American Bankers Association
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Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Proposed Form 5500 Revisions (RIN 1210-AB97)

Ladies and Gentlemen:

The American Bankers Association[1] (ABA) appreciates the opportunity to provide comments to the Department of Labor (Department) on 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). Form 5500 is required to be filed by each pension and other employee benefit plan concerning, among other things, the financial condition and operations of the plan.[2]

A number of the proposed revisions to Form 5500 result from the statutory amendments to the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (Code) that were enacted as part of the Setting Every Community Up for Retirement and Enhancement Act of 2019 (SECURE Act). Among other things, the SECURE Act expressly directs the Secretary of Labor and Secretary of Treasury to develop a new aggregate annual reporting option for certain groups of retirement plans, and includes other statutory amendments that directly impact annual reporting requirements for multiple-employer pension plans (MEPs).[3] The Department, however, is proposing additional revisions (*i.e.*, not part of the SECURE Act) to Form 5500 that would substantially expand the format and content of the schedules of assets held for investment that are currently required on Schedule H of Form 5500 (the "Schedules of Assets"). These changes are intended to make the financial information collected on the Form 5500 more useful, and in the words of the Department, "data-mineable." It is the Department's proposed changes to Schedule H that form the basis of our comments regarding the Proposal.

[1] The American Bankers Association is the voice of the nation's $22.8 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard nearly $19 trillion in deposits, and extend $11 trillion in loans. Learn more at www.aba.com.

[2] The Proposal appears in the *Federal Register* in two parts: proposed revisions to the Form 5500 regulation and proposed revisions to Form 5500 itself. *See* 86 *Fed. Reg.* 51,284 (2021) (Annual Reporting and Disclosure (Regulation)), 86 *Fed. Reg.* 51,488 (2021) (Proposed Revision of Annual Information Return/Reports (Form 5500)).

[3] A multiple-employer pension plan or MEP is a retirement savings plan maintained by two or more unrelated employers within a similar industry (*e.g.*, food services, construction). This is distinguishable from a *multiemployer plan*, which is a collectively bargained pension plan between two or more employers – typically within the same or related industries – and a labor union.

While we support the Department's goal to improve the usability of the Schedules of Assets, we believe that several of the Proposal's changes are highly problematic for Form 5500 filers and their service providers. We further believe that these problems stem from the Department overlooking the opportunity to engage stakeholders prior to Proposal's release, which has resulted in the inclusion of several flawed and unworkable changes.

In order to address these issues, we recommend that the Department delay the finalization and implementation of the proposed changes specific to Schedule H, and instead address the Schedule H reforms as part of the Department's larger ongoing effort to modernize the financial and other annual reporting requirements on the Form 5500.[4] In addition, we urge the Department to take the following steps as part of that larger effort:

(1) Conduct public hearings and/or roundtable discussions to permit input from stakeholders and interested parties,[5] with the goal of ensuring that any new requirements are feasible and achievable for Form 5500 filers and bank trustees/custodians and other service providers, while appropriately achieving the Department's regulatory goals.

(2) Provide for a minimum comment period of 90 days after the notice of proposed rulemaking, and conduct additional public hearings and/or roundtable discussions to permit input from stakeholders and interested parties prior to issuing final rules.

Without limiting the foregoing, we further wish to comment on specific provisions of the Proposal that raise particular concerns with our members that serve both as plan sponsors and as service providers to the retirement industry. The Department should consider fully these comments prior to finalizing any changes to the Schedules of Assets. We also request a meeting with Department staff in order to discuss and dialogue on these concerns and as part of our efforts to work with the Department to achieve useful, practical, and lasting reforms to the Schedules of Assets.[6]

I. <u>The Proposal</u>.

Under ERISA and the Code, employee benefit plans are subject to annual reporting and filing obligations, which are generally satisfied through a plan's filing of the Form 5500. Among other things, this annual reporting form serves as the primary source of information and data available concerning the operations, funding, and investments of employee benefit plans. The Department considers the Form 5500 as "essential to [its] enforcement, research, and policy formulation programs."[7] The Department has recognized and advocated the need to update and improve

[4] *See* Proposal, 86 *Fed. Reg.* at 51,492 ("The DOL components of this proposal are generally focused on implementing annual reporting changes related to the SECURE Act . . . [t]he DOL has added a separate project [beyond the scope of this proposal] that would focus on a broader range of improvements to the Form 5500 annual reporting requirements.")

