Securities Industry Association

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September 19, 2006

Via Messenger and E-mail to: e-ori@dol.gov

Robert Doyle, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, NW,
Washington, D.C. 20210

ATTN: Revision of Form 5500 (RIN 1210-AB06)

Re: Comments Regarding Proposed Revision of Annual Information Return/Reports
RIN 1210-AB06

Dear Mr. Doyle:

The Securities Industry Association ("SIA") represents around 600 securities firms, including investment banks, broker-dealers, and mutual fund companies. Our members are active in all U.S. and foreign markets and in all phases of corporate and public finance. SIA's primary mission is to build and maintain public trust and confidence in the securities markets.

On July 21, 2006, the Department published certain proposed revisions to the Form 5500 Annual Return/Report of Employee Benefit Plan (the "Form 5500").[1] These revisions include changes to Schedule C of the Form 5500, which would require service providers to an employee benefit plan to provide additional information regarding fees and related charges received by such service providers. Under the Department's proposed revisions, the changes to Schedule C would become effective for plan years (or for reporting years with respect to direct filing entities or "DFEs") beginning on or after January 1, 2008. The Department's proposed revisions are the most far ranging changes to the Form 5500 since it was first created.

Many of SIA's members would be significantly impacted by the Department's proposed revisions to the Form 5500. In particular, if adopted, the proposed revisions will require our members to make extensive and costly changes to their systems, in order to begin collecting and sorting information that is not currently collected, in some cases based on past guidance issued by the Department. The costs of these changes will be enormous and ultimately will be passed through to employee benefit plans and their participants and beneficiaries. Therefore, the SIA respectfully submits that the Department should carefully consider the proposed revisions, in light of the benefits that the additional information to be collected will provide to benefit plans.

[1] *See* 71 Fed. Reg. 41616 (July 21, 2006).

A. BACKGROUND

Under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and the Internal Revenue Code of 1986, as amended (the "Code"), pension and other employee benefit plans are generally required to file annual reports regarding their financial condition and other administrative matters. Section 104(a) of ERISA requires the administrator of any employee benefit plan subject to Title I, Part 1 of ERISA to file an annual report with the Secretary of Labor within 210 days after the close of a plan year (or within such other time prescribed by the Secretary of Labor). Section 103 of ERISA sets forth certain information which must be included in the annual report, including specific financial information regarding plan assets, a description of any transaction involving a person known to be a party in interest to the plan, and identifying information regarding the employees covered by a plan, as well as its fiduciary(ies) and administrator. Section 103(c)(3) of ERISA requires the plan administrator to furnish, except in the case of a person whose compensation is minimal and who performs solely ministerial duties (as determined by the Secretary of Labor),

> "the name of each person (including but not limited to, any consultant, broker, trustee, accountant, insurance carrier, actuary, administrator, investment manager, or custodian who rendered services to the plan or who had transactions with the plan) who received directly or indirectly compensation from the plan during the preceding year for services rendered to the plan or its participants, the amount of such compensation, the nature of his services to the plan or its participants, his relationship to the employer of the employees covered by the plan, or the employee organization, and any other office, position, or employment he holds with any party in interest."

Currently, plan administrators satisfy the annual reporting requirements by filing a Form 5500, together with any required attachments and schedules. For "large plans" or plans which cover 100 or more participants as of the beginning of a plan year, these schedules include Schedule C (Service Provider Information), which is the mechanism by which the administrator provides the information required by ERISA § 103(c)(3). Under the current rules, a plan administrator must list on Schedule C up to forty (40) of the highest paid plan service providers that received $5,000 or more in compensation from the plan during the plan year. The current Schedule C requires filers to report brokerage commissions or fees only where the broker is acting as a fiduciary with respect to the plan, and does not require reporting of "float" or overdraft charges.

In order to obtain the information required by Schedule C to the Form 5500, a plan administrator generally must collect relevant information from the plan's service providers. Therefore, to the extent that any revisions to Schedule C require plan administrators to provide additional information regarding fees and expenses paid by plans to third party service providers, these requirements will apply indirectly to such service providers. As described below, a new provision of Schedule C would also require plan administrators to identify any provider who refuses to (or fails to) provide information that the plan administrator is required to report.

