American Bankers Association
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Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW, Room N-5655
Washington, D.C. 20210

Re: Proposed Rule on Annual Reporting and Disclosure (Form 5500) – RIN 1210-AB63

Dear Mr. Canary:

The American Bankers Association[1] (ABA) welcomes the opportunity to provide additional comments[2] to the Department of Labor (Department) on the proposed amendments (Proposal) to the Form 5500 Annual Return/Report of Employee Benefit Plan and Form 5500-SF Short Form Annual Return/Report of Small Employee Benefit Plan (collectively, Form 5500). ABA and member bank representatives met with Department and Internal Revenue Service (IRS) staff on November 16, 2016 to identify, describe, and discuss a range of questions and issues raised by the Proposal (Agency Meeting). We appreciate receiving the Department's constructive and thoughtful responses to our concerns and trust that the Department likewise found the discussions helpful. We believe that continued dialogue with the Department beyond the comment period will contribute significantly to a modernized Form 5500 that is responsive to consumer needs, industry standards, and agency objectives.

In light of the Agency Meeting, we would like to reiterate our request that the Department take the following actions with respect to the Proposal:

(1) Following the end of the comment period, the Department should hold a hearing to allow interested parties to testify on the Department's proposed amendments and additions to the Form 5500.

[1] The American Bankers Association is the voice of the nation's $16 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $12 trillion in deposits, and extend more than $9 trillion in loans. Many of these banks are plan service providers, providing trust, custody, routine deposit/cash management, and other services for institutional clients, including employee benefit plans covered by the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code. Our member banks also routinely provide services for retail clients through individual retirement accounts and similar accounts that are covered by the Code. Learn more at www.aba.com.

[2] ABA previously has submitted comment letters on the Proposal dated August 15, 2016, and October 25, 2016.

(2) Thereafter, the Department should host a series of roundtable discussions with interested parties, with the goal of crafting revisions to the Proposal that make the terms used and information requested in the new Form 5500 consistent with existing industry standards, while being appropriately targeted to achieve the Department's regulatory goals.

(3) Once these revisions are made, the Department should introduce the revised Proposal for another round of public notice and comment.

(4) Prior to finalizing the revised Proposal, the Department should conduct a successful beta test (Beta Test), using actual plan data, in order to ensure that regulatory instructions are clear enough and the requested data are readily available, and to confirm the accuracy of the Department's estimated time and costs in preparing the Form 5500.

(5) In order to ensure that the revised Form 5500 comports with regulatory expectations and purposes, the Department should conduct a review of the revised (but not yet finalized) Form 5500 with at least several focus groups, comprised separately of (i) plan sponsors, (ii) service providers, (iii) plan participants, and (iv) account industry professionals and staff from the Department's Office of the Chief Accountant, who would evaluate and confirm the Form 5500's utility, transparency, workability, and functionality.[3]

We believe these steps will result in a Form 5500 that accurately reflects marketplace developments, enhances consumer understanding of its contents, and facilitates effective, streamlined agency supervision. Without limiting our foregoing requests or the substance of our previous comment letters, we also wish to comment on specific portions of the Proposal. These comments are intended to identify and bring clarity to ambiguous and/or incomplete provisions of the Proposal, which clarity would assist in producing a modernized, more comprehensible, and serviceable Form 5500.

I. Specific Issues.

The following sections describe issues that our members thus far have identified in the available timeframe for review. These comments are in addition to, and build on, the comments provided in our letter to the Department dated October 25, 2016, and our subsequent discussions with Department staff.

A. Trustee Certification and Signature.

1. Manner Held.

The Proposal requires the custodian bank, in connection with the provision of the certification that will enable the plan sponsor to engage the auditor to perform a limited scope audit for a plan, to describe *the manner* in which it is holding the plan's assets covered by the certification. In other words, a limited scope audit extends only to assets "held" by a bank or similar

[3] The Department recently has employed focus groups to ensure that written disclosures required by Department regulation are working as intended. *See* Proposed Information Collection Request Submitted for Public Comment: Evaluating the Effectiveness of the 408(b)(2) Disclosure Requirements, *79 Fed. Reg. 14,085* (March 12, 2014).

institution. While we appreciate the Department's desire to provide plan fiduciaries and auditors with sufficient information to determine whether the certifying institution "holds" the assets included in the certification, the meaning of the term "manner held" is unclear and therefore does not assist with this determination. This is because most securities and other assets no longer exist in physical form but are instead reflected as "books and records" holdings with one or more central depositories, clearing corporations, sub-custodians, transfer agents, or similar entities. The depositories and clearing houses, like the Federal Reserve and Depository Trust and Clearing Corporation (DTCC), actually hold the official record of the holdings. The banks reflect these holdings on their books.

Most custodians consider "holding" an asset to be equivalent to having "custody" of the asset. For non-physical assets, this generally means that the ownership of the asset is reflected through book-entry in the name of the trust for which the certifying entity serves as trustee, or in the name of the certifying entity itself (or its duly appointed nominee or other agent), acting on behalf of its customer(s). This includes assets the custodian "holds" with a domestic or foreign sub-custodian and/or depository, such as the Federal Reserve in the case of U.S. government securities held in book entry form, in an account that is identified as belonging to the custodian for the benefit of its customers. In other words, the essential element for "holding" an asset is generally understood as maintaining the evidence of ownership of the asset in the custodian's (or its duly appointed nominee's or other agent's) name, or in the name of the trust, for the benefit of one or more of its customers.