[5] This would be similar to the meeting that the Department held with ABA and its member banks in November 2016 during the Department's deliberations of its prior comprehensive proposal on Form 5500 revisions.

[6] Given ongoing concerns about COVID-19 transmission, we would be willing and available to engage in such discussion through video and/or audio conference calls with Department staff.

[7] *See* Proposal, 86 *Fed. Reg.* at 51,489 (Proposed Revision of Annual Information Return/Reports).

Form 5500 reporting requirements,[8] issuing a comprehensive proposal in 2016 (which was not adopted) and periodically implementing targeted changes to Form 5500. Significant, substantive changes to the annual reporting form, however, have not been made since 2007.

The SECURE Act's passage has resulted in the need for changes to Form 5500 by (i) expanding the availability and use of MEPs, and (ii) the SECURE Act's directing the Department to establish a consolidated reporting option for defined contribution pension plans that share certain key characteristics. The SECURE Act further amended ERISA to allow for a new type of ERISA-covered MEP: a defined contribution pension plan called a "pooled employer plan" (PEP) that is operated by a "pooled plan provider." A PEP allows employers from different industries to maintain a retirement savings plan, without the need for any common interest among the participating employers, but subject to certain requirements and restrictions under ERISA.[9] These SECURE Act provisions thus may offer attractive retirement plan alternatives for employers, particularly small businesses.[10] We support this legislation since it expands retirement plan choice for employers and further authorizes and enables the Department to simplify retirement plan administration for certain eligible defined contribution plans.

In carrying out its authority to create reporting requirements in accordance with relevant provisions of the SECURE Act, the Department has also taken the opportunity to propose a number of amendments to the Schedules of Assets (line 4i of the Form 5500's Schedule H). The Proposal, in particular, would amend the content requirements for the "Schedule of Assets Held for Investment" (line 4i(1)) and the "Schedule of Assets Acquired and Disposed of During the Plan Year" (line 4i(2)) to require that these schedules be filed electronically in an expanded, structured format so that the data may be "mined" by the Department and interested parties.[11] Parties filing Form 5500 would no longer be able to create their own schedules of assets, in the form of an attachment or otherwise. The Proposal further would require, among other things, that asset categories and asset identifiers be listed, and confirmation whether an asset is a "hard-to-value" asset. A "check-the-box" format also would be added for participant-directed individual account plans that are designated investment alternatives and qualified default investment alternatives. There is also a requirement to enter the total annual operating expenses for the investments expressed as a percentage of assets that was furnished to participants and beneficiaries in their most recently received 404a-5 statement.[12] Taken together, the proposed revisions would result in significant changes to the current Schedules of Assets.

II. General Concerns.

The Department's goal of revising plan reporting obligations, particularly with respect to financial information, calls for measured and targeted rulemaking, since "[g]overnment actions

[8] *See* Statement of Phyllis C. Borzi, Assistant Secretary, Employee Benefits Security Administration ("The [Form] 5500 is in serious need of updates to continue to keep pace with changing conditions in the employee benefit plan and financial market sectors"), *reprinted in* Department News Release (July 11, 2016).
[9] *See* SECURE Act § 101 (amending ERISA § 3(2) and adding ERISA §§ 3(43) and 3(44)).
[10] *See id.*
[11] Currently, identifying the investments held by a plan must be done manually because the investment schedules are not required to be attached in any particular format.
[12] *See* Proposal, 86 *Fed. Reg.* at 51,500-51,501 (Proposed Revision of Annual Information Return/Reports).