Master trust investment accounts, 103-12 investment entities and group insurance arrangements that file as DFEs also must prepare and attach a Schedule C to their Form 5500. Although common or collective trust funds and pooled separate accounts that file the Form 5500 as DFEs are *not* required to complete and attach the Schedule C, they are nonetheless required by ERISA § 103(a)(2) to transmit and certify to the plan administrator any information necessary for the administrator to prepare the plan's Form 5500, including any Schedule C. For example, if the ABC Collective Trust Fund holds "plan assets" within the meaning of ERISA, to the extent that the Department's Form 5500 would require plans to report fees and expenses paid to service providers by a plan indirectly, through its investment in the ABC Collective Trust Fund, the ABC Collective Trust Fund would be required to collect and maintain records of such expenses, and be able to allocate such expenses on a plan-by-plan basis.

B. PROPOSED REVISIONS

The proposed revisions indicate that, based on recommendations of the ERISA Advisory Council Working Groups and the Government Accountability Office, the Department has determined that Schedule C to the Form 5500 should be revised to require more information regarding plan fees and expenses. The description of the proposed revisions states that the Department's changes to Schedule C would "clarify the requirements regarding reporting of direct and indirect compensation (i.e., money or anything else of value) received during the plan year in connection with services rendered to the plan or [a provider's] position with the plan." In turn, the Department believes that the proposed revisions would ensure that plan officials obtain necessary information, for purposes of assessing the reasonableness of compensation paid to service providers for services rendered to a plan, taking into account revenue sharing and other financial relationships or arrangements and potential conflicts of interest. As such, as described below, the revisions add a new requirement that the source and nature of compensation in excess of $1,000 received from parties other than the plan or the plan sponsor be disclosed for certain key service providers.

The primary modifications proposed to the Schedule C are as follows:

- Identification of all providers who receive, directly or indirectly, $5,000 or more in total compensation (i.e., money or anything else of value) in connection with services rendered to a plan during a plan year, rather than just the 40 highest paid service providers to the plan.

- Identification of all service providers who receive any compensation attributable to their relationship with or services provided to a plan from a party other than the plan or plan sponsor.

- For enumerated service providers who receive, in addition to $5,000 or more total compensation in a plan year, more than $1,000 in compensation from a person other than the plan or plan sponsor, identification of the payor of the compensation, the relationship or services provided to the plan by the payor, the amount paid, and the nature of the compensation. For purposes of this requirement, the enumerated service providers are contract administrators, securities brokers (with respect to stock, bonds, and commodities), insurance

brokers or agents, custodians, consultants, investment advisers (to plans or plan participants) and other investment or money managers, recordkeepers, trustees, appraisers, and providers of investment evaluation.

- Identification by the plan administrator of each fiduciary or service provider that failed or refused to provide the information necessary for it to report the above information.

The SIA believes that these proposed revisions would dramatically expand the types of indirect payments that are deemed to be "reportable compensation" for Schedule C purposes and in many cases require the reporting of information that service providers historically have never tracked. For example, contrary to prior guidance issued by the Department, the proposed revisions would require service providers to track and report the aggregate amount of "float" or similar earnings on plan assets or plan deposits that are retained by such service providers. Similarly, brokerage commissions and fees charged to the plan on purchase, sale, and exchange transactions currently are not deemed reportable on Schedule C unless the broker has discretion with respect to a plan.[2] However, the proposed revisions to Schedule C would depart significantly from the current rules for reporting brokerage commissions and fees by requiring filers to report all such compensation regardless of whether the broker is granted discretion. The proposed revisions suggest that this change is appropriate because "brokerage fees and commissions may constitute a significant part of a plan's annual expenses."

