete this box and eliminate the related requirement to simplify reporting. If the Department does not eliminate this requirement, the Department should explain why this information is needed.

### **III. Schedule G**

- A. Line 2d. The Proposed Changes provide that plans must indicate the nature of a fixed income obligation as a bond, option, swap, future contract, forward contract, or other. If other, plans must enter a description.

Generally, “fixed income obligations” have been interpreted to refer to bonds. However, under the Proposed Changes, this category has now been expanded to include derivatives and certain structured products like CMOs. The purpose of this expansion and the potential inclusion of swaps, and particularly exchange traded futures or exchange cleared swaps, that are in default is unclear. We request the Department to provide a clear definition of “fixed income obligation,” clarify that swaps that are in default would not be considered fixed income obligations, and explain the purpose of the expansion of the definition of “fixed income obligation.”

### **IV. Schedule H**

- A. Master Trust Look-Through. Under the Proposed Changes, each investing plan must reflect the value of its portion of each master trust asset on its Form 5500, in addition to master trust assets being reported on the master trust’s Direct Filing Entity (“DFE”) filing.

This new requirement will significantly complicate the provision of annual reporting packages if the Schedule of Assets Held has to be prepared on a pro-rata basis for each plan in the master trust. There is no cost or time savings for custodians or plans simply because the master trust investment account (“MTIA”) filings have been eliminated – in order to complete the new schedule of assets held for master trust holdings, plans’ percentage ownership figures will have to be extracted from the plan allocation or unitization module and then applied against the trust holdings in the Form 5500 module, which today is a manual process. Consider that most 401k/DC plans participate in a master trust where the assets of the master trust are held in segregated pools, or MTIAs. In the case of larger DC plans, there could be over a dozen or more MTIAs. Different clients may have different allocation methodologies for allocating assets among the plan’s that participate in the master trust. It is unclear whether Department has a

particular allocation methodology in mind. As such, given the lack of clarity regarding allocation, custodians will need to program multiple methodologies for each unique master trust, resulting in substantial programming costs. There would be extra costs to build an automated link, and we would need lead time to develop and test the revised programming.

Further, given that this information is reported by plans in their filings, the imposition of this requirement at the master trust level would result in double reporting with no cost savings. As a result, we are not sure what benefit would be, if any, to requiring that this information be reported on the master trust Form 5500 as well as the Form 5500 for each investing plan.

It would be helpful if DOL would engage in a dialog around what they are trying to accomplish with the changes to master trust reporting – how do they audit master trust plans and reporting today, how the custodian community can help them to better understand the legal structure of these master trusts and how to more readily document the MTIA holdings information. One suggestion could be to require master trusts (or plans that participate in them) to submit a trust structure schematic diagram that shows that various MTIAs within a master trust, and shows the MTIAs that hold investments in other MTIAs within the master trust. In other words, the best way to show master trust holdings may not be to require each plan to show a look-through to the pro-rata portion of each master trust asset that the plan holds, but to show a roadmap of the master trust at the trust level. This would assist auditors, the DOL and participants in understanding the assets that are held at the master trust and plan level.

- B. New Asset Categories. The Proposed Changes would add the following new asset categories: investment grade, high yield, exchange-traded notes, asset-backed securities, and foreign debt. In addition, common and preferred stocks would be categorized as publicly traded or non-publicly traded. New categories of foreign equities would be added, including ADRs. Other categories include: limited partnership, VCOC, private equity, hedge funds, developed real property, undeveloped real property, REITs (publicly and non-publicly traded REITs shown separately), MBS, CMOs, REOCs, other, futures, forwards, options, and swaps.

We request that the Department provide guidance on how to map the prior year's assets into the new categories for the first year of the revised Form 5500 filings so that beginning of year value matches the prior year's end-of-year values. Further, for futures, options, forwards, and swaps, we ask that the Department clarify whether filers should report fair market value and whether, for futures, the last day's pending mark should be reported.