can be unintentionally harmful, and even useful regulations can impede market efficiency."[13] Given the scope of the revisions to the Schedules of Assets, it would have been prudent, useful, and constructive if the Department had reached out and consulted with plans and their service providers prior to issuance of the Proposal.[14] Indeed, prior to drafting the Proposal, we believe that the Department's *obligation* was to seek input from plans and service providers likely to be impacted from the revisions and additions to Schedule H. As stated in Executive Order 13563:

> "*Before* issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, *shall* seek the views of those who are likely to be affected, including those . . . who are potentially subject to such rulemaking."[15]

We are not aware of any Department efforts, prior to the Proposal's issuance, to study, survey, analyze, or evaluate the banking industry's provision of services to the retirement industry that are directly or indirectly impacted by the Proposal. Instead, the Department appears to have relied wholly on recommendations made by the Government Accountability Office (GAO) and Department of Labor Office of Inspector General (OIG).[16] Given the magnitude of the proposed revisions to the Schedules of Assets, the Proposal would have greatly benefitted from the banking industry's input at the outset, prior to the Proposal's release. At a minimum, the omission of advance input from the banking industry and other interested parties provides a compelling reason to delay the finalization and implementation of the Proposal's changes to Schedule H, and instead direct any changes to Schedule H to the Department's larger effort to modernize the financial and other annual reporting requirements on the Form 5500.[17] As noted above, such an undertaking should include steps described above regarding public hearings and/or roundtable discussions and a comment period of at least 90 days.[18]

We also note that the Proposal does not address several long-standing issues related to the Schedules of Assets, such as issues involving the definition of "fair market value" and "hard-to-value" for purposes of Schedule H, as compared to accounting standards and guidance regarding asset valuation. We would encourage the Department to work with the ABA and other industry

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[13] OMB Circular A-4 (Sept. 17, 2003).

[14] For instance, the Proposal would have greatly benefitted from a collaborative process between the Department and representatives from bank custodians, 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, which the Department could factor into its proposal and further could use as a springboard to discuss with vendors how to create the next generation electronic filing system, including the specifications for data sources and reporting formats.

[15] Executive Order 13563: Improving Regulation and Regulatory Review § 2(c) (Jan. 18, 2011). [Emphasis added.] *See also* OMB Circular A-4, *supra*: "As you [the Department] design, execute, and write your regulatory analysis, *you should seek out the opinions of those who will be affected by the regulation* . . . Consultation can be useful in ensuring that your analysis addresses all of the relevant issues and that you have access to all pertinent data. *Early consultation can be especially helpful. You should not limit consultation to the final stages of your analytical efforts.*" [Emphasis added.]

[16] *See* GAO Report, *Private Pensions: Targeted Revisions Could Improve Usefulness of Form 5500 Information* (2014); OIG Report, *EBSA Needs to Provide Additional Guidance and Oversight to ERISA Plans Holding Hard-to-Value Alternatives Investments* (2013).

[17] *See* Proposal, 86 *Fed. Reg.* at 51,492.

[18] We would be glad to work with the Department as it evaluates how to improve the Proposal, consistent with the federal government's priority that the rulemaking respond to compelling need and offer "the least burdensome tools for achieving regulatory ends." Executive Order 13563, *supra*, §1(a).

groups to address these issues as part of its comprehensive reforms of the Form 5500, recognizing the Department's view that public comments on its broader improvements to the Form 5500 are beyond the scope of the current rulemaking.[19]

III. ABA Recommendations for Proposal.

Although we believe finalization and implementation of the Proposal's changes to the Schedules of Assets should be delayed as described above, we also wish to comment on several specific portions of the Proposal that are of particular concern to our members and which the Department should consider fully in its evaluation of the Proposal.

A. Remove Element (c) from Both Schedules of Assets (*i.e.*, "Check" [the Box] If Asset Is "Hard-to-Value Asset") and Meet with Bank Service Providers and other Stakeholders to Assess Element (c)'s Feasibility and Necessity, Given the Ambiguity of the Term "Hard to Value" and the Logistical Challenges Involved in Verifying this Determination.

