November 1, 2021

The Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
Attention: Proposed Form 5500 Revisions, RIN 1210-AB97

Submitted Electronically via Federal eRulemaking Portal: www.regulations.gov

Re: Comments on Proposed Revision of Annual Return/Reports, RIN 1210-AB97

Acting Assistant Secretary Khawar:

We very much appreciate the opportunity to comment on the Proposal to amend the Form 5500 Annual Return/Report (the "Form 5500"). The information collected by the Form 5500 is vital for a wide variety of purposes, and it has been a number of years since the Department materially updated its reporting requirements. Unless the Form 5500 keeps pace not only with changes in the law, but also with developments in plan investments and participant behavior, it will not be able to serve the best interests of ERISA-covered retirement plan participants.

Accordingly, we applaud the Department's decision (as well as the corresponding decisions by the Treasury Department/Internal Revenue Service and the Pension Benefit Guaranty Corporation) to use the Proposal to address additional issues beyond those presented only by the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act"). The Department's proposed amendments to the Schedule H intended to update asset reporting make it possible for the Proposal to consider additional Schedule H issues of importance.

<u>Effect of Participant Loan Defaults on Retirement Plan Leakage:</u>

Many different groups, from organizations representing plans and participants to the Government Accountability Office ("GAO"), have identified retirement plan "leakage" (assets withdrawn prior to retirement age) as a serious issue threatening the success of our employment-based retirement system.

While there are a number of ways in which leakage occurs, perhaps the most significant—and the most preventable—are loan defaults, often caused by participants who lose their jobs while still in repayment. In fact, research shows that while the annual default rate is 10-12% for all 401(k) borrowers, that number dramatically increases to 86 percent for participants with loans outstanding following termination of employment.[1]

According to a 2018 study by Deloitte, the cumulative effect of these loan offsets is devastating to workers' retirement savings. The study found that "…more than $2 trillion in potential future account balances will be lost due to loan defaults from 401(k) accounts over the next 10 years, potentially threatening the retirement security of millions of Americans and undermining years of efforts by plan sponsors and providers to keep money in the retirement system."[2] We have attached the complete Deloitte report to this comment letter for the Department's review.

To try to reduce loan defaults, plans and consultants have various options, including participant education and plan design features, such as loan default insurance. However, to help plans address these concerns, and to help inform public policymaking by Congress, the Department or other Federal agencies, we need better data about the causes and types of loan defaults.

For example, the Form 5500 currently gathers data on loan defaults that are deemed distributions in Schedule H. But because deemed distributions are defaults by participants who are active employees, they make up only a small fraction of all loan defaults. As nearly 90% of loan defaults occur after termination of employment, they result instead in qualified plan loan offsets, in which the participant's account balance is reduced to repay the loan. The Form 5500 collects no data on this larger category of defaulting participants, even though this information is directly relevant to developing solutions to address the problem.

<u>The Proposal's Schedule H Amendment Should Gather Data on Qualified Loan Offsets as well as Deemed Distributions:</u>

The GAO examined this specific issue in GAO Report 19-179, "Retirement Savings: Additional Data and Analysis Could Provide Insight into Early Withdrawals." In reviewing available data to evaluate loan defaults, the GAO found that the Form 5500 did not gather essential information, with the result that:

> *"Currently, the incidence and amount of loan offsets in 401(k) plans cannot be determined due to the way DOL collects data from plan sponsors. Additional information on loan offsets would provide insight into how plan loan features might affect long-term retirement savings. Without clear data on the incidence of these loan offsets, which plan sponsors are generally required to include, (but not itemize) on the Form 5500, the overall extent of unrepaid plan loans in 401(k) plans cannot be known."*[3]

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[1] *See*, "Borrowing from the Future: 401(k) Plan Loans and Loan Defaults," Pension Research Council Working Paper 2015-06, Timothy (Jun) Lu, Olivia S. Mitchell, Stephen P. Utkus, and Jean A. Young, April 2015.

[2] "Loan Leakage: How Can We Keep Loan Defaults from Draining $2 Trillion from America's 401(k) Accounts?" Deloitte, 2018.

[3] "Retirement Savings: Additional Data and Analysis Could Provide Insight into Early Withdrawals," Government Accountability Office, GAO Report 19-179, pg. 35.

In light of these findings, the GAO made a single recommendation in this report, that DOL should "…revise the Form 5500 to require plan sponsors to report qualified plan loan offsets as a separate line item distinct from other types of distributions."[4]

- The Proposal is the "Efficient" and "Appropriate" Vehicle for Addressing Loan Offsets

In responding to the GAO report's findings and recommendation, then EBSA Assistant Secretary Rutledge noted that adopting the report's recommendation "…would itself require notice and comment rulemaking…[but] it would [not] be appropriate, or an efficient allocation of resources…" to pursue the changes "in isolation"—instead, they should be a part of broader Form 5500 modernization rulemaking.[5] This was not an unreasonable position, given that there are likely many different issues the Department intended to address in a Form 5500 regulation.

However, we believe the current rulemaking is such a broader rulemaking, at least with respect to the Schedule H, and that it would be both efficient and appropriate for the Department to adopt the GAO's recommendation in the Final rule. Accordingly, we urge the Department to add a line to the Schedule H that separately identifies loan offsets with general distributions at the plan level.

- Minimal Burden on Plan Sponsors

As the GAO noted, requiring this information on the Schedule H would not appear to create any material burden on plans. First, the Proposal (and presumably any final rule) already would require changes to Schedule H preparation, the costs of which would not be increased by making this additional, minor change. Second, plans are already required to collect this data, so merely disclosing it would not impose any undue burden or cost. As former Assistant Secretary Rutledge noted in his response to the GAO report, "The Department agrees with the GAO that 401(k)-type plans should already be keeping records that differentiate loan offsets from other benefit distributions…"[6]

Conclusion:

The Department may easily and efficiently make a material improvement in the data needed to assess and develop solutions to eliminate or reduce participant loan defaults by adopting this minor change to the Form 5500 Schedule H. It is unlikely to present any additional burden, and it is directly related to the Proposal's goal of modernizing the Schedule H. Please reach out to Mr. Tod Ruble, CEO of Custodia Financial, with any questions or concerns at (844) 723-3753.

Thank you for the work you do to protect America's workers.

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[4] GAO Report 19-179, at 35.

[5] Id at 49.

[6] Id.

About Us:

Custodia Financial, LLC is a social impact Insurance Technology organization whose goal is to provide an important service to society. Retirement Loan Eraser, "RLE", is a proprietary Insurance Technology product offered by Custodia Financial. RLE is the only 401(k) loan insurance program that helps repay an employee's loan in the event of involuntary job loss, disability, or death.