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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: RIN 1210-AB63
Annual Reporting and Disclosure
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

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 July 21, 2016.[1]

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 85 million employer-sponsored plan participants.

OVERVIEW

We support the Proposed Reporting Changes that would simplify and streamline the annual information return/report, like those intended to harmonize Schedule C reporting with DOL's 408b-2 disclosure regulations. Plan sponsors and retirement industry service providers, including many of our members, have been requesting some of those improvements for some time and the Agencies should be commended for listening to interested stakeholders and making changes that benefit plans, participants, and the companies that serve them. Where possible, we encourage the Agencies to adopt further changes that would reduce administrative burdens,

[1] At the outset, we want to thank the Agencies for extending the comment period for this proposal at the request of the SPARK Institute and others. As you will see, this additional time allowed the SPARK Institute and its members an opportunity to develop detailed comments which we would not have been able to do under the original schedule.

simplify the overall Form 5500 preparation process, and reduce costs associated with Form 5500 reporting.

Although we appreciate and support the Proposed Reporting Changes that would simplify the Form 5500, we are also concerned that the Agencies' Proposed Reporting Changes include many elements that would frustrate our call for a simplified reporting process. As explained further below, we are concerned that many of the new information requests would unnecessarily expand the reporting requirements in a way that would increase the administrative burdens and costs associated with Form 5500 reporting. Those changes would create problems for plan administrators, who remain ultimately responsible for completing the Form 5500, and service providers, like recordkeepers, third-party administrators ("TPAs"), and other Form 5500 preparers, who are often contractually obligated and expected to provide their clients with "signature-ready" Forms, Schedules, and Attachments.

We are also concerned that the Agencies have underestimated the extent to which all of these changes will increase administrative complexity and the overall length of the annual return/report. One SPARK member estimates that the efforts and costs necessary to comply with the Agencies' Proposed Reporting Changes will be two to three times greater than the efforts and costs resulting from the Agencies' last significant overhaul of the Forms, which became effective for the 2009 plan year. Another member estimates that the new data elements requested by the Proposed Reporting Changes would expand the current *two-page* Form 5500, not including any Schedules or Attachments, to at least *ten pages*. And another member estimates that a large plan's Form 5500 filing could easily exceed *one hundred pages* once all the Attachments and Schedules are taken into account.

Not only do the Proposed Reporting Changes increase the amount of information being requested, they also request new types of information that reflect a greater level of detail on plan operations. In fact, the Proposed Reporting Changes include more than 400 new or modified line items, each of which would require significant design and implementation efforts in order to gather, analyze, and report all of the requested information. Designing and implementing information systems that collect the newly proposed information request will require thoughtful and labor intensive coordination among plan administrators, information technology professionals, recordkeepers, investment providers, broker-dealers, actuaries, trustees, lawyers, and others. All of those efforts come with significant new costs that would ultimately be absorbed by the plans and participants for whose benefit these changes are being sought.

As the Agencies consider which information requests they will include in their final revisions, we strongly encourage you to carefully weigh these costs against the expected utility of each new or modified information request. Even minor changes to existing Form 5500 elements can generate significant industry-wide costs. For plan sponsors already questioning the value of their retirement arrangements in the face of recent regulatory requirements, there is concern that the new reporting burdens may result in more employers turning away from these arrangements and fewer employees becoming retirement-ready.

RECOMMENDATIONS

- ✓ Retain and implement the Proposed Reporting Changes that would simplify and streamline the Form 5500 reporting process.

- ✓ Exercise patience and adopt reporting rules that will not require future changes in the near-term.

- ✓ Adopt final reporting rules that avoid unnecessary duplication across the various Forms, Schedules, and Attachments.

- ✓ Eliminate information requests that unnecessarily increase reporting costs without producing meaningful benefits for retirement plans and participants.

- ✓ Eliminate proposed information requests that would generate inconsistent, inaccurate, and unreliable information.

- ✓ Establish reporting rules that draw clear lines between the obligations of plan administrators and other service providers.

- ✓ Revise the Proposed Reporting Changes' definition of "hard-to-value" assets.

- ✓ Provide clarification on proposed information requests that are unclear. The attached Appendix provides examples of new and existing reporting elements that require clarification and are not otherwise discussed in the body of our letter.

I. RETAIN AND IMPLEMENT PROPOSED REPORTING CHANGES THAT WOULD SIMPLIFY AND STREAMLINE THE FORM 5500 REPORTING PROCESS

As mentioned above, SPARK commends the Agencies for proposing certain changes that would simplify and streamline the Form 5500 reporting process. However, we also encourage the Agencies to adopt additional changes that would simplify the reporting process and reduce the costs associated with Form 5500 reporting. SPARK specifically supports the following Proposed Reporting Changes because they would help to simplify the Form 5500 reporting process:

1. the changes intended to harmonize Schedule C reporting with DOL's 408b-2 disclosure regulations (but see our concerns regarding certain changes that do *not* harmonize these rules);

2. the changes expanding Form 5500-SF eligibility to certain small plans by changing the Form 5500-SF participant threshold to reflect the number of participants *with account balances*, rather than the total number of participants;

3. the change that would permit plans to report common collective trusts ("CCTs") and pooled separate accounts ("PSAs") as a single line item on the Schedule H balance sheet regardless of whether the CCT or PSA files as a direct filing entity ("DFE");

4. the elimination of Schedule D for plans investing through a DFE;

5. the elimination of the reporting concept of separate master trust investment account ("MTIA") filings;

6. the proposed creation of an electronic Form 5558; and

7. the proposed changes that would simplify the final filing requirements for defined benefit plans that are trusteed by PBGC and have fewer than 500 participants.

408b-2 Harmonization. SPARK is particularly supportive of the Agencies' Proposed Reporting Changes intended to harmonize 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 408b-2. The current inconsistencies between the Schedule C reporting rules and DOL's 408b-2 disclosure regulations result in unnecessary reporting on entities that are not "covered service providers" (e.g., investment advisers for mutual funds) and create inefficiencies for plans and service providers who must design and implement compliance strategies to implement both sets of rules. We believe that the Proposed Reporting Changes intended to harmonize Schedule C reporting with the 408b-2 disclosure regulations will simplify the Form 5500 and reduce costs associated with the overall Form 5500 reporting process. We commend the Agencies for proposing these changes.

Schedule C Reporting Threshold. As the Agencies consider additional ways to make Schedule C reporting more efficient, we encourage the Agencies to also make the dollar amount threshold for reporting service providers on the Schedule C a uniform and consistent threshold regardless of whether the service provider receives direct or indirect compensation. The Agencies are proposing to lower the reporting threshold for service providers who receive indirect compensation to $1,000, based on the $1,000 compensation threshold included in the definition of a covered service provider for purposes of 408b-2. This lower threshold does not create significant concerns for our members. However, we think that the reporting threshold should be consistent, either $1,000 or $5,000, regardless of whether compensation received is direct or indirect. The different thresholds introduced by the Agencies' Proposed Reporting Changes create unnecessary inconsistencies and inefficiencies in the Form 5500 reporting standards.

II. EXERCISE PATIENCE AND ADOPT REPORTING RULES THAT WILL NOT REQUIRE FUTURE CHANGES IN THE NEAR-TERM

The retirement industry recently expended significant resources to redesign its information and recordkeeping systems in an effort to comply with the last major Form 5500 overhaul, which became effective for reporting on the 2009 plan year. It is not cost effective or efficient for the Agencies to significantly revise the Form 5500 reporting requirements approximately every ten years, especially when the industry is already being required to devote significant resources to address other regulatory developments, like DOL's recently finalized conflicts of interest rule. Accordingly, we encourage the Agencies to take their time to develop new information reporting rules that can remain in place for many years to come without the need for additional overhauls. Such patience would allow the implementation costs of any final revisions to be spread across many years, rather than a relatively short period of time, like the amount of time between now and the last major Form 5500 overhaul.

