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U.S. Department of Labor
Employee Benefits Security Administration
Office of Regulations and Interpretations
Room N–5655,
200 Constitution Ave. NW,
Washington, DC 20210

Subject: Notice of Proposed Forms Revisions/Proposed Rule (RIN 1210-AB97)

Greetings:

On behalf of the American Council of Life Insurers (ACLI), we appreciate the opportunity to provide comments in response to the Proposed Form Revisions and Proposed Rule Interim Final Rule (IFR) issued by the Department of Labor, the Internal Revenue Service, and the Pension Benefit Guaranty Corporation (collectively, the Agencies) that will implement changes to the Form 5500 Annual Return/Report forms filed for employee pension and welfare benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code). According to the Agencies, the proposed form revisions primarily relate to statutory amendments to ERISA as part of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) and the Agencies also proposed certain additional changes unrelated to the SECURE Act while the Department of Labor proposes certain conforming amendments to regulations promulgated under ERISA.

ACLI member companies provide insurance contracts and other investment products and services to all types of employee benefit plans subject to ERISA's reporting and disclosure requirements - including both defined benefit and defined contribution plans. The burden associated with

The American Council of Life Insurers (ACLI) is the leading trade association driving public policy and advocacy on behalf of the life insurance industry. 90 million American families rely on the life insurance industry for financial protection and retirement security. ACLI's member companies are dedicated to protecting consumers' financial wellbeing through life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, reinsurance, and dental, vision and other supplemental benefits. ACLI's 280 member companies represent 95 percent of industry assets in the United States.

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providing data and information to complete the Form 5500 and associated schedules rests primarily with plan service providers, and, accordingly, ACLI member companies play a significant and essential role assisting plan sponsors in completing the Form 5500 and applicable schedules.

Our comments below are in four parts. Part I includes our comments on the proposed conditions for plans to participate in a defined contribution group (DCG). Part II includes our comments on Proposed Form 5500 – Schedule MEP. Part III includes our comments on the proposed revisions to Schedule H. Part IV includes our comments on new Trust information.

I. Conditions for Plans to Participate in a DCG Reporting Arrangement

The Agencies propose to obtain for each plan in the DCG the additional information requested on a new proposed Schedule DCG and are proposing certain other key conditions for DCG reporting arrangements that are intended to ensure appropriate transparency and financial accountability. Specifically, under the proposal: (1) The DCG would file a Form 5500 under rules and conditions that apply generally to large defined contribution pension plans; (2) each of the plans participating in the DCG would need to meet certain conditions as discussed in more detail below, including that the participating plan must not hold any employer securities, be 100% invested in certain secure, easy to value assets that meet the definition of ‘‘eligible plan assets’’ and be audited by an IQPA or be eligible for the waiver of the annual examination and report of an IQPA under 29 CFR 2520.104–46, but not by reason of enhanced bonding; (3) the DCG's Form 5500 would have to provide the plan level information reported on the proposed Schedule DCG regarding the covered plans, including an IQPA audit report for each participating large plan; and (4) the investment assets of the plans participating in the DCG would have to be held in a single trust of the DCG reporting arrangement and the consolidated Form 5500 filed by the DCG would include an audit of the DCG's trust financial statements.

We have comments on several of these conditions. In general, we believe that several of these conditional requirements are overly restrictive and inconsistent with the overall purpose of SECURE Act Section 202 – which, as the Agencies note in the preamble, is to provide "annual reporting cost efficiencies similar to those that MEPs and pooled employer plans can offer to their participating employers."[1] Unfortunately, many of the restrictions will result in additional costs rather than cost efficiencies, rendering DCG reporting useless for many plans.

Single Trust Requirement

SECURE Act Section 202 requires eligible plans to have the same "trustee" as described in ERISA Section 403(a). The Agencies' conditions impose an additional restriction not found in SECURE Act Section 202 – by requiring not only the same trustee – but also that the investment assets of the DCG be held in a single trust. The Agencies have not provided any justifiable basis for this additional restriction, and it will preclude the use of DCG structures where each participating plan maintains a separate trust – a restriction not found in SECURE Act Section 202. Had Congress intended to require a single trust, it could have included such a condition within SECURE Act Section 202. The Agencies have inappropriately equated same "trustee" with same "trust," and accordingly, the Agencies should remove the single trust requirement in the final rulemaking package.

[1] 86 Fed. Reg. 54193 (Sept. 15, 2021).