One major issue with the Proposed Changes is that the proposed asset categories are not mutually exclusive, specifically in the case of the new partnership categories. For example, many alternative funds (*e.g.*, hedge funds) would fall within the limited partnership category. Thus, it is unclear whether an entity should be reported as a hedge fund or a regular limited partnership, and it is not clear which category would apply to

funds structured as LLCs. With respect to Delaware Statutory Trusts and limited liability corporations, which are taxed the same as limited partnerships, it is unclear whether these would be considered “joint ventures” for purposes of the Form 5500. As such, we recommend that the joint venture category be eliminated and captured as an “other” asset category or be clearly defined as any structure that would be taxed as a limited partnership. In addition, a private equity fund will often qualify as a VCOC, so it will not be clear whether to report these entities on the VCOC or private equity line. Foreign pooled funds also have other legal structures that would likely fall into the “other” category, and it is unclear whether DOL intended this result.

Custodians do not generally have information on the underlying investment strategy, the extent to which leverage or derivatives are being used, the legal structure of the fund, and whether a hedge fund or any commingled fund holds more than 25% of benefit plan investors. Custodians also do not generally know whether a particular limited partnership is a hedge fund, private equity fund, or some other type of alternative fund. Custodians would likely never know whether a particular limited partnership fund did or did not hold ERISA covered “plan assets” as this is a legal judgment the custodian would not be aware of. Therefore, to the extent the Department insists on a break-out of plan assets versus non plan assets vehicles, the Department should acknowledge that custodians and trustees cannot be held responsible for providing this information, which places the burden on the plan sponsors. Determining the correct asset category would fall entirely on plan sponsors and investment managers. If the Department insists on retaining these reporting distinctions between “plan asset” and “non-plan asset” vehicles, the Department should explain why it requires and how it will use this information. For custodians to be able to map existing limited partnership assets to new limited partnership categories, input would be required from investment managers with respect to each limited partnership for thousands of investments.

The Custody Banks are eager to engage with the DOL to bring more clarity to how these types of assets should be coded. However, as an industry, we are challenged with getting timely and accurate responses from fund companies regarding their legal structure and in trying to interpret which 5500 category should be used. Commingled investment vehicles are the least understood, have the least amount of industry standardization related to descriptions and asset identifiers, and will therefore require the most amount of time and effort to remap to the more granular asset categories that the DOL is proposing, which will largely be a manual undertaking given the lack of industry standardization.

Finally, we note that the distinction between a “publicly traded” versus a “non-publicly traded” security is not universally understood. The Department should articulate what it intends to capture by the distinction between “publicly traded” and “non-publicly traded” stocks and other securities to ensure consistent reporting across plans.

- C. Hard to Value Assets. Under the Proposed Changes, filers would be required to check a box for each individual investment listed on the Schedule of Assets to indicate whether the asset is “hard-to-value” under a new definition.

The Department's proposed definition of "hard to value" is problematic. One suggestion is to use the same accounting guidance that applies to "level 3" assets under fair value accounting rules in accordance with FASB Topic 820 Fair Value Measurement and Presentation. As an alternative, the Department should provide specific examples of the types of assets that are not listed on any national exchange or over the counter markets or for which quoted market prices are not available from publications, exchanges, or the NASDAQ. For example, it is unclear whether registered mutual funds would meet this definition given that they are not market-traded.

The current definition of "hard to value" asset does not enable a readily programmable solution for custodians, as custodians do not track whether a bond's "market price" was "available from publications," for example. Furthermore, it is unclear what the DOL is trying to ascertain by the "hard to value" flag; does the DOL intend to identify assets that priced using unobservable inputs? If so, assets other than those whose prices were quoted on an exchange or the NASDAQ (which is also an exchange) do have observable inputs to their prices but would be flagged as "hard to value" under the definition that the DOL has used. The HTV designation would result in assets that would qualify for a Level 2 designation in the FV hierarchy disclosures under current accounting guidance, now being flagged as "hard to value." This would add confusion to the users of the 5500, including plan sponsors, participants, and auditors. The "hard to value" flag will involve considerable reprogramming by custodians, as presently defined, and in our view, will not achieve the DOL's objective. We would be eager to work with the DOL on alternative standards.

In addition, we note that the Proposed Changes state that CCTs and pooled separate accounts that are primarily invested in "hard to value" assets should themselves be identified as "hard to value." The Department gave no guidance as to how to judge whether a CCT or pooled separate account is "primarily" invested in these assets. We request that the Department define "primarily" as meaning "80% or more of the value of the CCT or pooled separate, measured as of the end of the CCT or pooled separate account year." In addition, we note that custodians may not have the data to provide the required information. As such, an ERISA plan's investment fiduciary or plan administrator would need to make this determination for all existing and new investments in CCTs and pooled separate accounts.