The proposed revisions also include new rules for applying the Schedule C requirements to a bundle of services obtained by a plan from a provider. The revisions state that, where the amount paid for a package or bundle of services reflects the amount paid for all services included within the package or bundle, direct compensation would include only the aggregate amount paid by the plan to the provider of the package or bundle of services. Therefore, amounts need not be reported on a service-by-service basis. However, amounts paid by a provider of the bundled services to other service providers to the plan would be deemed reportable if (1) the plan is also paying the other service provider directly for services in addition to those included in the package or bundle, or (2) the recipient of such compensation is a fiduciary to the plan or one of the other enumerated service providers from whom additional information is required to be reported, as described above. The Department's description of the changes notes that, to address possible burdens associated with allocating revenue-sharing income and third-party payments to individual plans, the Schedule C would provide that "indirect" compensation (i.e., amounts paid by a party other than the plan or plan sponsor) could be reported as an actual amount or an estimate of the compensation received during the reporting period. Where estimates are used, the Schedule C would then require an explanation of the formula used for calculating the payments.

C. SIA COMMENTS REGARDING THE PROPOSED REVISIONS

The SIA appreciates the Department's concerns regarding the information available to plan fiduciaries with respect to service provider arrangements. However, many of the service

[2] *See* 2006 Instructions for Schedule C (Form 5500).

providers who would be affected by the proposed changes currently do not track the information which would be reportable under the new requirements, in many cases because current guidance specifically indicates that they are not required to do so. Moreover, the SIA respectfully submits that the proposed revisions would be extremely expensive to implement, that they would require service providers to track and provide a vast amount of information that has at best questionable value in determining whether the compensation received by a service provider is "reasonable," and that any benefit that could possibly be derived from this additional information would be substantially outweighed by increases in costs charged through to the plans.

1. Effective Date of the Proposed Revisions and Continued Acceptance of Comments

At a minimum, the SIA urges the Department to consider postponing the proposed effective date of its sweeping changes to the Form 5500 reporting requirements. The current effective date, which would apply any new requirements to plan years (or reporting years for DFEs) beginning on or after January 1, 2008, would likely require providers to develop, test and implement entirely new systems and procedures in less than one year, depending upon when the Department's revisions are finalized. This time frame would undoubtedly increase the costs of implementing new systems and procedures, and potentially jeopardize the accuracy of such systems and procedures.

In addition, many enumerated service providers who are impacted by the Schedule C fee reporting changes are currently engaged in implementing plan administrative and other changes mandated by the Pension Protection Act of 2006. The SIA believes that, in order to provide accurate and thorough compliance with any changes to the reporting requirements, sufficient lead time should be provided to implement the Department's final guidance, based on the date of such guidance.

Furthermore, the SIA and its members need additional time to investigate all of the changes in systems and procedures that would be required to implement the proposed revisions and to fairly estimate the costs associated with these changes. Because the costs of making these changes invariably will be passed through to employee benefit plans and their participants and beneficiaries, it is extremely important that these costs be thoroughly investigated and considered in determining whether the proposed revisions are justified. In that regard, SIA requests that the Department continue to collect comments from plans, service providers, and other interested parties beyond September 19, 2006.

2. Changes in the Form 5500 Reporting Requirements

SIA's members simply do not collect information regarding fees and expenses paid by plans in a format that would allow them to provide the information needed to comply with the proposed revisions to Form 5500. A primary example of this problem arises in the area of the Department's proposed revisions regarding brokerage commissions which must be reported on Schedule C. The proposed revisions would drastically alter the information which must be reported by broker-dealers, by requiring them to report aggregate figures of the commissions that they receive from plans, even with respect to trades for which such broker-dealers have no

discretion. The brokerage industry has never tracked or reported brokerage commissions in the manner that would be required under the proposed rules, and doing so would be extremely difficult from a practical standpoint, as well as costly.

Furthermore, the information collected on Schedule C to the Form 5500 should be carefully targeted to what is needed in order for plan fiduciaries to analyze the reasonableness of service provider fees. The SIA does not believe that a gross dollar amount stating how much a broker-dealer received in brokerage commissions, "float," overdraft charges, securities lending fees, custody service and other fees paid by a plan provides carefully targeted, or even useful information to a plan fiduciary.