Exclusion of Plans Funded by Insurance or Custodial Accounts from DCG Filing Eligibility

As discussed above, SECURE Act Section 202 includes a requirement that the eligible plans must have the same "trustee" as described in ERISA section 403(a). While acknowledging that (1) it is commonplace for ERISA covered plans to use insurance and custodial accounts as funding vehicles, and (2) there is no legislative history for SECURE Act Section 202 discussing why the provision was limited to plans with "trustees," the Agencies have concluded that a plan funded by insurance or custodial accounts pursuant to ERISA Section 403(b) are excluded from DCG filing eligibility. The Agencies solicit comments on whether they should, pursuant to their general regulatory authority, provide a consolidated reporting option for plans that use the same custodial account or insurance policy as the funding vehicle for their plans.

We believe the Agencies' interpretation is an overly restrictive interpretation of SECURE Act Section 202. Although a 403(b) plan is technically exempt from the 403(a) trust requirement, Code Section 401(f) provides that a custodial account or annuity contract, or a contract (other than a life, health or accident, property, casualty, or liability insurance contract) issued by an insurance company qualified to do business in a State shall be treated as a qualified trust under this section if the custodial account or contract would, except for the fact that it is not a trust, constitute a qualified trust under Code Section 401.

Further, Code Section 401 states in the case of a custodial account or contract treated as a qualified trust under that section, the person holding the assets of such account or holding such contract shall be treated as the trustee thereof.

Given that the Code treats the person holding the assets of a custodial account or annuity contract or contract issued by an insurance company as a "trustee," we believe that such plans should be able to participate in a DCG filing arrangement if such plans meet the other SECURE Act Section 202 requirements. There is simply no legal or policy basis to prohibit such plans from benefitting from the reporting cost efficiencies SECURE Act Section 202 is intended to provide. Finally, there is no evidence that in enacting Secure Act Section 202 Congress intended to exclude such plans. Therefore, we urge the Agencies to ensure that the final rulemaking package provide that such plans are eligible to participate in a DCG filing arrangement.

DCG Audit Requirements

As noted above, in order to participate in a DCG reporting arrangement, each plan must be audited by an independent qualified public accountant or IQPA or be eligible for the waiver of the annual examination and report of an IQPA under 29 CFR 2520.104–46. Additionally, the DCG trust would also be required to be audited by an IQPA.

As discussed above, the Agencies should remove the single trust requirement in the final rulemaking package. While the plans within a DCG may have separate trusts, it should be sufficient and in keeping with the SECURE Act for there to be a single consolidated audit of the DCG by an IQPA. As for the requirement for audits of each plan in the DCG that would otherwise be subject to an audit, this is not consistent with the SECURE Act Section 202's overall intent – to provide plans participating in the DCG reporting arrangement with annual reporting cost efficiencies. Nothing in the statute requires individual audits of large plans within the DCG rather than a consolidated audit of the DCG. We urge the Agencies to remove the DCG trust audit along with the single trust requirement and provide for a consolidated audit of the large plans (similar to

the consolidated audit of multiple employer plans and pooled employer plans which is consistent with Generally Accepted Auditing Standards), thereby removing unnecessary and overburdensome DCG reporting arrangement barriers in the final rulemaking package.

Eligible Plan Asset Requirement

In order to participate in a DCG arrangement, at all times during the plan year, the plan must be 100% invested in certain secure, easy to value assets that meet the definition of "eligible plan assets," such as mutual fund shares, investment contracts with insurance companies and banks valued at least annually, publicly traded securities held by a registered broker dealer, cash and cash equivalents, and plan loans to participants. As with the other conditions discussed above, the Agencies once again are proposing a regulatory requirement beyond the scope of the SECURE Act Section 202 requirements. While SECURE Act Section 202 requires each participating plan to provide the same investments or investment options to participants and beneficiaries, nothing in that section addressed the types of investments or any investment limitations. Inclusion of this additional requirement is yet another barrier to DCG reporting arrangements, and as with the other conditions discussed above, appears unnecessary and inconsistent with the overall intent of the statutory provision – reporting cost efficiencies. We recommend the Agencies remove this requirement in the final rulemaking package.

II. Proposed Form 5500 – Schedule MEP

Our comments on Proposed Form 5500 – Schedule MEP address duplicative reporting as well as the proposed requirement that pooled employer plans (PEPs) be required to indicate whether certain services are provided by an affiliate, and if relying on a prohibited transaction exemption (PTE), to identify the PTE (whether a class or individual exemption).

