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October 29, 2021

Office of Regulations and Interpretations  
Employee Benefits Security Administration, Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue N.W.  
Washington, DC 20210

Attention: Proposed Revision of Annual Information Return/Reports RIN 1210-AB97

Ladies and Gentleman:

The ABA Retirement Funds (“ABA RF”) respectfully submits this letter in response to the request by the Department of Labor (the “Department”) for comments regarding its proposed amendments to the Department regulations relating to annual reporting requirements under Title I of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), and the Proposed Revision of Annual Information Return/Reports (collectively, the “Proposal”).

As explained below, ABA RF recommends that the final rule issued by the Department relating to the Proposal include self-directed brokerage accounts (each, an “SDBA”) meeting the requirements described in this letter (“Qualifying SDBA”) as an “investment option” for a Defined Contribution Group (“DCG”) reporting arrangement, thereby permitting a DCG offering a Qualifying SDBA to file a consolidated Form 5500. In connection with that recommended change, the ABA RF also recommends that the requirement that all plans in the DCG reporting arrangement have a “common trustee” be modified to permit assets of the Qualifying SDBA to be held by a “common sub-custodian.” Further, in response to the Department’s request for information that should be collected regarding (a) the SDBAs, (b) the participants using the SDBAs, and (c) the individual assets held by the plans as a result of investments made through SDBAs, this letter asserts that sufficient information will be provided in the Form 5500 pursuant

to existing questions in the Form 5500 and recommends that no changes be made to the Form 5500 to collect any additional information regarding SDBAs.

## **BACKGROUND**

1. **Use of SDBAs.** The use of SDBAs has increased over the last twenty years. In 2001, only about 12% of participant-directed defined contribution plans offered SDBAs; in 2011, this percentage had increased to 29%; and it is estimated that, by the end of 2021, approximately 47% of participant-directed defined contribution plans will offer SDBAs.<sup>1</sup> Some SDBAs are limited in the types of investments permitted in the account whereas others do not limit the types of investments.<sup>2</sup>

Although nearly half of participant-directed defined contribution plans are projected to offer SDBAs by the end of 2021, usage of these accounts is low. Only about 2.4% of actively-employed participants in all plans, in the aggregate, use the accounts.<sup>3</sup>

2. **ABA RF.** The ABA RF is an Illinois not-for-profit corporation formed by the American Bar Association (“ABA”) as a professional association for the purpose of providing a retirement solution for adoption by individual lawyers and law firms who are members of the ABA or members of state or local bar associations represented in the ABA's House of Delegates. This retirement solution is provided through the Program, which is a comprehensive program that provides adopting eligible employers, acting as plan sponsors (“Employers”), administrative, investment and fiduciary services, including the provision and maintenance of pre-approved tax-qualified retirement plan documents, a fixed menu of diversified investment options, an SDBA

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<sup>1</sup> See whitepaper written by alight titled “[5 Facts about self-directed brokerage accounts](https://alight.com/getmedia/e6c4a910-0497-47e1-a73c-71238e7a4894/06528_5_Facts_about_SDBA_whitepaper_2021_v7_1.pdf),” August 2021: [https://alight.com/getmedia/e6c4a910-0497-47e1-a73c-71238e7a4894/06528\\_5\\_Facts\\_about\\_SDBA\\_whitepaper\\_2021\\_v7\\_1.pdf](https://alight.com/getmedia/e6c4a910-0497-47e1-a73c-71238e7a4894/06528_5_Facts_about_SDBA_whitepaper_2021_v7_1.pdf)

<sup>2</sup> Id.

<sup>3</sup> Id.

and related recordkeeping and administrative services. Different types of plans are available under the Program (“Plans”). Most Plans are self-directed 401(k) plans or profit sharing plans.