Some of the changes being proposed as part of this overhaul are the direct result of the Agencies' rush to finalize the current Form 5500 series in advance of the last major Forms revision. For example, the changes being proposed to harmonize Schedule C reporting with the 408b-2 disclosure regulations are necessary because the last round of major Schedule C revisions occurred before DOL could adopt its final 408b-2 disclosure regulations. Unlike previous overhauls, this current round of revisions cannot be rushed. Service providers and retirement savers, who ultimately bear the costs of these changes, deserve static reporting requirements that are not subject to frequent revisions. We urge the Agencies to be patient in this process and to adopt thoughtful changes that make the Form 5500 reporting process more efficient for many years to come.

Delay IRS-Only Compliance Questions until Broader Changes are Effective. On a related note, we are asking the Agencies to delay the effective date for the IRS-only compliance questions added to the 2015 and 2016 Form 5500 series. Those questions, which the IRS has instructed filers not to complete on the 2015 and 2016 Forms, will require significant changes to the information and technology systems that support each plan's Form 5500 preparation and filing. It would be much more efficient and cost effective for the Agencies to delay the effective date for those changes to coincide with the other changes contemplated by the Proposed Reporting Changes, rather than forcing plans, preparers, and other service providers to implement the Agencies' changes in multiple waves.

Effective Date for Proposed Reporting Changes. The Agencies' Proposed Reporting Changes indicate that the overall revisions are generally expected to become effective for reporting on the 2019 plan year. However, unless the Agencies intend to release their finalized or draft Forms revisions very shortly after the comment period closes, we are concerned that this timetable may not be feasible. Even under that expedited timetable, plan administrators, preparers, and other service providers would only have two years to design, implement, and test their reporting systems. With significant industry resources already tied up in efforts to comply with DOL's recently finalized conflicts of interest rule, this new regulatory reporting initiative will be particularly problematic for plan sponsors, recordkeepers, TPAs, and software vendors. Accordingly, unless the Agencies' Proposed Reporting Changes are significantly streamlined and scaled back in accordance with our recommendations, we are requesting that the Agencies delay the overall Proposed Reporting Changes' effective date until at least the 2020 plan year.

III. <u>ADOPT FINAL REPORTING RULES THAT AVOID UNNECESSARY DUPLICATION ACROSS THE VARIOUS FORMS, SCHEDULES, AND ATTACHMENTS</u>

Many of the new elements and information requests that would be added through the Agencies' Proposed Reporting Changes are duplicative of information that is already being provided through other sections of the existing or proposed Form 5500 series. In an effort to promote efficiency, simplify reporting, and reduce costs, we encourage the Agencies to remove unnecessary duplication from the Agencies' Proposed Reporting Changes. In this section, we have provided a list of examples highlighting some of the areas where plans would unnecessarily be required to report certain information more than once.

- ***Insurance Information Reporting.*** The Proposed Reporting Changes would add new breakouts under the Schedule H category for funds held in insurance company general accounts (unallocated contracts) – current Schedule H, Part I, Line 1c(14) – into subcategories for deposit administration, immediate participation guarantees, guaranteed investment contracts, and "other" unallocated insurance contracts. The Proposed Reporting Changes note that the these classes of contracts parallel the existing breakouts on Schedule A used to report on insurance contracts with unallocated funds. Because the Proposed Reporting Changes would require plans to report this information in two different places, we recommend that the Agencies eliminate this duplication by only requiring such information to be broken out on the Schedule H. Further, given the increased level of granularity being requested on the proposed Schedule H, the Agencies should consider exempting pension plans from Schedule A altogether. Schedule A would not be necessary because all of the relevant information currently being reported on Schedule A would otherwise be reported on the plan's Schedule H under the Agencies' Proposed Reporting Changes.

- ***Service Provider Expenses.*** The proposed Schedule H changes would add new breakout categories for reporting expenses paid for salaries and allowances, independent qualified public accountant ("IQPA") audit fees, recordkeeping and other accounting fees, bank or trust company trustee/custodial fees, actuarial fees, legal fees, valuation/appraisal fees, and trustee fees/expenses (including travel, seminars, and meetings). This duplication of reporting is unnecessarily detailed on the Schedule H and should only be reported on the Schedule C.

- ***Designated Investment Alternatives.*** Proposed Line 4p on the Schedule H, if answered "Yes," will require filers to include the number of designated investment alternatives ("DIAs") available under the plan and to indicate the number of DIAs that are index funds. This question duplicates information that would already be on the Line 4i Schedules of Assets pursuant to the Proposed Reporting Changes. In order to avoid duplication, it would make more sense to add an additional column on the Schedule H, Line 4i Schedules of Assets to check for investments classified as DIAs.

- ***Trustee Signature Line.*** One member has questioned why the Schedule H certification is required if the trustee already certifies the assets. This is duplicative and has no benefit for the plan sponsor or trustee.

This list is not exhaustive, but it does provide a sample of the unnecessary duplication of information being requested throughout the Agencies' Proposed Reporting Changes. Collecting and coordinating each new piece of information creates new costs that would ultimately be passed on to plans and participants for whose benefit the changes are being sought. In an effort to limit these costs and increase efficiency, the Agencies should streamline the duplicative elements referenced above and search for more areas where the Form 5500 can be simplified. It is unfair to place the burden of collecting and organizing these kinds of information on plans and service providers, when such information already appears elsewhere on the Form 5500 or could be derived from information already included in existing Form 5500 elements.

IV. ELIMINATE INFORMATION REQUESTS THAT UNNECESSARILY INCREASE REPORTING COSTS WITHOUT PRODUCING MEANINGFUL BENEFITS FOR RETIREMENT PLANS AND PARTICIPANTS

The Proposed Reporting Changes increase the amount of information reported through the Form 5500 series and the level of detail that must be collected and processed. SPARK is concerned that some of the information being requested will significantly increase the cost and complexity of reporting without providing interested stakeholders with enough meaningful benefits to justify their costs. Accordingly, we encourage the Agencies to review the existing and proposed Form 5500 data elements to determine which information collections justify their costs and eliminate those information requests that are not worth the effort and cost expended in order to collect them. With regard to the Agencies' Proposed Reporting Changes, we have identified the following information requests as reporting elements that would not justify the costs of creating and collecting them.[2]

A. Proposed Requirement to Report Indirect Compensation As An Actual Or Estimate Dollar Amount

The Proposed Reporting Changes would require service providers to generate, and plans to report, the total amount of indirect compensation received during the plan year as an actual or estimate dollar amount. As further explained below, we are concerned that any such estimate would require significant costs to generate and would yield unreliable information in the absence of additional guidance. Moreover, this requirement directly contradicts the Agencies' intended goal of harmonizing Schedule C reporting with DOL's 408b-2 regulations. Accordingly, we recommend the Agencies eliminate this information request from the final Schedule C revisions.

[2] One member pointed out that the Form 5500 instructions have become very complex, particularly requiring plan sponsors to reference and interpret various Internal Revenue Code (the "Code") sections. Many small plan sponsors do not have the resources or knowledge on how to reference the many Code references throughout the instructions. We suggest the Agencies consider whether the instructions might be reexamined to determine if they could be simplified.

Plan Level Estimates Would Be Labor Intensive and Costly. The new requirement to report an actual or estimate amount of indirect compensation would create many practical challenges for the plan administrators and service providers that would be responsible for calculating that figure. For many plans, any meaningful estimate of indirect compensation would require calculations based on daily inflows and outflows. It would also require a service provider to divide up indirect compensation received for services provided to all of its clients on a plan-by-plan basis, despite the absence of any uniform standards for doing so. This new undertaking would be administratively burdensome and any additional costs would ultimately be borne by the plans and participants for whose benefit the change changes are being sought.

Omnibus Accounts. The practical challenges created by this new reporting requirement are especially difficult for plans that invest through omnibus accounts. The preamble to the Proposed Reporting Changes seemingly recognizes this difficulty but nevertheless would require the reporting of indirect compensation as a dollar amount anyway.[3] Omnibus accounts provide plans with attractive pricing by reducing the administrative burdens and recordkeeping costs associated with a plan's investment vehicles. The proposed indirect compensation reporting requirement threatens some of the simplicity that makes omnibus accounts more cost effective than other investment alternatives. Further, from the perspective of a service provider exclusively providing investments (i.e., the mutual fund or insurer), it would be impossible to determine a meaningfully accurate actual or estimate amount of indirect compensation paid by each individual plan. Those service providers simply do not have the information that would be necessary in order to individually generate plan level figures or estimates.