The proposed element (c) of both of the Schedules of Assets requires that a box be checked for each asset held for investment that is "hard-to-value." The proposed instructions for element (c) of the Schedule of Assets Held for Investment state that any asset that is "not listed on any national exchanges or over-the-counter markets, or for which quoted market prices are not available from sources such as financial publications, the exchanges, or the National Association of Securities Dealers Automated Quotations System (NASDAQ)" be identified as a hard-to-value asset. The instructions further provide that bank collective investment funds (collective funds) "that are primarily invested in assets that are listed on national exchanges or over-the-counter markets and are valued at least annually need not be identified as hard-to-value assets," while collective funds "invested primarily in hard to-value assets must also be identified as a hard-to-value asset."[20] The instructions also state that "all assets designated as 'level 3' in the accompanying IQPA should be identified as hard-to-value."[21] However, unlike the current instructions for line 4g of the current Schedule H, the proposed instructions for element (c) do not clarify that mutual funds are not treated as hard-to-value.[22]

As an initial matter, the Department should be aware that bank trustees and custodians are generally not in a position to make the determination of whether a particular asset is hard-to-value under the Proposal's definition. Instead, the burden of obtaining the information necessary to make this determination will fall primarily on the plan administrator, possibly with the assistance of the plan's auditor. Making this determination for every asset will likely be confusing and burdensome for many Plan administrators, and because the information is unlikely to come from the bank trustee/custodian, it may also complicate the plan administrator's ability to produce the schedule in the required iFile or EFAST-approved format.

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[19] *See* Proposal, 86 *Fed. Reg.* at 51,492.
[20] Proposal, 86 *Fed. Reg.* at 51,549.
[21] The instructions for element (c) of Schedule of Assets Acquired/Disposed simply say, "Check here if the asset is a "hard-to-value" asset. Check this box for all assets designated as "level 3" in the accompanying IQPA report." It is unclear, however, whether two definitions are intended to be the same. *See* Proposal, 86 *Fed. Reg.* at 51,553.
[22] The current instructions state that Form 5500 filers should "not check 'Yes' on line 4g for mutual fund shares." *See* Form 5500, Instructions for Schedule H, lines 4g and 4h.

Moreover, it is not clear how identifying each individual asset for which quoted market prices are not available will provide valuable information to the Department or other interested parties. This is especially true when the Department is already proposing to add a new field to identify the Line 1c asset category for each investment, which will already make it possible to identify many of the types of assets that are (and are not) hard-to-value.

We recommend, therefore, that the Department remove this element and meet with bank service providers and other stakeholders to assess (1) the feasibility of establishing an asset coding system that will enable plan administrators to determine whether this box should be checked, and (2) the necessity for requiring this level of granularity, given that the Department is also proposing to add the Line 1c asset category to both of the Schedules of Assets.[23] If, on the other hand, the Department adds this element, we believe the Department then will need to provide plan administrators with the following additional guidance:

- Clarify that the definition is the same for both of the Schedules of Assets.
- Clarify whether mutual funds should be treated as hard-to-value.
- Clarify that the box should not be checked for any Level 1 assets.
- Clarify whether the box should be checked for Level 2 assets.

B. Remove Element (d) from Both Schedules of Assets Held for Investment and Meet with Bank Service Providers and other Stakeholders to Assess Identifiers and Create a Reasonable Approach that Can Be Supported by Bank Custodians.

The Proposal includes a new element (d) to both of the Schedules of Assets to require the inclusion of investment identifiers for each asset that is listed, if one is available. 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 supervisory and examination process. We agree that requiring investment identifiers, where available, will make the investment-level information more useful to the Department (and other regulators) that need to analyze these data on a macro level.

In the Department's proposed revisions to the Form 5500 regulations, it seems clear that the new element (d) is intended to capture a *single* government registration or identity number (such as the CIK) or a *single* market or exchange registration or identity number if no government identifier is available:

> F) The Central Index Key (CIK) number, Legal Entity Identifier (LEI) Code, or National Association of Insurance Commissioners (NAIC) Company Code, or other government registration or identity number for the investment described in paragraphs (b)(1)(i)(A) and (B) of this section, or if no government number is available, a market or exchange registration or identity number.[24]

[23] Adding the line 1c asset category will already allow the Department and other interested parties to identify such investments as partnerships/joint ventures and real estate.
[24] Proposal, 86 *Fed. Reg.* at 51,306 (Annual Reporting and Disclosure Regulation).

