

GROOM LAW GROUP

December 05, 2016

Submitted electronically via e-ORI@dol.gov

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: RIN 1210-AB63 – Proposed Revision of Annual Information Return/Reports (Form 5500) and Proposed Rules Regarding Annual Reporting and Disclosures

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

We write on behalf of the Groom Recordkeeper Group, a coalition of firms that provide recordkeeping services to employee benefit pension plans (the "Group"). Together, the members of the Group serve as the backbone of the retirement plan industry, helping to provide millions of working families the opportunity to earn a secure retirement benefit. This letter provides comments with respect to the proposed changes to the Form 5500 and related regulatory changes (the "Proposed Changes") issued by the Department of Labor (the "Department"), the Internal Revenue Service ("IRS" or the "Service"), and the Pension Benefit Guaranty Corporation (together, the "Agencies").

The Group appreciates the Agencies' constant and prodigious efforts to improve the Form 5500. The Form 5500 is an important source of information for the Agencies, participants, and financial service providers. The Group, like the Agencies, is committed to improving transparency throughout the retirement system. As you know, recordkeepers play an indispensable role in assisting plan sponsors gather and compile the data necessary to file the Form 5500 and related schedules. In fact, virtually every employer that sponsors a retirement plan – whether it is a defined contribution plan, defined benefit plan, or ESOP – relies heavily on the assistance of a recordkeeper in order to comply with their Form 5500 reporting obligations. Thus, the Proposed Changes would have a significant effect on recordkeepers.

In section I of this letter, we provide general comments on the cost and benefits of the Proposed Changes. We then, in section II, comment on specific changes and provide suggestions for the Agencies' consideration. In section III, we request that the Agencies accommodate our concerns by holding public hearings on the Proposed Changes, re-proposing the changes before finalization, and at the very least, delaying implementation.

I. Costs Outweigh Benefits

The Group shares the Agencies' goal of improving the utility of the Form 5500 and related schedules, but this is not the proper time for the Agencies to attempt to make such substantial changes. Over the past six years, the Agencies have made significant reporting and disclosure rule changes that have required massive new compliance regimes. For example, it has only been six years since the Agencies last made major changes to the Form 5500, and it has been a mere four years since the Department imposed complex participant fee disclosure rules. Moreover, recordkeepers currently are expending significant resources coming into compliance with the Department's new regulation related to investment advice. Recordkeepers and others in the industry simply do not have the resources to implement so many major regulatory changes in such a short period of time.

If the Agencies deem it is necessary to push forward with the Proposed Changes – despite the potential for industry disruption – the Agencies should, at the very least, do more work to quantify the costs and benefits. The Group has reviewed the Agencies' cost estimates for the Proposed Changes and believes the estimates significantly understate the true cost.

In determining the cost of implementing the Proposed Changes, the Agencies should consider historical evidence of the prior changes to the Form 5500. For example, the Agencies updated the Form 5500 in 2009, and those changes came with significant implementation costs. The Agencies originally estimated that the proposed changes for the Form 5500 in 2009 would have led to a cost reduction of \$174,000,000. However, one Group member estimates that its implementation took over 123,000 person-hours at a cost of over \$7 million dollars and required an implementation period of over 2 ½ years. We believe this example to be generally representative of the implementation costs and challenges experienced by other recordkeepers. But other Group members would be pleased to provide the Agencies with estimates of their own implementation costs if the Agencies would find it informative.

In comparison to the last major 5500 update in 2009, the implementation of the Proposed Changes is expected to be much more resource intensive because the Proposed Changes involve a much greater number of new questions and data elements, including new attachments. In fact, the Proposed Changes would be a net increase of \$502,800,000 when comparing against the Agencies' regulatory impact analysis for the 2009 update.

The Proposed Changes will require recordkeepers to build an entirely new infrastructure capable of tracking, capturing and reporting immense amounts of data to plan sponsors. The Group realistically estimates the extraordinarily resource-intensive process to be two to three times more than the cost of the 2009 changes (excluding any of the costs related to health and welfare plan reporting changes).

The more than four hundred new or modified line items in the Form 5500 represent a significant volume of data for multiple parties to gather, analyze, and report. Although one of the purposes of gathering this information is accessibility and usability of data to achieve research and enforcement objectives, it comes at the expense of plan sponsors that will need to expend resources to comply with the new requirements. For plan sponsors already questioning the value of their retirement arrangements in the face of recent regulatory requirements, there is concern this new burden may result in more employers turning away from these arrangements and fewer employees becoming retirement ready.

The Agencies cite several benefits to the Proposed Changes. For example, the Agencies believe that the Proposed Changes will (i) modernize financial reporting by, among other things, extending the reporting of alternative investments, (ii) enhance data transparency and mineability to allow private sector data users to develop more tools for employers to evaluate their retirement plans, (iii) improve service provider fee information, and (iv) enhance compliance with the Employee Retirement Income Security Act of 1974 (“ERISA”) and the Internal Revenue Code (the “Code”). The Group questions whether the Proposed Changes will accomplish these goals. Regardless, the Agencies, in large part, have not even attempted to quantify the supposed benefits. Without quantifying the benefits, it is impossible to do a prudent cost-benefit analysis of the Proposed Changes.

We note that the Group disagrees with the Department’s assertion that “the annual cost burden on filers would be higher still in the absence of the [Proposed Changes] in lieu of the statutory requirements.” Proposed Rule, Annual Reporting and Disclosure, 81 Fed. Reg. 47496, 47515 fn. 50 (July 21, 2016). The Proposed Changes are significantly more complex and less flexible than the statutory requirements under ERISA. Moreover, the Agencies are not working from a clean slate. They are proposing revisions that build upon an existing regulatory process and framework that has been in existence for decades.

