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Office of Regulations and Interpretations
Employee Benefits Security Administration (EBSA)
Room N-5669
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attn: Revision of Form 5500 (RIN 1210-AB06)

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Re: Comment on Proposed Revisions of Form 5500

Dear Sir or Madam:

Schwab Corporate and Retirement Services¹ ("Schwab") appreciates the opportunity to comment on the Department of Labor's ("DOL") proposed revisions to the Form 5500 Annual Return/Report forms issued in July 2006 ("Proposed Revisions").² The Proposed Revisions would make extensive changes to Form 5500 service provider reporting. As noted in the discussion of the Schedule C changes, the DOL has proposed these changes:

in an effort both to clarify the reporting requirements and to ensure that plan officials obtain the information they need to assess the reasonableness of the compensation paid for services rendered to the plan, taking into account revenue

¹ Schwab Corporate and Retirement Services provides bundled retirement plan services to more than 500,000 participants; custody, trust and trading services to hundreds of third party administrators and several million participants; stock option and equity reward servicing to some of the largest companies in the country; and special brokerage services for companies required to monitor the trades of their employees. The Charles Schwab Corporation (Nasdaq: SCHW), is a leading provider of financial services, with more than 330 offices and 6.8 million client brokerage accounts, 180,000 banking accounts and \$1.3 trillion in client assets. Through its operating subsidiaries, the Corporation provides a full range of securities brokerage, banking, money management and financial advisory services to individual investors and independent investment advisors.

² Proposed Revision of Annual Information Return/Reports, 71 Fed. Reg. 41616 (2006). Please note that to the extent that the views expressed herein reflect those of Mr. James McCool, such views are expressed pursuant to Mr. McCool's role as head of Schwab Corporate and Retirement Services and as Executive Vice President of Charles Schwab & Co., Inc., and not in his capacity as Vice Chairman of the ERISA Advisory Council.

sharing and other financial relationships or arrangements and potential conflicts of interest that might affect the quality of those services.³

Schwab Supports the DOL's Goal of Fee Transparency

Schwab has long been an advocate of fee transparency and supports and applauds the DOL's initiatives in this regard. Schwab agrees with the DOL that enhanced disclosure and the issuance of uniform guidelines are important so that plan fiduciaries receive the information necessary to determine whether fees paid, for specific plan services rendered, are reasonable. However, we feel that for the reasons expressed below, the DOL should consider alternatives to the Proposed Revisions in order to better accomplish this very important fee transparency goal.

Timing of Comments with respect to the Proposed Revisions and of Effective Date

Due to the timing of publication of the Proposed Revisions and their complexity, Schwab believes that the comment period should be extended.

Service providers are currently attending to implementation of the provisions of the Pension Protection Act of 2006 (the "Act"). The Act was introduced by House Majority Leader Boehner on July 28, was approved by the Senate on August 3 and was signed into law by President Bush on August 17. It is the one of most important pieces of pension legislation in the last thirty years and contains extensive provisions and new requirements that necessitate significant changes to the manner in which retirement plans are operated and serviced. Some of these changes have "short" effective dates. The Proposed Revisions were published on July 21, in close proximity to the passage of the Act, and are critical with respect to fee reporting issues. Service providers have not had the time and resources necessary to address the Act's provisions and simultaneously prepare the analysis necessary and appropriate to provide extensive comments on the Proposed Revisions.

As noted above, the Proposed Revisions are extensive. Certain of these would require the development of new technology infrastructures to accumulate and report items not previously tracked. For example, the proposed changes to Schedule C would require the accumulation and reporting of information per plan, on a participant-level, that encompass categories of compensation such as shareholder servicing fees, float and brokerage commissions. The submission of quantitative information related to the technology infrastructure costs is critical to evaluation of the proposed changes, in particular as many of the costs are likely to be passed on to plans and plan sponsors. An extension of the comment period is necessary so that such technology costs can be appropriately evaluated in light of the benefit of the proposed changes.

The Proposed Revisions have an effective date of January 1, 2008. However, many service providers are already in the process of budget finalization for 2007 and have allocated resources in order to meet the requirements of the Pension Protection Act. Again, the Proposed Revisions contain complex provisions that will require detailed analysis, clarification and the development of technology infrastructures that do not currently exist. An effective date of January 1, 2008 does not provide sufficient time for preparation and implementation, in addition to the pervasive

³ Proposed Revision of Annual Information Return/Reports, 71 Fed. Reg. 41621.

changes of the Pension Protection Act, should the Proposed Revisions in their current form be adopted.

Schwab supports the DOL initiative on fee disclosure, which will include modifications to the regulations issued under ERISA Sections 408(b) (2) and 404(c) and to the employer fee disclosure brochure. These matters are closely related to the Proposed Revisions. An important regulatory simplification purpose will be served if all fee transparency initiatives are coordinated as part of an encompassing, consistent and streamlined regulatory package. We believe that the comment period on the Proposed Revisions, as well as the effective date, should be delayed to incorporate evaluation and analysis of the additional fee initiatives.

Specific Issues under Schedule C

Although Schwab supports fee transparency and the DOL's initiatives in this regard, we are concerned about certain aspects related to Schedule C of the Proposed Revisions.