ABA RF is both a fiduciary and a service provider to each Plan after a sponsoring Employer adopts the Program. Pursuant to the terms of the Program documents, the Employers delegate to ABA RF the authority to engage, monitor and terminate the various other service providers to the Program. Those service providers are a trustee (the “Trustee”),<sup>4</sup> that acts as a trustee to Plans that adopt the pre-approved plan maintained by ABA RF, as discretionary trustee of the Plan’s assets held in the Program’s collective trust (the “Program’s Collective Trust”) and the directed trustee of the Plan assets invested through the SDBA; a recordkeeper (the “Recordkeeper”),<sup>5</sup> that provides ministerial administrative/recordkeeping services to the Plans and markets the Program to eligible employers; and a SDBA provider (the “Brokerage Provider”),<sup>6</sup> that provides the Program’s SDBAs. ABA RF is in the process of considering the engagement of a preferred plan administrator that could serve as the “administrator,” within the meaning of Section 3(16) of ERISA, of all Plans sponsored by Employers who elects to hire and pay the fees of the preferred plan administrator.

The investment options available to Plans are (a) all of the investment funds offered by the Program’s Collective Trust, and (b) the SDBA available through the Brokerage Provider. Unlike other platforms, Employers do not select, among a menu of investment options, the investment funds that will be offered under their particular Plans. Instead, the Trustee is responsible for establishing the investments funds that are available to all Plan participants. An Employer can choose not to offer the SDBA under its Plan but no Employer can decide not to

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<sup>4</sup> Currently, the Trustee is Mercer Trust Company.

<sup>5</sup> The Recordkeeper is Voya Institutional Plan Services, LLC and its affiliates.

<sup>6</sup> The Brokerage Provider is TD Ameritrade, Inc.

offer under its Plan one or more of the investment funds available under the Program's Collective Trust. An Employer does have responsibility for selecting the qualified default investment alternative provided under its Plan.

The SDBA offered by the Program permits Plan participants to invest in mutual funds, ETFs and securities but prohibits participants from investing in privately-offered investment funds and other investments that would generate unrelated business taxable income. The total assets in the Program as of June 30, 2021 were approximately \$7.8 billion of which approximately \$1.4 billion was invested in the SDBA and approximately \$6.4 billion was invested in the Collective Trust.

## COMMENTS

### ***1. The Final Rule Should Allow "Qualifying SDBA" in Plans Participating in a DCG.***

The preamble to the proposed changes to the Form 5500 Annual Return/Report forms states that the requirement of the SECURE Act that a DCG have the "same investments or investment options" precludes treating an SDBA "as an 'investment option' because such investments and investment alternatives would conflict with the investment uniformity objectives of the SECURE Act requirement." There should be no conflict with the SECURE Act provision requiring that the DCG "provide the same investments or investment options to participants and beneficiaries" or with "the investment uniformity objectives" referenced in the preamble if the DCG offers an SDBA with a designated brokerage provider with the same types of investments for all plans in the DCG. Moreover, as stated above, almost 50% of participant-directed defined contribution plans are expected to offer SDBAs by the end of 2020 and excluding all of those plans from the DCG reporting arrangement may disadvantage those plans that otherwise could meet the conditions to participate in a consolidated Form 5500 report.

As stated above, ABA RF recommends that the final rule permit a “Qualifying SDBA” to be treated an “investment option” for a DCG reporting arrangement, thereby permitting a DCG offering a Qualifying SDBA to file a consolidated Form 5500. For this purpose, ABA RF recommends that the term “Qualifying SDBA” be defined in the final rule as follows:

“Qualifying SDBA” is a self-directed brokerage account or window available to all plans in the Defined Contribution Group as an investment alternative in addition to other investment options offered to such plans and that meets the following conditions: (a) it is provided by a single designated registered broker-dealer, and (b) the only permitted investments in the Qualifying SDBA are assets with a readily determinable fair market value, as described in 29 CFR 2520.103-1(c)(2)(ii)(C).

A Qualifying SDBA, as defined above, meets the conditions for other investment options permitted to be offered in a DCG reporting arrangement and, therefore, should be added as a permissible investment option. Doing so would avoid penalizing the nearly 50% of plans expected to offer an SDBA.