Brokerage Commissions:

SIA's members do not currently track brokerage commissions or fees on a plan by plan basis. Indeed, broker-dealers are unable to identify plans for which they execute trades because the trades are presented by investment managers using their own proprietary account numbering systems. For example, assume that Manager X is an investment manager to Plan Y, within the meaning of ERISA § 3(38). Manager X determines to initiate a securities trade on behalf of Plan Y. In doing so, Manager X selects Broker Z, an unaffiliated broker-dealer to execute the transaction. Broker Z agrees to sell 1,000 shares of the security for a price of three cents a share. Under current market practices, Plan Y is identified to Broker Z as an account number which is proprietary to Manager X's internal systems. Broker Z is not aware that the account for which it is executing a securities trade is owned by Plan Y. However, under the Department's proposed rules, Broker Z would be required to determine, on an annual basis, the amount of compensation that it received from Plan Y, not only with respect to the one trade described in this example, but for all trades sent to Broker Z by all of Plan Y's investment managers. Therefore, Broker Z must somehow identify the appropriate investment account numbers for all trades with Plan Y, and then calculate the aggregate cost of all trades executed on its behalf, even though Broker Z did not know the identity of Plan Y at the time of the trades, or have any discretion over its trading activity. This requirement is particularly onerous when one considers the fact that large plans often retain numerous investment managers, who may all potentially select Broker Z to execute trades for Plan Y, at the investment manager's complete discretion. However, if Broker Z is unable to determine this information and report it to Plan Y, it would potentially be listed as an uncooperative service provider on Plan Y's Schedule C.

Because each investment manager has its own proprietary account numbering scheme, the cost of developing a system to track brokerage commissions and fees on a plan by plan basis will be enormous. Changing how market participants trade is itself cost prohibitive. The SIA would be pleased to share with the Department the difficulties of creating the new systems that will be needed to comply with the proposed revisions. We are actively seeking to compile information that would enable us to better estimate the cost of developing the systems necessary to comply with the Department's proposed revisions and ask that we be given additional time to supplement the record. Undoubtedly, however, any additional costs will be passed onto the plans because they are the only customers for which these records must be maintained.

Furthermore, requiring Broker Z to report the aggregate amount of brokerage commissions which Plan Y paid to it during a year will not help Plan Y's fiduciary determine whether trades executed by Broker Z were initiated by one investment manager or multiple investment managers, whether Plan Y received a low commission rate or a high commission rate on an individual trade, whether best execution was achieved, whether any of its managers used good judgment in selecting Broker Z, or whether Manager X is churning Plan Y's account by engaging in unnecessary transactions with a number of different brokers. A high number could mean any number of different things, including many trades in emerging markets, mostly agency transactions, difficult to assemble blocks of securities or unfavorable brokerage rates. By the same token, a low number could mean favorable commission rates, that a majority of trades were executed on a principal basis, or that many of the plan's managers used a "buy and hold" rather than a frequent trading investment strategy. A plan fiduciary could not determine from the proposed disclosure what the aggregate amount of brokerage commissions or fees means in this regard. A gross number for compensation received does not allow a plan fiduciary to compare one number to another because gross numbers do not disclose what services were provided or what the broker received for a particular trade or service.

A plan fiduciary is always free to ask an investment manager how it selects broker-dealers and why it agrees to a particular commission rate. The SIA believes that this information is far more targeted and useful than the aggregate amount of compensation actually received by a broker-dealer in connection with services provided to a plan. Aggregate brokerage commissions and fees provide no useful or meaningful information to a plan fiduciary, particularly where the broker-dealer has no control over its involvement in the securities trades, has not selected itself to provide the service, and is charging market rate commissions or fees. Plans engage in an enormous volume of trading activity every day. The Department's proposal is not designed to help fiduciaries understand an investment manager's trading decisions, the comparability of broker-dealers or whether efficient trading has occurred. Aggregate numbers reported by broker-dealers may include commissions, float, overdraft charges, securities lending fees, debit interest for margin transactions, custody and other service fees – the SIA does not see how this aggregate number will be meaningful for a fiduciary. Nonetheless, because broker-dealers will be required to build entirely new systems and reporting mechanisms as a result of the proposed revisions, the costs of trading activity to plans are likely to increase dramatically under the Department's proposed revisions.

