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of Labor and
Congress of Industrial
Organizations**

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AFL-CIO

AMERICA'S UNIONS

December 5, 2016

Submitted electronically to e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: RIN 1210-AB63; Annual Reporting and Disclosure
Room N-5655
US Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Proposed Revision of Annual Information Return/Reports
Annual Reporting and Disclosure Proposed Rule
Docket ID: EBSA-2016-0010

Ladies and Gentlemen:

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is pleased to submit these comments on the Annual Reporting and Disclosure Proposed Rule ("Annual Reporting NPRM") issued by the Department of Labor¹ and on the Proposed Revision of Annual Information Return/Reports Proposed Rules ("Proposed Rule") issued by the Department of Labor ("DOL" or "Department"), the Department of Treasury ("Treasury") and the Pension Benefit Guaranty Corporation ("PBGC").²

The AFL-CIO is a voluntary, democratic federation of 56 national and international labor unions that represent 12.2 million working people across all sectors of our economy. We work every day to improve the lives of people who work for a living. We help people who want to join together in unions so they can bargain collectively with their employers for fair pay and working conditions and the best way to get a good job done. Our core mission is to

¹ The Annual Reporting NPRM was published in the Federal Register on July 21, 2016 and is available at <https://www.gpo.gov/fdsys/pkg/FR-2016-07-21/pdf/2016-14892.pdf>.

² The Form 5500 Revision was also published in the Federal Register on July 21, 2016 and is available at <https://www.gpo.gov/fdsys/pkg/FR-2016-07-21/pdf/2016-14893.pdf>.

ensure that working people are treated fairly and with respect, that their hard work is rewarded and that their workplaces are safe. We also provide an independent voice in politics and legislation for working women and men, and make their voices heard in corporate boardrooms and the financial system.

Our affiliated unions negotiate health care benefits for millions of workers, retirees, and their family members, and these benefits are provided through single employer and multiemployer plans, both insured and self-funded. In light of our decades-long commitment to providing quality, affordable health care coverage to working families and retirees, as well as our commitment to health care for all, we have actively monitored and participated in the regulatory process as the Department, together with the Departments of Treasury and Health and Human Services, has implemented the Affordable Care Act.³

For four decades, the AFL-CIO and its affiliate unions have followed and sought to shape both legislative and regulatory changes to the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and related laws to assure that promised retirement, health care and other regulated benefits are protected and maintained. ERISA’s reporting and disclosure requirements are a key feature of the legislative and regulatory scheme as they serve both to inform participants about their benefits and plan operations and to provide information to the agencies responsible for monitoring plan and fiduciary compliance with legal requirements.

We appreciate the Departments’ efforts to update the Form 5500 to reflect current law and developments affecting retirement and health care benefit plans and recognize the challenges faced in developing the significant revisions to the annual report. While we generally support the proposed revisions, our suggestions to modify certain aspects of the Proposed Rule and the revised Form 5500 are detailed in these comments.

New Compliance Questions and Potential Penalties

The Proposed Rule adds new compliance questions to the Form 5500 and accompanying schedules. For example, the proposed Schedule J compliance questions require group health plans to certify that the coverage is in compliance with numerous laws, including the Genetic Information Nondiscrimination Act, the Mental Health Parity Act and the Mental Health Parity and Addiction Equity Act, and the Affordable Care Act.⁴ Both health and retirement plans must certify that the plan is in compliance with the detailed content and distribution timing

³ The “Affordable Care Act” refers to the Patient Protection and Affordable Care Act, P.L. 111-148 and the Health Care and Education Reconciliation Act, P.L. 111-152.

⁴ Proposed Schedule J, Lines 24-30, 81 Fed. Reg. at 47588.

requirements for summary plan descriptions and summaries of material modifications.⁵ These certifications are apparently subject to enforcement through the attestations included in the Form 5500 signature block.