Estimates Would Yield Unreliable and Inconsistent Information. In the absence of any further guidance, we are also concerned that the requirement to report an actual or estimate amount of indirect compensation would ultimately yield information that would be unreliable due to the inconsistent valuation methodologies that would be adopted by different service providers. Indirect compensation is infrequently calculated at the plan level and any such estimate would require significant discretion when service providers adopt methodologies to calculate the requested figure. For example, service providers would need to use discretion when calculating an estimate amount for soft-dollar compensation, non-monetary compensation, float revenue, and even asset-based fees, which are highly dependent on when and how often such fees are assessed. When previously confronted with these valuation issues in other contexts, the disclosure of formulas and percentages have been acceptable methods of disclosure and reporting under DOL guidance. For example, when considering the disclosure of float income, Field Assistance Bulletin 2002-03 only requires the service provider to "disclose the rate of the float or the specific manner in which such rate will be determined." In contrast to the new requirement included in the Proposed Reporting Changes, no actual or estimate dollar amount is expected or required.

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[3] "The DOL invites comments on this proposed method for plan level allocation of indirect compensation generated at an "omnibus" level, including whether there are particular types of indirect compensation for which it would be unduly expensive or burdensome to report a dollar amount or estimate at the plan level." 81 Fed. Reg. 47,534, 47,552 (July 21, 2016).

Further, these inconsistent estimates raise acute concerns about how plaintiffs' attorneys would use this publicly available information. Inconsistencies among estimates could lead to frivolous lawsuits based on the mistaken belief that amounts reported as indirect compensation on the Schedule C were determined in a uniform manner across service providers. Plaintiffs' attorneys would be comparing "apples to oranges" and claiming they are comparing "apples to apples." In the absence of further guidance, the percentages and formulas currently permitted as part of DOL's 408b-2 disclosure regulations and Schedule C reporting regimes provide both a possible as well as more accurate and efficient way for plans to compare and think about indirect compensation being paid to service providers.

Actual or Estimate Figures Not Consistent With 408b-2. The new requirement to report an actual or estimate amount of indirect compensation is somewhat surprising in light of the Agencies' stated goal of harmonizing Schedule C reporting with DOL's 408b-2 disclosure regulations. Neither reporting regime currently requires indirect compensation to be calculated as an actual or estimate dollar amount. The absence of any such requirement reflects previous rounds of notice and comment rulemaking, which have developed beneficial and cost-effective methods for informing responsible plan fiduciaries about indirect compensation received by service providers. Those rulemakings reflect a balance between the needs of plans, participants, and service providers. The newly proposed request for indirect compensation to be reported as an actual or estimate dollar amount disrupts that balance without providing any substantial benefits for plans or participants who can already refer to readily comparable percentages and formulas if they wish to compare the amount of indirect compensation received by service providers. If the Agencies intend to overhaul how plans and service providers think about indirect compensation, we believe that the Forms revision is not the appropriate forum for collecting and responding to comments from industry stakeholders on this issue. Rather, such an impactful change to the treatment of indirect compensation should be developed through its own notice and comment rulemaking.

B. Eliminate Detailed Reporting Regarding Related Party Compensation

The Proposed Schedule C Part I, Line 4b would require plans to report information on "related party compensation," including any compensation that is paid among the service provider, affiliates, and subcontractors in connection with services rendered to the plan if the amount was set on a per transaction basis. This new requirement would specifically require plans to report the *amount* of related party compensation. This new reporting element would create significant administrative burdens on large financial institutions that have many affiliates and subcontractors (e.g., subcontracting activity might include QDRO review, brokerage distribution, trust services, etc.). Further, the administrative complexity created by this new reporting requirement would only be multiplied in the event that the Agencies do not allow bundled service providers to be reported on a single consolidated Schedule C. This level of administrative complexity and its associated costs is unnecessary. Information regarding related party compensation is reported on the service provider's 408b-2 disclosure and, although it is important for plan sponsors to understand for purposes of 408b-2, it is not relevant to Form 5500 reporting. Additionally, because related party compensation is typically a subset of indirect compensation already reported on the Schedule C, we ask the Agencies to remove this new information request in order to avoid duplicative reporting. This duplicative reporting would only increase administrative costs while collecting relatively little information that is helpful to a plan or participant for Schedule C reporting purposes. At the very most, this new information request should only ask ***whether*** the plan's arrangement with the service provider involved any related party compensation.

Clarification Requested. If the Agencies ultimately retain the Proposed Reporting Changes requiring detailed reporting of related party compensation, our members are seeking confirmation that the proposed element requesting the amount of related party compensation can be reported as a formula or percentage, rather than an actual or estimate dollar amount. This type of compensation is not typically tracked on a plan-by-plan basis. Any attempt to produce an estimate of this type of compensation on a plan-by-plan basis would yield inconsistent and unreliable figures.

We also request further clarification on what constitutes related party compensation, as that term is defined by DOL's 408b-2 regulations. This term is often misunderstood, inconsistently applied, and often over-reported by service providers. This clarification would not only be helpful in allowing interested stakeholders to fulfill their obligation under 408b-2, but would also greatly improve the consistency and reliability of any information reporting on the Form 5500 regarding related party compensation, if the proposed information requests are not removed.

C. Allow Grouping Of Service Providers On Schedule C

Because of the elimination of the concept of "eligible indirect compensation," and requiring each service provider to be listed on a separate Schedule C, our members are concerned about the sheer volume of additional reporting. One member pointed out that, on the current Schedule C, they report each fund family the plan invests in on Line 1, and it is not uncommon to have more than ten fund families listed. The trend here is to have more funds/families. This member pointed out that if, currently, it takes an average of twenty minutes to gather information and prepare a fairly simple Schedule C, that time would be multiplied at least ten times for each plan.

Therefore, we recommend that the Agencies consider allowing plan administrators to continue to group funds and fund families together. This will be critical for larger plans that use collective trusts and other non-registered investments.

D. Schedule H Breakouts Should Carefully Weigh Costs Against Benefits

The Proposed Reporting Changes to the Schedule H balance sheets and Line 4i Schedules of Assets would require more granular reporting with respect to plan and DFE investments. We are concerned that the information that would be collected as a result of the new breakouts does not justify the administrative challenges and costs that would be necessary for plan administrators and service providers to collect it. Therefore, we are encouraging the Agencies to carefully consider which breakouts justify the accompanying costs and administrative burdens in light of our comments below.

In the plan context, TPAs and recordkeepers typically prepare each plan's Form 5500 for review by the plan administrator ultimately responsible for the content of the Forms. TPAs and recordkeepers, by themselves, do not have all of the information or expertise that would be necessary to accurately complete the level of detail contemplated by the proposed breakouts. In order to complete the Forms, plan administrators and preparers would have to coordinate with, and rely upon the expertise of, investment advisers and other third party financial experts. For example, in order to complete certain new investment breakouts like the proposed partnerships and joint venture line item, the Proposed Schedule H would require filers to break out those investments along the following subcategories: limited partnerships, venture capital operating companies ("VCOCs"), private equity, hedge funds, and "other" partnership/joint venture interests. This effort would require costly coordination among plan administrators, Form 5500 preparers, and financial experts, while increasing the cost of reporting. Additionally, we want to note that this level of detail may result in inconsistent and unreliable reporting because reasonable differences of opinion may exist between those parties regarding which asset categories match specific plan investments. All of this administrative complexity and coordination would be required despite uncertainty over whether this level of detail will actually be useful to plans, participants, and policy makers.

Participant-Directed Brokerage Accounts. The concerns discussed above are also problematic for the Proposed Reporting Changes' treatment of participant-directed brokerage accounts. Although the Proposed Reporting Changes would create a new line-item to report participant-directed brokerage accounts (except for certain asset categories) on the Schedule H balance sheet, the Proposed Reporting Changes would still require significant amounts of information regarding brokerage windows to be reported on the Schedule H, Line 4i Schedules of Assets. For example, the Line 4i Schedules of Assets would require filers to indicate the particular asset categories in which the individual participant-directed his or her account. As discussed above, this kind of reporting would require recordkeepers and TPAs to coordinate with third-party financial experts and could produce disagreements over how brokerage window investments should be categorized. These issues become particularly problematic in the context of participant-directed brokerage accounts because the information necessary for completing the proposed information requests is commonly housed among many unaffiliated entities. Given the complexity and administrative burden that would be required in order to collect this information, we question whether the reporting of such granular information justifies its costs and encourage the Agencies to eliminate this level of detailed reporting for participant-directed brokerage accounts.

