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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:

I am writing on behalf of several clients who provide services to ERISA-covered retirement plans. We appreciate the opportunity to comment on the Proposal to amend the Form 5500 Annual Return/Report (“Form 5500”), and we wish to offer suggestions that we believe would improve participant outcomes and gather important missing plan information.ⁱ

As the Department notes in the Preamble, the Form 5500 serves many important purposes, and is used by a wide array of entities. It serves as a disclosure document for participants, as an enforcement tool for the Department and other Federal agencies, and as the primary data collection vehicle for ERISA-covered retirement plans for public and private sector purposes. The information provided by the Form 5500 is essential for the Department, other governmental agencies, Congress, and scholars to develop public policy recommendations to improve our employer-provided retirement system. Thus, it is important that the Form 5500 be reviewed and updated on a periodic basis to address new and emerging needs of its users.

The Department Should Make Additional Targeted Modifications to the Form 5500:

We appreciate that the Department issued the Proposal primarily to address provisions in the Setting Every Community Up for Retirement Enhancement Act of 2019 (“SECURE Act”). However, we also note the Proposal contains numerous elements that are not directed by the SECURE Act, but that are policy priorities of the Department or other agencies. In particular, the Proposal’s revisions to Schedule H reporting are not related to any new statutory requirements, but are changes desired by the Department (and recommend by the Government Accountability Office) for a variety of enforcement and research purposes.

Given that the Proposal is not limited to implementing the SECURE Act, we urge the Department to consider adding two additional provisions to the final rule. While both of these would be of significant benefit to retirement plan participants and policymakers seeking to improve our retirement system, we believe neither of these would add any material cost to the preparation of the Form 5500, and are simple, discrete changes that are appropriate for inclusion in the final rule.

While we understand the Department may intend to propose a new regulation at some time in the future to make other changes to the Form 5500, we do not believe the two items discussed below can or should wait for such a potential future project. These changes address issues that are currently material to plans and participants, and we believe timely action is needed to make these improvements.

- ***Require the 404a-5 Comparative Chart to be Attached to the Form 5500***

A very inexpensive, yet powerful change to the Form 5500 that is also consistent with the Proposal's Schedule H changes would be to require plans to attach a copy of the comparative investment information separately required to be provided to participants under 29 CFR §2550.404a-5(d)(2). This regulation requires fiduciaries of a participant-directed, individual account plan to provide annually to participants specified plan investment information in a comparative format.

As this chart is already prepared by these plans, and as the EFAST2 system accepts attachments, there would be no material burden in requiring a copy of this information to be attached to the Form 5500 filing for such a plan.

The reason to make this change is to make it easier for plan participants and their financial advisors to access information about the plan needed to develop and document a best-interest recommendation related to a rollover from a plan to an Individual Retirement Account ("IRA").

In February, the Department implemented new guidance reinterpreting ERISA fiduciary investment advice that was released along with Prohibited Transaction Class Exemption 2020-02 ("PTE 2020-02"). One of the effects of the new guidance is that many rollover recommendations now would be considered ERISA fiduciary advice, and would result in a prohibited transaction. The new PTE 2020-02 exempts such prohibited advice transactions if its conditions are met.

In April, the Department released new guidance entitled "New Fiduciary Advice Exemption: PTE 2020-02: Improving Investment Advice for Workers & Retirees Frequently Asked Questions" to provide more information regarding compliance with PTE 2020-02. In FAQ 15, the Department wrote:

"...To satisfy the documentation requirement for rollovers from an employee benefit plan to an IRA, investment professionals and financial institutions should make diligent and prudent efforts to obtain information about the existing employee benefit plan and the

participant's interests in it. In general, such information should be readily available as a result of Department regulations mandating disclosure of plan-related information to the plan's participants (see 29 CFR 2550.404a-5)..."

In practice, it has proved more difficult than the Department anticipated for financial institutions to build systems to obtain the information required by the participant disclosure regulation. Our clients have also found that many participants do not know what these "404a-5" disclosures are, and often are unable to access them in a timely manner to provide to a financial professional assisting them with a rollover. Indeed, recognizing the difficulty for financial institutions in gathering this or alternative data, the Department recently extended in Field Assistance Bulletin 2021-02 the effective "deadline" for meeting the documentation and disclosure requirements of PTE 2020-02 from December 20, 2021 to July 1, 2022.