We are concerned that these new compliance questions could potentially expose plan administrators and trustees to significant penalties without providing sufficient guidance regarding the actions required to avoid them. To minimize this possible result and in keeping with the goals of fostering compliance, providing clear guidance to plan fiduciaries and moderating administrative burdens, we recommend that the compliance questions be limited to specific actions, such as completing the DOL Self-Compliance Tool for Part 7 of ERISA (“Compliance Tool”),⁶ which is referenced in the Instructions for completing Schedule J.⁷

Our suggested approach would replace Lines 24 through Lines 30 of proposed Schedule J with a question asking whether the Compliance Tool was completed as part of a review of the terms of the group health plan. Similar questions could be developed with respect to the broad question in Line 23 regarding the SPD, summary of material modifications and the Summary of Benefits and Coverage. Where appropriate, plans exempt from certain requirements of Part 7, such as retiree-only and grandfathered plans, should be provided the opportunity to respond that requirements are not applicable due to their status.⁸ Because the available compliance tools may change from time to time, it may be appropriate for options and references to be changed in the annual update of the Form 5500.

Modernize Financial and Plan Operations Information

The Proposed Rule would “modify the asset breakouts on the balance sheet component of the Schedule H to enable more accurate and detailed reporting on the types of assets held by

⁵ Proposed Schedule H, Line 4y, 81 Fed. Reg. at 47584; Proposed Schedule J, Lines 23a and 23b, 81 Fed. Reg. at 47588.

⁶ The tool is available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/cagappa.pdf>.

⁷ 81 Fed. Reg. at 47636-47637.

⁸ We note that Lines 24 through 30 on the proposed Schedule J offer “N/A” as a response. However, Line 23b, regarding the SBC, does not even though that requirement does not apply to certain plans.

plans, including alternative investments, hard-to-value assets, and investments through collective investment vehicles.”⁹

We have serious concerns that plan fiduciaries do not have the guidance needed to meet the greater accountability standards the Agencies seek in the Proposed Rule with respect to hard-to-value assets. Plan fiduciaries take their duties very seriously, and they are put in an untenable position when the law is unclear as to what their duties require. Because existing guidance with respect to hard-to-value assets is inadequate, we ask that no new reporting requirements be finalized until DOL first issues guidance on the prudent valuation of hard-to-value assets as urged by the Office of the Inspector General, the ERISA Advisory Council, the American Institute of Certified Public Accountants and other expert bodies.

In particular, “EBSA has not formalized into regulatory guidance a letter the Boston Regional Office Director issued to specific plans notifying them that failure to properly value alternative investments violates ERISA. Similarly, EBSA proposed, but never finalized, guidance that would have required written documentation relating to the determination and basis of fair market value of securities without a generally recognized market.”¹⁰

By demanding greater detail, without providing plan fiduciaries with the necessary guidance to determine what is prudent valuation of hard-to-value assets, the Agencies will discourage diversification into many alternative investments, contrary to fiduciary obligations under ERISA §404(a)(1)(C).¹¹

We ask EBSA to issue overdue guidance on prudent valuation of hard-to-value assets in conjunction with finalizing the Annual Reporting NPRM and the Proposed Rule.

⁹ 81 Fed. Reg. at 47539.

¹⁰ U.S. Dep’t of Labor Office of Inspector Gen., Report 09-13-001-12-121, *Employee Benefits Security Administration Needs to Provide Additional Guidance and Oversight to ERISA plans Holding Hard-To-Value Alternative Investments*, at 4 and 19 (“2013 OIG Report”) available at <http://www.oig.dol.gov/public/reports/oa/2013/09-13-001-12-121.pdf>.

¹¹ For many plans, “alternative investments can provide the opportunity to better manage or lower overall portfolio risk by proper diversification of (low correlation) assets, and allow pension funds, as long term investors, to benefit from the illiquidity premium that may be associated with less liquid instruments.” *OECD/IOPS Good Practices on Pension Funds’ Use of Alternative Investments and Derivatives* (December 2011) at 2 available at <http://www.oecd.org/finance/private-pensions/49192070.pdf>.