II. Specific Comments

The Group offers the following comments on the Form 5500 and related schedules. Where appropriate, we have made suggestions for alternative approaches.

A. Form 5500

Mandatory Preparer Information. Most recordkeepers do not currently report themselves as paid preparers on the Form 5500 because all of the guidance to date has provided that preparing a Form 5500 does not make a recordkeeper a “tax return preparer” and does not subject a recordkeeper to Circular 230. IRS Notice 2008-13 (Form 5500 is not a tax return that will subject one to tax return preparer penalties under Code § 6694 and someone who prepares Form 5500 is not a tax return preparer under Code § 7701(a)(36)); IRS Notice 2011-6 (preparers of Form 5500 are not subject to the preparer tax identification number requirements). The Service now believes that it needs basic information on Form 5500 preparers so that the IRS can contact preparers for issues relating to Form 5500s and plan qualification.

The Group is sympathetic to the Service's desire to identify a point of contact, but it would be inappropriate and unhelpful for the Service to contact recordkeepers directly. Recordkeepers rarely, if ever, have a power of attorney for their plan clients, so if the Service were to call, a recordkeeper would not be legally permitted to respond. Even if recordkeepers could respond, they are unlikely to be in a position to answer the Service's questions about the Form 5500 without contacting the plan's administrator. Recordkeepers merely gather information from various sources and help compile it for the plan administrator. They do not take tax positions or provide legal advice. They also have access to a limited subset of information about plan administration, and the final Form 5500 actually filed by the plan administrator may differ significantly from the one initially prepared by the recordkeeper. For example, prior to submission, plan administrators may adjust the draft Form 5500s provided by recordkeepers to reflect any true-ups or any other information that is necessary for a complete and accurate Form 5500.

Importantly, the Service already has contact information for the key entities responsible for plan administration and compliance (*i.e.*, the plan administrator and sponsor) under current Form 5500 rules. They are listed with a telephone number on the Form 5500. These parties, rather than the recordkeeper, are the appropriate parties to contact in the event there are issues or questions with the Form 5500 or plan qualification as they are the legal representatives of the plan. Thus, the preparer information should be removed from the Form as it will only create confusion as to the reach of the Service's PTIN and paid preparer rules.

B. Schedule H

“Hard to Value” Assets. Under the proposed changes, the Department has specifically defined a CCT or a PSA that is invested primarily in hard-to-value assets to itself be a hard-to-value asset, regardless of whether it is valued at least annually. The Group respectfully disagrees that CCTs and PSAs should be identified as hard-to-value regardless of the underlying investments that they hold. Mutual funds invest in similar assets as separate accounts, including the “hard-to-value” assets mentioned in the Proposed Changes, without being considered hard-to-value.

The Advisory Council Report on Employee Plan Auditing and Financial Reporting Models includes background commentary on Limited Scope Audits. It states, “ERISA § 103(a)(3)(C) permits the plan administrator to exclude from the audit any plan assets held by a bank or similar institution or insurance carrier regulated by a state or federal agency. Based on the its legislative history, the Advisory Council understands that ERISA contains this exclusion because Congress presumed that assets held by such institutions were already subject to a governmental audit and regulation and therefore at less risk. It also appears that at the time of ERISA's enactment, retirement plan assets were often held under insurance contracts or in trusts. Custodian banks or trust companies held assets and provided an independent valuation of asset values. Most investments had readily ascertainable market values. Witnesses recounted that since 1974, the investment landscape has changed dramatically. Alternative asset classes and hard to value assets have exploded and now occupy a significant allocation in many plan portfolios. In short, the context in which the limited scope exemption was adopted no longer exists.”

The Group agrees that plans are holding a wider range of assets, but that wider range is outside the CCT and PSA structure. As referenced above, CCT and PSA continue to be regulated by state or federal agencies and continue to be subject to governmental audit and regulation. The Group – as banks, trusts, and insurance carriers – continue to hold these assets and provide independent valuation of those assets. The valuation process for CCTs and PSAs is consistent with that applicable to a mutual fund and, in many cases, use the same or similar custodian and valuation agents as mutual funds.

In addition, plans do not own the underlying investments in CCTs or PSAs. The plan owns units of participation in the overall CCT or PSA. Under FASB Accounting Standards Codification TM (ASC) (Topic 820), CCTs and PSAs are able to use the NAV per share as practical expedient to estimate the fair value of a CCT or PSA if the following criteria are met:

- The investee has calculated NAV consistent with ASC 946, which contains guidance on how investment companies calculate NAV;
- The NAV has been calculated as of the investor's measurement date (e.g., date of the financial statements); and
- It is not probable at the measurement date that the reporting entity redeems the investment at an amount different from NAV.

Therefore, consistent with FASB guidance, the Agencies should allow for CCTs and PSAs utilizing NAV as a practical expedient to be reported consistently with assets with readily determinable fair values rather than labeling them as hard-to-value.

