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November 1, 2021

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: RIN 1210-AB97
Room N-5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Re: Proposed Changes to the Form 5500 Annual Return/Report (RIN 1210-AB97)

Dear Sir or Madam:

The SPARK Institute, Inc. appreciates the opportunity to comment on the changes being proposed to the Form 5500 series annual return/report ("Proposed Reporting Changes") published by the Department of Labor ("DOL"), Internal Revenue Service ("IRS"), and Pension Benefit Guaranty Corporation ("PBGC") (collectively "the Agencies") in the Federal Register on September 15, 2021.

The SPARK Institute represents the interests of a broad-based cross section of retirement plan service providers and investment managers, including banks, mutual fund companies, insurance companies, third party administrators, trade clearing firms, and benefits consultants. Collectively, our members serve approximately 100 million employer-sponsored plan participants. The vast majority of Forms 5500 filed with respect to defined contribution plans will have been prepared with the assistance of a SPARK Institute member.

In 2016, the Agencies proposed major and, in our view, troubling changes to the Form 5500 (the "2016 Proposal"). The SPARK Institute filed an extensive letter identifying dozens of concerns and suggested many changes and clarifications. The 2016 Proposal was never finalized. We were pleased that this new proposal does not incorporate the vast majority of the very worrying changes from the 2016 Proposal that received significant negative feedback (although, as noted below, a few of those proposed changes have been repeated in this proposal).

OVERVIEW

Our letter is divided in three parts. First, we provide comments on the changes being made generally to Form 5500 for all plans, particularly Schedule H. Second, we provide comments on the new proposed consolidated Form 5500 reporting option for certain groups of

plans (called "Defined Contribution Groups" or "DCGs"). Third, we offer comments on new Schedule MEP, which applies to all multiple employer plan ("MEP") structures, including the new pooled employer plan ("PEP") structure. Our recommendations and comments are as follows:

- If the Agencies are seriously considering future changes to Form 5500, the changes to Schedule H and R should be delayed.

- We are concerned that the new information required on Schedule H results from an improper focus on fees, to the exclusion of other very important aspects of plan administration.

- Because much of the new information on Schedule H will not be contained in the plan's trust report (such as whether the investment is a QDIA), significant and expensive system builds will be needed to connect the trust report information with other plan data to complete Schedule H.

- The requirement to report "hard to value" assets, which is repeated almost verbatim from the 2016 Proposal, should be modified and clarified, particularly with respect to common/collective trusts and pooled separate accounts.

- We support the changes being proposed to how participants are counted for purposes of the simplified reporting rule for small plans.

- In response to the request for comment on further changes to Form 5500, we would not support the Agencies reviving most of the aspects of the 2016 Proposal, although we would support harmonization of reporting of compensation on Schedule C with the 408(b)(2) disclosure requirements.

- A DCG should be allowed to use a single audit, rather than requiring multiple audits for each large employer in the DCG.

- DOL should remove the requirement that a DCG group utilize a master trust, and allow separate trusts for each employer in the DCG group, as long as the requirements of the SECURE Act are otherwise satisfied.

- A DCG should not be restricted from investing in annuity contracts or 403(b)(7) custodial accounts, as long as the requirements of the SECURE Act are otherwise satisfied.

- Employers participating in a DCG should be allowed to file a combined Form 5558 to request an extension of the deadline to file a Form 5500.

- We recommend that the questions related to use of affiliates by a pooled plan provider ("PPP") on Schedule MEP be removed or significantly clarified.

I. PROPOSED CHANGES APPLICABLE TO ALL PLANS

A. Delay Changes Unrelated to MEPs and DCGs if Further Changes are Contemplated

The Proposed Reporting Changes include changes to Schedule H (the schedule of Financial Information for large plans) and Schedule R (the schedule for Retirement Plan Information). With respect to Schedule H, the Agencies are proposing to require significant additional information about the assets held under the plan as of the end of year and, in some cases, assets acquired or disposed of during the plan year. With respect to Schedule R, the Agencies are proposing to add new tax compliance questions.