To the extent the Department can provide examples of such asset types that the Department believes should *not* be treated as being "held" by the custodian, we would be happy to discuss those concerns and provide input regarding how such assets could be "flagged" in the certification. Absent such examples, we respectfully request that the Department eliminate the "manner held" description from the proposed changes to the certification and instead require that the certifying entity separately identify any assets that are outside its "chain of custody" (*i.e.*, any assets for which the certifying entity does not maintain evidence of ownership) in accordance with industry practice.

2. <u>Separate Identification of Assets for which Current Value Is Not Provided</u>.

We recognize the Department's concern that plan fiduciaries may improperly conclude that banks and similar institutions are certifying "current value" for all assets included in their certified reports. However, based on the wording of the statutory definition, requiring banks to identify assets separately for which current value is not being certified is problematic given that (i) bank trustees are generally not in a position to know whether or not the prices they obtain from third-party sources represent "fair market value where available," and (ii) bank trustees do not necessarily provide determinations of "fair value . . . assuming an orderly liquidation." Accordingly, as noted in our October 25, 2016 comment letter, the Proposal will likely result in custodians applying a blanket "caution" to substantially all of the assets listed in the certification.

Based on the Department's concerns and the practical limitations on bank trustees' ability to provide "fair value" determinations, we respectfully request that the Department revise the Proposal to address this issue in two ways:

(a) Eliminate the requirement to identify assets separately for which current value is not provided. Instead, the Department can require custodians that do not certify "current value" for *all* assets to include a "caution" reminding the plan fiduciary of its obligation to verify independently that prices reported by the custodian represent "current value" before using them for Form 5500 reporting purposes.

(b) Harmonize the definition of "fair market value where available" with the definition of "hard-to-value" such that 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. (Language for these definitions could be the subject of one of the Department's roundtable discussions.)[4]

3. **Trustee Signature and Contact Information**.

Although we did not have an opportunity to discuss this issue at the Agency Meeting, our October 25, 2016 comment letter requested clarification from the Department regarding the purpose for requiring the trustee signature and contact information on Schedule H and Form 5500-SF. Given that (i) trustees do not prepare these forms, and (ii) trustees routinely provide general telephonic contact information only, we respectfully request that the Department eliminate the trustee signature and contact information requirements. Alternatively, if the Department concludes that the inclusion of this information is important to provide on the Form 5500, then we request that revised forms specifically state that the sole purpose of requiring trustee information, including a signature, is to start the statute of limitations, consistent with the stated purpose for the former Schedule P.

B. **Asset Identification and Classification Changes**.

1. **In General**.

The Department has modified the Form 5500's Schedule of Assets to require the inclusion of all the investment identifiers that apply to a particular investment. We understand that the Department is trying to standardize the data it receives about plan investments, and that current filings include a variety of abbreviations of stock and bond issuer names that could complicate the oversight process. We believe that requiring investment identifiers will make the investment-level information more useful to the Department (and other regulators) that need to analyze these data on a macro level. We were encouraged to learn at the Agency Meeting that the Department will reconsider the requirement to include all applicable investment identifiers in one cell of the report, as that would impede the data-mineability of the Form 5500. In the meantime, we offer the following comments as the Department considers revisions to the security identification requirements:

1. The Schedule of Assets should be organized to allow bank custodians and other service providers and filers that prepare Form 5500 information for filing ("Form 5500

[4] *See* Section C below for additional comments regarding the definition of "hard to value."

preparers") to include one identifier per investment, and the Department should allow the Form 5500 preparer to determine which identifier to include. It would be helpful to include an additional data point to enable the Form 5500 preparer to indicate which type of identifier is being provided (with categories such as issue, issuer, counterparty, or other). We believe that plan sponsors will benefit from lower-cost services if bank custodians, which provide the underlying asset and security identifiers reported on the Form 5500, are afforded the flexibility to maintain universal approaches to creating security master files, since those same security master files apply to all the clients investing in those securities, not just employee benefit plans. Form 5500 preparers and plans would be able to reflect investments using the security identifiers they find most appropriate to maintain.

2. If the Department mandates the use of specific identifier types or multiple identification schemas, custodial banks will incur costs to store the expanded security master files and to build and test new report extract functions used to generate the proposed expansion of data fields.

3. We encourage the Department to address in the Form 5500 instructions the fact that some plan investments have no investment identifiers. For example, many private funds do not obtain standard industry identifiers. Over-the-counter derivatives, like credit default or total return swaps, also do not have investment identifiers. For those kinds of investments, some custodians and investment managers create dummy identifiers, to serve as internal identifiers in security master files. Until global regulators require all investments to be assigned a third-party-sourced investment identifier, the Department should include in the Form 5500 instructions clear guidance for Form 5500 preparers that have to report on unidentified investments. The Department could instruct Form 5500 preparers to leave blank the investment identifier field, thereby making it clear that the investment does not have a universally recognized or issued identifier.

4. The Department could also consider requiring Form 5500 preparers to include sell-side counterparty Legal Entity Identifiers (LEIs) for over-the-counter (OTC) derivatives, since LEIs are required in other regulatory reporting.

5. Private funds may be identifiable by their issuer, or by the use of a tax identification number or state registration number.

The Proposal would greatly benefit from a collaborative process between the Department and representatives from custodial banks, asset managers, and issuers of security identifiers to discuss current industry practices concerning investment identifiers and security master files. Industry participants can provide insight into how they use different identification schemas. The Department would benefit from gathering investment information using an approach similar to existing regulatory reporting requirements.[5]

[5] This can be part of a larger Department project to discuss with vendors how to create the next generation electronic filing system, including the specifications for data sources and reporting formats.