We recognize that the comparative "chart" required by 29 CFR 2550.404a-5(d)(2) is not the entirety of the 404a-5 information that would be useful to advisors and participants considering a rollover. However, it would provide a great deal of useful investment information about the plan as a whole, not just the participant's current allocation and account balance. It would also be easy for advisors to find, as it would be available in the online EFAST2 database maintained by the Department and open to the public. None of the information in this mandatory disclosure is sensitive, private or unique to any individual participant. Further, as mentioned above, the burden of attaching to the Form 5500 a copy of a document the plan already has to send to all participants is minimal.

- ***Amend the Schedule H to Require Reporting on Qualified Loan Offsets***

Policymakers and plan fiduciaries have worked for a number of years to try to reduce the incidence of participant loan defaults. While access to plan assets before retirement can be very important to plan participants and can be a factor in their decisions of whether and how much to contribute to the plan, as many as 10% of loans end in default.ⁱⁱ However, there are different reasons for different types of loan defaults, and good data is essential to understanding the issues facing participants to develop valid strategies to reduce loan defaults.

The effect of these defaults may be quite large. A 2018 Deloitte study estimated the 10 year effect of loan defaults on participant retirement accumulation to be \$2 trillion, taking into account lost growth opportunity, tax issues and other effects.ⁱⁱⁱ Unfortunately, one of the most significant measures of participant default losses, loan offsets, aren't captured by the Schedule H, even though some other measures, including deemed distributions, are.

This results in a significant hole in the data. The active employees who default on a participant loan are reported on the Schedule H as deemed distributions. The far more numerous category, terminated employees who do not default on their plan loans until after termination, experience qualified loan offsets reducing their account balances, but these are not reported on the Schedule H. The situations facing these two groups, and the reasons they default are likely quite different, and solutions that work for one group may not work for the other. Having real data, publicly available, on what is actually occurring, will be quite helpful for policymakers and others.

The GAO studied this issue in its 2019 report, “Retirement Savings: Additional Data and Analysis Could Provide Insight into Early Withdrawals.” In the report, GAO found that “...the incidence and amount of loan offsets in 401(k) plans cannot be determined due to the way DOL collects data from plan sponsors... Without clear data... the overall extent of unrepaid plan loans in 401(k) plans cannot be known.”^{iv} To address this data gap, GAO recommend 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.”^v

While the Department demurred in its response to the 2019 GAO report because the change would require notice and comment rulemaking the Department felt was best undertaken in connection with a broad regulatory review of the Form 5500, we note that is exactly what the Proposal represents—a broad review and multiple changes to the Schedule H. Accordingly, we urge the Department to modify the final rule to add a line to the Schedule H that separately identifies loan offsets with general distributions at the plan level.

Always cognizant of the burden regulatory reporting can create, we believe that no additional, material burden would result from this change. In the report, GAO and the Department agreed that plans must already collect the loan offset data, and the Proposal already requires broad changes in the Schedule H, so any impact should be incidental and the benefits significant. We also note that this would bring the Form 5500 loan offset data collection into alignment with the IRS’ 1099R reporting requirements, providing readily accessible public data useful to both agencies.

Conclusion:

The comments offered here from our clients are narrowly tailored to request the Department address the two issues described, and should not be read to otherwise endorse the Proposal.

Both of these changes would present minimal new burdens on plan sponsors, as both the comparative investment document and the loan offset information are already prepared by plans for other purposes. Adding them to the publicly available Form 5500 filings will make this data accessible to all users in ways that will benefit participants. Making the investment information public will make it easier for participants and financial professionals to access needed plan information in connection with rollover recommendations. Making the loan offset data clear and publicly available will facilitate efforts by policymakers, researchers and others to better address loan defaults.

Thank you for the opportunity to present our comments.

Sincerely,



Bradford P. Campbell

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ⁱ These comments are the views of specific clients, and I write in my capacity their counsel and representative. These comments are not intended to express my own views or those of Faegre Drinker Biddle & Reath, LLP.

ⁱⁱ *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.

ⁱⁱⁱ “Loan Leakage: How Can We Keep Loan Defaults from Draining \$2 Trillion from America’s 401(k) Accounts?” Deloitte, 2018.

^{iv} “Retirement Savings: Additional Data and Analysis Could Provide Insight into Early Withdrawals,” Government Accountability Office, GAO Report 19-179, pg. 35.

^v GAO Report 19-179, at 35.