We also encourage the Agencies to delay any changes to the reporting of participant-directed brokerage accounts **until after it has completed its outstanding regulatory project** on this issue. We are concerned that DOL's outstanding brokerage window project could impact the information that the Agencies are seeking and require the industry to go back and change its information systems after the reporting overhaul is complete. Further, it is clear that DOL has yet to grapple, and receive meaningful comment, on what issues, if any, brokerage windows present. Therefore, we ask that the Agencies to at least delay their changes regarding the reporting of participant-directed brokerage accounts until after DOL's regulatory project is complete.

E. <u>New Information Collected On Defined Contribution Plan Operations</u>

Similar to our concerns regarding the new Schedule H breakouts, we want to express our concerns regarding the newly proposed Form 5500 elements seeking to collect more detailed information on certain aspects of defined contribution plan operations.[4] In determining whether the Proposed Reporting Changes justify the costs associated with collecting such information, we felt that it was important to inform the Agencies that much of the information being requested through those reporting elements is not currently being tracked or reported at the plan level. Tracking this level of detail will require substantial efforts to redesign and implement new recordkeeping and information technology systems. Additionally, it would require significant coordination between plan administrators, who have access to the information necessary to complete the new reporting elements, and the plan's recordkeeper or Form 5500 preparer, who will actually prepare the report. The Appendix attached to this letter provides greater detail on which elements would be particularly problematic, but the following points are offered to highlight some of our most important concerns regarding these new questions.

- Not all plans and recordkeepers track which participants were *automatically defaulted* into a QDIA as opposed to which participants *chose* to invest in the QDIA.

- Recordkeepers often do not track which contributions are "catch-up contributions" or whether a participant maximizes the employer match.

- Recordkeepers typically do not track the information that would be necessary to complete the proposed reporting elements regarding terminated plans or transfers of assets between ongoing plans. For example, in many instances, recordkeepers do not know whether a plan is terminating until all assets are being distributed. Moreover, it is often inherently difficult to collect information or receive directions from terminated plans.

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[4] <u>Participation and Contributions</u>: With regard to plan participation and plan contributions, the Proposed Reporting Changes would ask defined contribution plans to provide the number of participants with account balances at the beginning of the plan year, the number of participants that made contributions during the plan year, the number of participants that terminated employment during the plan year that had their entire account balances distributed, the number of participants making catch-up contributions, the number of participants investing in default investment options, and the number of participants maximizing the employer match.

<u>Investments</u>**:** With regard to plan investments, defined contribution plans would be required to indicate whether the plan has an intended qualified default investment alternative ("QDIA") and, if so, the types of alternatives available. If the plan has a QDIA, it would be required to check all of the QDIAs that apply from the following list: target date/life cycle fund; fixed income; money market or equivalent; balanced fund; professionally managed account; and "other." If "other" is selected, filers would be required to provide a description.

- Recordkeepers often do not track the information that would be necessary to complete the proposed Schedule G reporting elements seeking to collect specific details on non-exempt prohibited transactions.

Proposed Alternative. As an alternative to tracking all of statistical defined contribution plan operation information described above, we encourage the Agencies to consider whether their reporting needs would be satisfied for some information requests if defined contribution plans simply indicated whether they offered certain features, rather than providing plan-level statistics. For example, the Agencies should consider whether a simple checkbox asking whether the plan offered a match, permitted catch-up contributions, or included default investments would satisfy the Agencies' reporting needs. Those types of questions require much less effort, would appear to produced more meaningful information, and reduce the overall costs attributable to Form 5500 reporting.

F. <u>New Requirement To Attach 404a-5 Participant-Level Fee Disclosure Comparison Chart</u>

In addition to the proposed collection of statistical information regarding defined contribution plan operations, the Agencies' Proposed Reporting Changes would also require defined contribution plans subject to the 404a-5 disclosure rules to report greater information on its investments' performance and fees by attaching a copy of the plan's 404a-5 comparison chart. This particular requirement creates unique practical challenges that will increase plan reporting costs without providing any meaningful informational benefits to plans, participants, or policy makers. Accordingly, we ask the Agencies to eliminate this newly proposed requirement, or at the very least, only ask whether or not the plan provided the 404a-5 comparison chart to its participants.

Inefficient and Costly Requirement Provides Few Benefits for Plans and Participants. The purpose of the 404a-5 comparison chart is to provide participants who are able to direct defined contribution plan investments with certain information that DOL has deemed necessary for them to receive in order to make informed investment decisions. The 404a-5 rules are uniquely designed to serve that purpose and include detailed regulations regarding how and when such disclosures must be furnished or made available to participants. Additionally, many plans and service providers make all of the information contained in the 404a-5 comparison chart available to plans and participants in other formats (either online or in hard-copy, upon participant request). These "on-demand" channels to investment performance and fee information supplement DOL's requirements and, together with the 404a-5 rules, provide participants with all the information they would need to make an informed decision based on plan investment performance and fees. For these reasons, we do not understand why the Agencies are requesting this comparison chart to also be attached to each defined contribution plan's annual return/report. There is no evidence suggesting that plans and participants are not receiving these disclosures, and if the Agencies want to collect all of this information on an aggregate basis, it is not appropriate or efficient for them to tack this information request on to each plan's Form 5500. There are more efficient ways to compile that aggregate data. Accordingly, we ask the Agencies to remove this new requirement from their Proposed Reporting Changes.

Regulatory Inconsistency. DOL's 404a-5 disclosure project was marked by transparency and careful consideration. While DOL did not agree with all the comments the SPARK Institute and others made, we agree that DOL's process created a good product given DOL's goals. But DOL *never* sought comments on a *public* disclosure; the regulation was always portrayed as one intended to create a disclosure for participants (who are entitled to particular rights under ERISA). Had the community known that this disclosure would ultimately be posted on a government website, the comments might have reflected meaningful input on how the disclosure should be changed. Therefore, we think it inappropriate to "pull the rug" out from under the prior notice and comment period.

Participant Confusion. As stated in the preamble to the Proposed Reporting Changes, one of the reasons the Agencies are proposing to collect the 404a-5 comparison chart is to "allow participants and beneficiaries in participant-directed individual account plans to access the most recent and prior year comparative charts through [EFAST]." Unfortunately, we are concerned that the attachment of the 404a-5 comparison chart to each plan's annual return/report would actually frustrate this goal because the 404a-5 attachment available on EFAST could reflect outdated performance and fee information that may have changed since the plan's last Form 5500 filing. (Public filing of Form 5500 is significantly delayed.) Participants accessing EFAST could easily assume that they are viewing their plan's current investment performance and fee information when they would actually be retrieving outdated information. It is also unclear what the basis might be for the Agencies' expectation that plan participants would seek plan information through EFAST.

Unfair Burden on Plans and Participants. The preamble to the Proposed Reporting Changes indicates that one reason the 404a-5 comparison chart is being requested with the Form 5500 is to benefit "private third parties" who would be able to use the charts to "develop more individualized tools to help plan sponsors, plan fiduciaries, and participants and beneficiaries evaluate and compare their plans' investment options."[5] This supporting rationale unfairly allocates data collection and research costs to retirement plans and their current service providers for the benefit of other private third parties. The Proposed Reporting Changes should not create new costs for plans and existing service providers for the benefit of other third parties who may be able to use newly collected information to benefit their own businesses and not for the direct benefit of plans and participants. Further, any tool that such parties could create for the benefit of plans and participants could already be designed based on already available information that does not require reference to a plan's 404a-5 comparison chart.