Asset Breakouts. The proposed Schedule H greatly expands the asset-type breakouts to provide more accurate and detailed reporting on the types of investments held by the plan, including alternative investments and investments through collective investment vehicles. New breakouts have been added to Schedule H for audit fees, trustee and custodial fees, actuarial fees, legal fees, valuation fees, and trustee expenses. While the Group does agree that additional investment breakouts are appropriate, it is not in agreement with the extent to which this information is requested for the following reasons:

- *Likely Empty Spaces.* A majority of plans in the industry will be required to fill out only a few breakouts leaving the remaining items blank. This level of detail may confuse plan sponsors and fiduciaries making the Schedule H less useful.
- *Line 2 Expenses Breakouts.* The expansion of the administrative breakouts will require extensive system changes for recordkeepers and service providers. The changes will include more collection from the plan sponsor for expenses paid from plan assets, participant accounts as well as ERISA budget accounts. This level of breakdown is duplicative because the detail will be already reported on the Schedule C. A general desire of the Group is to eliminate duplicative reporting requirements in the Proposed Changes, where possible, in order to reduce administrative burdens, costs, confusion and the possibility of ministerial mistakes when complying with those requirements.

- Another issue noted is that updates for the earnings on Line 2 in relation to the new investment breakouts to Line 1 were not included. The Group requests that the Agencies update the instructions to map the earnings on Line 2 to Line 1, or conversely, line 2 should be expanded to match line 1.
- *Necessity of a Mapping Document.* Without a mapping document, the Department may, counter to its stated intention, receive inconsistent results due to the filer's ability to interpret this requirement in different ways. For example, there is a line for earnings on "Loans – other than participant," but there is no longer an asset line for "Loans – other than participant." Would the plan sponsor place all the earnings on Exchange Traded Notes and Asset Backed Securities in 2c(a)(F) "Other"?

Stable Value CCT Value. FASB issued Accounting Standards Update No. 2015-12 ("ASU"). This ASU clarified the definition of Fully Benefit Responsive Investment Contract ("FBRIC") to apply to "traditional guaranteed investment contracts" and "synthetic guaranteed investment contracts." The update designates contract value as the only required measure for FBRICs since contract value is the relevant measure for these contracts because that is the amount participants normally would receive if they were to initiate permitted transactions under the terms of the plan. This now coincides with Form 5500 Schedule A reporting as Line 4 (Current value of plan's interest under this contract in the general account at year end – current value defined as fair value) and excludes fully benefit responsive contracts.

The Form 5500 currently requires CCTs to report at fair value. Stable Value CCTs are very similar to FBRICs. Like FBRICs, the book value/Net Asset Value ("NAV") is the relevant measure for these investments because that is the amount participants normally would receive if they were to initiate permitted transactions under the terms of the plan. The Group request that the Department consider, if it has not already done so, making the same exception for Stable Value CCTs as it has for FBRICs since for both the contract/book value/NAV is the amount participants would normally receive and clarifying its position in the instructions or through an FAQ.

Additional Columns on the line 4i Schedule of Assets. The Group requests that the sections have all columns with consistent information up front and place any variable columns at the end. For example, "Check if asset is hard-to-value asset" is (iii) for Element (a), (iv) for Element (b) and (v) for Element (c). This should be in the same position for all 3 Elements. Additionally, there is also no column for entering the current value of each investment on any of the proposed line 4i attachments.

Clarify Requirements for Beginning of Year Values for New Asset Categories. For the first effective year of the revised Forms, the Forms will require beginning balances for new categories of assets. There will be a significant one-time cost associated with generating these "beginning balances." The Group requests that the Department provide guidance as to how to reflect beginning of year values for the new asset categories and to provide enforcement relief for good faith efforts to compile those beginning balances.

Investment Alternative Comparative Chart Attachment. The Proposed Changes require that the section 404a-5 regulatory comparative chart containing designated investment alternative information be attached to the Form 5500. The Group understands that the Department may be interested in asking compliance questions on whether this disclosure was provided, similar to the current question regarding whether “blackout” notices were provided. However, the attachment of the chart will cause expense and delay in achieving a complete filing. This attachment is not in a structured format and is not mineable, and the Department has separately required the provision of certain pieces of information from the 404a-5 regulation as part of the Proposed Changes, so the Group questions the intent of the Agencies to require this attachment. Moreover, the Department currently has the authority to request the chart under ERISA section 104(b)(6). The Group strongly requests that the Department not require the addition of this, or any, attachment to the Form where it already has a method of obtaining the information so as not to unreasonably burden and complicate the Form 5500 process.

Line 4p. This line requires disclosure of the number of designated investment alternatives (“DIAs”) available under the plan and the number of DIAs that are index funds. This question duplicates information already listed on the Schedule of Assets Held and should be removed. The Group requests that the Department instead add a check box to the line 4i attachment to Schedule H for investments classified as DIAs, and for those DIAs that are index funds.

Line 4u. This line asks whether the plan sponsor paid any expenses that were not reflected on line 2i. Plan sponsors pay administrative expenses routinely from their general assets without reimbursement from the plan. They do not necessarily keep plan-related records of these expenses. Rather, records associated with these expenses would be kept in the company’s general expense records and frequently would not be easily accessible to those involved in filing the Form 5500 for the company’s benefit plans. The Group requests that this line be removed as it will not provide any useful information to the Agencies and simply adds more complexity and burdensome data retrieval to completing the form accurately.

Line 4z, Uncashed Check Reporting. Answering these questions will require system updates to collect, capture and report the data for the 5500. The Group requests guidance from the Agencies, either in a final rule or through FAQs, on the meaning of “any uncashed check at the end of the plan year.” For example, are escheated funds to state governments still considered “uncashed checks” for purposes of the 5500? And are FDIC-insured bank accounts set up for participants with uncashed checks, under FAB 2014-1, still considered “uncashed checks” for purposes of the Form 5500? Also, it is not clear how various approaches described in FAB 2014-01 should be integrated into the answers to the new questions. The Proposed Changes require a plan administrator to report, in a narrative description, procedures regarding verifying addresses, and monitoring uncashed checks. This narrative information, along with the other items the Department asks plan administrators to “describe” through the use of open text fields, seems likely to bog down reporting without providing much in the way of useful or minable information for the Department. Because only a limited number of characters will be permitted in the narrative description boxes, the mere process of a plan administrator deciding how to succinctly describe its procedures so as to enter a description will itself be difficult and time

consuming. The Group requests that the Department remove the narrative response boxes entirely or, at most, include a ‘yes’ or ‘no’ question regarding whether such procedures exist.