2. **Investment Identification Numbers**.

The Proposal states that Schedules for Assets Held in a Master Trust, a bank common trust fund or collective investment trust (CCT), a pooled separate account (PSA), or 103-12 investment list all investment identification (ID) numbers that apply. Based on our reading of the Proposal, we are assuming that while the instructions indicate that only one identifier would be required for Schedule of Assets Held Directly by the plan, *multiple* securities identifiers ("list all that apply") would be required for the other schedules of assets held. We have the following concerns with this proposed requirement:

(1) Having all of the IDs in one cell/field will not make the information data-mineable.

(2) All IDs in separate fields would create many empty fields, since most securities do not have the full range of identifiers.

We agree that the provision of an ID number is a positive step in allowing for the identification and aggregation of securities. It would be helpful to understand how the DOL plans to use the security identifiers in its supervisory, enforcement, and research activities. It is noted that the Central Index Key (CIK) and LEIs do not serve to identify a security specifically, while the Committee on Uniform Security Identification Procedures (CUSIP), Stock Exchange Daily Official List (SEDOL), International Securities Identification Number (ISIN), and Financial Instrument Global Identifier (FIGI) all do, with the caveat that FIGI is more specific in identifying the trading venue of a security, where multiple venues exist. An optional data point for an LEI assigned to the entity issuing a security, or a counterparty to an OTC derivative, could be useful to the Department in determining a plan's exposure to a legal entity. Introducing a separate field for LEI submission would therefore be a viable option.

Issue-based IDs are useful for aggregated comparisons only if the same ID is used by every reporting entity. For example, if the Department wanted to determine the percentage of retirement plans that held a specific asset, it would either need to maintain a database of all possible identifiers for each and every security, or it would need all plans to provide the exact same identifier. Knowing the nature and form of database searches the Department might wish to perform would help custodians and preparers offer the best solutions for including the appropriate identifier(s) on the Form 5500.

3. **Asset Classifications**.

We acknowledge the Department's desire to make the terms of the Form 5500 understood by all interested parties, including plan participants and beneficiaries. Simplicity of language, however, needs to be balanced with the realization that the further away the proposed asset categories are from conventional asset classification schemes, the more costly it will be to build and maintain the reporting needed for Form 5500 filings. If, as contained throughout the Proposal, asset classifications are unique to Form 5500, Form 5500 preparers will have to revise an already complex Form 5500 asset mapping schema to generate the new Form 5500. Revamping the current Form 5500 schema for hundreds of thousands of investments will be costly, and it is likely that smaller and less sophisticated Form 5500 preparers will have challenges meeting the new requirements by the deadlines proposed by the Department. It is also not clear that the Proposal's newly created asset classification schemes will be completely or better understood by participants, beneficiaries, and other parties than the current conventional schemes.[6]

In the Agency Meeting, we were encouraged to hear that the Department is open to engage in dialogue with the industry, including investment managers, custodians, and other industry data providers, about how best to fit investments into more standardized categories while achieving the Department's desired transparency. We offer the following suggestions as the Department works toward this goal:

1. In order to avoid inconsistencies in reporting, the Department should provide clear and appropriate instruction for each new and existing category and sub-category. Engaging industry experts can help to ensure that reporting categories do not leave gaps or overlap with each other, alleviating the need for Form 5500 preparers to make assumptions or interpretations, which can lead confused Form 5500 preparers to place investments in the wrong categories or over-report investments in the "other" category.

2. Special consideration should be given to categorization instructions for commingled fund investment vehicles (other than mutual funds), which are considered to be the most challenging assets category to map consistently and accurately, since there is no standard convention for identifying these funds.

3. The Department should also provide guidance on how it would like to see the prior year's assets reflected in the Beginning of the Year column for the first year of the revised Form 5500 filing. If the ending balances of the prior year are expected to match the beginning balances of the new year (which is one of the EFAST edit checks), using the new asset categories on the Schedule H, then plans effectively need to be ready to comply with the requirements by December 31, 2018. This means that the definitions of which assets map to which Form 5500 category would have to be finalized with sufficient time to allow Form 5500 preparers to build new mapping rules, acquire any additional reference data, and test the new mapping results, using December 31, 2018, holdings information. It would be reassuring to Form 5500 preparers for the Department to acknowledge that it does not expect reports under the old nomenclature to match the new.

We offer the following specific asset classification recommendations, for consideration in conjunction with the Department's outreach to the other industry practitioners and providers of security-level reference data:

a. <u>Interest-bearing cash and cash equivalents</u>.

We recommend explicit inclusion of standard cash equivalent vehicles, like money market mutual funds, CCT short-term investment fund (STIF) vehicles, and commercial paper that matures within three months from the date of acquisition. Adopting this change in the definition

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[6] This is why we believe it is important that focus groups be established before finalizing any revisions to the Form 5500, in order to ensure that the revisions are in fact understood by those for whom they were primarily intended.

would alleviate conflicts with other plan sponsor reporting, including plan financial statements. For example, investments in a bank's STIF would be included in the same category on the Form 5500 as would be reflected on the plan's financial statement (that is, the Cash and Cash Equivalents line, rather than the Value of Interest in a CCT line).

b. Debt interests/obligations.

United States government securities should be approached the same way for small plans using Form 5500-SF as for plans reporting on Form 5500. State government securities should be either included with U.S. treasuries in both forms, or separated in both. Consistency in this category would help Form 5500 preparers which support reporting for plans using both forms.