Increased Costs Attributed to Litigation Risks. We understand and appreciate that one reason the 404a-5 disclosure exists is so that participants can seek relief for any alleged fiduciary breaches. Unfortunately, the scourge of class action plaintiffs' lawyers has now descended upon participant-directed plans. There is a big difference, however, between allowing a participant to have information about their own plan and offering these disclosures up to assist plaintiffs' attorneys. As indicated in the preamble to the Proposed Reporting Changes, this new

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[5] 81 Fed. Reg. 47,534, 47,549 (July 21, 2016).

comparison chart attachment "would not be filed in a data captured structure" and would not be readily data mineable.[6] If this new attachment is not meant to be used to aggregate data across plans, and participants do not currently have any trouble accessing such information (nor does DOL, which routinely requests it during an examination), we can only conclude that the only purpose is to assist plaintiffs' attorneys in pursuing class action litigation against retirement plans and their service providers. The statutory underpinnings of the Form 5500 do not allow this Form to be used for this purpose.

Clarification Requested. Beyond the overall administrative burdens and costs that would be created by this proposed element, we are also concerned that the Proposed Reporting Changes do not clearly instruct plans and preparers on how this new element should be completed. The instructions to Schedule H, Line 4o specifically tell filers to "attach the comparison chart(s) provided to participants and beneficiaries," and the instructions to Form 5500-SF, Line 14i tell filers to attach "a copy of the comparison chart for the plan year." Those instructions are not clear on which comparison chart or charts must actually be attached. If the Agencies retain this requirement to attach a copy of the plan's comparison chart, we encourage the Agencies to adopt instructions clarifying that the only 404a-5 comparison chart that must be attached is the most recent version of the 404a-5 comparison chart at the end of the given plan year. Also, as explained above, the proposed 404a-5 comparison chart requirement already adds to administrative burdens and that burden should not be aggravated by requiring plans to attach multiple versions of the chart.

G. <u>Eliminate New Questions Asking For Detailed Information Regarding Uncashed Checks</u>

The Proposed Reporting Changes would add a new set of questions seeking to find out more information about plans that have uncashed checks at the end of the plan year. These new questions would apply equally to terminated and ongoing defined contribution plans. If there were uncashed checks, filers would be required to report how many uncashed checks there were and the total dollar value of the uncashed checks. Defined contribution pension plan filers would also be asked to describe briefly in an open text field the procedures that they followed to verify a participant's address and to monitor the uncashed checks. The proposed instructions to Schedule H, Line 4z define "uncashed checks" as a check that is "no longer negotiable or is subject to limited payability."

The information requested by this proposed reporting element would require our members to design and implement significant new recordkeeping and information technology systems, while providing limited benefits for plans, participants, and policy makers. It is not as if this aggregated plan-level data would allow missing participants to reconnect with uncashed checks owed to them by searching EFAST. We also find it odd that DOL has consistently refused to provide guidance on missing participants in ongoing plans, but is now requiring detailed reporting on these uncashed checks. If the Agencies want to provide additional guidance on this question, they could do so without the need for making this information request. For example, many plan administrators and Form 5500 preparers have expressed a need for the

[6] 81 Fed. Reg. 47,534, 47,548 (July 21, 2016).

Agencies to develop guidance on the circumstances in which uncashed checks constitute "plan assets." This would be useful guidance for general plan administration and for Form 5500 reporting purposes. However, as noted in the preamble to the Proposed Reporting Changes, the answer to those questions will remain unresolved.[7]

Delay Reporting Requirement. If the Agencies choose to retain the information requests regarding uncashed checks and missing participants, these new reporting requirements should at least be delayed until after PBGC finalizes its new missing participant program for defined contribution plans. The contours of that program are unsettled and could require new or different information to be reported (or nothing to be reported at all). Further, such a delay would be consistent with our general recommendation to adopt final Forms revisions that do not require future changes in the near term.

Clarification Requested. If these questions regarding missing participants and uncashed checks are not eliminated from the Form 5500, the Agencies must provide clarification on the following issues:

- It is not clear whether this information request seeks to collect information on the total value of *all* outstanding uncashed checks at the end of the plan year, or only those checks that have been issued during the plan year and remain uncashed as of the end of the plan year. We request that the Agencies provide clarification on this issue.

- It is also not clear whether the proposed compliance questions regarding uncashed checks would cover the value of uncashed checks that are ultimately transferred to an IRA, an interest bearing federally insured bank account, or state unclaimed property fund in accordance with DOL guidance (e.g., FAB 2014-01, Labor Reg. § 2550.404a-2, or Labor Reg. § 2550.404a-3).

V. ELIMINATE PROPOSED INFORMATION REQUESTS THAT WOULD GENERATE INCONSISTENT, INACCURATE, AND UNRELIABLE INFORMATION

A. Eliminate Open Text Fields For Descriptions To Explain "Other" Categories

Many of the Proposed Reporting Changes would require filers to report information through open text fields by describing certain plan features or investments that do not fit within the common and prepopulated answers already included as checkboxes on the various Forms and Schedules themselves. We are concerned that the use of open text fields to report information on "other" data elements is inefficient, unlikely to yield consistent or reliable information, and

[7] "In proposing to add a compliance question instead of telling filers how to account for the assets associated with uncashed checks on the Schedule H, the Agencies recognize that the ERISA Advisory Council indicated that there are questions regarding how the underlying assets represented by uncashed checks should be reported on the Form 5500 Annual Return/Report. Because of the variety of situations that might result in uncashed checks and the different ways uncashed checks might be accounted for in an ongoing plan, the Agencies have chosen to add a compliance question, leaving flexibility in the balance sheet reporting on Schedule H and on the Form 5500-SF and, where applicable, the IQPA report." 81 Fed. Reg. 47,534, 47,548 (July 21, 2016).

counter to the Agencies' goal of enhancing the Forms' "data-mineability." For example, the open text field requiring plan sponsors to insert text describing how they verify participant addresses would yield inconsistent and unreliable results as each plan would insert its own wording, while adding additional burdens to the Form 5500 reporting process. Also, attempting to glean any meaningful information from the information reported in response to this new request would require a manual review of the Forms. If the new information requests regarding uncashed checks for missing participants are retained, we recommend that the Forms simply include a checkbox asking whether the filer has procedures in place to monitor uncashed checks. Only if that method is insufficient would it make sense to have a series of checkbox options for plan administrators to select from to describe their missing participant search process, rather than an open text field.

Additionally, several questions require structured Attachments to the Schedules, which would similarly be inefficient, yield inconsistent or unreliable information, not produce data-mineable information, and add to the length of the return. Accordingly, we encourage the Agencies to remove the open text fields and unstructured Attachments that provide few benefits, while only adding to the overall length of the return.

B. Eliminate Schedule C Checkbox Asking Whether A Service Provider Was A Fiduciary

Unreliable and Inconsistent Reporting. The proposed Schedule C would include a new checkbox requiring plan administrators to indicate whether a service provider was a fiduciary during the plan year within the meaning of section 3(21) of ERISA. We are concerned that this new checkbox will not yield reliable or consistent information, and therefore, it should be eliminated from the list of new information requests being proposed by the Agencies. Fiduciaries under ERISA section 3(21) not only include named fiduciaries, which can be easily identified and reported, but also functional fiduciaries, like "investment advice fiduciaries," as that term is defined under DOL's recently finalized conflicts of interest rule – Labor Reg. § 2510.3-21(a). That facts and circumstances test is too indeterminate to yield reliable or consistent reporting. Accordingly, it would not be appropriate to require plan administrators to reach a conclusion on whether a service provider's activities crossed the line into fiduciary investment advice for purposes of Form 5500 reporting, especially when considering that plan administrators must complete the Form 5500 by attesting, under penalty of perjury, that the information reported is true, complete, and correct. We believe that this new checkbox, if adopted, would lead to service providers being incorrectly identified as fiduciaries on the Form or failing to be correctly identified as a plan fiduciary. Accordingly, this proposed requirement should be eliminated from the Proposed Reporting Changes because it would collect information that is unreliable. We recommend the Agencies either remove the question asking whether a service provider was a fiduciary under ERISA section 3(21) altogether or limit the reporting on this checkbox **to service providers who have affirmatively stated that they are a fiduciary** on their 408b-2 disclosure.