Line 6. This line requests information on service providers who are terminated. Currently, this question reads: “Have any of the plan's service providers, other than an accountant or actuary who has been identified in Line 5, been terminated for a material failure to meet the terms of a service arrangement or failure to comply with Title I of ERISA, including the failure to provide required disclosures under 29 CFR 2550.408b-2?”

The Group requests that the Agencies remove this question or, alternatively, asks that clarification be provided on what the Agencies consider a “material failure.” Without this additional clarification, plan administrators will make subjective judgment calls regarding service provider terminations. If the question is retained, the Agencies will need to incorporate an additional question that asks the plan sponsor/fiduciary if they have contacted the service provider to request the necessary information. Further, there should be a statement indicating that they will be listed on Schedule H as a service provider who failed or refused to provide information if the requested information is not provided. Plan sponsors and fiduciaries should have increased accountability on this question otherwise they may list service providers for reasons outside of the service arrangement or 29 C.F.R. 2550.408b-2 (“408b-2”).

Lastly, the current Schedule C reporting of terminated accountants and actuaries requires plan administrators to provide terminated accountants and enrolled actuaries with a copy of the plan’s explanation for their termination. It also requires that a notice be provided informing the service provider that they are being reported and that they have an opportunity to submit comments to the Department concerning any aspect of the plan administrator’s termination explanation. The revised forms have no indication that such notice must similarly be provided to terminated service providers that are not accountants or actuaries. If this new question is ultimately retained, terminated service providers, other than accountants or actuaries, must be given the same benefit of notice afforded to terminated accountants and actuaries. Additionally, the Group requests that the Agencies move line 6 to Schedule C in order to consolidate it with the other service provider information.

Line 7b/7c. The Agencies are requesting the Plan Name, as listed on the Form 5500, EIN, plan number, date of transfer, and type of transfer for transfers in and out of the plan. This is a burden on plan sponsors and recordkeepers. Processes will need to be updated to request the information, and the data will also need to be stored. The Group requests that the Agencies remove these new data points from the Forms. We note that this data is already provided via Form 10 and Form 5310-A. If those forms are not sufficient, then the IRS should consider updating those forms rather than the Form 5500.

Unrelated Business Taxable Income (“UBTI”). The Proposed Changes would require a disclosure as to whether a plan trust incurred UBTI. UBTI is very difficult to track, particularly in plans with self-directed brokerage windows, and the responsibility for tracking UBTI resides with officials of the plan, not the recordkeeper. Consequently, most recordkeepers do not have the systems in place to track UBTI, and building those systems will be difficult and expensive.

The Group notes that, generally, UBTI is already required to be reported on Form 990-T, so we request that the Agencies remove this line from the Forms.

Accountant's Opinion. Part III of Schedule H requires that plan sponsors/recordkeepers provide information related to an Accountant and peer review questions. The Group believes that many of the questions in this section provide information that could be gathered by the plan's administrator during the audit process, but it should not appear on the Form 5500. The Department could provide further guidance to plan sponsors on the sponsor's obligations in hiring a qualified auditor that would involve reviewing the auditor's peer review processes, but we believe it is an overreach for the Department to require peer review information to appear on the Form 5500 itself.

Trustee Signature. The Agencies are proposing to mandate a Trustee Signature, as well as EIN and phone number for the Trustee. In 2006, the IRS announced the "Elimination of Schedule P of the Form 5500 Series." *See* IRS Announcement 2007-63. It cited the announcement of the rules mandating electronic filing as well as reduction in administrative burden and anticipation of the transition to a fully electronic environment as their reason for the elimination. It was stated at that time the Service had determined the continued use of Schedule P in connection with the filing of the plan's Form 5500 was no longer necessary for the efficient administration of the Internal Revenue laws. The announcement goes on to state that "Pursuant to the authority contained in Code section 6033(a), the Schedule P, which may be completed by a trustee of an employee benefit trust as the annual return of the trust, is being eliminated."

The Service also stated they would "treat the plan's filing of a return from the applicable Form 5500 series as if the filing constitutes a return of the plan's employee benefit trust for purposes of §6501(g)(2). Thus, the Service will not assess income taxes with respect to an employee benefit trust later than the limitations periods specified in section 6501 for the assessment of tax related to the Form 5500 filed by the plan to which the trust relates."

It is unclear why, after 14 years of not needing this information, it is necessary to once again include trust information and a signature to satisfy the requirements under Code section 6033(a). The Group notes that a signature for a trustee is already required to be received on the Trustee's certification for purposes of the limited scope audit rules. Moreover, the name of the Trustee and a contact person's name and address will already appear on the Schedule C. Because this information is duplicated by other information provided on the Form, the Group requests that the Trustee signature line be eliminated. It should be enough that Trustee information appear on the Form 5500 (without a signature) in order to start the running of the statute of limitations under the Code, and the Agencies should make clear that the statute of limitations will run without a signature.