It is not clear under the Proposal why some agency-issued securities are included with U.S. government securities, but not others. This is particularly confusing when some of the agencies left out of the category are explicitly backed by the U.S. government, like the Tennessee Valley Authority and the Veterans Administration. An approach more aligned with market convention would separate U.S. Treasuries from all agency and government-sponsored entity (GSE) debentures, and report all the GSE debentures together. This agency debenture category should also be separated from asset-backed securities issued by agencies and GSEs, which is normally a separate asset category.

The Department should consider discussing with fixed-income industry representatives how to create structured debt categories that align with industry convention. One approach would be to place structured debt into one overall category, and then subdivide it by the type of asset backing the security, and then subdivide it further by indicating whether it is issued by a GSE or by a private trust. ERISA plans receive reporting from their asset managers that segregates asset-backed securities into sub-categories such as home equity loan, student loan, car loan, car lease, or equipment lease. Consistent with the Department objective to minimize use of the "other" category, we recommend that the Department identify sub-types of asset-backed securities in the instructions, thereby helping to achieve its expressed goal of keeping as many investments as possible out of the "other" sub-category.

Mortgage-backed securities are a prevalent type of asset-backed security in retirement plan portfolios, and may be sub-divided by the quality of borrower (prime, alt-A, sub-prime), the type of property (residential and commercial), or other qualifiers. Mortgage-backed securities generally do not belong in a government security or real estate category, since the risks associated with them are different from the other two asset classes. For example, mortgage-backed securities are subject to prepayment risk, whereas real estate investments are subject primarily to liquidity risk. One approach to re-aligning structured securities would be to include mortgage-backed securities, TBAs (to-be-announced agency mortgage pools), commercial mortgage-backed securities, agency collateralized mortgage obligations (CMOs), non-agency CMOs, collateralized debt obligations (CDOs) and collateralized loan obligations (CLOs), and other asset-backed securities in one category.

The Department should review the approach proposed for corporate debt instruments. We understand the Department may be reconsidering its use of certain credit rating agency ratings to differentiate between investment grade and high-yield corporate bonds. We encourage the Department, where consistent with applicable law, to allow the use of nationally recognized securities rating organization (NRSRO) ratings, so long as the plan fiduciary is not aware of any reason why the rating is an inaccurate reflection of the credit quality or risk associated with a particular bond. If each Form 5500 preparer were required to report its own internal rating, it would be very difficult for the Department to compare corporate bonds held across the universe of benefit plans. This would be especially complex for custodial banks that are Form 5500 preparers, since they may be required to report different/contrasting ratings on the same bond held for separate plans, where investment managers may have diverging internal views on the credit quality of the bond.

We also suggest that the rating reported should be the one recorded at the last day of the plan or reporting year. Investment managers generally consider a bond's credit rating at the time of purchase, and when reporting a holding to a plan the rating is the one in effect on the last day of the reporting period. It would also be beneficial to clarify that anticipated ratings can be used in the event that a plan purchases a new issue bond before it receives a permanent rating. An instruction to that effect would prevent newly issued corporate bonds with anticipated ratings from having to be reported as "non-rated."

The Department should also consider including defaulted bonds that no longer carry a credit rating in the non-investment grade or high yield category. Additionally, consideration should be given to bonds that are not rated because the issuer did not pursue a rating. In this case, we recommend that those bonds not be included in the high yield/non-investment grade category unless the investment manager had concluded that the credit profile of the unrated bond belonged in that category.

It would be very helpful to Form 5500 preparers if the Department would clarify its view of split ratings among multiple rating agencies. The language in the Proposal is commonly understood as "split higher" language. This means that if a bond has a BBB- rating, a Ba1 rating, and a BB+ rating, the bond is still considered investment grade because it has one investment grade rating. Split ratings can also be addressed by a "split lower" method, where any one below-investment-grade rating makes the bond below-investment grade. A third option, commonly used by industry, is the "split mid" approach. Under this approach, if there are three ratings, the applicable rating is the middle one, and if there are two ratings, the applicable rating is the lower rating. While the simpler "split higher" methodology may be better and less costly to provide, the retirement services industry could adapt to any of the three approaches, so long as it is clearly articulated in the Form 5500 instructions.

c. **<u>Corporate stocks</u>**.

We recommend that the term "publicly traded" be removed and replaced with "exchange traded." This same comment applies to REITs as well. The Department should consult with industry experts as to whether rights and warrants should be included with corporate stocks, so that Form 5500 preparers report them consistently.

d. Registered investment companies.

Because exchange traded funds (ETFs) are, in most cases, registered investment companies, we believe they should be specifically mentioned in this category since they are noticeable by their absence from the list that includes mutual funds, unit investment trusts, and closed-end funds.

e. Eligible pooled investment vehicles.

We are concerned that some types of pooled investment vehicles are not reflected in the Form 5500 categories. For example, these would include funds structured as limited liability companies (LLCs), or as a Section 3(c)(7) private placement New Hampshire business trust. A defined benefit plan may be eligible to invest in such a fund, and the fund may not meet the definition of "plan assets" because ERISA plans represent less than 25% of the assets invested in the fund. In this event, the fund would not be a 103-12 filing entity and may not be considered a hedge fund or private equity fund. Many funds organized outside the United States also do not fit into the categories provided, by strategy or by legal structure. For these reasons, we encourage the Department to consider adding an "other" sub-category for pooled investment vehicles that do not fit the described categories.

f. Insurance general account.