The Agencies are proposing to make these changes effective for the 2022 plan year, which begins for calendar year plans in a few months. (The fact that Form 5500 for the 2022 plan year is not filed until mid-year 2023 is of no help, because the proposal would require tracking of new information regarding plan assets immediately.) Further the proposal also states that the Agencies are considering *additional* changes to Form 5500.

We understand and appreciate that the changes related to DCGs and MEPs are required to be applicable for the 2022 plan year because of a statutory requirement under the SECURE Act. But these other changes, which apply to hundreds of thousands of plans, are not subject to any particular statutory deadline.

These changes to Schedules H and R will require significant systems changes and processes to collect information that is not currently being captured. We are very concerned that providers will incur costs to prepare for these changes in a short period of time, and then the Agencies will propose *additional* changes to the Form 5500. Thus, we recommend that changes to Form 5500 unrelated to MEPs and DCGs all be effective at the same time. ***If the Agencies are seriously considering additional changes in the foreseeable future, these Schedule H and Schedule R changes should be delayed.***

B. Improper Focus on Fees

The Proposed Reporting Changes would require that, for each designated investment alternative ("DIA"), the plan must provide the total annual operating expense expressed as a percentage of assets, based on the information reported in the most recent 404a-5 statement. This is a variation of what the Agencies had proposed in 2016, which was to require that the most recent 404a-5 disclosure be attached to the Form 5500.

The SPARK Institute has some concern about the purpose of this new requirement, and how it might be used (or misused). For example, we are concerned that this will pour gas on the fire of largely frivolous lawsuits being brought against 401(k) plans based solely on fees. While

we agree that fees are an important piece of information that fiduciaries and plan participants should consider, they are only part of the picture for a well-managed plan.[1] The Department's own publication reminds participants: "**don't consider fees in a vacuum**. They are only one part of the bigger picture, including investment risks and returns and the extent and quality of services provided."[2] Unfortunately, by picking out this *one* aspect of an investment, the reporting may be misused by EBSA regional offices or class action plaintiff firms, who will focus on fees to the exclusion of other very important aspects of plan administration. We would ask that the Agencies reconsider this aspect of Schedule H.

C. QDIA Designation and Similar Information Will Require Costly Systems Changes

The proposed changes to Schedule H include a requirement to report, in the case of an individual account plan, whether a particular investment is a qualified default investment alternative ("QDIA") or DIA, and, as noted above, report the expense ratio for the investment.

Reporting which DIA is the plan's QDIA for the Form 5500 is more complex than it might appear. This information would not be contained in the trust records, because it is simply a designation for legal purposes and not necessary to administer or audit trust records. The same is true for the expense ratio of each investment—this is not something the trustee must maintain and report. Thus, new systems will need to be built to connect the information in the trust records to this information from the plan administrator or investment sponsor.

Given the short time that the Agencies have proposed to make this new requirement effective, we are concerned that some providers will need to generate this information manually, which is costly and will lead to errors and delays in filings. Thus, consistent with our suggestion above, we recommend that this requirement be delayed, especially if additional changes to Form 5500 are contemplated.

D. Modify and Clarify the Requirement to Identify Hard to Value Assets

Among the proposed changes is a requirement to identify which assets are "hard-to-value." This proposal appears to be repeated largely verbatim from the 2016 Proposal, although the preamble to the latest proposal does not address the significant comments the Agencies received on that proposal.

The Proposed Reporting Changes would define hard-to-value assets as: "[a]ssets that are not listed on any national exchanges or over-the-counter markets, or for which quoted market

[1] The SPARK Institute's 2021 survey of advisors confirms that advisors agree. Advisors ranked cybersecurity, fraud prevention, and participant experience all ahead of fees in terms of importance in evaluating recordkeepers.

