GROOM LAW GROUP

Stephen M. Saxon
sms@groom.com
(202) 861-6609

November 1, 2021

Filed via www.regulations.gov

Hon. Ali Khawar
Acting Assistant Secretary
U.S. Department of Labor
Employee Benefits Security Administration
200 Constitution Ave., NW
Room N-5655
Washington, DC 20210

Re: Proposed Form 5500 Revisions and Regulations
RIN 1210-AB97

Dear Acting Assistant Secretary Khawar:

Groom Law Group, Chartered, is providing the comments described in this letter on behalf of a group of companies (the "Group"), each of which is a major provider of recordkeeping and administrative services to employer-sponsored retirement plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). We write to provide comments on the U.S. Department of Labor's ("DOL's"), the Internal Revenue Service's ("IRS's"), and the Pension Benefit Guaranty Corporation's (collectively, the "Agencies") Notice of Proposed Form 5500 Revisions and related Notice of Proposed Form 5500 regulations. *See Proposed Rule, Annual Reporting and Disclosure*, 86 Fed. Reg. 51284 (Sept. 15, 2021); *Notice of Proposed Form Revisions, Proposed Revisions of Annual Information Returns*, 86 Fed. Reg. 51488 (Sept. 15, 2021) (the "Proposal" or "Proposed Changes").

Each of the recordkeepers in the Group is involved in the preparation of the annual Form 5500 for hundreds, and in many cases thousands, of retirement plans subject to ERISA and the Internal Revenue Code ("Code"). While some recordkeepers prepare a complete "signature ready" Form 5500 filing on behalf of their plan customers, others prepare portions of the Form 5500 for completion, review and filing by the plan customer. All members of the Group rely on complex, integrated systems and processes in order to compile the data and detailed information necessary to complete each of the schedules and associated attachments necessary to develop a complete Form 5500.

Several aspects of the Proposal help facilitate compliance with the Form 5500 reporting requirements. Certain other aspects are problematic and require modification. In particular, we believe some aspects of the Proposal are unworkable and our comments suggest alternatives. We thank you for the opportunity to comment on this important initiative and hope that our comments are helpful as the Agencies work to finalize these rules.

As an initial comment, we note that the Agencies have proposed to make the majority of proposed Form 5500 changes effective for plan years beginning after January 1, 2022. Given the systems changes that are necessary in order to accommodate the breadth of changes proposed, as well as the long lead times necessary to implement those changes, we ask the Agencies to give the regulated community more time to implement the changes. Recordkeepers that prepare Form 5500s for their clients will need at least a year before the beginning of the first plan year subject to the revisions in order to complete the programming needed to revise the Form and gather new categories of information.

Our additional comments are set forth below.

I. Forthcoming Broader Form 5500 Proposal

In the preamble to the Proposal (the "Preamble"), the Agencies announced a new regulatory project that will make extensive changes to the Form 5500, including changes to the reporting of the plan's finances and investments and changes to group health plan reporting. DOL's regulatory agenda currently published at reginfo.gov indicates a projected publication date of May 2022 for the NPRM for that project.[1] For the reasons explained further below, we urge the Agencies to limit Form 5500 changes under the current rulemaking to only those required or necessary to implement the SECURE Act. DOL should reserve other changes not envisioned by the SECURE Act for the comprehensive Form 5500 rulemaking project it has scheduled for next year.

Most recordkeepers or administrative providers prepare a signature ready Form 5500 for their clients as a client service. As a result, recordkeepers and plan administrative providers bear the burden of implementing changes to the Form 5500 for their clients. Changes to individual lines and schedules require significant resources and time to implement by recordkeepers because of complex programming and systems requirements. Systems changes require lead times as much as one year long (or longer) in order to implement and test to ensure that the change is operational and reliable. We ask the Agencies to limit the changes to the Form 5500 as a result of the current proposal to those changes that must be implemented under the SECURE Act, including the changes related to MEPs, PEPs and defined contribution groups ("DCGs"). For example, the changes related to the addition of IRS compliance questions, trust information

[1] This new project is entitled "Improvement of the Form 5500 Series and Implementing Related Regulations under the Employee Retirement Income Security Act of 1974" (RIN 1210-AC01).

reporting, new plan expenses categories on Schedule H and changes to the format and information reported on the line 4i attachments to Schedule H are not compelled or envisioned by the SECURE Act and should therefore be excluded from the current Form 5500 project.