The Department should consider adding instructions and additional asset categories or sub-categories to help plans with stable value options report the benefit-responsive agreements that are part of those options. Some contracts are issued by banks, rather than by insurance companies, and many bank-issued contracts are not part of an insurance company's general account. A clear location for bank-issued contracts should be established, and the instructions should require all benefit responsive contracts to be reported at their contract (or book) value, not their market value. The market value might be considered the contract's "fair value," but reporting contract value is consistent with Financial Accounting Standards Board (FASB) reporting and reflective of how the contracts are shown in plan financial statements. We encourage the Department to discuss stable value reporting with the Stable Value Industry Association and other asset class specialists in order to understand the various ways stable value options are organized. That dialogue should assist in making the Form 5500 reporting categories and instructions more meaningful for Form 5500 preparers and help the Department obtain more consistent and potentially comparable stable value reporting.

g. Partnerships and joint ventures.

This category may overlap with the reporting of pooled investment vehicles, because some 103-12 entities may be structured as partnerships or joint ventures. Similarly, the sub-categories are not mutually exclusive and could be overlapping. Some of the sub-categories seem to reflect legal structure, such as limited partnerships and joint ventures, and others seem to reflect strategies, like hedge funds. We recommend that the Department align the definitions in this category with definitions used by other regulators for private funds, such as the SEC's Form PF categories. Private fund sponsors must categorize private funds for Form PF. Moreover, the Form PF categories for real estate fund and venture capital fund are very similar to the

Department's real estate operating company and venture capital operating company definitions. It would streamline reporting for Form 5500 preparers to be able to ask private fund sponsors for their Form PF designation as a data field. On the other hand, it would be a challenging and frustrating process for Form 5500 preparers to obtain meaningful responses from private fund sponsors regarding the appropriate ERISA-defined term to use to determine the fund's sub-category, which could lead to preparers defaulting to the "other" asset category if information is not provided in a timely manner.

There are two new sub-part questions that require plan sponsors to identify separately the partnership/joint venture interests that hold plan assets and those that do not. Custodians that are providing detailed listing of plan investments would not be in a position to provide this information to plan sponsors, as custodians are not generally receiving information about the underlying investors and whether a fund's 25% investment threshold limit for ERISA plan assets has been breached, or whether the partnership or joint venture has become ERISA plan assets for some other reason. Plan sponsors would need to work directly with the partnership/joint venture to determine how to populate these new lines and this may cause delay and complications for Form 5500 preparers. It would be helpful to understand why the Department wants to collect this information, in order to suggest ways to capture it that may be workable for all parties.

h. <u>Derivatives</u>.

We recommend that the Department include an instruction that Form 5500 preparers should report market value for futures, options, forwards, and swaps. For futures, the instructions should clarify that market value should be based on the last day's mark. Another issue that the Department should clarify is whether derivatives like swaps, with a liability side, should be netted and reported either as an asset or liability, or should have an asset and liability entry.

As described above, we recommend that CDOs be included with other structured debt in its own category, rather than as derivatives.

The retirement services industry would benefit from the Department instructing Form 5500 preparers to rely on the CFTC's practices and interpretations concerning which derivatives (or commodity interests) are considered futures, options, forwards, and swaps so that the Form 5500 reporting is consistent with other reporting about derivatives investments.

In addition, the Department should clarify whether foreign derivatives (those based on indices outside the United States that clear outside the United States, like the Financial Times Stock Index (FTSE) and the Tokyo Stock Price Index (TOPIX)), belong in the derivatives category or in some part of the "Foreign investment category."

C. <u>Hard-to-Value Assets</u>.

Our comment letter of October 25, 2016, stated that the proposed term "hard to value assets" is not sufficiently defined to enable consistent interpretation across service providers. The Department should further consider its definition of "hard to value." The Proposal's definition is sufficiently vague to possibly include conventional corporate bonds and non-exchange traded mutual funds, neither of which have "quoted market prices." This is an area where further discussion with industry experts, the FASB, and the American Institute of Certified Public Accountants (AICPA) may help the Department to generate more clear definitions. Plan sponsors identify investments that require "fair value pricing" in their financial statement reporting using FASB's guidance that defines generally accepted accounting principles (GAAP). Some of those investments, according to the DOL's definition, may belong in a "hard to value" category, even though they are classified as "Level 1" assets that have readily observable prices under FASB's guidance.

We also believe that the Department should instruct Form 5500 preparers as to what value to report as "current value" for investments that are flagged as hard to value. If the reported values can be the same as on the plan's financial statement, or on the direct filing entity's financial statement, then it seems that GAAP and FASB principles are the appropriate standard for when an asset is hard to value. If CCTs and plans were required to identify as "hard to value" only those investments that are being fair value priced, or have been deemed worthless, then there would be very few CCTs or plans with any significant percentage of investments in the hard-to-value category.

Regarding CCTs, we note that CCT sponsors follow similar pricing protocols as mutual funds and generally strike a daily net asset value and report it as mutual funds do. We request that the Department consider revising the Proposal to provide that both vehicles be treated consistently for purposes of the "hard to value" definition. If a CCT could be considered hard to value because of its underlying investments – even when the CCT is being priced and valued on a daily basis, and that net asset value (NAV) is the undisputed exit price for all participants – then it is difficult to understand how a CCT should be treated less favorably by the Department than a similar mutual fund. Plans should be able to invest in the investment vehicle they prefer, without concern that a CCT managed similarly to a mutual fund may be labeled as a hard-to-value asset because of its underlying investments, and therefore the plan will have to file a complete and more complex Form 5500 rather than the simplified Form 5500-SF.