Additional Requests for Specific Definitions and Examples. Schedule H contains terms that need further clarification either through examples or definitions in order to ensure correct completion of the Form 5500. Undefined terms will likely result in less than useful data because plan sponsors and service providers will be inconsistent in their responses and understanding of the question. Therefore, the Group requests that the Department provide additional guidance, definitions, and examples, either as part of a final rule or through FAQs, regarding the terms

used in Schedule H and throughout the Proposed Changes. Below we have listed several of the terms in Schedule H where the Group is seeking such guidance:

- (i) Part I Section 1b(4) – Define “Publicly traded.”
- (ii) Part I Section 1b(6) – Define “Eligible Pooled Investment Vehicle.”
- (iii) Part I Section 1b(9) – Define terms used in this section.
- (iv) Part II Section 2i(12) – Define the terms used in this section.
- (v) Part IV Section 4r – Define “utilized.”
- (vi) Part IV Section 4t – Define whether contract value, an appraisal value, or both is considered the “fair market value.”
- (vii) Part IV Section 4x –
 - Define “affiliates.”
 - Clarify whether “direct” and “indirect” compensation have the same meaning as Schedule C and the 408b-2.
- (viii) Part IV Section 4z –
 - Define “no longer negotiable” as referenced in instructions.
 - Define “subject to limited payability” as referenced in instructions.
- (ix) Part V Section 6 – Define “material failure.”
- (x) Part VI Section 7a(2) – Define “distributed.”
- (xi) Part VI Section 7b & 7c – Define the terms used in this section. In particular, please differentiate “Merger” from “Consolidation.”

C. Schedule A

Group Health and Welfare Plans. The Group requests that the Agencies require Schedule A only for group health and welfare contracts. For pension contracts (DAs, IPGs, and GICs) the information on Schedule A can easily be reported on other Schedules. For example:

- (i) Form 5500, Line 10 indicates Insurance Contracts;
- (ii) the Schedule of Assets reports the Name of Insurance Carrier, EIN of Insurance Carrier, NAIC Code;
- (iii) Schedule H and Form 5500 SF report the specific asset information; and

(iv) Schedule C and 5500 SF can be updated to report all insurance commissions.¹

Commissions and Fees. The Group requests that commissions and fees be moved to the Schedule C, so that all commissions and fees are reported in one place. As discussed above, the Group is making a global request that the Department consolidate and reorder the Proposed Changes in order to minimize, as much as possible, duplicative and disjointed disclosures.

Line 2. This line asks if the policy or contract was issued by an insurance company that is wholly owned by the plan or the plan sponsor. No instructions were provided for line 2. The Group requests that the Department provide instructions and examples either as part of a final rule or through FAQs.

D. Schedule A/H

Adequacy of Insurance General Account Contracts Breakout Categories. The Group questions if the breakout categories for the insurance general account contracts are adequate. Many DA and IPG contracts were issued prior to or shortly after the passage of ERISA and are not common today. Today there are newer generations of “hybrid DB” contracts. Since current DA & IPG’s have many other names and differ from the originals in a number of ways, the Group requests that more current, broader categories such as DB Group Annuity Contract, DC Group Annuity Contract, GIC (with defined maturity dates), GIC (Evergreen) be used in the final rule.

E. Schedule C

Indirect Compensation. Reporting the total amount of indirect compensation as an estimated dollar amount runs contrary to the Agencies’ efforts to harmonize Schedule C reporting with the Department’s 408b-2 disclosure regulations. 408b-2 does not require plans to report, or service providers to calculate, the total amount of indirect compensation paid to a service provider as an actual or estimate dollar amount. To the contrary, 408b-2 permits the disclosure or reporting of indirect compensation as a formula or percentage of assets, rather than an actual or estimate dollar amount. This was a deliberate and carefully considered choice that the Department made during the notice and comment process for 408b-2, and it would not be appropriate to upend that regulatory outcome. Therefore, the Group requests that, for covered service providers, indirect compensation should be permitted to be expressed by the same methods that are permitted to be expressed under 408b-2, including by a formula, percentage or per capita amount, or where no other method will reasonably disclose the compensation, by any other method. The inconsistencies between permissible 408b-2 disclosures and Schedule C reporting will cause confusion and unnecessary expense as providers must revisit disclosures they drafted in 2012 in order to develop Schedule C-compliant indirect compensation

¹ The Group notes that, for purposes of the Form 5500-SF, the Proposed Changes single out commissions and fees for only insurance contract or policies. That causes confusion, and it is unclear why all commissions are not reported. Not reporting all commissions does not appear to promote the goal of transparency.

disclosures. For example, recordkeepers are often compensated by revenue sharing amounts received from mutual funds.

Related Party Compensation. The Proposed Changes would add a new question asking whether the arrangement with each covered service provider required to be reported on Schedule C involved any related party compensation. If such compensation is reported, the filer would be required to indicate the services for which the compensation was paid, the names of the payor(s) and recipient(s) of such compensation, status as an affiliate or subcontractor (indicated by checkbox), and the amount of the compensation. As 408b-2 make clear, this information is typically *duplicative* of direct or indirect compensation already disclosed.² It does not reveal information on the total costs that a plan pays (directly or indirectly) for services. While it may be helpful for a responsible plan fiduciary to understand the relationships among affiliates and subcontractors of the primary service provider, this is not useful for Schedule C, which should provide information about the direct and indirect expenses paid by the plan. The Group requests that the Department eliminate the new “related party disclosures.”