Miscellaneous Technical and Conforming Changes for Forms and Instructions

Under the Proposed Rule, the signature section of the Form 5500 would be revised to add a check box to indicate whether the plan is a Taft-Hartley plan (such as a multiemployer plan) and to provide a dedicated signature area for both a “management” and a “labor” trustee.¹²

The current practice for most multiemployer plans is to designate a single trustee to sign the Form 5500 on behalf of the entire Board of Trustees, and it is unnecessary and impractical to require plans to obtain signatures from both labor and management trustees. We understand that the signatures of two trustees would be an option. The Instructions should be very clear if the final revised Form 5500 retains the two signature block.

New Information on Employer Matching Contributions, Employee Participation Rates and Plan Design for Defined Contribution Plans (Schedule R)

The Agencies propose to add a new Part VII to Schedule R to collect information about the coverage of defined contribution plans and their “performance as retirement savings vehicles.”¹³ We support the inclusion of this new Part on Schedule R, and we offer some suggested modifications and additions to improve its usefulness.

With respect to Question 23, we suggest adding two new questions. First, a new Question 23d asking for the number of participants eligible to receive an employer matching contribution. Second, a new Question 23f seeking the number of participants who did not make sufficient deferrals to receive a matching contribution.

We also propose the addition of three new questions, one inquiring about loans, another seeking the average account balance and the last providing a distribution of participants by average age and account balance.

The suggested language for these changes to Part VII is included in Exhibit A attached to these comments.

Re-introduction of Schedule E

We appreciate the Agencies’ decision to reintroduce the Schedule E and make it required reporting under both Title I of ERISA and the Internal Revenue Code. The additional information included in the proposed Schedule is helpful.

¹² 81 Fed. Reg. at 47565, 47572.

¹³ 81 Fed. Reg. at 47549.

Based on our review of the revised Schedule E, we suggest some modifications and additions as reflected in Exhibit A attached to these comments. The suggested modification with respect to the allocation of common stock would provide more detail about which employees and former employees benefit from an ESOP.

With respect to common stock that is not readily tradeable, our suggested additions would describe the rights appurtenant to those shares, including voting rights, as well as the buy-back of shares from participants and the disposition of those repurchased shares.

New Group Health Plan Reporting Requirements and Information

In the preambles to the Annual Reporting NPRM and the Proposed Rule, the DOL proposes that plans covered by ERISA would satisfy the reporting requirements included in Sections 2715A and 2717 of the Public Health Service Act by completing the Form 5500 and any required schedules.¹⁴

We support the approach proposed by DOL as it is likely to avoid unnecessary duplication or conflicting reporting requirements from the Agencies and the Department of Health and Human Services (“HHS”). Moreover, given DOL’s expertise with respect to private sector group health plans covered by ERISA, it is the appropriate agency to consider what should be reported by these plans as compared to what health insurance issuers should report.

We are concerned, however, that adopting reporting requirements for ERISA-covered plans before HHS adopts its rules, may ultimately result in more confusion and additional burdens. To avoid that result, we suggest that DOL maintain some flexibility to modify the Form 5500 requirements as HHS develops its rules.

Specific areas of concern include:

- Because HHS has not yet issued its rules under PHSA Sections 2715A and 2717, no comparison of the burdens under the Proposed Rule can be made. In our view, any requirements imposed on ERISA-covered plans should not be greater than those faced by health insurance issuers.
- Under the Proposed Rule, the Schedule J would be completed by both grandfathered and non-grandfathered plans, as well as other plans exempt from the market reform provisions of the Affordable Care Act. Many grandfathered and retiree-only plans maintain their status in part to avoid certain benefit and reporting requirements. Any reporting requirements included in the Form 5500 that are designed to comply with

¹⁴ Annual Reporting NPRM, 81 Fed. Reg. at 47498-47500; Proposed Rule, 81 Fed. Reg. at 47557.

inapplicable PHSA provisions should not apply to these exempt plans.

- While many multiemployer plans are self-funded and self-administered, some are fully insured or administered by insurers as claims payers or third party administrators. To the extent possible and to avoid additional expense, any data collection requirements under the Form 5500 and the expected HHS rules should be aligned.