In addition, the Department should clarify what the term "primarily" means when referring to the portion of a CCT's investments in hard-to-value assets. We would suggest a specific percentage, so that reporting is consistent, and suggest that 80% would be an appropriate level to reflect the concept of "primarily invested." We note, however, that custodians generally will not be in a position to report this information, so the burden of obtaining the information necessary to make this determination for all existing and new investments in CCTs will fall primarily on the plan administrator (or on the investment fiduciary that directed the investment in the CCT).

Finally, we suggest that the Department align the definition of this term with FASB accounting and reporting requirements.[7] Specifically, a "hard-to-value asset" could be defined as a "Level 3" asset under FASB classification standards. This definition is widely known and understood and leaves little room for interpretive differences. At the Agency Meeting, the Department had expressed concern that the term be understandable to participants reviewing the Form 5500. We believe that this concern can be accommodated by providing a Form 5500 guidance summary or

[7] As noted in Section A above, we also request that this definition be better aligned with the concept of "fair market value where available" for purposes of reporting "current value."

explanation (which can be released together with the finalized rule), which would describe in detail and in plain English the meaning of “hard to value,” so that participants can understand clearly what is intended by the term.[8]

D. Schedule of Assets Disposed of During the Year.

1. Records of Purchase Date for Sold Securities.

The Proposal would require information of the purchase and sale date for securities. Changing the current approach (simply reporting securities bought and sold during the plan year) makes the data reporting much more complicated for Form 5500 preparers. Many institutional clients have portfolios, or invest in collective funds, where the portfolio manager buys and sells portions of the same investment over a period of years. The Department should develop instructions as to which purchase date to report when a security is sold; *e.g.*, the original purchase date, which could be several years before the sale date, or possibly the purchase date closest to the sale date. We are not certain how this information may be valuable to the Department. Since it will be hard to gather this information for the Form 5500 preparer, even with clear instructions, it would be helpful to understand why the Department wants these details, in order to further consider whether the purpose(s) justifies the costs.

The requirement to use revalued cost (*i.e.*, calculating the current year’s gains and losses based on the market value of the assets as of the prior year end) rather than historical cost in calculating the gains and losses is costly to maintain, difficult to reconcile to the realized and unrealized gains and losses reported under GAAP in the plan financial statements, and adds to the cost of performing the audit. We endorse the AICPA’s recommendation that the Department move away from revalued cost as the basis for calculating gains and losses, in favor of historical cost, absent the Department’s demonstration that the revalued cost method yields more valuable information and significantly improves the enforcement measures.

Additional information requested on the Schedule of Assets Sold could also require additional programming, some of which will be problematic, including those listed below. We respectfully ask the Department to weigh carefully the value and necessity of providing this additional information, against the additional cost incurred by the plan sponsor to obtain this information.

- **(a) Enter name, EIN of issuer, borrower, lessor, or similar party**: It is unclear as to what information is requested in this field – the name of the party to whom the asset was sold? The EIN of the issuer is not generally maintained by the custodian bank as part of the sales transaction.

- **(b) Check if issuer, borrower, lessor or similar party is party-in-interest**: The custodian would not know whether the issuer of a security that is sold is a party in interest to the plan, which means that the plan sponsors would have to update this field on the electronic file provided by the custodian in a structured data format.

[8] The Department released a similar guide when it issued the Fiduciary Rule. *See* Fact Sheet: DOL Finalizes Rule to Address Conflicts of Interest in Retirement Advice, Saving Middle-Class Families Billions of Dollars Every Year.

- **(c) Schedule H, Line 1b category**: This is driven by the asset category of the investment that was sold, which would have to be linked to the sale transaction, requiring reporting logic to link a holdings characteristic to an entry on a transaction file.

- **(d) Selling pric**e: Trust reporting generally reflects total proceeds of disposition, not just the selling price.

- **(e) Net gain (loss) on transaction**: Should this be based on historical cost or Department "revalued" cost? If the information is important, then the Department should provide clear instructions for Form 5500 preparers and plan sponsors to follow.

2. Schedule of Reportable Transactions (5% Report)

Providing an indication of whether the transaction occurred with a party in interest is problematic for the same reason mentioned above: the Form 5500 preparer is not in a position to know whether the transaction occurred with a party in interest. This requires manual intervention by the plan sponsor to amend the file provided electronically by the Form 5500 preparer in a structured data format.

As part of the overhaul of the Form 5500, we would respectfully request the Department to take a fresh look at this series of schedules to reassess the value versus the cost to provide. It would be useful to know specifically how the Department has used the information from these schedules, and how often has it led to enforcement action. It would further be useful to know whether all assets, especially daily STIF trades, actually need to be reported to the Department, and whether this information has been useful in its enforcement efforts.

E. Service Provider Information.

The Proposal would require service providers to calculate and record an estimated dollar amount on compensation, in place of the current option that allows service providers to use a formula. Requiring an actual/estimated dollar amount, however, is highly unworkable for the same reasons that the financial services industry provided to the Department several years ago when the Department's Section 408(b)(2) disclosure regulation (408b-2 Regulation) was promulgated.

As discussed in the October 25, 2016 comment letter, the elimination of eligible indirect compensation as a category of reportable compensation and the new requirement that service providers calculate an actual or estimated dollar amount of compensation received by plan would be extremely burdensome, and in some instances, impossible for service providers. In addition, as discussed below concerning shareholder servicing fees in omnibus accounts, we believe that some compensation is expressed accurately for comparison by the plan fiduciary only when a formula is employed. If compensation varies based on the amount invested or attributed to a particular service provider, the plan fiduciary cannot easily compare service providers based on the dollar amount of compensation.