Identification of Contact Person for Each Service Provider. The Form 5500 is a public document. We respectfully ask the Agencies to remove the requirement to disclose a contact person, including phone number, for each service provider. This information should not be presented in the Form 5500 for a number of reasons. First, a contact person at a service provider will be authorized to communicate with the plan sponsor or fiduciary committee, but it will not be authorized to communicate with federal agencies, research groups, or plan participants and beneficiaries who might try to contact it from information provided on the Form 5500. Moreover, contact information will likely be subject to change frequently as employees and divisions change over time. And the plan sponsor will already have the provider’s contact information through its ordinary interaction with the provider. Accordingly, this information should be removed from disclosure on the Form 5500 itself. We expect that the Department is interested in having specific contact information for those service providers that may present specific ERISA compliance issues. As an alternative, the Department could require service provider contact information on Schedule C line 5, in the case of service providers who fail to provide Schedule C information, and on Schedule H, line 6, in the case of terminated service providers that had material failures or 408b-2 disclosure failures. However, service provider contact information should not be required as a matter of course for each service provider reported on Schedule C.

Check the Box to Identify Providers that Provide Fiduciary Services. Recordkeepers will generally not have this information. Further, the Form 5500 contact at the plan sponsor/fiduciaries responsible for completing the Forms is often different from the plan’s “responsible plan fiduciary” and may not know which service providers acknowledge fiduciary

² 408b-2 specifically requires disclosure of related party compensation “regardless of whether such compensation also is disclosed pursuant to paragraph (c)(1)(iv)(C)(1) or (2), (c)(1)(iv)(E), or (c)(1)(iv)(F) of this section.” 29 C.F.R. § 2550.408b-2(c)(1)(iv)(C)(3).

status. Consequently, some service providers will be misidentified as fiduciaries, and some fiduciaries will be misidentified as non-fiduciaries. Additionally, we are also concerned that this new checkbox unfairly increases litigation and enforcement risks for plan sponsors and service providers who may, based on the information reported on the Form 5500, appear to be engaging in prohibited transactions for which no exemption exists. We respectfully ask that this box be removed from the Form 5500 or, alternatively, ask that the fiduciary designation box be made mandatory only for those providers who are covered service providers under 408b-2. This rule would be consistent with the Department's stated goal of harmonizing Schedule C with 408b-2 and would cut down on misidentifications of fiduciary service providers.

Additional Requests for Specific Definitions and Examples. Schedule C contains terms that need further clarification, either through examples or definitions, in order to ensure correct completion of the Form 5500. Undefined terms will likely result in less than useful data because plan sponsors and service providers will be inconsistent in their responses and understanding of the question. As discussed above, the Group requests that the Department provide additional guidance, definitions, and examples, either as part of a final rule or through FAQs. Below we have listed several of the terms in Schedule C where the Group is seeking such guidance:

- (i) Part I Line 1g(1) – Define “explicit compensation.”
- (ii) Part I Line 4b(3) – Define “affiliate” and “subcontractor.”
- (iii) Part I Line 4b(1)-(4) – This line currently asks for the amount of compensation paid to service providers. The Group request guidance on whether “compensation” can be listed as a formula or the other methods provided for in 408b-2.

F. Schedule D

Clarification of deadline for Filing of DFE Filings. The Agencies state that DFEs other than GIAs File 20XX returns/reports no later than 9½ months after the end of the DFE year that ended in 20XX. A Form 5500 Annual Return/Report filed for a DFE must report information for the DFE year (not to exceed 12 months in length). A DFE with a plan year end of 1/31/2016 would not have the 2016 forms available for several months. The Group requests that the Department clarify these instructions in the final rule or through FAQs. The Group further requests that this item, rather than referring the DFE's year end, refer to the first day of the DFE's year. In the Group's opinion, it does not make sense to treat a DFE differently than the plan or a GIA with regard to determining the year of forms to file.

Value Reporting. A DFE must report information about investing ERISA plans, including the value of the plan's interest in the DFE at the end of the DFE year. The Group requests that the value requirement be eliminated. The value of the DFE will reflect the value of the plan's investment in its filing, so this requirement appears to be unnecessary and duplicative. Moreover, the plan's Form 5500 filing will show the value of its interest in each DFE. The Group requests that the Department retain the current required information on the investing plan on Schedule D (*i.e.*, plan name, EIN and plan number) without a plan value.

G. Schedule E

System Limitations. Schedule E has been reintroduced many years after having been eliminated. Many if not most recordkeepers have eliminated the system necessary to complete the Schedule E and will have to redevelop those systems from scratch. The Group requests that the Agencies carefully review their need for this information versus the cost of compiling it so as not to place unnecessary burdens on plan sponsors.

H. Schedule R

Lines 19a and 19b regarding nondiscrimination requirements. The Group requests additional guidance on the timing of this disclosure. Additionally, the Group notes that in some cases, the necessary testing may not be finalized by the Form 5500 filing due date, making the question impossible to answer.

Line 20a regarding coverage testing under Code section 410(b). The Proposed Changes ask whether the plan uses the ratio percentage test or the average benefit test to satisfy the coverage requirements under section 410(b) of the Code. Some plans use both tests to determine coverage because different tests may be used for different plan components, and there may be situations where a recordkeeper has no knowledge about the testing method ultimately used. For example, a recordkeeper may provide coverage testing services based only on a plan-by-plan basis while the plan sponsor may sponsor more than one plan and ultimately have another service provider conduct coverage testing on an aggregated basis. In some cases, the testing may not even be finalized by the Form 5500 filing due date, making the question impossible to answer. The Group requests that the Agencies carefully review their need for this information versus the cost of compiling it so as not to place unnecessary burdens on plan sponsors.