[2] Employee Benefits Security Administration, *A Look at 401(k) Fees* (Sept 201), page 9, available at https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf. (emphasis in original)

prices are not available from sources such as financial publications, the exchanges, or the National Association of Securities Dealers Automated Quotations System ("NASDAQ")." A non-exhaustive list of examples of assets that would be required to be identified as hard-to-value on the proposed Schedules of Assets includes: non-publicly traded securities, real estate, private equity funds, hedge funds, and real estate investment trusts. Consistent with our general comment above regarding timing of these changes, we would point out that this information may not currently be reflected in the trust report and provided to the plan administrator or service provider, so systems changes and processed must be implemented to create it.

In addition, and most troubling, the Agencies would require Common/Collective Trusts ("CCTs") and Pooled Separate Accounts ("PSAs") that are invested "primarily" in hard-to-value assets to be identified as hard-to-value assets themselves, regardless of whether they are valued at least annually. We respectfully disagree that CCTs and PSAs that provide a net asset value similar to a mutual fund should be identified as hard-to-value assets if they are valued at least annually:

- It is inconsistent with the treatment of similarly managed registered mutual funds investing primarily in hard-to-value assets. Those funds would not be required to be identified as hard-to-value assets. While CCTs and 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. The valuation of CCTs and PSAs are 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 in and of itself make a CCT or PSA a hard-to-value asset.

- CCTs and PSAs are subject to oversight from state insurance and banking agencies. CCT and PSAs, although not registered with the SEC or listed on an exchange, are regulated by state and federal agencies and continue to be subject to governmental audit and regulation. As banks, trusts, and insurance carriers, many of our members continue to hold these assets and provide independent valuation of those assets.

- The instructions do not provide any guidance on what it means for a CCT or PSA to be "primarily" invested in hard-to-value assets. We assume this is not a subjective test, but if this is a bright line percentage test (99% ? 75% ? 51% ?), it would require a CCT or PSA provider to evaluate each and every one of its investments to determine if they are "hard to value." This is an additional cost which could discourage plans from investing in CCTs and PSAs, which typically provide cost saving benefits and simplification.

Therefore, we ask the Agencies to change their proposed treatment of CCTs and PSAs that invest primarily in hard-to-value assets so that they do not need to be identified as hard-to-value assets if they are valued at least annually.

In our 2016 letter, we raised the following alternative suggestion, and repeat it here. Under FASB Accounting Standards Codification TM ("ASC") (Topic 820), CCTs and PSAs are able to use the net asset value ("NAV") per share as a practical expedient to estimate the fair

value of a CCT or PSA if the following criteria are met: (1) the investee has calculated NAV consistent with ASC 946, which contains guidance on how investment companies calculate NAV; (2) the NAV has been calculated as of the investor's measurement date (e.g., date of the financial statements); and (3) it is not probable at the measurement date that the reporting entity redeem the investment at an amount different from NAV. It would seem both practical and appropriate for the Agencies to be consistent with FASB, and as such, they 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.

E. Support for Changes to Participant Count Rule

The Proposed Reporting Changes include a change to the method by which defined contribution plans must count participants for purposes of determining whether they are subject to the large plan audit requirement. Currently, plan size is determined based on the total number of participants at the beginning of the plan year, including those who are *eligible* to have contributions made under a 401(k) plan—even if they have not elected to participate and have no account balance. Under the proposal, plan size would generally be determined based on the number of participants with account balances as of the beginning of the plan year.

The SPARK Institute is pleased to support this change, which is a common-sense improvement to the rules exempting small plans from the need for an audit. The proposal would not otherwise change the participant count methodology, so that the Agencies and the public would still have information on the number of employees eligible to make contributions to a 401(k) plan.

F. Additional Changes Under Consideration

The Proposed Reporting Changes include a request for input on additional changes that the Agencies might undertake to the Form 5500. We reiterate the point we raised above, namely that it would be wasteful to adopt amendments to Schedules H and R, requiring major systems changes by plans and providers, and then propose and adopt new changes a few years later.