C. <u>Eliminate Question Asking Whether The Plan Terminated Any Service Provider Other Than An Accountant Or Enrolled Actuary For A "Material Failure To Meet The Terms Of A Service Arrangement Or Failure To Comply With Title I Of ERISA"</u>

The Proposed Reporting Changes would add a new question to the Schedule H and Form 5500-SF asking whether any of the plan's service providers have been terminated for a material failure to meet the terms of a service arrangement or failure to comply with Title I of ERISA, including the failure to provide required disclosures under 29 CFR 2550.408b-2. For the reasons discussed below, we encourage the Agencies to remove this question from the Proposed Reporting Changes.

Material Failure. The "material failure" standard, which is critical to completing this proposed information request, is too indeterminate to produce accurate, consistent, or reliable reporting. In the absence of significant clarification and clear objective standards, this "material failure" standard would require plan administrators to make subjective judgment calls regarding service provider terminations. This is not only problematic for service providers that may be reported incorrectly, it is also unfair to require plan administrators to complete such a subjective question when they must attest, under penalty of perjury, that information reported on the Form 5550 is true, correct, and complete to the best of their knowledge. The "material failure" standard is simply too indeterminate and provides plan administrators with too much discretion in answering a question for which incorrect reporting would carry serious reputational consequences for our members.

Beyond the issue of reporting consistency, we are also concerned that this indeterminate standard also creates two other acute issues. First, we are concerned about how new service providers may report old service providers when a plan moves to a new recordkeeper in the middle of the year and the new recordkeeper (who is a competitor) would have the option of claiming that the old service provider was terminated for a material failure. We are particularly concerned about the potential for abuse inherent in this standard and the dangers of over-reporting. Second, we are concerned about how the Agencies might use the information reported through this new element in order to target audits. Large recordkeepers may be reported under this new question in high numbers on an absolute basis even though the relative percentage of their clients reporting termination is very low.

Inadequate Notice. The current Schedule C reporting of terminated accountants and actuaries requires plan administrators to provide terminated accountants and enrolled actuaries with a copy of the plan's explanation for their termination along with a notice informing the service provider that they are being reported and that they have an opportunity to submit comments to DOL concerning any aspect of the plan administrator's termination explanation. Neither the preamble to the Proposed Reporting Changes, nor the instructions to the proposed Forms, indicate that such notice must similarly be provided to terminated service providers that are not accountants or actuaries. If this new question is ultimately retained, terminated service providers other than an accountant or actuary must be given the same benefit of notice afforded to terminated accountants and actuaries.

Moreover, if the Agencies do not eliminate this proposed information request regarding the termination of service providers that are not accountants or actuaries, we also ask the Agencies to develop standards that would require plans to provide additional notice to the service provider regarding any unresolved request from a plan prior to the service provider's termination. For example, any plan that reports a service provider as part of this proposed information request should also be required to, prior to termination and reporting, contact the service provider to request the necessary information and tell them that they will be listed on the Schedule H if they do not provide the necessary information. Plan sponsors and administrators need to have some accountability on this question and service providers must be given the opportunity to remedy any reasonable issues prior to being reported. Otherwise, plan administrators could use broad discretion in answering the proposed question and exceed the intended scope of the proposed element.

VI. ESTABLISH REPORTING RULES THAT DRAW CLEAR LINES BETWEEN THE OBLIGATIONS OF PLAN ADMINISTRATORS AND OTHER SERVICE PROVIDERS

The Proposed Reporting Changes would require the plan's trustee to affix its signature to the Schedule H or Form 5500-SF and the plan to report the name and contact information of each trustee, Form 5500 preparer, and other service providers. We are concerned that these new requirements continue a regulatory trend that is blurring the reporting obligations of the plan administrator and plan service providers. Accordingly, we encourage the Agencies to establish reporting rules that draw clear lines between the reporting obligations assigned to plan administrators and service providers. In particular, we are asking the Agencies to remove the new provisions that would require trustees to sign the Form 5500 and for the plan to supply contact information for each service provider.

ERISA section 104(a)(1) designates the plan administrator as the party responsible for completing the annual return/report and the Agencies have always taken the position that the plan administrator is accountable for all of the content reported on the Forms, Schedules, and Attachments. In practice, this division of responsibilities makes sense because the plan administrator is the only party that could reasonably have access to all of the information that must be reported on the Form 5500. Although service providers and preparers can assist a plan administrator fulfill many of its obligations under ERISA, including its reporting obligations, the ultimate responsibility for managing the plan and completing the Form 5500 is always the obligation of the named fiduciary and plan administrator. To ease the burden of preparing the Form 5500, recordkeepers and Form 5500 preparers often provide plan administrators with pre-populated Forms reflecting information provided to them by the plan administrator and information collected from other sources. Even in that case, however, it is ultimately the plan administrator's responsibility to review the pre-populated Forms for accuracy and completeness and to make necessary changes prior to filing.

By requiring trustees to sign the Form 5500 and plans to provide contact information for all of its service providers, the Proposed Reporting Changes would seemingly shift some of the plan administrator's reporting obligations on to the plan's service providers. At the very least, it seems to minimize the plan administrator's role in a way that puts participants at risk. Moreover, based on the plan administrator's ultimate responsibility for information reported on the annual return/report, the Agencies should be contacting the plan administrator with any questions they might have regarding information reported on the Form 5500. The new trustee signature and service provider contact information elements imply that the Agencies could hold service providers responsible for the content of the Forms or use such information to contact service providers directly about the content of the plan's Form 5500. This position is misguided. As discussed above, it is ultimately the plan administrator's responsibility to complete the Forms and, if the Agencies want to contact the service providers about information reported on the Forms, the plan must complete a power of attorney independent of the Form 5500 in order to authorize such communications.

Clarification Requested on the Scope of the Trustee Attestation. If the Agencies do not adopt our recommendation to eliminate the trustee signature requirement altogether, we are requesting clarification on the scope of the trustee's signature. The trustee signature line on the Form 5500-SF seemingly requires all signers, including trustees, to attest "under penalties of perjury and other penalties set forth in the instructions" that they have examined the return/report (including all accompanying schedules, statements, and attachments) and all of that information is true, correct, and complete to the best of their knowledge and belief. We do not believe that the Agencies intend for the trustee to attest that they have reviewed *all* of the information reported on the Form 5500 or that all of that information is true, correct, and complete. Ultimately, that can be verified only by the plan administrator. Plan trustees, unlike the plan administrators or plan sponsors, often do not have access to much of the information being reported on the Form 5500. At the very most, they could only reasonably be expected to attest that all of the information regarding the trust itself is true, accurate, and complete.

Any requirement for plan trustees to attest to the accuracy of broader information collected through the Forms would also create significant issues in the event that the plan trustee and plan administrator disagree about how to complete the Form. For example, in various instances, the Proposed Reporting Changes would require the plan to make a determination and report on any "parties-in-interest," which has a fairly broad definition. If there is a disagreement between the plan administrator and a directed trustee about which service providers are covered by this definition, the Proposed Reporting Changes do not provide any process to resolve both parties' reasonable positions. This could become particularly problematic if the plan administrator and trustee are required to attest to the filing's accuracy under penalty of perjury.

A similar trustee attestation used to appear on the former Schedule P in order to satisfy Code section 6033(a). That attestation only required the trustee to attest to the accuracy of a very limited set of basic information regarding the trust itself. Although we generally question why the Agencies are returning the trustee signature line after the IRS eliminated the requirement through Announcement 2007-63, we strongly recommend that any trustee signature line should not exceed the scope of the attestation covered by the former Schedule P signature requirement.

Other Issues Regarding Proposed Trustee Signature Requirement. If the Agencies do not eliminate the trustee signature requirement, we ask that the following issues be addressed in any final Forms revisions:

- The final Forms and instructions must make clear *which* trustees are required to report. For example, will directed trustees employed by the plan be required to sign? If so, what will be the purpose and scope of such signatures? In order to sign the Forms, directed trustees would be required to review thousands of forms, the content of which is the legal obligation of each individual plan administrator to verify. Requiring directed trustees to sign would add an unreasonable and unnecessary cost to the process. In addition, it would be inconsistent with ERISA section 403, which specifically provides for the limited authority and responsibility of directed trustees.