Additionally, we are concerned that some of the information requested on the proposed Schedule J, such as the details about rebates, may not be readily available. More information needs to be provided about what carriers, pharmacy benefit managers, or other entities must provide to plan sponsors before those sponsors should be required to report to the Agencies.

We recommend that information reporting relating to the requirements under PHSA Sections 2715A and 2717 not be finalized with respect to plans governed by ERISA until standards are proposed under the PHS Act so that the two sets of requirements can be appropriately coordinated.

Health Benefits Claims Processing and Payment

Part IV of the proposed Schedule J requires information about health benefit claims processing and payment, including whether claims are approved or denied and paid in a timely manner.¹⁵

The Instructions for Part IV refer to the existing claims procedure regulations¹⁶ in their introduction to what information must be entered. These regulations provide, in relevant part, that an

“adverse benefit determination” means any of the following: a denial, reduction, or termination of, or a failure to provide or make payment (in whole or in part) for, a benefit.¹⁷

¹⁵ 81 Fed. Reg. at 47587.

¹⁶ 29 CFR §2560.503-1 and §2590.715-2791.

¹⁷ 29 CFR §2560.503-1(m)(4).

The FAQs About the Benefit Claims Procedure Regulation¹⁸ makes clear that any claim submitted for reimbursement that is not paid in full due to any applicable deductible or co-payments is to be treated as an adverse benefit determination, subject to appeal.¹⁹

Applying the regulatory definition of adverse benefit determination would mean that virtually all health benefit claims would be categorized as denials as they are generally subject to deductibles, co-payments or co-insurance. It is not clear whether the Agencies intend to have all claims reported as denied but, absent another definition, that appears to be the result.

We suggest that the Agencies consider an alternate definition if they do not intend to treat benefit claims subject to deductibles, co-payments or co-insurance as denied claims. One approach might be to exclude any claims not paid in full due to any deductibles, co-payments or co-insurance applicable under the terms of the plan.

Schedule SB

We recommend the Agencies use the opportunity of revising the Form 5500 to collect additional information about defined benefit plan freezes and risk transfer activity. The loss of coverage by defined benefit pension plans has eroded the retirement security of thousands of private sector workers, and the ongoing risk transfer activity has impacted both workers and retirees. The PBGC recently revised its premium payment instructions to include questions about risk transfer activity,²⁰ and it has asked about participant and benefit accrual freezes for some time.

While the risk transfer questions posed by the PBGC are useful, additional publicly available information should be collected and evaluated by the Agencies to assure that plan sponsors and fiduciaries have acted in accordance with applicable legal requirements. Questions similar to those included on Schedule H with respect to plan terminations and asset transfers could be included for risk transfers. Information about the number of participants affected and the benefit payment options offered and taken, the total amount of plan assets spent, and the

¹⁸ The FAQs are available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/benefit-claims-procedure-regulation>.

¹⁹ FAQ C-12.

²⁰ See PBGC, 2016 Premium Payment Instructions, Item 18 at p. 23 available at <http://www.pbgc.gov/documents/2016-Premium-Payment-Instructions.pdf>.

identity of the insurance company if annuities were purchased are just some of the elements that would be important to collect.²¹

Similarly, with respect to defined benefit plan freezes, additional information should be reported as the information provided to the PBGC is not publicly available. The reporting should include the effective date of any freeze, the scope of the freeze with respect to compensation and service credited to participants, and the participant groups affected by the freeze. In addition, for each reporting year, the number of participants continuing to accrue service under the plan should be reported.

New Schedule H and Form 5500-SF Compliance Questions

Limited Scope Audit Certification

The Proposed Rule requires the attachment of the proposed revised certification of investment information, and we support this requirement. In addition, the proposed modifications to the certification included in the Annual Reporting NPRM²² are appropriate, in our view, and should be adopted in the final rule. Including the additional information will enhance the quality of the certifications and provide more detailed information to plan sponsors and the Agencies.