Regarding duplicative reporting, Lines 1-5 on the Schedule MEP are duplicative of the acknowledgements provided on Form PR. According to the Form PR instructions, filing a true, and correct registration statement, including any required updates, satisfies the requirement under section 3(44) of ERISA to register as a pooled plan provider with the Department of Labor. Filing the Form PR also satisfies the requirement under section 413(e)(3)(A)(ii) of the Code to register with the U.S. Department of the Treasury. The Ack ID is also available on the EFAST website and can easily be obtained using the Pooled Employer Plan Provider EIN.

As for PTEs, we note that in June 2020, the DOL published a Request for Information (RFI) related to PEPs, specifically requesting information relating to conflicts and prohibited transaction exemptions (PTEs), including whether the current PTEs are sufficient, and, if not, what amendments or new PTEs would be needed. DOL received 30 comment letters, including ACLI's comments, which recommended that, for persons such as financial services firms that seek to act as a PPP and thus a named fiduciary, DOL should issue a new class prohibited transaction exemption with specific parameters and compliance requirements.[2] As of this date, DOL has not responded to the RFI, or issued any additional guidance – including the potential applicability of existing PTE's to this new type of plan arrangement. Requiring a legal conclusion on a reporting and disclosure annual report, without addressing any of the issues raised in the RFI or the DOL's

[2] *See* https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA28/00018.pdf.

views, is wholly inappropriate and fraught with potential liability. We strongly urge the Agencies to reconsider this requirement pending further study and stakeholder input.

III. Schedule H Revisions

The Department of Labor proposes a standardized electronic filing format for Schedule H, line 4i and breaking the line 4i into two elements: (1) Schedule of Assets Held for Investments; and (2) Schedule of Assets Acquired and Disposed of During the Plan Year. The Department also proposes adding a number of new data elements to the schedule. The Department argues that these changes are needed to "improve electronic use and transparency" to help make it easier for third parties to gather data for research purposes.

As the Department of Labor is aware, the costs associated with plan administration are generally borne by plan participants. Clearly, these proposed changes will increase the cost of plan administration. Thus, the proposal shifts cost currently borne by these unrelated third-party researchers to plans and plan participants. As much of this data is already furnished directly to plan participants and other data here can be obtained upon request of the plan administrator, we do not see how this particular effort would benefit them. ACLI urges the Department to forgo these proposed changes.

Beyond our disagreement with the justification for these changes, we have the following specific concerns.

Hard-To-Value Assets

Under the proposed changes, the Department of Labor has specifically identified common collective trusts (CCTs) and pooled separate accounts (PSAs), primarily invested in hard-to-value assets, to themselves be identified as hard-to-value assets, regardless of whether they are valued at least annually. We respectfully disagree that CCTs and PSAs should be identified as hard-to-value regardless of the underlying investments. For example, mutual funds invest in similar assets, including the hard-to-value underlying assets mentioned in the proposed guidance. While CCTs or PSAs may not be listed on an exchange, this does not mean the assets are valued any differently or have more risk than a mutual fund listed on an exchange. In addition, many small plan filers using Form 5500-SF currently invest in CCTs or PSAs. Labeling these investments "hard-to-value" could prevent many current filers of Form 5500-SF from filing this short form, increasing the cost of plan maintenance for these small businesses (which will likely stifle small business plan formation).

The Advisory Council Report on Employee Plan Auditing and Financial Reporting Models includes background commentary on Limited Scope Audits. It states,

> "ERISA § 103(a)(3)(C) permits the plan administrator to exclude from the audit any plan assets held by a bank or similar institution or insurance carrier regulated by a state or federal agency. Based on the statute's legislative history, the Council understands that ERISA contains this exclusion because Congress presumed that assets held by such institutions were already subject to a governmental audit and regulation and therefore at less risk. It also appears that at the time of ERISA's enactment in 1974, retirement plan assets were often held under insurance contracts or in trusts. Custodian banks or trust companies held assets and provided an independent valuation of asset values; most investments had readily ascertainable market values. Witnesses recounted that since 1974,

> the investment landscape has changed dramatically. Alternative asset classes and hard to value assets have exploded and hold a significant allocation in many plan portfolios. In short, the context in which the limited scope exemption was adopted no longer exists."