- The proposed instructions indicate that when there is more than one trustee or custodian, the trustee or custodian authorized by the others may sign. However, this seemingly straightforward authorization method raises a number of concerns. For example, if a plan has multiple trustees that are not associated with one another and/or different trustees for different assets of the plan, it is unclear whether a trustee would be able to sign only for the assets under its trusteeship. These trustees would rarely have a contractual relationship between each other whereby the allocation of this responsibility could be determined.

- The proposed Forms and instructions are not clear on what would happen if a plan changes trustees during the plan year. Would all of the trustees for the plan year be required to sign? Or, would the trustee remaining at the end of the year be the only trustee required to sign?

- The proposed instructions indicate that if the plan trustee or custodian is an entity, the signature must be the name of a person authorized to sign on behalf of the plan trustee or custodian. Does this also mean that a trustee's EFAST credentials will be issued at the individual level? We encourage the Agencies to issue credentials at the firm level in an effort to ease overall administration.

VII. THE PROPOSAL INAPPROPRIATELY DEFINES HARD-TO-VALUE ASSETS AND MUST BE REVISED

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 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 ("REITs").

Proposed Reporting Changes Mischaracterize Certain CCTs and PSAs. Under the Proposed Reporting Changes, the Agencies would require CCTs and 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 should be identified as hard-to-value assets regardless of whether they are valued at least annually for the following reasons:

- 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 it 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.

- It would increase administrative complexity by making small plans ineligible to file the Form 5500-SF if they retain their current CCT or PSA investments. Under the Proposed Reporting Changes, eligibility for small plans to file the Form 5500-SF would be conditioned on the plan not investing in any hard-to-value assets, which would include all CCTs and PSAs that are primarily invested in hard-to-value assets. In fact, one provider estimates that **over 6,000 of their Form 5500-SF filers** would have to stop filing a short form if they kept the investments they currently have based on the new definition of hard-to-value assets.

- It discourages 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.

Suggestion. Under FASB Accounting Standards Codification TM (“ASC”) (Topic 820), CCTs and PSAs are able to use the 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.

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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

APPENDIX

<u>APPENDIX</u>

GENERAL ISSUES

- <u>Form 5500-SF Eligibility</u>

Clarification is needed in the instructions to confirm that Form 5500-SF eligibility for defined contribution plans is based on the number of participants with account balances, and not the total number of participants. The Form 5500-SF instructions indicate that Form 5500-SF eligibility for defined contribution plans is based on the number of *participants with account balances*. However, the Form 5500 instructions have not been updated to reflect this change. The proposed Form 5500 Instructions tell filers to "[u]se the number of participants required to be entered in Line 6 of the Form 5500 to determine whether a plan is a "small plan" or "large plan." Line 6 requests the "[t]otal number of participants at the beginning of the plan year." Line 6 is not limited to the number of participants with account balances.

- <u>Plan Sponsor Investment Advice/Education Checkbox</u>

The Proposed Reporting Changes would add a new question requiring defined contribution pension plans to indicate whether they provide financial education and/or financial advice for participants. Virtually every plan sponsor provides investment education to its participants. Accordingly, this question does not provide the Agencies with any useful information with respect to investment education. This question should be eliminated.

- <u>Form 5500-EZ vs Form 5500-SF</u>

The preamble states that a new electronic version of the Form 5500-EZ is proposed and that the Form 5500-SF can no longer be used by persons eligible to file the Form 5500-EZ. However, the instructions in Appendix B state that one-participant plans and foreign plans can file Form 5500-EZ with IRS *or the Form 5500-SF through EFAST2*. If EZ filers can no longer use the 5500-SF, the instructions need to be updated.

- <u>Unrelated Business Taxable Income</u>

The Proposed Reporting Changes would add new questions regarding unrelated business taxable income ("UBTI") under Code sections 511 and 512. One of our members raised concerns that the proposed questions regarding UBTI are not appropriate for the Form 5500 because the plan sponsor files a Form 990 and the IRS should be able to identify plans through the Form 990. Another member also explained that recordkeepers do not get K-1s and would not have accurate information on UBTI. The plan administrator should receive the K-1s and determine if the Form 990 is required.

DEFINITIONS

➢ <u>Definitions Generally</u>

Several terms throughout the Proposed Reporting Changes require additional definition or examples to ensure each question is completed correctly. Several of these terms are as follows:

- Schedule C, Part I, Line 1g(1) – define "explicit compensation"
- Schedule C, Part I, Line 4b(3)&(4) – define "affiliate" and "subcontractor"
- Schedule H, Part I, Line 1(b)4 – define "Publicly traded"
- Schedule H, Part I, Line 1(b)6 – define "Eligible Pooled Investment Vehicle"
- Schedule H, Part I, Line 1(b)9 – need to define all terms here (i.e., "Developed" real property)
- Schedule H, Part II, Line 2(i)12 – define terms in this section
- Schedule H, Part IV, Line 4r – define "utilized"
- Schedule H, Part IV, Line 4t – is contract value or an appraisal value considered fair market value?
- Schedule H, Part IV, Line 4x – define "affiliate". Does direct and indirect compensation have the same meaning as Schedule C and fee disclosure?
- Schedule H, Part IV, Line 4z – as noted in our letter, the Agencies need to define "uncashed" checks. Also define "no longer negotiable" and "subject to limited payability" as referenced in instructions
- Schedule H, Part V, Line 6 – define "material failure"
- Schedule H, Part VI, Line 7(a) – define "distributed"
- Schedule H, Part VI, Line 7(b)&(c) – define terms and the difference between "Merger" and "Consolidation".

➢ <u>Derivatives</u>

In addition to the list of terms identified above, one of our members also expressed strong concerns regarding the reporting category for investments in "derivatives" – Proposed Schedule H, Part I, Line 1b(11). The proposed instructions simply state that "[d]erivatives include futures, forwards, options, and swaps." This does not provide plans, preparers, and service providers with enough guidance and the Agencies must provide more direction as the definition for these items is not clear. Any definition must be capable of being clearly understood and applied by someone who is not an investment expert.

Building systems to track and identify the positions held in these contracts and those that are subject to a loss in excess of the account balance of the participant/beneficiary will be very costly and time consuming (for 1b(14)(F)). Wouldn't the amount entered into derivative contracts (1b(11)) and the unrealized appreciation on 2c(5)(D) be sufficient? Service providers will also not have access to over-the-counter derivative transactions that are privately negotiated, and this will create further costs in the collection of this information. Derivatives are complex in nature and it will be difficult for some preparers and plan sponsors to make these determinations, which may lead to frequent incorrect reporting, particularly on 1b(14)(F).

Schedule C

- Multiple Schedule C Filings for Bundled Service Providers

The Proposed Reporting Changes would require a separate Schedule C to be filed for each service provider that must be reported. However, it is not clear whether this separate filing requirement would require separate Schedules for each affiliated corporate entity comprising a single "bundled" service provider. For example, one bundled service provider may include a broker-dealer, investment adviser, and record-keeper. Would the Proposed Reporting Changes require each corporate entity to be reported on their own Schedule C? We encourage the Agencies to develop reporting methods that would allow such entities to be reported on a single form.

- Service Provider Contact Information

The Proposed Reporting Changes indicate, in the case of service providers that are not natural persons, plans must identify a person or office, including contact information, that the plan administrator may contact with regard to the information required to be disclosed on the Schedule C. One of our members is seeking clarification on whether this would require contact information for the investment manager of investment funds. Would this have to be reviewed more than once a year for each fund?

Schedule D

- Schedule D Requirement For DFEs To Value Plan Assets At End Of Year

The Proposed Reporting Changes would add a new question to Schedule D requiring DFEs to report the dollar value of an investing plan's or DFE's interest *at the end of the DFE reporting year*. This new question creates an issue for our members, especially for omnibus accounts, because CCTs and PSAs may not have information at the plan level when trades are made at the omnibus level. In general, we ask the Agencies to remove this newly proposed information request because it provides little valuable information to interested stakeholders. The DFE year and any investing plan's plan year generally will not coincide.

- Non-Plan Investors

The Proposed Schedule D, Line 1e would require DFEs to report whether they had any investors other than plans that are required to file the Form 5500 or Form 5500-SF. One of our members has expressed concerns over this new element because it would be difficult and costly to implement with little benefit.