Moreover, we would point out that the Agencies' 2016 Proposal contained a dizzying array of very troubling changes that were the subject of significant negative feedback from many stakeholders. The 2016 Proposal included more than 400 new or modified line items, each of which would have required significant design and implementation efforts in order to gather, analyze, and report all of the requested information. Many of the changes would have unnecessarily expanded the reporting requirements in a way that would increase the administrative burdens and costs associated with Form 5500 reporting.

As we expressed in 2016, we were concerned that the Agencies underestimated the extent to which all of those changes will increase administrative complexity and the overall length of the annual return. One SPARK member estimated at the time that the efforts and costs necessary to comply with the 2016 Proposal will be two to three times greater than the efforts and costs resulting from the Agencies' last significant overhaul of the Forms. Another member estimated

that the new data elements requested by the 2016 Proposal would have expanded the current two-page Form 5500, not including any Schedules or Attachments, to at least ten pages. And another member estimated that a large plan's Form 5500 filing could easily exceed *one hundred pages* once all the Attachments and Schedules are taken into account.

We were very happy to see that most of those changes were not included in the newest proposal. But further changes, if any, should be responsive to comments the Agencies received in 2016 and more targeted and thoughtful.

That said, there were some aspects of the 2016 Proposal that were widely supported by many stakeholders. For example, the 2016 Proposal would have harmonized Schedule C reporting with DOL's 408b-2 disclosure regulations by eliminating the concept of "eligible indirect compensation" and limiting the reporting of indirect compensation to "covered service providers," as that term is defined by the 408b-2 disclosure regulation. This is a long-requested and commonsense harmonization of the fee disclosure regimes.[3]

II. NEW SCHEDULE DCG

A. Allow for a Single Audit for the DCG Group

The Proposed Reporting Changes will require that each large plan in a DCG must have its own audit *and* the master trust covering the DCG also must have an audit. We recommend the Agencies reconsider this proposal. Congress enacted section 202 of the SECURE Act to help increase retirement plan coverage by allowing plans that participate in a DCG to share the expenses and burdens associated with filing an annual Form 5500, including the accompanying audit requirement. Section 202 will do far less to accomplish that goal if each large plan within the DCG is required to have a separate audit as though each large plan were filing its own separate Form 5500. In fact, it is unprecedented for multiple audits to be required with respect to a single Form 5500. Had Congress intended that such an unprecedented approach of requiring multiple audits be taken, Congress would have specified that intent. Moreover, for purposes of Form 5500, a DCG is very similar to a MEP, so it would not be odd for the audit to proceed similarly.

Our most significant concern is that the audit burden that the Agencies have proposed on DCGs will defeat the cost savings of the DCG cost structure, which is intended to provide savings similar to a MEP. These costs could fall particularly on small employers who join the DCG and must subsidize the cost of the audits for large employers, even though they would not need an audit if they filed a separate Form 5500.

[3] In fact, DOL officials with institutional knowledge will recall that the lack of harmonization of Schedule C and the 408b-2 regulation is a historical accident—for other reasons, various changes to Form 5500 needed to finished before DOL could complete the much more thorough and thoughtful process of the 408b-2 regulation. By the time the 408b-2 regulation was finalized, DOL had refined its thinking on what and how service providers should report their compensation. It is long overdue for this to be addressed.

As best we can tell, the Agencies' reasoning for this aspect of the proposal is that current auditing standards do not contemplate a single audit for a group of plans similar to a DCG. This is hardly a compelling reason; auditing standards must adjust as new business structures and processes are developed. After all, the auditing standards around employee benefit plans have changed significantly since the enactment of ERISA, and the auditing standards for MEPs are well-settled.

In short, we strongly urge the Agencies to reconsider this aspect of the proposal and allow a single audit with respect to large employers in the DCG.

B. Remove Requirement for Use of a Master Trust

Under the Proposed Reporting Changes, it appears that the Agencies are requiring that a DCG is eligible for the new single Form 5500 only if the arrangement uses a master trust to hold assets of all the employers in the DCG. But the SECURE Act does not require this—all the SECURE Act requires is that all the plans in the DCG have the same "trustee." Had Congress wanted all the plans to have the same "trust," it could have said so.