Float, Overdraft Charges and Extensions of Credit:

The SIA's members do not currently calculate or separately maintain data regarding the aggregate float, overdraft, margin, securities lending or other similar fees paid by each plan. We believe this is consistent with past Departmental guidance indicating that plan service providers are not required to collect or report this type of information. For example, in Field Assistance Bulletin ("FAB") 2002-03 (November 5, 2002), the Department described the information that a fiduciary should consider in evaluating the reasonableness of an arrangement where a service provider retains "float" with respect to plan assets or deposits. As FAB 2002-03 notes, a number of financial service providers, such as banks and trust companies, maintain general or "omnibus" accounts to facilitate employee benefit plan transactions. These general or "omnibus" accounts may hold contributions and other assets pending reinvestment or disbursement of plan assets,

allowing plans to experience short-term investment earnings on assets held in the accounts. In some cases, a service provider retains earnings, or "float" resulting from the short-term investment of funds held in such accounts.

FAB 2002-03 indicates that service providers should, as part of their fee negotiations, provide "full and fair disclosure" regarding the use of float with respect to plan funds. The bulletin then goes on to describe what constitutes full and fair disclosure, which is intended to ensure that plan fiduciaries are able to make informed assessments concerning the prudence of a compensation arrangement involving float. In describing what constitutes full and fair disclosure for these purposes, the Department indicated that service providers should provide, and plan fiduciaries should consider, information regarding the specific circumstances under which float may be earned by a service provider, such as appropriate time limits with respect to cash awaiting investment or disbursement. In addition, a plan fiduciary should receive sufficient information to enable it to evaluate whether float to be earned as part of a service provider's total compensation for services rendered under an agreement will be a significant component of the provider's overall compensation arrangement. For example, this would require advance disclosure of the rates the provider generally expects to earn (e.g., money market rates), or how such rates will be determined. FAB 2002-03 specifically notes that, given uncertainties with respect to both actual interest rates and the periods of time for which funds may be pending disbursement or reinvestment, these projections are likely to provide only a rough approximation of potential float.

Nowhere in FAB 2002-03, or in any other guidance on the subject of float, does the Department indicate that a service provider is required to determine the amount of float it earns with respect to plan assets, or to provide this information to plan fiduciaries. In practice, it would be difficult to determine these amounts, and financial services institutions currently do not calculate or retain this information. For example, every time a broker-dealer engages in a securities transaction on behalf of a plan, cash will typically be moved from a client account and held by the broker-dealer for three days pending settlement. A T+3 settlement structure is a commonly accepted practice with respect to securities transactions. However, no broker-dealer that the SIA is aware of keeps track of any float compensation earned by the broker-dealer in this situation. Yet, the Department's proposed revisions would potentially deem such earnings to be direct or indirect compensation to a plan service provider, which is subject to the proposed reporting requirements. Where appropriate advance disclosure of float arrangements has been provided to a plan, the SIA believes that the plan is adequately protected, and that requiring service providers to calculate and maintain records regarding float actually earned by such service providers would impose unnecessary costs, which will ultimately be passed through to plans.

Similarly, the proposed revisions indicate a potential shift in the Department's past guidance on overdrafts. In DOL Advisory Opinion 2003-02A (February 10, 2003), the Department indicated that, where appropriate disclosures are provided to a plan fiduciary, the provision of overdraft protection services to a plan does not constitute a prohibited transaction. As the opinion letter recognizes, overdraft protection is an integral part of a bank's standard operating systems offered to all institutional customers, and is an expected and necessary service for both plan and non-plan clients. Also, as noted in the opinion letter, overdrafts are generally

inadvertent or outside of the control of the service provider. Thus, the Department has indicated that such overdraft protection may satisfy the statutory "ancillary services" exemption where the financial institution has fully disclosed and obtained the plan fiduciary's consent to the provision of such services, provided that provision of the service otherwise meets the terms and conditions of the exemption. Although the advisory opinion indicates that appropriate disclosures must be provided to a plan fiduciary in advance of providing overdraft protection services, nowhere does it indicate that the financial institution must track and report to the plan the amount of any compensation actually earned through the provision of the service.