However, the Proposal's instructions for element (d) of the Schedule of Assets Held for Investment state that the "CUSIP, CIK number, LEI, NAIC Company Code, or other government or market exchange registration or identity number" is required, and that "you must include all that apply."[25] Similarly, the instructions for element (d) of the Schedule of Assets Acquired and Disposed of During the Plan Year instruct the plan administrator to "enter, separated by commas, if applicable, the CUSIP, CIK, LEI, NAIC Company Code, or other registration number." In the case of Direct Filing Entities (DFEs), such as most collective funds, the Proposal's instructions state that the same EIN and Plan Number used to identify the DFE on Schedule H should also be used for element (d).[26]

The Proposal's request for *all* available "government or market exchange registration or identity numbers" for each of the assets held would significantly complicate the compiling of the Schedules of Assets, without adding any benefits to the mineability of data. More important, it is not practical for plan administrators (or their bank custodians) to obtain, store, and generate reporting for every possible registration or identity number that could apply to a particular asset. The Department has not yet articulated a rationale for the necessity, or usefulness, of including all identifiers that could apply to an asset.

We recommend, therefore that the Department (i) remove the new element (d) from both the Schedules of Assets and (ii) meet with bank service providers and other stakeholders to assess identifiers and create a reasonable approach that can be supported by bank custodians. We believe that plan sponsors would benefit from lower-cost services if the Department would work with bank custodians, which provide the underlying asset and security identifiers reported on Form 5500, to develop ***universal*** approaches for the use of asset identifiers for the various types of assets that are listed on the Schedules of Assets.[27] Form 5500 preparers and plans would then be able to reflect investments using the specified security identifiers that are practical to obtain and include in the new mandatory reporting format for the Schedules of Assets.

C. Provide a Separate Question and/or Schedule for Participant-Directed Plans in Place of the Proposed New "Check the Box" for Designated Investment Alternatives/QDIAs with Total Annual Operating Expenses, in order to Avoid Possible Confusion Between Assets Held for Investment and Designated Investment Alternatives.

The Department should be aware that there is not necessarily a correspondence between assets held for investment and designated investment alternatives (DIAs). For example:

(i) A DIA may consist of a separately managed account (SMA) that matches the S&P 500 index, also known as "direct indexing." In these cases, the assets held for investment are the 500 stocks that make up the S&P 500, none of which represents the S&P DIA that is available to participants.

[25] Proposal, 86 *Fed. Reg.* at 51,549-550 (Proposed Revision of Annual Information Return/Reports).
[26] Proposal, 86 *Fed. Reg.* at 51,553.
[27] We assume that the Department is aware that plans and DFEs may hold assets that have neither a government registration nor identity number, nor an exchange registration nor identity number. We recommend that this circumstance be addressed more clearly in the instructions for the new element (d).

(ii) Target date fund DIAs are often composed of underlying collective funds. In these cases, the assets held for investment are the underlying collective funds, none of which represents the target date funds that are available to participants.

We recommend that instead of trying to incorporate this information into the Schedule of Assets Held for Investment, the Department should provide a separate question and/or schedule to list the DIAs and associated total annual operating expenses for all participant-directed plans.

D. <u>Retain the Current Schedule H Approach to Other Elements of the Schedule of Assets Acquired and Disposed of During the Plan Year, Given the Logistical Challenges and Costs Raised by the Proposal's Requirements in Obtaining this Information</u>.

There are two additional issues raised by the proposed changes to the Schedule of Assets Acquired and Disposed of During the Plan Year:

(1) <u>Clarification to proposed instructions</u>:

The proposed instructions for line 4(i)(2) include the following statement:

> "You must identify on the line 4i(2) Schedule *each investment asset sold during the plan year* except: [list of excepted assets]."[28]

We recommend that the Department retain the relevant language of the current Schedule H instructions for line 4i, which reads, "Any investment asset *purchased during the plan year and* sold before the end of the plan year."[29]

(2) <u>Changes to element (g), new elements (h) and (i)</u>:

The Department also is proposing the following changes to the Schedule of Assets Acquired and Disposed of During the Plan Year, which appear to be based on information that is currently required for the Schedule of Reportable Transactions.