We expect that some DCG structures will use a master trust, with sub-trusts for each individual plan in the DCG. But in other cases, this may not be necessary or efficient; it may be easier to simply have separate trusts with an identical trust document. We expect that many DCGs will use pre-approved plan documents and identical trust documents, all of which name the same entity as trustee. We see no compelling policy reason to prohibit the latter structure, and urge the Agencies to allow this. In fact, we are concerned that imposing this requirement is inconsistent with the idea that small plans are not subject to the requirement to have an independent audit, a point which the DOL implicitly acknowledges in the preamble.

C. Allow DCGs that Use Annuity Contracts and Custodial Accounts

Under the Proposed Reporting Changes, use of the DCG structure is allowed only if the arrangement uses a trust, and is not allowed if the plans' assets are held in an annuity contract or a 403(b)(7) custodial account. The Agencies justify this restriction because the SECURE Act requires that all plans in the DCG have the same "trustee." But the impact of such an interpretation is to unnecessarily limit the types of perfectly legal investments that can be used in a DCG (as group annuity contracts are common investments for small plans) and to completely prohibit 403(b) plans from taking advantage of the DCG structure. There is no evidence Congress intended such a restriction, and plainly two plans with no trustee have the "same" trustee.[4] Section 403 of ERISA makes clear that the requirement to hold assets in trust does not apply when a plan is funded with an annuity contract or a 403(b)(7) custodial account.

The underlying theory behind section 202 of the SECURE Act was that it is possible for a group of plans to file a single Form 5500 as long as they all had sufficient commonality of investments, named fiduciary, plan administrator, and plan year, such that it serves no purpose to

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[4] Two bank accounts with a zero balance have the "same" account balance.

file multiple Forms 5500 repeating the same information. The fact that a group of plans do not have a trustee because it uses annuities or custodial accounts would not undermine the justification for section 202 of the SECURE Act, because such DCGs would still have a commonality of features making filing a single Form 5500 appropriate. Accordingly, we recommend the Agencies allow for DCGs to be funded with annuity contracts or 403(b)(7) custodial accounts, as long as the plans otherwise meet the requirements of section 202 of the SECURE Act.

D. Allow a Single Form 5558 to Request an Extension

In a footnote in the preamble, the Agencies state: "Because the DCG filing is an alternative to each participating plan filing its own Form 5500, that would mean that 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. A plan that did not submit a timely Form 5558 and that participated in a DCG filing that was submitted after the 7th month normal due date would be treated as having filed late." The Agencies requested comments on this issue.

We would urge the Agencies to allow a single Form 5558 to be filed by the plan administrator for the DCGs. This would avoid unnecessary burden for the Agencies in receiving multiple Form 5558s and is consistent with the goal of reducing, as much as possible, the costs associated with participation in a DCG. Because these plans, by definition, will have the same plan administrator, we see no reason that that plan administrator could not request an extension for all plans in the DCG using a single form.

We recognize that the Form 5558 is currently drafted to be completed by a single plan. However, it could be easily be modified so that the name of DCG is entered on the form (similar to Schedule DCG) and the plan administrator attaches a list of all employers (and their EINs) who are requesting an extension under the single DCG.

III. NEW SCHEDULE MEP

A. Importance of Reducing Cost and Fiduciary and Administrative Burdens in MEPs

The SPARK Institute strongly supports the provisions of the SECURE Act that resulted in the creation of PEPs, because we believe – and we know the Administration does too – that it is critical we reduce the cost of plan sponsorship. The SECURE Act's PEP provision was intended, in large part, to expand retirement plan coverage among Americans, especially those working for smaller employers that are less likely to offer a retirement plan to their employees. The new PEP plan structure is another option to supplement the variety of existing rules intended to entice smaller employers to offer retirement plans at a reasonable cost given their size, including SIMPLE IRAs, safe harbor contribution rules, pre-approved plan documents, and Form 5500-SF. We all share the goal of making this new option a viable and cost-effective option, and to offer a plan structure that can meaningfully reduce fiduciary and administrative burdens for small employers.