We recommend the Department remove this new requirement with respect to compensation not paid by the plan or the plan sponsor, such as float revenue and mutual fund or collective fund shareholder servicing fees, and allow trustees and custodians to report such revenue as a formula, a rate, or other reasonable methodology, consistent with currently applicable disclosure requirements for 408(b)(2) and for the retention of float revenue pursuant to the Department's Field Assistance Bulletin 2002-03 (FAB 2002-03).

Consequently, while we appreciate the Department's goal in harmonizing the Section 408(b)(2) disclosure requirements and providing greater transparency to plan fiduciaries, we feel that the cost and burden required to calculate what would by necessity be inaccurate assessments of the dollar amount of certain types of indirect compensation is not justified by any corresponding benefit to the plans. On the contrary, service providers would pass those increased costs on to their plan clients, resulting overall in higher fees to the plans.

1. **Shareholder Servicing Fees in Omnibus Accounts.**

Many plans which invest in CCTs and mutual funds transact with those funds through "omnibus" accounts, meaning that many plans are held in an account with the fund and transactions among the plans are netted on a daily basis before being communicated to the fund. The custodian or trustee maintaining the omnibus account and netting transactions may receive a share of the fund's shareholder servicing fees, which have heretofore been reported to plan sponsors as a formula or a rate, consistent with the disclosures of such fees contained within each fund's prospectus or fund offering documents. A trustee or custodian would not be able to calculate the dollar amount of such fees attributable to each plan in an omnibus account with any degree of accuracy and the cost and burden required to calculate what would certainly be an inaccurate figure would be significant. Moreover, the amount of shareholder servicing fees received by the trustee or custodian will be entirely dependent on the funds and share classes selected by each plan's fiduciary and on the investment activity of each plan's participants, since the plans utilizing omnibus fund trading arrangements, by and large, are participant-directed defined contribution plans.

The plan fiduciary selects the funds and share classes to offer in its plan based (at least in part) on the information and disclosures contained in the funds' prospectuses or offering documents in which shareholder servicing fees are disclosed as a *percentage* of fund balances. Furthermore, participant investment activity can affect the total amount of shareholder servicing fees received by the trustee or custodian. For these reasons, a formula or rate would be more useful and meaningful to a plan fiduciary (i) in understanding the compensation received by the trustee or custodian and (ii) in evaluating and comparing service provider compensation.

2. **Float Revenue.**

With respect to other types of indirect compensation, such as float revenue earned by a bank on uninvested cash balances, the use of a formula or estimated rate to disclose that indirect compensation is more appropriate than a dollar amount, due to the inherently variable rates of interest generating that compensation. In many cases, float revenue is not actual compensation earned by a bank or trust company. Instead, a bank may use bank deposits (which are for the bank's use) overnight to fund the bank's operations. In many cases, the use of these deposits does not raise any actual income or interest. In addition, it is important to recognize that cash balances on deposit with a bank are fungible and are not segregated by depositor. As such, it would be impossible for a bank to calculate an estimated or actual dollar amount of float revenue on a per plan basis. Any attempt to do so would be unnecessarily burdensome and costly for the service provider, with little true benefit to the plan sponsor.

Banks and other parties earning float have relied on the FAB 2002-03 as well as on the "eligible indirect compensation" rules under the Section 408b-2 regulation, which permits covered service providers to report indirect compensation, including float, using a dollar amount, formula, percentage of assets, per capita charge, or, where the compensation cannot be expressed in such terms, by any other reasonable method.[9] Providing an estimate of an overall rate of interest generally earned by a bank on such deposits is of greater utility to a plan fiduciary in evaluating and comparing service provider compensation.

F. <u>Common and Collective Funds</u>.

The Proposal would require CCTs to store names and employer identification numbers (EINs) of plans that terminated prior to the end of the CCT's year-end reporting and provide the market value of a terminated participants' interest. We believe that the marginal benefit of this addition to reporting is significantly outweighed by the cost that will be incurred by bank custodians (costs which will then have to be passed on to plans) to accommodate these changes. In order to avoid increased costs to plans, we request that the Department not require reporting for plans that terminated their respective participating interest in a CCT prior to the end of the CCT's year.

The Proposal further would require filers to enter the dollar value of each investing plan's interest in the CCT as of the end of the CCT's fiscal year. This would require a separate line to be completed for each plan investing or participating in the CCT. This requirement, however, would create a mismatch between those plans and the CCTs that have different fiscal year periods. In other words, where the fiscal year of the plan ends on one date, and the fiscal year of the CCT ends on another, the two values stated on the Form 5500 will not align. Moreover, it is also not clear how the Department intends to use this information. Rather than providing transparency, this mismatch in filing date reporting may serve only to confuse or obfuscate, rather than clarify, Form 5500 information. This requirement further would add significantly to the costs resulting from providing actual dollar value amounts.

The Proposal requires CCTs to include any non-ERISA investors (*e.g.*, governmental plans, plans with only one participant) on the revised Form 5500. The Proposal does not explain why this information is needed or what its intended use may be. Given that the purpose of Form 5500 is to provide information on ERISA-covered plan investors, we request that the Department delete this requirement.

[9] *See* 29 C.F.R. § 2550.408b-2(c)(1)(viii)(B). Other industry groups are providing comments concerning soft dollar disclosure, comments with which we agree.