We ask the Agencies to delay non-SECURE Act Form 5500 changes for two reasons. First, it is substantially more efficient from a cost as well as resources standpoint for recordkeepers and other administrative service providers to make numerous systems changes at one time, rather than to make changes on a piecemeal basis. Members of the Group report that it is far more expensive and costly to upgrade systems to accommodate two rounds of Form 5500 changes separated by a year or two in time than to make the very same changes all at one time. Second, the Agencies have specifically requested comments on the administrative burdens associated with the proposed Form 5500 changes. The regulated community first needs an opportunity to consider the full scope of changes that the Agencies intend to make to modernize the Form 5500 in one place in order to fairly assess the full impact and burdens associated with the Form 5500 changes. Our Group members will be able to better evaluate the costs of upgrading systems and data collection if all of the Agencies' anticipated changes are proposed and spelled out in a single package.

Finally, we urge the Agencies to keep in mind that each additional line item, checked box, or data element that is added to the Form 5500 represents significant expense for plan recordkeepers and service providers to program, test and operationalize as well as develop the information necessary to populate. Moreover, each additional item added to the Form 5500 increases the burdens on plan administrators who must ensure that the correct information is gathered and reported, and must sign the form under penalty of perjury. Therefore, as a bigger picture comment, we ask the Agencies to refrain from adding additional data elements to the Form that are either not necessary to support a regulatory purpose or duplicative of other information readily available on the Form or elsewhere.

II. Participant Count for Audit Purposes for Defined Contribution Plans

The Agencies propose to change the relevant count for determining those defined contribution plans that are subject to an audit requirement from the number of eligible participants as of the beginning of the plan year to the number of participants with an account balance as of the beginning of the plan year. This is a helpful change, and we believe it will appropriately save many plans that provide benefits to fewer than 100 enrolled participants from the significant expense of a professional audit.

Nonetheless, the cost and administrative burdens associated with the audit requirement have increased in recent years and have a substantial chilling effect on the willingness of companies to sponsor ERISA-covered plans. HealthEquity.com reported recently in its blog that for small to medium size businesses with plans under $50 million in assets, average audit costs range from $8,000 to $18,000 annually. Those figures don't take into account the internal staff

time and resources that must be dedicated by an employer in order to effectively work with the auditor. We believe the Agencies could go further toward encouraging the voluntary adoption of defined contribution plans by limiting the count for determining whether a plan is subject to an audit to the number of *active employees with an account balance as of the beginning of the plan year*. This calculation would exclude from the count terminated vested participants who decide to leave their account balances in the plan after they have separated from service.

Employers should be encouraged to adopt plans and to allow participants to leave account balances in the plan following termination of employment instead of requiring rollovers of small account balances to an IRA. Leaving account balances in the plan means that terminated participants receive several important protections over the alternative of rolling to an IRA – these include having an ERISA fiduciary standard apply to the funds selected and monitored for the plan, the benefit of institutional or lower cost share classes available to ERISA plans, access to advice and education services offered through the plan, and the protection of plan account balances from creditors. We believe that employers should not be dissuaded from offering a plan by having terminated vested participants count toward the audit threshold. Excluding terminated vesteds from the participant count for audit purposes also makes sense in light of the topics reviewed by a defined contribution plan auditor. An audit includes an examination of the plan's eligibility provisions, as well as plan contributions, benefit payments and loan activity. Terminated vested participants do not generally receive or make plan contributions after termination. Also, most defined contribution plans that offer participant loans do not extend loans to terminated vested participants. Because most of the plan activity reviewed by an auditor relates to active employees, we believe that counting *only active employees with an account balance* is a better metric for separating those plans subject to an audit from those that should be exempt.