- Element (g): this element has been changed from "Proceeds of dispositions" to "Sales price."
- Element (h). This is a new element that requires reporting of "Total expenses incurred with disposal of asset, including any termination or surrender charges."
- Element (i). This is a new element that requires reporting of "Net gain/loss."

We are not certain how this information may be valuable to the Department, or to participants or beneficiaries. Since it would be burdensome to gather and add this information to the Schedule of Assets Acquired and Disposed of During the Plan Year, it would be helpful to understand why

[28] Proposal, 86 *Fed. Reg.* at 51,551. [Emphasis added.]
[29] Instruction for Schedule H, line 4i.

the Department wants these details, in order to further consider whether the purpose justifies the expense, the costs of which are likely to be passed on to plans and their participants. At a minimum, adding this information would require additional programming and could create confusion with filers, even with more clear instructions. We recommend that the Department reconsider the value and necessity of requiring this additional information, against the additional costs that would be incurred to obtain this information and add it to the Schedule of Assets Acquired and Disposed of During the Plan Year in the new, standardized format.

E. Provide Clarification for the New Categories of Administrative Expenses Relating to Trustee Fees and Expenses.

The Proposal would add new breakout categories to the "Administrative Expenses" category of the Income and Expenses section of the Schedule H balance sheet. Two of the new proposed data elements are "Bank or Trust Company Trustee/Custodial Fees" and "Trustee fees/expenses (including travel, seminars, meetings)."[30] We believe that the current wording for these proposed data elements will create confusion and lead to the possibility of double reporting, since *both* elements appear to require reporting of trustee fees.

In reviewing the Proposal, we also noted similar language in the instructions for line 6g of the new Schedule DCG, which requires reporting of expenses involving administrative service providers. The instructions state that line 6g requires inclusion of the following:

> 4. Fees and expenses for ***individual*** plan trustees, including reimbursement for travel, seminars, and meeting expenses.[31]

We recommend that the Proposal be modified to clarify that the new element for "Trustee fees/expenses (including travel, seminars, meetings)" under the "Administrative Expenses" category of the Income and Expenses section of the Schedule H balance sheet is for individual trustees only, similar to the proposed instructions for line 6g of the new Schedule DCG. Alternatively, if the new data element for "Trustee fees/expenses" is intended to include the fees and expenses associated with bank trustees, then the Proposal should be modified to ensure that (i) the Administrative Expenses section of Schedule H does not include two separate categories, both of which appear to require reporting of bank trustee fees, and that (ii) the new category for trustee expenses does not include expenses that are directly associated with custody of assets (*e.g.*, pass-throughs), as separate reporting of such expenses is impractical.

F. Establish the Effective Date of any Final Rule No Sooner than January 1, 2023 in order to Give Form 5500 Reporting Entities Sufficient Time for Reporting System Changes, Additions, and Adjustments.

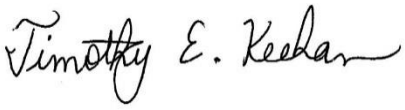
The Department intends that changes to Schedule H take effect with plan years starting on or after January 1, 2022. The Proposal in its current form, however, would require additional work to prepare and produce the expanded Schedules of Assets. For example, for the new field, line 1c, for the Schedule of Assets Purchased and Sold, bank trustees/custodians would need to build

[30] Proposal, 86 *Fed. Reg.* at 51,504.
[31] *See* Proposal, 86 *Fed. Reg.* at 51,532. [Emphasis added.]

or procure, install, and test the systems required for this information. We recommend, therefore, that the Department establish the effective date of any finalized rule until at least January 1, 2023 to allow sufficient time for bank trustees/custodians to come into compliance with the new rule.

Thank you for your consideration of our views and recommendations. 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,



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