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September 27, 2013

Yvette Lawrence
Internal Revenue Service
Room 6129
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Proposed Collection; Comment Request for the Annual Return/Report of Employee Benefit Plan (OMB 1545-1610)

Ladies and Gentlemen:

The Investment Company Institute¹ is pleased to provide the following comments in response to the Internal Revenue Service's (IRS) proposed collection and comment request relating to the Annual Return/Report of Employee Benefit Plan (Form 5500).² Our comments focus on the Form 5500 Schedule C - *Service Provider Information*.

The Institute and its members have a strong interest in ensuring that Form 5500 information collection is clear to those who provide information for the form and understandable for the members of the public who use the data collected. Mutual funds are the investment vehicle of choice for defined contribution plans in household retirement accounts, representing over 50 percent of all defined contribution plan assets.³ The Institute maintains an extensive research program on retirement security and our researchers and economists are heavy users of Form 5500 data. Our research program also

¹ The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$15.4 trillion and serve more than 90 million shareholders.

² 78 Fed. Reg. 45615 (July 29, 2013).

³ See Investment Company Institute, "The U.S. Retirement Market, First Quarter 2013," (June 2013), available at www.ici.org/research/stats/retirement/ret_13_q1.

includes studies focusing on fees paid on mutual funds held in 401(k) plans⁴ and overall defined contribution retirement plan fees.⁵

As is explained further below, we recommend that IRS and the Department of Labor (DOL) harmonize the requirements of Schedule C of Form 5500 with the DOL 408(b)(2) service provider disclosure regulation, which was effective July 1, 2012.⁶ Specifically, we suggest that IRS and DOL allow the Schedule C requirements for mutual funds and other similar pooled investments to be satisfied by using the information required by the 408(b)(2) regulation in lieu of the current Schedule C requirements.

The Form 5500 Schedule C “Eligible Indirect Compensation” Disclosure Requirement

The current Form 5500 Schedule C requires disclosure of both “direct compensation” (generally, payments made directly by the plan for services rendered to the plan), and “indirect” compensation (generally, compensation received from sources other than directly from the plan or plan sponsor if the compensation was received in connection with services rendered to the plan). In the case of charges against an investment fund, reportable “indirect compensation” includes, for example, the fund’s investment advisor asset-based investment management fee from the fund, brokerage commissions and fees charged in connection with purchases and sales of interests in the fund, fees related to purchases and sales of interests in the fund (including 12b-1 fees), fees for providing services to plan investors or plan participants, such as communication and other shareholder services, and fees relating to the administration of the employee benefit plan such as recordkeeping services, Form 5500 return/report filing and other compliance services.⁷ Disclosure of “indirect compensation” is required when a plan makes an investment in a mutual fund or similar pooled product, whether or not the fund holds “plan assets” under ERISA. Mutual funds have dozens – sometimes hundreds – of service providers, none of whom has any idea the extent to which particular employee benefit plans are invested in the mutual fund.

⁴ See, e.g., Collins, Holden, Chism and Duvall, “The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2012,” *ICI Research Perspective*, Vol. 19, No. 4 (June 2013), available at www.ici.org/pdf/per19-04.pdf.

⁵ See Deloitte Consulting and Investment Company Institute, *Inside the Structure of Defined Contribution/401(k) Plan Fees: A Study Assessing the Mechanics of the ‘All-In’ Fee*, (November 2011), available at www.ici.org/pdf/rpt_11_dc_401k_fee_study.pdf.

⁶ 77 Fed. Reg. 5632 (Feb. 3, 2012).

⁷ See *2012 Instructions for Schedule C (Form 5500)*, available at www.dol.gov/ebsa/pdf/2012-5500inst.pdf.

Recognizing the complexity associated with subjecting service providers to investment products to Schedule C reporting, DOL created an alternative reporting option for “eligible indirect compensation” (EIC). In order to qualify as EIC, the indirect compensation must be fees or expenses charged to investment funds and reflected in the value of the investment or return on investment of the participating plan or its participants, finder’s fees, “soft dollar” revenue, float revenue, and/or brokerage commissions or other transaction-based fees for transactions or services involving the plan that were not paid directly by the plan or plan sponsor. In order to be treated as EIC, the plan administrator must receive written materials that disclose and describe (a) the existence of the indirect compensation; (b) the services provided for the indirect compensation or the purpose for payment of the indirect compensation; (c) the amount (or estimate) of the compensation or a description of the formula used to calculate or determine the compensation; and (d) the identity of the party or parties paying and receiving the compensation.

DOL issued two sets of Frequently Asked Questions (FAQs) clarifying the Schedule C requirements and many of the FAQs relate to the application of EIC with respect to mutual funds and payments from mutual funds to others.⁸ The FAQs provide that existing mutual fund disclosure documents, which are required and regulated by SEC rules, such as the fund’s prospectus, statement of additional information, and shareholder reports, may satisfy the EIC disclosure requirements if the documents contain the required EIC disclosure and a reasonable plan administrator can readily determine this information from the documents.

Further, pursuant to the Form 5500 Schedule C disclosure requirements, if the only compensation received by an entity qualifies as EIC, in lieu of completing detailed information about the EIC on Schedule C, the plan administrator is required only to disclose the identity of the party providing the EIC disclosure. In such cases, the Schedule C will not likely provide participants, regulators, or the public with any information about EIC.