- D. Assets With No Readily Determinable Value. The Proposed Changes would retain the following compliance question: "Did the plan hold any assets that either did not have a readily determinable fair value or were not valued by an independent third party appraiser?" (line 4g).

There has been considerable uncertainty with respect to the scope of this question since it was added to the Form 5500 several years ago. This question should be eliminated based on the addition of the "hard to value" identifier that will accompany the Schedule of Assets Held. The Department will have information related to "hard to value" assets in great detail on the schedule of assets held, so the existing "yes" or "no" question regarding non-readily determinable values on line 4g should be eliminated because it will

not provide additional information. Moreover, the inclusion of two different questions related to assets that are difficult to value will raise more uncertainty than it is worth because filers will be unsure of which assets should be captured by each of the two different tests.

If the Department does intend to have two separate tests for identifying those assets that are hard to value (meaning, one test for determining “hard to value” assets for purposes of checking the box on the line 4i attachment, and a second test for assets that do not have a readily determinable value on line 4g), the Department should clearly articulate the difference between these two tests. Plan administrators will be unable to distinguish between the two tests, and will be confused as to what assets belong in either category without further clarification from the Department.

- E. Security IDs. The Proposed Changes state that, for some schedules, filers must list all investment ID numbers “that apply.” This is simply unworkable, as any number of identifiers could apply. Without a consistent and simplified approach, this would also compromise the Department’s objective to enhance data mining in connection with securities held by plans. We ask the Department to identify identification numbers that are required if available, and allow other identification numbers to be included only if none of the required identifiers are readily available for a given asset, such as through a hierarchy of identifiers. Specifically, legal entity identifiers (LEIs) are not yet commonly used, often relate to issuers and not necessarily specific issues, and should not be mandatory. If multiple identifiers are required to be reported, extensive coordination between custodians and vendors will be required, and programming must also be developed, resulting in substantial costs to plans to generate the information. As a result, the Department should not require more than one identifier to be provided for any single asset. We would be happy to work with the DOL further on developing an appropriate hierarchy of identifiers.
- F. No Current Value Data Element. The Proposed Changes do not include a data element for current value in the line 4i attachment samples provided in the instructions. See 81 Fed. Reg. 47534, 47629 (July 21, 2016). This appears to be a drafting oversight in the instructions because it is inconsistent with the preamble discussion regarding the line 4i attachment, which suggests that a “current value” column was retained. See 81 Fed. Reg. at 47543. We ask that the Department clarify whether it intends to include a current value column in the line 4i attachments.
- G. All Sales In the Plan Year. Under the Proposed Changes, plans must report all sales in the plan year on a revised line 4i attachment (not just assets bought and sold within the same plan year as in the current attachment to line 4i). Reporting on all sales during the year adds significantly to the time and administrative resources that would be required to complete the revised Schedule of Assets. The Department should provide a clearer explanation of the types of transactions that should be reported and how “acquired” and “sold” are defined. For example, it is unclear whether paydowns and corporate actions (e.g., mandatory corporate actions) would need to be reported as “sales.” Also, some assets may be sold in tranches that occur over time, so it may be difficult to determine a

precise sales date for some asset sales. Finally, the schedule of assets sold during the plan year includes a box that is checked to indicate whether the asset was acquired during the plan year. Since the schedule no longer reports solely assets acquired and sold during the plan year, this box should be eliminated. It should no longer be necessary for the Department's purposes to have information regarding whether the asset was purchased within the year, so this box should be removed. The DOL should also reaffirm how the purchase and sale data is used today, and how gathering all sales information for a year will be used. Specifically, has sales data that has been gathered via the Form 5500 heretofore unearthed compliance issues that justify the continued need to collect this volume of trading information?