We recognize that the DOL is interested in protecting the interests of terminated vested participants with respect to plan benefits and has focused significant resources on missing participants from an enforcement and guidance perspective in recent years. We note that the Form 5500 currently contains a line (Line 6(c)) that reports the number of retired or separated participants entitled to future benefits as of the end of the plan year. This line gives the DOL a specific count of terminated vested participants that is useable for its own research purposes. Because DOL can retrieve a specific count of terminated and retired vested participants from the Form 5500, removing these participants from the count that is relevant for audit purposes should not in any way impact or compromise DOL's enforcement activities related to terminated vesteds or missing participants.

III. Defined Contribution Groups (DCGs)

The SECURE Act directed the Secretaries of DOL and Treasury to develop special reporting rules so that members of a "group of plans" may file a single consolidated annual report under ERISA and the Code. We believe that Congress intended the "group of plans"

reporting option to serve as an additional means, in addition to PEPs and MEPs, through which service providers may offer ERISA plans to many small employers through a common arrangement and thereby achieve cost savings. We believe that small employer plans (and their service providers) would be the primary users of the "group of plans" reporting option envisioned by the SECURE Act. Nonetheless, the DCG reporting option proposed by the Agencies has such substantial practical and legal limitations as to be rendered unusable by plans or service providers in its current form. We submit the following comments in an effort to help the Agencies craft a DCG reporting alternative that will facilitate cost savings and thus the expansion of retirement plans, and be useful to plans.

a. Plans with Separate Trusts should be Permitted to Participate in a DCG:

The SECURE Act requires that all plans participating in a "group of plans" must have the "same trustee." However, the Agencies' proposed DCG reporting scheme goes further, requiring that all plans within a DCG must also have the same trust. The Preamble makes clear that holding participating plan assets in subtrusts within the same trust would be permissible in a DCG arrangement.

We believe the Agencies have exceeded their regulatory authority by requiring all plans within a DCG to have the same trust. Plans that otherwise meet the SECURE Act group of plans requirements but have established separate trusts with the same trustee should be eligible for the DCG reporting option as envisioned by the statute itself. We see no practical reason for treating subtrusts of a single trust as qualitatively different from plans having separate trusts with the same trustee for purposes of DCG reporting eligibility. This is particularly true in light of the fact that a trust is established by entering a trust agreement with a trustee that defines the terms of the trust relationship, including terms that address the services provided, trustee powers, termination and successor trustee rules as well as legal terms that address indemnification, liability, and governing law. Many trust agreements are highly negotiated and customized instruments based on the particular requirements and demands of different employers. A requirement that each participating employer in a DCG arrangement must be bound to the same trust agreement terms that every other employer within the DCG has accepted is unreasonably restrictive and unnecessary, not to mention beyond the SECURE Act's directive to simply utilize the "same trustee."

Under the Proposal, the requirement that the assets of unrelated plans be pooled together under a single trust raises significant federal securities law concerns that appear to have gone unnoticed. Section 3(a)(2) of the Securities Act of 1933 provides a registration exemption to interests and participations in a *single trust fund* issued in connection with ERISA plans and for collective trust funds maintained by a bank through the exercise of substantial investment authority over trust assets. Section 3(c)(11) of the Investment Company Act of 1940 contains a

substantially similar exemption. The Staff of the SEC has historically taken the view that, for purposes of both exemptions, a single trust fund must be maintained in connection with a single employer plan or in connection with plans sponsored by a group of commonly controlled or otherwise closely related plan sponsors.[2] The exemptions from registration under the federal securities laws that are widely relied upon by single employer trusts and master trusts adopted by plans within a controlled group of employers appear to be unavailable for trust arrangements covering multiple, single employer plans sponsored by unrelated employers. In light of this securities law issue, which we believe is significant, we are concerned that the Agencies' proposed "single trust" requirement effectively renders the proposed DCG reporting alternative unworkable.

b. Small Plans within a DCG and the Trust-Level Audit:

The proposed trust-level audit requirement substantially undermines the utility of the DCG reporting option and the potential for cost efficiencies associated with it. The Agencies should eliminate the audit requirement at the trust level, particularly where each plan within a DCG arrangement covers fewer than 100 participants. Under the Proposal, if each plan within a DCG covers fewer than 100 participants, each plan would generally be exempt from the audit requirement under the DOL's small plan audit waiver regulation at 29 C.F.R. § 2520.104-46. A trust-level audit adds significantly to the expense and compliance burdens associated with operating a DCG and greatly limits the utility of the DCG reporting alternative. In this regard, we note that the master trust reporting rules provide a useful analogy. A master trust (or MTIA) is generally a trust that holds the assets of several plans sponsored by employers within the same controlled group that is required to file a Form 5500 as a "direct filing entity" under DOL's Form 5500 regulations. The master trust (MTIA) itself is not subject to an audit requirement. Therefore, if each plan within a master trust has fewer than 100 participants and otherwise meets the requirements to be exempt from audit, there would be no audit at the plan or master trust level. We believe that the DCG arrangement should similarly involve no audit at the trust level, particularly where each participating plan is exempt from the audit requirement under 29 C.F.R. § 2520.104-46.

---

[2] *See* SEC Release No. 33-6188, 19 S.E.C. Docket 465, 1980 WL 29482, § IV.B.1.d. (defining a "single trust fund" as "[a]non-collective trust fund (i.e., a fund which is not established at the instance of, or by, a financial intermediary for the use of separate employers). Under this definition, each of the following would be considered a single trust fund: (1) a trust fund for employees of a single employer; (2) a trust fund for employees of employers so closely related as to be regarded as a single employer (e.g., a parent and its subsidiaries) and (3) a trust fund established and controlled by employers and/or a union representing the employees of such employers.")

Another alternative is that the Agencies could provide that no trust-level audit is required under circumstances where the common trustee in a DCG arrangement qualifies as a regulated financial institution similar to the current requirements for a master trustee. In this regard, a master trustee is required to be a bank, trust company, or similar financial institution that is regulated by a state or federal regulator. *See* 29 CFR § 2520.103-1(e). We believe that permitting the DCG arrangement to involve no audit at the trust level where the trustee is a regulated financial institution, and thus meets certain regulatory criteria and is subject to regulatory oversight, such that no audit is needed at the trust level is a superior alternative to requiring a trust-level audit in all DCG arrangements. This change would go a long way toward encouraging the development of DCG arrangements as a cost-saving tool that expands the availability of defined contribution retirement plans.

c. Brokerage Windows:

The Agencies specifically asked for comment on whether plans should be permitted to participate in a DCG arrangement if they offer an open brokerage window. We believe the Agencies are being overly restrictive by foreclosing DCG plans from offering these arrangements to their participants. We ask the Agencies to permit DCG participating plans to offer open brokerage windows to their participants. The SECURE Act requires DCG plans to "provide the same investments or investment options." We believe that the Agencies could interpret this statutory requirement as permitting DCG plans to offer brokerage windows. The brokerage window itself could be treated as a single "investment" made available to participants by participating DCG plans. Alternatively, based on DOL guidance that excludes a brokerage window from treatment as a "designated investment alternative" under a defined contribution plan, the Agencies could take the position that a brokerage window is a valuable service offered to participants through a broker dealer, rather than an "investment or investment option." *See* 29 C.F.R. § 2550.404a-5(h)(4). Either way, we believe the Agencies could reasonably interpret the SECURE Act to permit plans within a DCG arrangement to offer brokerage windows to participants where appropriate and selected and monitored consistent with ERISA's fiduciary standards.

d. Eligible Plan Assets:

We believe the Agencies also unreasonably limited the availability of the DCG reporting option by limiting the types of investments that may be held by DCG plans. As mentioned above, the SECURE Act requires DCG plans to "provide the same investments or investment options to participants and beneficiaries." We believe the Agencies have exceeded their statutory authority by requiring that the plans must "be 100% invested in certain secure, easy to

value assets that meet the definition of 'eligible plan assets'" for purposes of the Form 5500-SF filing rules. The limited list of secure, easy to value investments promulgated by the DOL for purposes of Form 5500-SF eligibility was crafted to generally align with the categories of investments required in order for a small plan to be exempt from audit under 29 C.F.R. § 2520.104-46(b)(1)(ii) (defined as "Qualifying Assets" under DOL's small plan audit waiver regulation). This was done so that plans that would be eligible to file the Form 5500-SF would also meet the requirements to be exempt from audit under DOL regulation 29 CFR § 2520.104-46. In crafting the list of "eligible plan investments" for Form 5500-SF purposes, DOL sought to limit the types of investments held by plans to a limited range of investments that are held or issued by regulated financial institutions and easily valued because DOL was also exempting those plans from the important protections associated with an independent auditor verifying the plan's investment holdings.

Nonetheless, nothing in the SECURE Act links DCG arrangements to only those plans that intend to be exempt from audit, so we believe it is inappropriate for the Agencies to limit DCG plans to "eligible plan assets" for purposes of the Form 5500-SF. Indeed, the SECURE Act places no limitation whatsoever on the types of investments made available to a DCG plan, only that the investments or investment options must be the same for each plan within a DCG arrangement. To be clear, we believe that many DCG arrangements that are offered to small employers will likely *voluntarily* choose to be invested entirely in "eligible plans assets" in order to avail themselves of the exemption from audit available to the such plans under 29 CFR § 2520.104-46. But, we believe it is unreasonable for the Agencies to ***require*** DCG plans to be so invested, particularly where the plans participating in the DCG are large, have no ability to rely on the small plan audit waiver regulation, and will receive a plan-level audit as required by ERISA. This requirement hampers an investment fiduciary's ability to prudently select investment alternatives for participants and substitutes the judgment of the Agencies for the fiduciary with respect to the range of investment options that may be offered in a DCG arrangement. For example, certain white label funds that have become common in the defined contribution retirement space would be rendered unavailable to DCGs if this requirement is retained based on the nature of some underlying assets held within white label funds.

e. Plans Without Trusts

In the Proposal, the Agencies took the position that plans without trusts would not be eligible to participate in a DCG arrangement. This would include Code section 403(b)(1) plans, which are funded by annuity contracts, and Code section 403(b)(7) plans, which by design are funded with custodial accounts holding regulated investment company shares. We believe that IRS and DOL have the authority to permit non-trusteed plans to participate in a DCG arrangement by regulation, even though the statute requires each plan to have the "same trustee." Presumably this statutory trustee requirement was added to the SECURE Act because having a common trustee is viewed as important to being able to accurately report as a "group of plans." However, we believe that section 403(b) plans should be permitted to be eligible for the

consolidated DCG reporting option where the 403(b) group of plans is very similar in structure to a DCG arrangement with a common trustee. For example, this would be the case where each participating 403(b) plan has the same or a related insurance company for each annuity contract or the same or a related custodian for the 403(b) custodial arrangement (and also where the insurance company and the custodian are related entities, where a 403(b) plan offers both annuity contracts and custodial account investments). We ask the Agencies to extend eligibility for a DCG arrangement to a group of 403(b) plans that has the same insurance company under 403(b)(1) insurance contracts, or the same custodian under 403(b)(7) custodial accounts (or such insurance company and custodian are related entities, where the plan offers both annuities and custodial account investments) as long as the plans otherwise meet the SECURE Act "group of plans" requirements, because such arrangements are functionally equivalent to having a common trustee for a 401(a) or 401(k) trusteed plan.

f. Consolidated Form 5558 for DCG Arrangements

In the Proposal, the Agencies have proposed a filing deadline for all plans in a DCG arrangement as no later than the end of the seventh month after the end of the common plan year for the DCG plans. This is the same Form 5500 deadline that currently applies to plans under DOL's Form 5500 regulations. The Preamble states that, because the DCG filing is an alternative to each participating plan filing its own Form 5500, "each plan would have to submit its own IRS Form 5558 to extend the plan's due date, and, as a consequence, extend the due date for the DCG filing." The Agencies requested comments on whether a DCG arrangement should be permitted to file a single Form 5558 to obtain an extension for filing the DCG arrangement's Form 5500 on behalf of all participating plans as an alternative.

