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

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

Dear Sir or Madam:

Teachers Insurance and Annuity Association of America (“TIAA”) appreciates the opportunity to provide comments to proposed amendments to Department of Labor (“Department”) regulations relating to annual reporting requirements under Title I of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) (the “Proposed Rule”).<sup>1</sup> We hope our comments will be helpful as the Department works to finalize regulations on this important topic.

### **About TIAA**

Founded in 1918, TIAA is the leading provider of retirement services for those in the not-for-profit space, including the academic, research, medical, and cultural fields. Over our century-long history, TIAA’s mission has always been to aid and strengthen the institutions, retirement plan participants, and retail customers we serve, and to provide financial products that meet their needs. With our strong not-for-profit heritage, we remain committed to the mission we embarked on in 1918 of serving the financial needs of those who serve the greater good.

To carry out this mission, we have evolved to include a range of financial services, including asset management and banking services. TIAA has \$1.3 trillion in assets under management, and our investment model and long-term approach aim to benefit

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<sup>1</sup> *Proposed Revision of Annual Information Return/Reports*, 86 Fed. Reg. 51488 (Sep. 15, 2021), available at: <https://www.govinfo.gov/content/pkg/FR-2021-09-15/pdf/2021-19714.pdf>.

the 5 million retirement plan participants we serve across more than 15,000 institutions.<sup>2</sup> This means that TIAA is the number one not-for-profit retirement market provider in assets and participant accounts.<sup>3</sup>

As a full-service retirement provider, TIAA provides over 15,000 of our ERISA plan sponsor clients a Certified Annual Plan Financial Reporting Package after the close of each plan year. The reporting package provides an overview of all plan activity during the plan year, which is needed to prepare financial statements and populate information on the applicable lines for the Schedules of Form 5500. If the sponsor is preparing their own Form 5500 or using a third-party preparer, the values in these reporting packages can be easily transposed to the correct location on the Form 5500. Other reports in the package provide an overview of all participant activity during the plan year, including details on participant transactions to support the plan audit, *i.e.*, contributions, distributions, loans, transaction activity by day, and transaction activity by investment. The package also contains plan fee information which serves as the required annual investment disclosure under 29 U.S. Code § 1108(b)(2).

TIAA also offers a Signature Ready Form 5500 Preparation Service in partnership with Deloitte Tax LLP. Deloitte Tax has assisted plan sponsors in Form 5500 preparation since the inception of the applicable regulatory reporting requirements more than 35 years ago. The TIAA Form 5500 Preparation Service helps clients comply with the Department's annual plan filing requirements while easing their administrative responsibilities, a key benefit, given the increasing regulatory demands our clients are facing.

**The Proposed Rule should include language allowing 403(b) plans, who do not have trustees, to utilize Defined Contribution Group (“DCG”) reporting arrangements.**

Section 2520.104–51 of the Proposed Rule requires plans relying on a DCG reporting arrangement meet certain requirements, including having the same trustee as described in 29 U.S. Code § 1103 (“common trustee”).

The Proposed Rule should be revised to permit plans with tax favored status under 26 U.S. Code § 403(b) (“403(b) plans”), who do not have trustees, to leverage DCG reporting arrangements in recognition that ERISA’s trust requirements do not apply to 403(b) plan assets invested in annuity contracts and custodial accounts in accordance with the requirements of 29 U.S. Code § 1103.

403(b) plans are generally funded with annuity contracts under 26 U.S. Code § 403(b)(1) and/or custodial accounts under 26 U.S. Code § 403(b)(7).

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<sup>2</sup> As of September 30, 2021.

<sup>3</sup> Based on data from 53 providers in PLANSPONSOR magazine’s 2020 DC Recordkeeping Survey, combined 457, 403(b) and money purchase plan data as of July 15, 2020.

Under 29 U.S. Code §§ 1103(b), Congress recognized that ERISA's trust requirements do not apply to 403(b) plan assets invested in annuity contracts and custodial accounts as follows.

“(b) Exceptions. The requirements of subsection (a) of this section shall not apply—

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(5) to a contract established and maintained under section 403(b) of title 26 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of title 26.”

Because 403(b) plans do not hold plan assets in trust, such plans do not have trustees. The Department acknowledged this issue in the Proposed Rule. The Department specifically solicited 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, and if so, whether special conditions should apply in light of the absence of a trustee or trustees. (See 51494 Federal Register / Vol. 86, No. 176 / Wednesday, September 15, 2021 / Proposed Rules.)