***2. The Final Rule Should Allow Assets of the Qualifying SDBA to be Held by a Sub-Custodian.***

To accommodate the holding of assets of the Qualifying SDBA by the registered broker-dealer, the requirement that all plans in the DCG reporting arrangement have a “common trustee” should be modified to provide an exception for the assets of the Qualifying SDBA, which may be held by a “common sub-custodian.” In this regard, ABA RF recommends that the final rule change paragraph (c)(2)(i) of §2520.104-51 to read as follows:

(i) The same trustee as described in section 403(a) of the Act (“common trustee”) and trust(s) (“common trust”) and, for the Qualifying SDBA, the same sub-custodian (“common sub-custodian”) that holds assets of the Qualifying SDBA pursuant to an agreement with the common trustee;



***3. Information to Be Collected Regarding (a) the SDBAs, (b) the Participants Using the SDBAs, and (c) the Individual Assets Held by the Plans as a Result of Investments Made Through SDBAs.***

The Form 5500 already provides a mechanism for plans to provide information relating to assets held in all plan participants' SDBAs. Line 8a of Form 5500 requires reporting of all applicable plan characteristics codes. One such code is Code 2R for "Participant-directed brokerage accounts provided as an investment option under the plan." Therefore a DCG reporting arrangement offering a Qualifying SDBA will be required to insert Code 2R on line 8a of the Form 5500 and in Part V of the Proposed Schedule DCG.

In addition, instructions to Schedule H of Form 5500 provide guidance on how to report investments made through SDBAs where an SDBA is an investment alternative under the plan. Under that guidance, investments in assets made through SDBAs, other than loans, partnership or joint-venture interests, real property, employer securities, or investments that could result in a loss in excess of the account balance of the participant or beneficiary who directed the transaction, can be reported either:

1. As individual investments on the applicable asset and liability categories in Part I and the income and expense categories in Part II, or
2. By including on line 1c(15) the total aggregate value of the assets and on line 2c the total aggregate investment income (loss) before expenses. Expenses charged to the accounts must be reported on the applicable expense line items. Participant-directed brokerage account assets reported in the aggregate on line 1c(15) should be treated as one asset held for investment for purposes of the line 4i schedules.

If the Department adopts the recommended definition of Qualifying SDBA, the assets of such SDBA will not include tangible personal property, loans, partnership or joint-venture

interests, real property, employer securities, or investments that could result in a loss in excess of the account balance of the participant or beneficiary who directed the transaction.

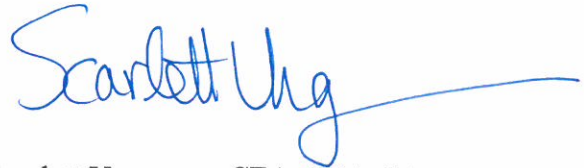
The above questions will require the DCG to provide sufficient information regarding the SDBAs and the assets held by plans as a result of investments through the SDBAs. The Form 5500 currently does not require information regarding participants using an SDBA and the ABA RF does not believe that any purpose would be served by requiring that information in a DCG reporting arrangement. Moreover, the ABA RF does not believe it would be helpful to the Department to have information as to which plans in the DCG reporting arrangement hold specific assets in the Qualifying SDBAs.

For the reasons stated above, the ABA RF recommends that no changes be made to the Form 5500 to require additional information regarding (a) the SDBAs, (b) the participants using the SDBAs, or (c) the individual assets held by the plans as a result of investments made through SDBAs. The ABA RF believes that sufficient information regarding these items will be provided under the existing provisions of the Form 5500.

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On behalf of the ABA Retirement Funds, we thank you for considering our comments. If you have any questions or need additional information, please let us know.

Sincerely,

A handwritten signature in blue ink that reads "Scarlett Ung". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Scarlett Ungurean, CFA, CPA CA  
Executive Director