Revenue Sharing and Other Investment Related Fees:

With respect to investment related fees like revenue sharing payments or soft dollars received by a service provider, the SIA believes that the types of indirect compensation which the Department proposes to cover under its new reporting requirements are too broad. Certain forms of indirect compensation cannot be tracked under service providers' current systems, and in some cases, it is unclear whether new systems can be developed which are able to track such compensation. For some service arrangements, it is impossible or impractical to calculate fees on a plan-by-plan basis.

For example, where a plan's recordkeeper receives fees for services on behalf of an unaffiliated mutual fund offered as an investment option under the plan, such fees are generally calculated at an omnibus account level. An omnibus account combines the investments of many shareholders in a particular mutual fund into one account. The shareholders may include retirement plans, brokerage accounts, IRAs, trusts and other investors. Use of omnibus accounts, which is considered to be a best practice in the industry, allows for efficient and convenient data exchanges and settlement of transactions between a mutual fund and a recordkeeper. Recordkeeping service fees are periodically calculated and paid to the recordkeeper by mutual funds, on the basis of assets held in the omnibus account, and without distinction between the identity of the underlying shareholders, such as which shareholders are plan or non-plan investors. Similarly, where a recordkeeper offers mutual funds, its mutual funds may be held in omnibus accounts by other recordkeepers, third party administrators, transfer agents, or other third parties, and the recordkeeper's mutual funds would pay recordkeeping service fees to those entities. Significant changes would be required for virtually all recordkeepers who maintain omnibus accounts to comply with the proposed changes to Schedule C, in order to accurately allocate service fees at a plan-by-plan, rather than an omnibus account level. These changes include development of new calculation methodologies and recordkeeping rates, renegotiation of agreements between mutual funds and recordkeepers and, as a threshold matter, determination of who is responsible for determining allocations and reporting of such allocations to plans (i.e., the omnibus account recordkeeper which has access to underlying plan information, or the mutual fund which pays recordkeeping fees).

If the Department determines to require reporting of investment related payments, it is unclear what types of investment-related payments received by a service provider should be considered indirect compensation reportable on Schedule C. It also unclear how such payments would be allocated or whether the allocations would be meaningful or helpful to plans invested in a master trust or in a common or collective trust fund. The SIA believes that the Department

should consider the reporting required by other regulators, such as the Securities and Exchange Commission ("SEC"), in making these determinations. The SEC is currently reviewing the reporting and disclosure of soft dollar arrangements by investment managers. Until the SEC has completed its detailed inquiry in this area, any reporting and disclosure requirements imposed by the Department would likely subject service providers to inconsistent compliance requirements and unnecessary costs. Yet the Department has indicated in ERISA Technical Release 86-1 that plans are adequately protected by an interpretation of soft dollar arrangements that is consistent with the SEC's interpretation of such arrangements. The Department has no reason to depart from its previous stance on this issue.

3. *The Department's Proposed Revisions Are Broader Than Necessary*

Achieving Full and Fair Disclosure to Plans:

The SIA believes that the fee disclosure requirements which the Department has included in existing regulations, exemptions and advisory opinions are more reasonable and beneficial to plans. Much of the Department's existing guidance focuses on providing full and fair disclosure to a plan's fiduciaries in advance of any transaction. As interpreted by the Department, ERISA § 408(b)(2) already requires plan fiduciaries to ensure at the time a service provider is retained that the service provider's compensation is reasonable. Under the Department's current regulatory pronouncements, plans also receive regular reports from investment managers and other service providers, as well as disclosure of a provider's use of its affiliates in executing transactions. These reports and disclosures contain detailed information for plan fiduciaries in carrying out their responsibilities to monitor plan service providers and the reasonableness of fee arrangements.

The SIA believes that the disclosures required by the Department's current interpretation of ERISA § 408(b)(2) and other pronouncements are the type of targeted disclosures that provide plan fiduciaries with information necessary to determine whether a service provider's fees are reasonable, and whether to continue to retain the service provider. In contrast, the SIA believes that the proposed revisions to the Form 5500 requirements unnecessarily increase the costs of providing services to benefit plans, without providing added benefits to such plans which justify those costs. In practice, this will increase the administrative costs passed onto plans by service providers, and potentially limit the number of providers willing to transact business with employee benefit plans.