TIAA agrees that the Department should, pursuant to their general regulatory authority, provide a consolidated reporting option for 403(b) plans that utilize the same:

1. Named fiduciaries;
2. Administrator(s);
3. Insurer for their respective annuity contracts; and
4. Custodian for custodial accounts with identical underlying investments.

TIAA does not believe Congress' mandate requires the same 'trust' be used by each plan. (See below for a more detailed discussion on the same trust requirement.)

As such, we believe plans may utilize multiple annuity contracts and custodial accounts provided the same insurance company issues the annuity contracts and the same custodian custodies the custodial accounts with identical underlying investments.

TIAA's position aligns with Congressional intent for the Department to modify the Form 5500 Annual Return/Report and the Department's regulations to implement

consolidated annual report for groups of defined contribution retirement plans who utilize the same named fiduciaries and investments while reflecting Congress' long recognized statutory exception to ERISA's trust requirements for 403(b) plans invested in annuity contracts and custodial accounts.

**The Proposed Rule should be revised to remove the “common trust” requirement for Defined Contribution Group (DCG) reporting arrangements.**

In Section 202 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (“SECURE Act”), Congress directed the Secretary of Labor to jointly with the Secretary of the Treasury provide for a single, aggregated Form 5500 option that would satisfy the annual reporting obligations for defined contribution pension plans participating in a group of plans. SECURE Act, Section 202 defines a ‘group of plans’ as plans meeting the following requirements.

1. Are individual account plans or defined contribution plans (as defined in 29 U.S. Code § 1002(34) or in 26 U.S. Code § 414(i));
2. Have -
  - A. The same trustee (as described in 29 U.S. Code § 1103(a));
  - B. The same one or more named fiduciaries (as described in 29 U.S. Code § 1102(a));
  - C. The same administrator (as defined in 29 U.S. Code § 1002(16)(A) and plan administrator (as defined in 26 U.S. Code § 414(g)); and
  - D. Plan years beginning on the same date
3. Provide the same investments or investment options to participants and beneficiaries.

Proposed section 2520-104-51 includes an additional requirement that the same trust hold the assets of the participating plans (“common trust”). However, the requirements needed to be a group of plans as mandated by Congress do not include a requirement for the plans to use a common trust.

Therefore, TIAA respectfully requests the common trust requirement be removed from the final regulations.

**The Department should allow plans participating in a DCG reporting arrangement to undertake a consolidated audit, unless findings by an auditor warrant further investigation at the individual plan level.**

TIAA appreciates the Department's acknowledgment that audit requirements under the Proposed Rule must be flexible to accommodate plans for which the eligible population of participants includes part-time, long-term employees. However, we believe the audit requirements under the Proposed Rule should be made even more flexible to ease administrative burdens and control costs. Specifically, proposed new subsection (b)(6) of 29 CFR § 2520.103-1 (*Contents of the annual report for defined contribution pension plan group (DCG) reporting arrangements*) states:

“In the case of a plan participating in a DCG reporting arrangement covering 100 or more participants at the beginning of the plan year, the Schedule DCG for each participating plan shall include the following as provided in the instructions to the Schedule DCG: (i) A report of an independent qualified public accountant for the participating plan. (ii) Separate financial statements and financial schedules described in § 2520.103–10 for the plan, if such financial statements and schedules are prepared for the independent qualified public accountant to form the opinion required by section 103(a)(3)(A) of the Act and paragraph (b)(6) of this section. The financial statement shall include the information outlined in § 2520.103–1(b)(2). (iii) Notes to the financial statements described in paragraph (b)(2)(i) of this section, which contain the information outlined in § 2520.103–1(b)(3).”

TIAA believes the requirement that each plan participating in a DCG reporting arrangement undergo a plan audit does not align with the intent of the Proposed Rule to simplify administrative burdens while allowing plans to take advantage of the benefits of DCG reporting arrangements. 29 CFR § 2520.103-1(b)(6) would impose a significant burden on those sponsors of individual plans, requiring them to hire an auditor and pay for the audit and testing, just as they are required to do under current regulations. This provision would not ease the administrative burdens of these sponsors at all. To mitigate this issue, the Department should allow for a consolidated audit of plans participating in a DCG reporting requirement, instead of requiring separate reporting by each participating plan. In our view, separate audit findings should be required only when the auditor discovers something in the consolidated audit requiring further investigation at the individual plan level.

**Conclusion**

TIAA appreciates the Department's consideration of our comments to the Proposed Rule and welcomes the opportunity to engage further on any aspect of the foregoing.

Sincerely,

A handwritten signature in black ink that reads "Wayne McClain III". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Wayne McClain III  
Managing Director, Associate General Counsel