The 408(b)(2) Disclosure Requirements

DOL’s final 408(b)(2) service provider disclosure regulation includes a reporting structure that is similar to what occurs now in preparation of the Form 5500 – the plan’s recordkeeper or similar service provider serves as a conduit of information related to plan investments. The final 408(b)(2)

⁸ See Frequently Asked Questions: The 2009 Form 5500 Schedule C: www.dol.gov/ebsa/faqs/faq_scheduleC.html, and Frequently Asked Questions: Supplemental FAQs about the 2009 Schedule C: www.dol.gov/ebsa/faqs/faq-sch-C-supplement.html.

regulation generally requires that with respect to plan investments, a covered service provider⁹ must provide the responsible plan fiduciary with:

1. A description of any compensation that will be charged directly against an investment, such as commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees, and that is not included in the annual operating expenses of the investment contract, product, or entity.
2. A description of the annual operating expenses (*e.g.*, expense ratio) if the return is not fixed, and any ongoing expenses in addition to any annual operating expenses (*e.g.*, wrap fees, mortality and expense fees), or for an investment contract, product or entity that is a designated investment alternative, the total annual operating expenses express as a percentage and calculated in accordance with DOL's participant-level fee disclosure regulation.¹⁰
3. For an investment contract, product or entity that is a designated investment alternative, any other information or data about the designated investment alternative that is within the control of, or reasonably available to, the covered service provider, if the information is considered investment-related information which must be provided automatically to participants under DOL's participant-level fee disclosure regulation. This includes, for example, identifying information such as the name and type or category of the alternative, performance data, benchmarks, and fee and expense information for alternatives for which the fee is fixed.

In the case of an investment that holds plan assets and in which the plan has a direct equity investment, the fiduciary providing services to that investment will likely provide the required disclosure to a plan fiduciary unless the plan's recordkeeper or broker has already provided the disclosure information. With respect to mutual funds and other non-plan asset vehicles, the recordkeeper or broker offering access to the investments may provide the required information. The

⁹ The Final 408(b)(2) regulation generally defines a "covered service provider" as a service provider that enters into a contract or arrangement with a covered plan and reasonably expects \$1,000 or more in compensation, direct or indirect, to be received in connection with providing one or more of the following services: (1) fiduciary services to the plan; (2) fiduciary services to a plan asset investment; (3) investment advisor services; (4) recordkeeping or brokerage services; or (5) other services for indirect compensation (such as accounting, auditing, actuarial, appraisal, banking, consulting, custodial, insurance, investment advisory, legal, recordkeeping, securities or other investment brokerage, third party administration, or valuation services for which the covered service provider, an affiliate, or subcontractor reasonably expects to receive indirect compensation or compensation among related parties).

¹⁰ See 29 CFR section 2550.404a-5(h)(5).

recordkeeper or broker may satisfy this requirement by providing current disclosure materials of the issuer of the investment that includes the fee information, provided that (1) the issuer is not an affiliate of the covered service provider; (2) the issuer is a registered investment company, an insurance company qualified to do business in any state, an issuer of a publically traded security, or a financial institution supervised by a state or federal agency; and (3) the covered service provider acts in good faith and does not know that the materials are incomplete or inaccurate, and furnishes the responsible plan fiduciary with a statement that the covered service provider is making no representation as to the completeness or accuracy of the materials.

Recommendation

The Form 5500 Schedule C “eligible indirect compensation” disclosure requirement and the 408(b)(2) regulation disclosure requirement have the same general goals – to provide clear and understandable information regarding a plan’s operating costs (including indirect compensation), allow stakeholders to assess the reasonableness of such costs, and identify potential conflicts of interest. We believe that the 408(b)(2) regulation generally takes the right approach to the reporting structure and data points, facilitates comparisons among investments, provides clear information regarding fund fees, and provides clear information regarding fees paid among related parties. In our view, the information required by the 408(b)(2) regulation regarding mutual funds provides fiduciaries, participants, regulators, and the public with more meaningful information about fund fees than the information currently required to be disclosed in the Form 5500 Schedule C. This conclusion is based on our experience in helping the fund industry understand and comply with Schedule C and as users of Form 5500 data and researchers on the topic of mutual fund and retirement plan fees.

Additionally, many plan administrators seek information from plan recordkeepers in order to complete the Form 5500 Schedule C. The same plan recordkeeper may be providing the responsible plan fiduciary with the required 408(b)(2) disclosures. Our members expend considerable resources responding to requests for information from plan recordkeepers to assist in the completion of the Form 5500 Schedule C as well as substantial resources to comply with the 408(b)(2) disclosure requirements. As the reporting obligations are not identical, and given the continuing lack of clarity regarding the Form 5500 Schedule C EIC disclosures, plan administrators and plan fiduciaries may receive duplicative or inconsistent information and have difficulty determining what information should be reported and for what purpose.

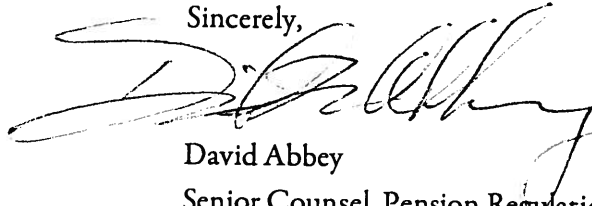
We therefore recommend that IRS and DOL revise the Form 5500 Schedule C so that information plans receive for purposes of 408(b)(2) would be reported on Schedule C. This approach will provide more meaningful information to plan administrators and would lower ongoing compliance costs and reduce confusion, as compensation would be disclosed as either “direct” or “indirect,” without the lack of clarity regarding whether certain “indirect compensation” may qualify as EIC. More

importantly, it will enhance Schedule C's effectiveness as a tool for participants, regulators, and the public to understand and evaluate the costs plans incur.

* * *

Thank you for considering our comments on this matter. The Institute is available to provide additional information and clarification regarding these issues. Please do not hesitate to contact Howard Bard at 202-326-5810 (howard.bard@ici.org) or the undersigned at 202-326-5920 (david.abbey@ici.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Abbey', written over a faint, larger version of the same signature.

David Abbey

Senior Counsel, Pension Regulation