Members of our Group strongly support allowing the administrator of the DCG to file a single Form 5558 on behalf of each plan expected to be included in the DCG arrangement's Form 5500. Filing a single Form 5558 would substantially streamline the process for requesting extensions and increase the cost and administrative efficiencies associated with participation in a DCG. We recommend that the DCG administrator file a Form 5558 that includes a listing of all plans to which the extension would apply. Although the filing extension would apply to each plan listed on the DCG's Form 5558, it is important that the list of plans in the Form 5558 be viewed as preliminary. This is because it may be necessary for the DCG arrangement to later exclude a plan from the DCG filing if the plan fails to provide information necessary to complete the DCG's Form 5500. As a result, the filing extension would still apply to the excluded plan because of the Form 5558 filed on behalf of the DCG arrangement that covered the plan, and the plan would still be eligible to file its own individual Form 5500 by the extended deadline without penalties for lateness.

IV. Addition of Plan Expenses Break-Out Categories on Schedule H

The Agencies have proposed to add eight new categories of administrative expenses to the income and expenses statement on Schedule H, including separate lines for the following general categories: salaries, audit, recordkeeping, trust company/custodial, actuarial, legal, valuation and individual trustee (travel, meetings, etc.) expenses. We understand that these lines would be added to the existing expense categories on Schedule H, that already include separate lines for professional fees, contract administrator fees, investment advisory and management fees, and an "other" category. To explain this addition to Schedule H, the Agencies stated, "to get a better picture of plan expenses, particularly those related to service providers, more detail in this category is warranted."

These additional expenses lines are unnecessary and will only contribute to the expense and difficulty associated with completing the Form 5500 without providing any additional useful information. The introductory instructions to the expenses lines of 2i of Schedule H make clear that these lines are to break out expenses "paid by or charged to the plan." Accordingly, any expense that would appear as a line item on line 2i of Schedule H would also be recorded as a payment of direct compensation to a service provider on line 2 of Schedule C, to the extent that the service provider receives more than $5,000 from the plan during the year. As a result, the new expenses categories will almost invariably already be reflected on line 2 of Schedule C. In addition, the entry for the service provider on Schedule C, line 2, is currently required to include far more information about the services arrangement than would be added to Schedule H in the new line 2i categories. Specifically, for every provider that earns more than $5000 from the plan in direct compensation, Schedule C will identify not only the amount received by the provider from the plan, but it will also reflect more detailed information including service provider's name and EIN, specific services and compensation codes, and whether the provider also received any indirect compensation (including eligible indirect compensation) from third parties. Moreover, Schedule C reports compensation information on a provider-by-provider basis. Therefore, as an example, if a plan pays several trustees and custodians during the year, fees paid to those multiple providers would be lumped together in one line item on Schedule H, line 2i. By comparison, Schedule C would break out payments to each of these providers on an individual basis and report amounts paid to each provider (assuming each provider earned more than $5000 in connection with plan services during the year).

We note that there is sensitivity regarding adding additional break-out categories to the expenses lines of Schedule H because the plaintiff's bar focuses on the these lines for purposes of bringing litigation in connection with 401(k) fees. We urge the Agencies to avoid adding additional expenses categories to line 2i of the Schedule H because far more detailed and useful information already appears on Schedule C regarding these plan services payments. Adding the

proposed new expense lines to Schedule H only increases Form 5500 burdens without adding any new information.

V. Assets Held for Investment Schedule, Line 4i, Schedule H

We are concerned about the potential burdens associated with the proposed standardized electronic filing format for Schedules of Assets that would be associated with line 4i of Schedule H. Today, as the Agencies are well aware, plans file the line 4i attachment by and large in the form of a PDF document attached to the filing. Many large plans hold literally thousands of securities, and the plan administrator receives the Schedules of Assets (or line 4i attachment list) for Form 5500 purposes from its trust or custodial provider. The formats used by custodians and trustees to provide this information to the plan administrator vary greatly among providers. In the Proposal, the Agencies have indicated that the option of creating a list and attaching it to the Form 5500 filing in the form of a PDF will be unavailable after the new electronic line 4i asset list system is finalized and effective.