Reporting Requirements for Subcontractors and Other Third Parties:

The SIA also notes that it is unclear in many circumstances whether a subcontractor or other third party, such as a foreign subcustodian or a clearing merchant retained by a service provider on behalf of a plan would be required to report compensation received indirectly from a plan, because the proposed revisions indicate that reporting may be required in some instances with respect to entities that do not have a direct relationship to a plan. For example, where a plan's global custodian engages in a currency trade with a foreign subcustodian, the foreign subcustodian may be deemed to have received indirect fees from a plan (through its relationship with the global custodian). It is completely unclear whether the foreign subcustodian would be

required to report this compensation, and if so under what circumstances. The foreign subcustodian in this situation has not contracted to provide services to the plan. Rather, the foreign subcustodian's only direct relationship is with the global custodian who selected it for purposes of executing a currency trade, and it probably would not know the identity of the plan, or even that it was executing a trade on behalf of a plan.

In the SIA's view, the foreign subcustodian is a provider of services to the global custodian, and should not be required to report the payment; however, the SIA requests confirmation that subcontractors or other third parties are not required to report compensation where they are providing services to another service provider, rather than to a plan. The SIA believes that this is consistent with ERISA § 103(c)(3), which requires reporting with respect to compensation "for services rendered to the plan or its participants." Furthermore, an alternative interpretation of a subcontractor's role would lead to illogical results, because if subcontractors were required to report compensation received from their relationship with service providers to a plan, "double counting" of fees may result. Thus, continuing with our example, if the foreign subcustodian were required to report any compensation that it received indirectly from the plan, the global custodian arguably would be required to report the same compensation to the plan, since the global custodian would have to report the gross amount which it received directly from the plan as compensation for its services. Requiring both the global custodian and foreign subcustodian to report aggregate numbers would thus create the false impression that a plan has paid the same fee twice. Rather than provide plans or the Department with helpful information regarding compensation paid to service providers, this requirement would be duplicative and confusing, and undoubtedly raise the costs borne by plans in retaining service providers.

Plan fiduciaries may, of course, obtain information from any service providers with whom they have contracted directly regarding payments made indirectly to third parties. As noted above, the Department's current interpretation of ERISA § 408(b)(2) and other guidance require service providers to provide plan fiduciaries with full and fair disclosure of all applicable fees, as well as whether a provider intends to appoint its affiliates to assist in executing transactions, within the limits imposed by ERISA's prohibited transaction rules. To the extent that the Department believes that additional disclosures are necessary to provide carefully targeted information to plan fiduciaries who select and monitor service providers, the regulations under section 408(b)(2), which are currently under review by the Department, would be an appropriate forum for changes to required disclosures. However, the SIA believes that any required disclosures should be meaningful, and allow plan fiduciaries to determine the compensation charged by service providers for services which are "rendered to [a] plan or its participants." The SIA does not believe that requiring subcontractors or other third parties to report aggregate amounts of compensation which they have received indirectly from a plan, through the provision of services to a plan service provider, enhances the amount of useful information available to plan fiduciaries, particularly where such a requirement would result in plan fiduciaries receiving duplicative or misleading information.

D. CONCLUSION

Thank you for considering our comments on the proposed revisions to the Form 5500 reporting requirements. We believe that the current proposals with respect to reporting of

service provider fees on Schedule C are overbroad and would unnecessarily increase plan costs, without providing plans with meaningful information to use in carrying out their fiduciary duties to such plans. The SIA would welcome the opportunity to work with the Department in developing rules that would achieve its goal of clarifying the reporting requirements, and improve the information available to plans with respect to service provider fees. Please do not hesitate to contact us if you have any comments or questions regarding this letter.

Sincerely,

Elizabeth A. Varley

Elizabeth A. Varley

cc: The Honorable Anne Combs
Joe Canary
Alan Lebowitz
William Taylor
Melanie Franco Nussdorf