Plans do hold a wide range of assets, but CCT and PSA structures themselves should not garner additional concern. As referenced above, CCTs and PSAs continue to be regulated by state/ federal agencies and continue to be subject to governmental audit and regulation. Banks, trusts, and insurance carriers continue to hold these assets and provide for independent valuation of the assets. The valuation of CCTs and PSAs is consistent with a mutual fund, and in many cases, use the same or similar custodian and valuation agents as mutual funds. Simply not being listed on a national exchange does not make it a hard-to-value asset. In addition, as with mutual funds, plans do not own the underlying investments in CCTs or PSAs. The plan owns units of participation in the overall CCT or PSA. Under FASB Accounting Standards Codification TM (ASC) (Topic 820), CCTs and PSAs are able to use the Net Asset Value (NAV) per share as practical expedient to estimate the fair value of a CCT or PSA if the following criteria are met:

- The investee has calculated NAV consistent with ASC 946, which contains guidance on how investment companies calculate NAV.
- The NAV has been calculated as of the investor's measurement date (e.g., date of the financial statements); and
- It is not probable at the measurement date that the reporting entity redeem the investment at an amount different from NAV.

If the Department of Labor seeks to be consistent with FASB, the Department should allow CCTs and PSAs utilizing NAV as a practical expedient to be reported consistently with assets with readily determinable fair values rather than labeling them as hard-to-value.

Effective Date

The Agencies propose to make the changes to the Form 5500 Series Reports effective with the 2022 Form series. We request that the Agencies delay the implementation date for any change to Schedule H to correspond to the effective date set for other changes the Agencies agree to in the broader regulatory project focused on improvements to the Form 5500 annual reporting requirements beyond the changes needed for the SECURE Act. The current proposed changes to Schedule H will take significant time; new processes will need to be created, multiple systems built and tested, training executed. Plan sponsors, administrators and fiduciaries will also need to be brought up to speed as well. The software industry and recordkeepers generally require at least a year or more to update their software, recordkeeping systems and processes for changes such as these. Under the proposal, software vendors and recordkeepers would need to have systems in place two months from now to be in position to collect data necessary for the 2022 Forms. Yet, work cannot commence as the full scope of changes required cannot be determined until final regulations are promulgated.

IV. Trust Information

The Agencies are requesting Trust Information which was previously discontinued in 2006. The DOL announced the Elimination of Schedule P of the Form 5500 Series in Announcement 2007-63. The purpose of the elimination was to reduce administrative burden and to acknowledge the transition to an electronic filing environment.

Announcement 2007-63 states, "To reduce administrative burdens of employers, plans, their administrators and trustees and custodians, and in anticipation of the transition to a wholly electronic filing environment under the ERISA Filing Acceptance System (EFAST), the Service has determined that the continued use of a Schedule P, Annual Return of Fiduciary Benefit Trust, in connection with the filing of a plan's Form 5500 is no longer necessary for the efficient administration of the of the Internal Revenue laws." The announcement clearly states that the Schedule P is no longer necessary: "Pursuant to the authority contained in §6033(a) of the Internal revenue code, the Schedule P, which may be completed by a trustee of an employee benefit trust as the annual return of the trust, is being eliminated."

For plans that have engaged a life insurance company to provide both an insurance contract and recordkeeping, the trust-related questions do not fit an insurance contract-only arrangement. These plans should be directed to skip these questions. When trusts are created to hold a plan's non-insurance investments, these may not have plan specific names or EIN numbers. The proposal seeks the EIN used on Form 1099-R. The EIN shown on the plan's Form 1099-R is associated with tax filings made by the financial institution servicing plan distributions. For trusts without an EIN, there is no direct correlation to the Form 1099-R filings and the trust identified at line 6a. The Schedule R gathers the EIN used on the Form 1099-R. When the trust does not prepare Form 1099-R filings, it would be duplicative and inappropriate to include some other entity's EIN on line 6b.

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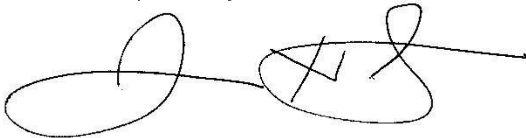
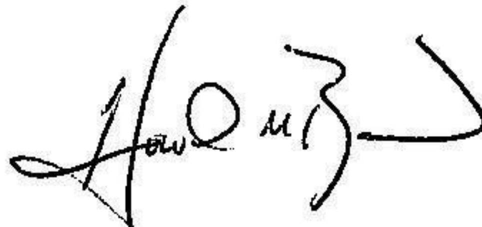
On behalf of the ACLI member companies, thank you for your consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department.

Respectfully,





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