Collection of ETI and ESG Investment Information

The DOL solicited comments on “whether collecting information related to ETI and ESG investment activities of ERISA-covered plans on the Form 5500, such as whether plans incorporate ESG factors into their investment analysis, would add value to this growing data source and allow ERISA fiduciaries to more easily consider the role ESG factors could or should play in their investment decisions.”²³

The Department’s 2015 guidance²⁴ as to how pension plan fiduciaries may consider ESG criteria in their investment decisions while satisfying their fiduciary duties reaffirmed the

²¹ While we suggest adding the risk transfer activity questions to Schedule SB, they could instead be part of Schedule H.

²² 81 Fed. Reg. at 47504-47505 and 47530.

²³ 81 Fed. Reg. at 47564.

²⁴ Interpretive Bulletin 2015-01 available at <https://www.gpo.gov/fdsys/pkg/FR-2015-10-26/pdf/2015-27146.pdf>.

Department's long-standing interpretation of ERISA. We do not support singling out these activities particular investment strategy by requiring plans to communicate when they chose to utilize it—as opposed to any other investment strategy or activity—as part of the Form 5500 reporting obligation. It is highly uncertain whether required reporting on this subject would deliver any gains in the form of actionable information for plan fiduciaries; more likely it would undermine the clarity provided by the 2015 guidance, while imposing additional reporting costs. In our view, the expected benefits of such a requirement would be outweighed significantly by the negatives.

The AFL-CIO appreciates the opportunity to comment on the Annual Reporting NPRM and the Proposed Rule, and we urge the Department to include our suggestions in the final rules. If you have any questions about these comments or need any additional information, please do not hesitate to contact me.

Sincerely,

/s/ Karin S. Feldman
Karin S. Feldman
Benefits and Social Insurance Policy Specialist

Exhibit A

Schedule E ESOP Annual Information

Common Stock Allocation:

1d [New] Enter number of allocated common shares at the end of the plan year to:

1d(1) [New] Top officers, managers and other supervisory employees ____

1d(2) [New] Non-supervisory employees not represented by a union ____

1d(3) [New] Non-supervisory employees represented by a union ____

1d(4) [New] Former employees or beneficiaries ____

1d(5) [New] Other ____

Common Stock Rights:

1g [New] for common stock not readily tradable on an established securities market, indicate which rights the ESOP participants who own stock held in the ESOP have:

1g(1) [New] Vote for members of Board of Directors __ Yes __ No

1g(2) [New] Submit proxy resolutions for voting on by Common Stock holders __ Yes
__ No

1g(3) [New] Vote on proxy resolutions __ Yes __ No

1g(4) [New] Same voting rights as common shares not held in the ESOP __ Yes __ No

1g(5) [New] Right to attend shareholder meetings __ Yes __ No

1g(6) [New] Voting rights limited to only major events __ Yes __ No

Stock Bought Back:

1h [New] for common stock not readily tradable on an established securities market:

1h(1) [New] Enter number of shares company acquired during the year from ESOP
participants ____

1h(2) [New] Enter number of these shares that are still held as treasury stock ____

1h(3) [New] Enter number of these acquired shares that were re-acquired by the ESOP

1h(4) [New] Enter number of these acquired shares that were sold or allocated other than
through the ESOP ____

Exhibit A (cont'd)

Schedule R Retirement Plan Information

Suggested Additions to Part VII

Employer Matching Contributions:

23d [New] Enter the number of participants eligible to receive an employer match if they make sufficient elective deferrals.

23e [renumbering draft 23d] Enter the number of participants making sufficient elective deferrals to receive the maximum employer match.

23f [New] Enter the number of participants not making sufficient elective deferrals to receive any employer matching contribution.

Additional Questions to Include:

26 [New] As of the end of the plan year, the number of participants with loans from the plan.

27 [New] As of the end of the plan year, the average participant account balance.

28 [New] As of the end of the plan year, the number of participants and their average age with an account balance of:

\$0 (zero) account balance

\$1 - \$24,999

\$25,000 - \$49,999

\$50,000 - \$99,999

\$100,000 - \$199,999

\$200,000 - \$299,999

\$300,000 - \$399,999

\$400,000 - \$499,999

\$500,000 - \$999,999

\$1,000,000 & Over