G. Self-Directed Brokerage Issues.

1. Self-Directed Brokerage Option Reporting.

Under the Proposal, it is unclear how a Form 5500 preparer would determine whether an investment a participant chose in a self-directed brokerage window "could result in a loss in excess of the account balance of the participant or beneficiary who directed the transaction." This information may be available to the sponsor of the investment if it is a fund, but if the participant engages *directly* in derivatives trading, it is not clear who the responsible party will be for collecting the information about the loss profile of the investment. It appears that the Department would like more information about how participants use self-directed brokerage windows. This situation, however, places the burden for reporting on a party with no access to the necessary information.

2. Schedule H: New Asset Categories and the Effect on Self-Directed Brokerage Accounts (SDBAs) with Retirement Plans.

The Proposal's requirement for new asset categories and subcategories potentially may cause difficulties in providing accurate information on the Schedule H for SDBAs. Each mutual fund company categorizes funds in a distinct manner. The revised Form 5500 will need a clear definition of each category and subcategory contained therein; however, mutual fund companies and other asset issuers cannot be expected to re-categorize their assets simply to accommodate the revised Form 5500 requirements. Banks that use third party SDBA platforms would need to ensure that those third parties implement coding changes on their sub-accounting systems to ensure that the SDBAs can account for transactions coded to fall within the new asset categories. This would not only involve a costly and labor-intensive compliance burden, but also would provide little benefit, since this is typically a small portion of the assets in the plan.

H. Technical Appendix.

The cost burden reflected in the Department's analysis for service providers in the Proposal does not appear to account for the cost to custodians to create, test, and deliver all of the newly required or modified information in the yet-to-be-determined "structured data format" electronic file to plan sponsors. ABA members have provided us with an estimated range of $500,000 to $750,000 per custodian to create the business requirements, implement the programming changes, and provide the updates to (i) the security master files, (ii) the service provider codes, (iii) the changes to Schedule H Part I and Part II, (iv) the provision of the master trust look-through reporting for hundreds of plans, and (v) the manual coding of thousands of commingled funds. While most of these costs are likely to be one-time, pre-launch costs to deliver Form 5500 reports to plan sponsors in the new format, there likewise will be ongoing costs to support all the new data fields and structured data formats.

I. Additional Considerations.

1. Cost of Recoding and Possible Double Coding.

Compliance with the Proposal likely will involve significant costs to plans and to the retirement services industry. The expenses that Form 5500 preparers would incur to recode manually thousands of assets for reporting under the Proposal likely is very high and difficult to estimate. It is likely to take hundreds of hours per firm, with each firm having to evaluate whether to modify security masters in a way that does not change reporting for other regulators or clients that are not ERISA plans. That effort would give rise to even greater expense associated with manual coding and significantly higher data storage costs. Consequently, in addition to the issues described in this letter, we request that the Department minimize, wherever possible, any reporting that would appear to be duplicative or unnecessary.

2. Schedule R.

Current instructions under Form 5500 indicate that receivables should be excluded from the plan asset values which are broken out by investment grade, high yield, equities, real estate, and other assets. The Proposal's instructions are not clear as to whether liabilities would be included. The Proposal further does not provide clear guidance on how to reflect properly the true picture of the plan assets, or why the beginning of the year balances are to be reported, which in most cases would reflect asset values that are 22 months old (*e.g.*, December 31, 2015, pension plan Form 5500s are filed by October 15, 2016, and Schedule R reflects December 31, 2014, as the proxy for the "beginning of the year" values for January 1, 2015). We would be glad to work with the Department to provide more clarity on these issues.

3. Securities Lending and Repurchase Agreements and Leverage.

The Department should clarify whether securities lending and repurchase agreements reporting would apply to programs that the plan engages in directly with securities owned by the plan, and whether this would intend to require reporting about programs used by sponsors of collective investment vehicles the plan invests in, where the plan's exposure is indirect. If the collective investment vehicles that participate in securities lending or repurchase agreement programs are meant to be included, the Department should clarify if this includes mutual funds or other collective investment vehicles that are not ERISA plan asset funds. Industry experts might be able to help the Department determine which types of securities lending or repurchase agreements that are permissible under ERISA could lead to the Department's concern about the use of leverage in such transactions.

4. Non-Cash Compensation Limit.

The Department should clarify that the $250 non-cash compensation limit for service providers is an annual limit. This clarification would be helpful for Section 408(b)(2) reporting as well as Form 5500 reporting.

5. **Master Trust Reporting**.

The Proposal would synchronize year-end reporting for master trusts and plans. Such a requirement, however, could be disruptive to the current reporting regime for master trusts and entail significant costs to align with plan reporting. We would like the Department to clarify the purposes of a year-end alignment and would further appreciate making this a topic for discussion at a Department roundtable on Form 5500.

II. **Conclusion**.

Once finalized and effective, the Department's revised Form 5500 will require a significant investment by the retirement services industry. Given the magnitude of the changes to be made and costs to be incurred, the Department should allow the industry sufficient time and flexibility for compliance so that the Form 5500 reflects, fully and accurately, the purposes for which it is intended. We believe that the best approach to ensure this result is extensive Department consultation and discussions with stakeholders – including bank custodians – that result in clarity of terms, availability of information, and realistic timeframes for systems development and testing.

We look forward to continued engagement with the Department as it evaluates how to improve the Proposal (including consideration and incorporation of alternative solutions and participation in the Beta Test), consistent with the goal of accomplishing Department objectives for transparency in the least burdensome manner.

Thank you for your consideration of these views. If you have any questions or require any additional information, please do not hesitate to contact the undersigned at 202-663-5479 (tkeehan@aba.com).

Sincerely,

Timothy E. Keehan

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