Schedule E

The Proposal would bring back a revised version of Schedule E, which was part of the Form 5500 prior to 2009. The questions previously moved from Schedule E to Schedule R would be moved back to the newly proposed Schedule E. Additional questions would also be included as part of the proposed changes. The questions contained in the proposed Schedule E are divided into sections based on whether the ESOP stock was acquired by a securities acquisition loan, whether the stock is readily tradable on an established securities market (including stock acquired by securities acquisition loans), whether the ESOP has an outstanding securities acquisition loan, and other miscellaneous questions. One of our members pointed out that this will place additional burdens on plan sponsors and fiduciaries without providing additional value.

SCHEDULE H

- Income and Expense Statement (Part II)

Trustee fees/expenses (Proposed Line 2i(10)). The Proposed Reporting Changes would require each plan to specifically break out trustee fees and expenses, including expenses for "travel, seminars, meetings, etc." Like a number of the proposed breakouts already discussed above, we are concerned that this level of detail, especially the requirement to report expenses for travel, seminars, and meetings on a plan-by-plan basis, would collect an unnecessarily granular level of detail that will drive up reporting costs.

Administrative Expenses Charged to Participant Accounts (***Proposed Line 2i(12)(B)).*** We are also concerned about the proposed information requests that would require plans to break out whether administrative expenses were generally charged to the plan or *directly charged to individual participant accounts.* The information being sought through this breakout for participant-level charges would be particularly burdensome and costly for plans and recordkeepers because it would require a participant-level overhaul of the information systems that support each plan's Form 5500 preparation and filing. Given the fact that participants are already provided with participant-level fee information pursuant to DOL's 404a-5 disclosure rules and the significant costs that would have to be expended in order to comply with this new information breakout, we question whether the level of detail being requested through this new reporting element justifies its overall costs. Due to that uncertainty, we encourage the Agencies to remove this proposed breakout and seek alternative methods for collecting information that would give the Agencies "a better idea of how and when participants are being charged administrative expenses." It is unfair to simply place this information collection burden exclusively upon the plans and service providers responsible for filing the annual return/report.

Total Administrative Expenses (***Proposed Line 2i(12)(C)).*** One member has expressed concerns over whether the requirement to calculate an actual or estimate of indirect compensation for purposes of Schedule C reporting would somehow make its way to the revised administrative expense reporting on Schedule H, Line 2i(12)(c). From an accounting perspective, this would not make much sense unless there was an offset somewhere else, but the preamble to the proposal raised some doubts about what would need to be reported on the new Schedule H breakouts on Line 2i(12)(c).

- Accountants Opinion (Part III)

There are a number of questions located in Schedule H, Part III related to the accountant's information and peer review questions that could be answered more efficiently through other channels than to have such information reported on a large plan's Form 5500 filing. One member expressed their view that the Agencies should consider asking for this information directly from the CPA firms.

- Plan Termination Information (Part VI)

Clarification Requested Regarding Plan Terminations. In the event of plan termination, Proposed Schedule H, Part VI, Lines 7a(1) and 7a(2) would ask for the effective date of plan termination and the year the plan assets were distributed to plan participants and beneficiaries. When a plan is liquidating all assets, as opposed to transferring all assets out because of a merger, an effective date of plan termination is not necessarily included in the board resolution. In that case, would the "effective date of plan termination" on Line 7a(1) be the date the board resolution was signed? Also, the liquidation of participants' accounts could span over two (or more) reporting years. Would Line 7(a)2 only be answered if it was the ***final*** report?

Clarification Requested Regarding Transfers. Proposed Schedule H, Part VI, Lines 7b and 7c would request information regarding the transfer of plan assets to or from other plans during the preceding year. Information regarding such transfers would also be reported on Schedule H, Part II, Lines 2*l*(1) and 2*l*(2). There are instances when a plan would need to complete these information requests even though neither plan is terminating. This would be common when an employer maintains a separate plan for union and non-union employees. However, the heading for Schedule H, Part VI, which includes Lines 7b and 7c, is "Plan Termination Information." Putting these questions (7b and 7c) under a section titled "Plan Termination Information" will be confusing (to the plan sponsor) in cases when neither plan is terminating.

Beyond the organizational aspects of these information requests regarding plan transfers, we are also requesting clarification on Proposed Schedule H, Part VI, Lines 7b(3) and 7c(3), which would newly request the date of any transfers to or from other plans. Will there be an option to add more than one date? This would be important when assets are transferred to more than one plan. Also, would the date of transfer be the date ownership of the assets change to the successor plan (in the case of a merger) or when they administratively are moved to the successor plans trust?

Missing Participants For Terminated Defined Contribution Plans. Proposed Schedule H, Part VI, Line 7d adds new information requests seeking information regarding terminated defined contribution pension plans that transfer plan assets to interest bearing federally insured bank accounts in the name of missing participants. First, in order to prevent the need to go back and revise information technology systems, we encourage the Agencies to delay this question at least until PBGC finalizes its proposed missing participant program for terminated defined contribution plans. Second, if this question eventually becomes effective, our members are requesting clarification on whether this question must only be completed if amounts owed to missing participants are transferred *to a federally insured bank account*. Would the transfer of amounts owed to a missing participant under another acceptable method described in Field Assistance Bulleting 2014-01 also be permitted? For example, would plans need to report on this question if such assets were transferred to an IRA or state unclaimed property fund? Further, we are seeking clarification that there will be an option to list multiple financial institutions and multiple "dates of transfer."

SCHEDULE R

➢ <u>Calculating Employer Contributions</u>

Schedule R, Part VII, Lines 22b and 23b would ask filers how the employer's contribution is calculated and the minimum elective deferrals to qualify for the full match. How should this question be answered if the allocation is discretionary and the determination of the contribution has not yet been made by the employer?

➢ <u>Number of Participants Receiving the Maximum Match</u>

Schedule R, Part VII, Line 23d would ask how many participants received the maximum employer match. Is this total number of participants to be calculated on an annual basis? Also, how should this question be answered if a participant received the full match for part of the year and then changed their deferral rate?

➢ <u>Participants Not Making Investment Elections</u>

Schedule R, Part VII, Line 24b would ask for the number of participants that have not made investment elections. This is an example of a particularly burdensome question, as it would likely require significant coordination between plan administrators, preparers, and other service providers in order to verify participant elections. The plan's recordkeeper will know which participants have assets in the fund designated as the default, but typically would not know whether the participant was defaulted into that fund or affirmatively elected it. And this information gap cannot be remedied retroactively.

➢ <u>Catch-Up Contributions</u>

Schedule R, Part VII, Line 25 asks for the number of participants making catch-up contributions. Does this include those with catch-ups retained as a result of an ADP excess? Collecting this new information, like many of the other new requests, would require significant programming in order to ascertain the requested figure.

It turns out that many plans and their service providers do not track "catch-up" contributions in the sense of knowing exactly which contributions satisfy Code section 414(v).

- First, there is no need for the *recordkeeper* to track this information during the year; rather, the recordkeeper or whomever else performs contribution limits testing may simply examine contributions at the end of the year. (Because catch-up contributions are subject to the same distributions as elective deferrals, they do not need to be held in a different "source.") The payroll system might track catch-up contributions, but not the plan's recordkeeper.

- Second, if the catch-up contribution is because of a *plan-imposed* limit, the recordkeeper would not track this information.

- Finally, even if a participant or a payroll system designates a catch-up contribution, unless the participant actually reaches a contribution limit, the "designation" in the system will not be correct.

We would suggest that the Form 5500 simply ask the plan to state whether or not it offers catch-up contributions.

SUMMARY ANNUAL REPORT

- Summary Annual Report

One member also expressed concern that the Summary Annual Report ("SAR") must be updated to reflect the changes being made to the Form 5500. We recommend the SAR be updated to appropriately reflect the revised Form 5500 data or be eliminated. The current data reported on the SAR does not add anything and provides a very general summary of the plans financials. The SAR is not clear or concise and does not provide a good overview of the overall financial health of the plan. As DOL's goal is to increase transparency for participants, the lack of attention paid by them to the SAR does not support meeting this objective.