- H. 5% Reportable Transactions. It is unclear how the Department uses this information and how any such information is useful to the Department's enforcement and compliance efforts. Given the substantially added complexity to the Form 5500 in the revised Forms, and the amount of detail added to the proposed line 4i attachments, we urge the Department to eliminate this schedule, as it does not provide helpful or necessary information. In this regard, the Department should prioritize the asset-based information that it needs for its purposes, limit reporting to meaningful information, and eliminate some of the complexity of the line 4 attachments where possible in light of the volume of new information and added complexity on the revised Form 5500. As mentioned above, if this schedule is retained, we ask the DOL to justify how this information has been useful in the oversight of plan compliance: (1) what is done with the information that is collected today, and (2) what enforcement insights or actions have been gained by the information that is provided on the 5% Reportable Transaction schedule? For example, sales and purchases of collective STIF funds, which can occur daily across all accounts within the trust as a result of normal investment activity, generally end up on at least one of the 5% reportable transaction schedules. How is this sort of information useful to the DOL's plan oversight efforts?

Additionally, we note that there are significant challenges associated with the use of revalued cost as required by the Department for Form 5500 purposes (i.e., using the prior end of the year market value as the new cost to calculate gains and losses for the current filing year). It is costly to maintain this separate method that is used only by the DOL, and it creates reconciliation issues when comparing the unrealized and realized gains and losses in the Form 5500 to the financial statements. We concur with the AICPA that consideration should be given to eliminating the revalued cost approach, in favor of historical cost.

## V. **Compliance Questions**

- A. Leveraged Assets. Under the Proposed Changes, the Department has categorized securities lending activities as a form of leveraged investing. However, certain third party securities lending arrangements (such as in custody situations) or certain mortgage backed securities are not considered leveraged financing. Therefore, we request that the Department explain why these arrangements are being incorporated into disclosures

designed to identify leveraged transactions and how the DOL will use the information collected.

- B. Trustee Signature. Under the Proposed Changes, a trustee's signature would be added in the trustee information section on the Schedule H and Form 5500-SF. Many trustees are concerned that this added signature incorporates an attestation as to the accuracy and completeness of the Form 5500 as a whole, much of which contains information beyond the knowledge of and services provided by the Trustee. It is unclear what the significance of the trustee signature is on Schedule H. Also, consideration should be given to the logistical challenges with affixing the trustee signature to the Schedule H or Form 5500-SF when, in many cases, these reports are not prepared by the trustee.

We urge the IRS to clarify and confirm that the sole purpose of requiring the trustee signature is to start the statute of limitations under Internal Revenue Code ("Code") section 6501(a) for a trust described in Code section 401(a) that is exempt from tax under Code section 501(a). This was the stated purpose behind the filing of Schedule P, eliminated from the Form 5500 years ago. If this is indeed the sole purpose of the Trustee information on Schedule H, is a signature in fact required in order for the statute of limitations to run under section 6501(a) of the Code? If there is some other purpose that the trustee's signature is to serve, that should be identified by the Department in the final package. Further, because the trustee signs the limited scope audit certification, which will be attached, we ask the Department to eliminate the requirement of a trustee signature, and instead simply require information about the trust itself. The information provided about the trust on Schedule H should be deemed to start to the statute of limitations, and the IRS should clarify that this is the purpose of the trust information.

Finally, we ask that the Department clarify that the trust EIN is distinct from the plan sponsor's EIN, as there is confusion on this point. The proposed instructions further allow for use of the EIN on Schedule R that is used for the issuance of benefit payments or "used to conduct transactions of the trust." In the case of the Schedule R, custodians may use a universal EIN for transmission of federal tax withholding. This universal EIN reflected on Schedule R may be used to report withholding to the IRS for hundreds of clients. We are uncertain why the DOL asks for a trust EIN but then offers the option to default to the Schedule R EIN. If the Schedule R EIN would suffice, is it necessary to require the reporting of the Trust's EIN on Schedule H?

- C. Trustee Contact Information. Under the Proposed Changes, the trustee's contact information, including the name, address and telephone number, would be added in the trustee information section on the Schedule H and Form 5500-SF. It is unclear under what circumstances the Department would contact the trustee. Further, pursuant to the Proposed Changes, the Department would obtain contact information for the plan sponsor, the plan administrator, as well as the named fiduciary. With this information, the Department will have contact information for the key plan fiduciaries and officials who have primary responsibility for the Form 5500 and the plan. As such, the Department should not require contact information for additional providers, including the trustee, as it is unnecessary and will add to the time, expense, and complexity of

completing the plan's Form 5500 filing. As we mentioned in comment I.C. above, even if plan participants or the Agencies were to contact the trustee, the trustee will likely not be authorized to provide information on behalf of the trust. Moreover, the sponsor will already have the trustee's contact information. We ask the Department to eliminate this information, which will not be useful to any person reviewing the Form.