A key mission of the SPARK Institute is to support policies that make saving for retirement affordable for employers and participants. While we have and will continue to support rules that are necessary to protect participants and beneficiaries, we also believe that unnecessary costs and burdens should be avoided. Thus, as a general principle in considering finalization of Schedule MEP, we recommend the Agencies consider whether aspects of the Schedule can be simplified to avoid unnecessary costs and to limit fiduciary and administrative burdens on participating employers.

We would also point out that, while PEPs currently can only be offered as 401(a) plans, there is bipartisan legislation pending which would also allow for 403(b) plan PEPs.[5] We recognize that Form 5500 can only reflect current law, but we think that there is a very good chance this legislation will be enacted. Thus, we would urge the Agencies to finalize the Schedule MEP and instructions in a way that would make it easy for 403(b) plan PEPs to fill out Form 5500 if and when the legislation is enacted and effective.

B. Prohibited Transaction Question for PEPs Should be Eliminated or Significantly Clarified

The Agencies have proposed to include a question on the Schedule MEP that asks whether "services have been provided to the plan through affiliates or other related parties to the pooled plan providers." If the answer is yes, then Schedule MEP requires that the PPP state whether it is relying on a prohibited transaction exemption ("PTE") and requires that exemption to be entered.

The Agencies provide no explanation or justification for why they are proposing to ask these questions of PEPs. It is unclear if the Agencies are seeking to address a particular problem or push the PEP industry to particular business models. In June 2020, the DOL published a request for information on PEPs (to with the SPARK Institute responded), but the DOL has otherwise not provided any substantive guidance on the application of the prohibited transaction rules to PEPs. Moreover, fiduciaries in ERISA-governed plans rely on a variety of statutory, class, and individual exemptions for many ordinary transactions, and it is unfair to target PPPs for special reporting. We recommend that this question ***be removed*** unless and until DOL issues regulations laying out how the prohibited transaction rules apply to PEPs.

If the Agencies decide to keep some version of the question, the instructions should be clarified. First, the proposed instructions state that if the PPP is not relying on a PTE, then it must "complete Schedule G to report nonexempt transaction." In other words, the instructions assume that, simply because services are being provided by an affiliate or a related party, the PPP must be relying on a prohibited transaction exemption. This is incorrect. As the DOL knows, there are a variety of arrangements under which affiliates provide fiduciary and other services to plans which would not require an exemption. For example, if a fiduciary engages an

[5] *See* Securing a Strong Retirement Act of 2021, H.R. 2954 § 103, which was voted out of the House Ways and Means Committee on a unanimous basis on May 5, 2021.

affiliate to provide services but the plan does not pay any additional fee for those services, this is not a prohibited transaction. Similarly, if a decision to engage one fiduciary's affiliate is made solely by an independent fiduciary, the first fiduciary has not improperly used its discretion or authority.[6] Thus, we recommend that the sentence in the instructions related to Schedule G be revised to simply note that Schedule G must be completed *if* a non-exempt prohibited transaction has occurred during the plan year.

Second, the instructions refer to "affiliates or other related parties" to the PPP. The instructions include a definition of "affiliate" but do not define "other related parties." To the extent that "related party" is intended to encompass any entity in which the PPP may have an interest which may affect its best judgement as a fiduciary, this is a very intensive facts and circumstances inquiry for which even DOL itself will not issue advisory opinions. We recommend the reference to "other related parties" be eliminated.

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The SPARK Institute appreciates the opportunity to provide these comments to the Agencies. If the Agencies have any questions or would like more information regarding this letter, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com or 202-347-2210).

Sincerely,

Tim Rouse
Executive Director

[6] DOL Reg. § 2550.408b-2(f), example 7.