Line 22a regarding employees eligible to receive an employer contribution. The Group requests guidance on how to answer this question where participants are eligible to receive employer contributions, but no such contribution was funded by the employer (e.g. discretionary profit sharing contribution). The IRS should also consider providing guidance on how to answer the question where a plan has multiple formulas and how much detail is needed for describing discretionary contributions. Further, this item may conceivably not be answerable until the plan sponsor decides to fund, which could be after the original filing deadline and delayed as late as 30 days prior to the 2 1/2 month extended deadline. The Group requests that the Agencies carefully review their need for this information versus the cost of compiling it so as not to place unnecessary burdens on plan sponsors.

Line 22b regarding the calculation of employer contributions. The Group requests guidance on how to answer this question. In its present form, this question is difficult for the Group members to answer in situations where the allocation is discretionary and where the determination of the contribution has not yet been made by the employer.

Line 23b regarding employer matching contributions. The Group requests guidance as to the disclosure of the minimum elective deferrals necessary to qualify for an employer matching contribution, either in the final rule or through FAQs. The Group is concerned that without this

additional guidance, the plan sponsors and fiduciaries will provide inconsistent answers or answer in a way that is not beneficial to the Agencies.

Line 23c regarding employer matching contributions. The Group notes that there may be more than one formula for determining the maximum employer matching contributions. For example, there may be different formulas for different classes of employees. Therefore, the Group requests additional guidance, either in the final rule or through FAQs, regarding this line item.

Line 23d regarding employees receiving the employer match. The Group notes that, without clearer guidance on this line item, it will be difficult to determine the number of participants making sufficient elective deferrals to receive the maximum employer match. Although a plan may have a stated formula, participants can change their deferral percentage throughout the year. Therefore, data obtained because of this question may not be accurate. The Group requests additional guidance, either in the final rule or through FAQs, regarding this question.

Line 24b regarding automatic escalation and default investments. The Group requests additional guidance, either in the final rule or through FAQs, regarding this line item. The question regarding automatic escalation contained in the Proposed Changes could be interpreted in more than one way. Currently, this question reads: “Does the plan have automatic escalation, assuming a participant has made no active elections?” The Group is unclear if the question is being asked to request the ceiling of the maximum escalation (i) for a participant who has been in the plan since escalation was adopted or (ii) for a participant who was recently hired and automatically enrolled but is not yet at the plan maximum. Moreover, neither the recordkeeper nor the plan sponsor will typically be able to identify those participants that remain in the plan’s default investment fund and have not made an affirmative investment election. This is because recordkeeping systems do not generally distinguish those employees that have affirmatively elected the default fund from those who were defaulted into the fund. In addition, many participants who have been defaulted into the default fund will undoubtedly decide the default fund is in fact their affirmative choice based on the plan’s QDIA disclosure. Also, many participants may move a portion of their account away from the default fund, signaling that they have affirmatively chosen the default fund for the portion of their account that remains invested in the default fund. This question should be eliminated. Alternatively, the Department could revise the question to ask simply the following: “How many participants hold investments in the plan’s default fund as of the end of the plan year?”

Line 25 regarding the number of participants making catch-up contributions. The Group notes that it is not possible for recordkeepers to efficiently obtain information regarding participants making catch-up contributions. By and large, recordkeeping systems do not distinguish between elective deferrals generally and elective deferrals that are catch-up contributions. Recordkeepers do not account for catch-up contributions in a separately coded “bucket.” Accordingly, this question should be eliminated. If the question is retained, the Group requests additional guidance, either in the final rule or through FAQs, regarding situations where a participant’s elective deferral contributions are recharacterized for a failed ADP test as catch-

up contributions. In this instance, participants may not have actually affirmatively made catch-up contributions but catch-up contributions are retained as a result of an ADP excess.

I. Schedule SM/MB

Necessity of Certain Defined Benefit Plan Information. The additional information requested for defined benefit plans (e.g., retiree data stats, term vested data statistics, and cash flows) creates an additional cost that will be passed on to plan sponsors. Although the information is currently obtainable, it will require programming to update systems. It will also require additional time to prepare the forms and answering questions. Lastly, the cost of obtaining and compiling this information may not outweigh the benefits for the Agencies of obtaining this the new information.

SB Line 30. The Group requests additional guidance and examples, either in the final rule or through FAQs, regarding the instructions for the expected benefit payments (line 30 of SB).

Schedule SB Reporting for CSEC Plans. The Group requests that the Agencies consider changes in Schedule SB reporting for CSEC plans. Under current law and guidance (IRS Notice 2015-58), CSEC plans are treated differently from other pension plans in several ways. However, the reporting requirements have not been adjusted to recognize the unique rules. For example, in the past, plans have followed the reporting rules for plans with Pension Protection Act (“PPA”) delayed effective dates. Those rules are inappropriate as the CSEC plans will never need to report PPA liabilities. The Group requests that the reporting requirements for CSEC plans be required to only report Schedule SB (i) Lines A-F, Basic Information, (ii) Part I, lines 1 (valuation date) and 2a (market value of assets) (used for PBGC premiums; including it allows the PBGC to validate the premium reporting), and (iii) Part V, Line 21 (segment rates used for PBGC premiums).

The Group notes that the Statement by Enrolled Actuary on the SB does not match the requirements under law for the CSEC plans. *See* Code § 433(c)(3). Therefore, the Group requests that the Agencies change the Proposed Changes so that CSEC plans are required to complete the 2007 Schedule B instead of the Schedule SB with two exceptions. First, the instructions should direct the actuary to substitute Code section 433(h) Current Liability whenever “RPA ’94” Current Liability is referenced. Second, Line 12 is not necessary as it never applies to CSEC plans.