## **VI. Statement Certification under 2520.103-8**

- A. Manner Held. The Proposed Changes require the custodian bank to describe the "manner" in which it is holding the assets covered by the certification under 29 C.F.R. § 2520.103-8. Given that a limited scope audit extends to all assets "held" by a bank or similar institution, without regard to the "manner" in which such assets are held, we respectfully request that the Department eliminate the "manner held" description from the proposed changes to the certification. We suggest that the Department could instead require the certifying entity to separately identify any assets for which the certifying entity does not maintain evidence of ownership, which is generally considered the equivalent of "holding" a non-physical asset.

If this requirement is retained, we would urge the Department to clarify what information is intended to be conveyed by "manner held," as well as the purpose for requiring such information. For example, does this mean a simple identification of whether assets are held in a trust or custodial account or in a separate account? Further, it is unclear how to answer for common, non-physical assets such as stocks, derivatives, limited partnerships, collective funds, and mutual funds. For example, will banks be required to indicate whether the asset is held in nominee name or street name, or disclose the name of the depository trust company, transfer agent, prime broker, and/or foreign depository/clearing agency? We also note that requiring this sort of detail for every asset would involve a tremendous amount of additional programming, the costs of which would be transmitted directly to plan customers. Therefore, it is important that stakeholders understand the rationale for (and expected benefits of) requiring this information.

- B. Current Value Caution. The Proposed Changes require that assets for which "current value" is not being provided must be separately identified (and a "caution" must be included). However, based on the definition of "current value," most bank custodians are not in a position to determine whether the prices they obtain from third-party sources represent current value. More specifically, current value is defined as "fair market value where available . . . [or otherwise,] . . . the fair value as determined in good faith under the terms of the plan by a trustee . . . assuming an orderly liquidation at the time of the determination." This is not a workable standard and does not align with current market practice, under which trust agreements do not require the trustee to determine either "fair market value" or "fair value" based on orderly liquidation. In addition, we are concerned that, to the extent "fair market value where available" is intended to refer to market price, certifying that such a price represents "current value" may be seen as an implication that the custodian is making a determination that market price is fair market value.

Because trustees are not able to determine whether prices they obtain from pricing sources represent “fair market value where available” or “fair value” based on an orderly liquidation, we are concerned that many trustees may simply provide the “caution” with respect to all assets in its certification in a boilerplate caution provided to all ERISA clients. This would provide little or no benefit to plan customers or their auditors. Accordingly, we respectfully request that the Department consider revising the Proposed Changes in several ways. First, the Department could eliminate the requirement to separately identify assets for which current value is not provided and instead require custodians to either certify they are providing “current value” for all assets or include a “caution” notifying the plan fiduciary that (i) prices provided by the custodian may not represent “current value” and (ii) the plan fiduciary has an obligation to verify that prices reported by the custodian represent “current value” before using them for Form 5500 reporting purposes. In addition, the Department could provide guidance stating the any assets that are not considered “hard-to-value” are equivalent to assets that have an “available” fair market value. This will assist plan fiduciaries and auditors in identifying the assets for which the plan fiduciary is obligated to make its own “current value” determination. Finally, the Department could clarify that the inclusion of a “caution” stating that the custodian is not certifying current value does not eliminate the plan sponsor’s ability to rely on a limited scope audit.

We note that these issues related to the limited scope audit certification are critically important to trustees and custodians and there is much uncertainty as to what specific information the DOL intends to require to be certified under 29 C.F.R. § 2520.103-8. We would like this letter to serve as the beginning of a dialogue with the Department about the scope of the certification requirement. Specifically, we would like to request a meeting with the Department to further explain our concerns and provide input with regard to our challenges related to current value determinations, in particular. We believe that by working together, we can help the Department develop workable rules that trustees and custodians can comply with, and benefit plan sponsors by helping them comply with their ERISA reporting obligations. We thank you for considering our request.

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We appreciate your consideration of our comments and recommendations. As noted above, we request that the Agencies hold a public hearing on the Proposed Changes and re-propose the revisions prior to finalizing the new rules.

Sincerely,

/s/ Peggy A. Bradley  
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/s/ Susan M. Hollingsworth  
Senior Managing Counsel  
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/s/ Kristen A. Kennedy  
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