We are concerned about the burdens associated with the electronic line 4i Schedules of Assets process proposed by DOL in as much as it is impossible to judge from the Proposal how such a system will be implemented and how much work will be associated with creating the mandatory electronic file. In this regard, the Proposal indicates that the plan administrator must input the plan's assets held for investment purposes into the DOL's IFILE system, or use approved third party software. But the Proposal gives no indication of the level of work required by a plan administrator in order to translate its custodian's asset list into the required standardized electronic format. And assessing the level of work necessary to input the list into the new electronic system is complicated by the fact that the Agencies are proposing to add several new data points to the asset list, including LEIs and CUSIPs, whether the asset is hard-to-value, DIA or QDIA status, and operating expenses figures for DIAs. We believe the Agencies have not provided enough information about the electronic filing process to assess how burdensome the process will be. We ask Agencies to delay mandating an electronic format for the schedule of assets held for investment until further information is available regarding how such an electronic format will be implemented, and to re-propose the mandatory electronic line 4i asset list process at that time. We believe this is required so that the regulated community has a more meaningful opportunity to comment on the burdens associated with the mandated process.

VI. Hard-to-Value Assets

One aspect of the changes to the line 4i attachment is particularly concerning for the Group. Under the Proposal, plans would be required to indicate on the Line 4i Schedules of Assets whether any of the plan's investments are "hard-to-value." For this purpose, the proposed instructions for Line 4i provide that common collective trusts ("CCTs") and pooled separate accounts ("PSAs") must be identified as hard-to-value assets if the CCT or PSA is itself

"primarily" invested in hard-to-value assets. This is true regardless of whether the CCT or PSA is valued annually.

Labeling CCTs and PSAs as "hard to value" is unfair and inappropriate when compared to the treatment of registered mutual funds that may also be invested primarily in hard-to-value assets without being labeled as hard-to-value assets. PSAs and CCTs have become extremely popular in recent years and are widely used in the defined contribution space. In many cases, these funds provide a more economical and flexible alternative to mutual funds and are sought by plan fiduciaries as they look for ways to reduce the plan's fees and at the same time offer quality investments to their participants.

CCTs and PSAs are subject to regulation by state or federal banking or insurance regulators, can be accurately valued, and usually provide the same daily net asset value and liquidity provided by mutual funds. In particular, CCTs sponsored by National Banks are required to be annually audited under regulations issued by the Office of the Comptroller of the Currency ("OCC"). *See* 12 CFR § 9.18(b)(6). CCTs that are sponsored by other banks are generally subject to state banking regulations that often mimic the OCC's annual audit requirement. We are not aware of any plan being harmed by a failure to value the assets of the PSA or CCT appropriately.

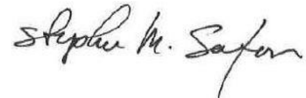
Our specific concerns with this new requirement are two-fold. First, practically speaking, how is the plan administrator to assess whether the fund is "primarily" invested in certain categories of underlying assets each year when the underlying assets of these funds constantly change? Does the "primarily" test ask whether the CCT or PSA is 51% invested in hard to value assets, or is the threshold higher, at 70 to 80%? The materials provided to the plan administrator each year from the fund provider likely do not indicate whether the "hard to value" test is met, and in that case, the plan administrator will be required to ask each CCT or PSA provider whether the threshold is exceeded. Second, we believe that asking the plan administrator to indicate that the plan's CCT or PSA investments are "hard-to-value" on the Plan's Form 5500 creates an unfair inference that these investments are inappropriate for ERISA investors and could stifle their use and development. Based on these concerns, we ask the Agencies to remove the requirement to identify CCTs and PSAs as hard-to-value assets on the Line 4i Schedules of Assets when they are valued at least annually.

*   *   *   *

We thank the Agencies for all of their work in developing and finalizing the Proposal and for the opportunity to submit these comments. We hope our comments are helpful. We would

be happy to discuss these comments with members of your staff in person or by telephone. Please let us know if that would be helpful.

Very truly yours,



Stephen M. Saxon