J. Limited Scope Audit Certification

Schedule H Signature. The Group requests that the trustee signature requirement on Schedule H be eliminated in the case of plans that qualify for the limited scope audit, given the trustee is already required to sign the limited scope audit certifications and the certification will appear on the Form 5500 as an attachment.

Manner in which the Company is Holding the Assets. The Group requests additional guidance and specific examples, particularly as it relates to assets held via annuity contracts, regarding what the Agencies mean by the “manner in which the company is holding the

assets.” As asked in the Proposed Changes, a plan’s answer may change dependent upon where the assets are physically held.

Current Value. The Group requests that the Agencies clarify that “current value” has the same meaning as Fair Value for separate accounts and Contract Value for the general account. Alternatively, the Group recommends adopting the following as the definition of “current value”: the value at which an investment can be redeemed or the amount a plan participant would receive at plan year end if they were to withdraw or transfer funds within the plan prior to maturity for an event other than death, disability, termination or retirement.

K. Additional Issues

Form 5500-EZ vs Form 5500-SF. The Appendix B Instructions state one-participant plans and foreign plans can file Form 5500-EZ with the IRS or the Form 5500-SF through EFAST2. However, the preamble states a new electronic version of the Form 5500-EZ is proposed and the Form 5500-SF can no longer be used by these filers. 81 Fed. Reg. at 47567. The Agencies should clarify whether EZ filers can no longer use the 5500-SF. Should this be the case, the Group requests an update to the current instructions.

One-Participant Plans. Occasionally, a one-participant plan will expand and, therefore, no longer qualify as a one-participant plan. Conversely, small plans sometimes lose participants over time and become one-participant plans. However, when such a situation arises, there currently is no way to indicate on the Form 5500 why a former one-participant plan is now filing the Form even though it has been in existence for several years or, in the reverse, as a result of falling below the \$250,000 threshold, on why the new one-participant plan is no longer filing the Form. Rather than waiting for the Agencies to provide a letter asking for an explanation, the Group requests that a question be added to the Form 5500-SF (or new Form 5500-EZ) to address these situations.

Determination of Large Plan Filer. The preamble to the Proposed Changes summarizes how defined contribution pension plans would determine the need to file as a large plan and attach an independent qualified plan audit report. This determination is based upon the number of participants with account balances or Line 7g(1) as of the beginning of the plan year. 81 Fed. Reg. at 47549. The proposed instructions to the Form 5500 and the 5500-SF also refer to “participants at the beginning of the plan year.” Based on that direction, defined contribution plans would use 7g(1) to determine large versus small plan filing status while defined benefit plans would use line 6 to make this determination. If this is correct, the Group requests the Instructions be updated to better define the determination of large or small plan filer and the need for an accountant opinion.

Form 8955-SSA. The Group supports the Agencies’ decision to allow the filing of Form 8955-SSA electronically on EFAST2, rather than exclusively on the IRS FIRE system.

GDIT. The Group requests that any updated electronic filing system (e.g., EFAST3) be maintained with General Dynamics Information Technology (GDIT). Additionally, the Agencies should consider retaining the current filing system vendor to ensure continuity.

Form 5558 Comments. The Group agrees with the Agencies' objective to develop an electronic version of Form 5558 (Application for Extension to Time to File Certain Employee Plan Returns), enabling filers to submit through EFAST2. As many providers submit these forms on behalf of their clients, the Group encourages the Agencies to consider providing the ability for providers to file multiple Form 5558s. Additionally, the Group requests that the Agencies consider developing a system that would not require electronic signature submission by the plan sponsor as it is today.

Summary Annual Report. The Group requests that the Summary Annual Report ("SAR") be updated to appropriately reflect the Proposed Changes data or be eliminated. The current data reported on the SAR provides only a very general summary of the plans financials. The SAR is not clear or concise and does not provide a user-friendly overview of the overall financial health of the plan. As the Department's goal is to increase transparency for participants, the lack of attention paid to the SAR undercuts this objective.

Confidentiality. The Proposed Changes allow for more information collected through the Form 5500 to be mineable. The Group, however, would prefer to keep as much information produced in the Form 5500 protected from potential business identity theft. Therefore, the Group requests the Agencies apply, as appropriately, the principles laid out in the 2016 Information Reporting Program Advisory Committee Public Report's section on Theft of Business Taxpayer's Identity. One possible solution includes not publically disclosing private business information once it is collected.

III. Request for Effective Date Extension, Re-proposal, and Public Hearing

The Group urges the Agencies to extend the effective date of the Proposed Changes. The changes are significant, and as discussed, it will take a substantial amount of time to develop the systems necessary to efficiently and effectively comply with the new reporting requirements. We recommend at least three years between the date the final forms are released and the effective date of the changes. For example, if the final forms are issued in 2017, we recommend that the changes go into effect no earlier than the 2020 plan year.

Given the complexity of the Proposed Changes, we further urge the Agencies to consider engaging in a more collaborative process with stakeholders to identify ways to reduce costs and clarify areas of uncertainty. The notice and comment process is not designed to accommodate the type of dialogue between the government and stakeholders that is necessary to resolve technical issues. The Group feels strongly that the Agencies could achieve significantly better results by, for example, holding stakeholder roundtables to resolve technical issues. At the very least, we urge the Agencies to hold a public hearing on the Proposed Changes and re-propose the rules before finalization.

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GROOM LAW GROUP

The Group appreciates the Agencies' consideration of our comments and would be pleased to discuss the issues with you at any time.

Sincerely,



Stephen M. Saxon



Michael P. Kreps



Ellen M. Goodwin