First, the Proposed Revisions would significantly expand the scope of parties with respect to whom compensation would be detailed on Schedule C. Under current filing requirements, only the fees of the *forty highest paid* service providers who receive, directly or indirectly, \$5,000 or more in compensation *for services rendered to the plan*⁴ must be listed. The Proposed Revisions would expand the list of service providers to include *any* person receiving, directly or indirectly, more than \$5,000 in total compensation *in connection with services rendered to the plan or their position with the plan*.

We believe this definition is too broad and could have unintended consequences. For example, the definition could include parties who do not have an affiliation with the individual plan, such as a vendor to the plan's direct service provider. Plan recordkeepers, trustees and custodians retain vendors to perform plan-related services regularly in the course of business. Examples include trust accounting, disbursement processing, 1099 reporting, proxy reporting and statement printing vendors. In each case, the contract for services is entered into between the plan's service provider and the vendor, the services are generally performed for all of the plans serviced by the service provider and most importantly, the compensation of the vendor is paid directly by the service provider, not by the plan, plan sponsor or participants.

The usefulness of such reporting is questionable where the plan service provider pays the vendor out of its general assets, the charge is not a plan or plan sponsor expense and the vendor has no relationship, contractual or otherwise, with the plan or plan sponsor.⁵ Such disclosure could lead to confusion by the plan sponsor over whether it or the plan is also paying for these services and raise the implication that there are duplicative charges. Also, this provision could require public disclosure of the terms that service providers have negotiated with their vendors—information

⁴ or from the "Direct Filing Entity", such as a master trust ("DFE"), for services rendered to the DFE.

⁵ The Proposed Revisions indicate that payments by bundled service providers to other plan service providers may not need to be disclosed where the plan is not paying the provider directly. Proposed Revision of Annual Information Return/Reports, 71 Fed. Reg. 41621. In such case, our comments above are directed towards payments by service providers to other service providers in nonbundled arrangements. We question why there would be a distinction between bundled and non-bundled service providers in this regard.

that may be proprietary and could violate confidentiality agreements. Finally, we question the need to track such information where the impact on the reasonableness of the plan services arrangement is remote at best.

Second, the Proposed Revisions would significantly expand the scope of reportable compensation. Filers would be required to indicate, for all covered service providers, whether the service provider received any compensation attributable to the person's relationship with or services provided to the plan from a party other than the plan or plan sponsor. Fiduciaries and certain enumerated service providers⁶ receiving more than \$5,000 in total compensation and more than \$1,000 in compensation from a party other than the plan or plan sponsor would be subject to more extensive disclosure, including the identity of the payor, the relationship or services provided to the plan by the payor, the amount paid and the nature of the compensation. Also, reportable compensation would be broadened to include money or any other thing of value (including gifts, awards and trips), placement fees, commissions on investment products, transaction-based commissions, sub-transfer agency fees, shareholder servicing fees, 12b-1 fees, soft dollar payments and float income.⁷ As contrasted to current Schedule C requirements, brokerage commissions and fees charged to the plan on purchase, sale and exchange transactions would be reportable even if the broker does not exercise discretion.

In a same-day, omnibus trading environment, many service providers do not have the systems necessary to track and generate per plan/per participant level information and coordinate it across brokerage trading, trust/custodial and recordkeeping platforms. Many systems are not currently linked at this level. Significant technology costs will be required if it becomes necessary to so track, accumulate and report on a plan-specific basis types of compensation such as collective trust fund fees (which may be layered), sub-transfer agent fees, shareholder servicing fees, and transaction-based commissions. These costs will ultimately be passed on to plans and plan sponsors.

We question whether the value of this information to the plan fiduciary justifies the significant expense to build the necessary technology infrastructure to track this information. This is in particular the case where much of the aggregate fee impact is dictated by participant investment behavior outside of the control of the service provider. For example, if a plan offers a self directed brokerage platform, the specific amount of commissions generated by participant trading activity during a twelve month period will vary based on market conditions and participant investment goals and expertise. The relevant consideration by the plan fiduciary in determining whether compensation for services is reasonable is the underlying brokerage commission fee charged (per share and/or per transaction) by the service provider and not the total amount of commissions generated over the course of the plan year through participant trading activity. The technological challenges to tracking this specific information is heightened

⁶ These service providers would be defined as contract administrator, securities brokerage (stocks, bonds or commodities), insurance brokerage or agent, custodial, consulting, investment advisory (plan or participants), investment or money management, recordkeeping, trustee, appraisal or investment evaluation.

⁷ We note that certain categories of indirect compensation, such as finder's fees and other fees and commissions paid by a service provider to an independent agent or employee for a transaction or service involving the plan, are currently reportable on Schedule C. See 2006 Instructions for Schedule C (Form 5500) *Service Provider Information*.

when one considers the implications of also tracking float on these amounts, again through a technology that does not yet exist and brokerage systems not necessarily tied to trust and recordkeeping systems on a plan-specific basis.

Similar issues are raised if a service provider is required to report the compensation earned by its affiliates as a result of the investment of plan participants in the proprietary investment offerings of such affiliates or through the use of the affiliates' trading platforms. These fees are typically an expense charged to all investing shareholders and in the case of mutual funds, are generally disclosed in the fund prospectus. The aggregate amount of fees generated will again be dictated by the plan fiduciary selection of plan investment options and participant investment decisions among these options. The service provider should not be required to track and report such affiliate compensation where it does not have a role in determining these fees and does not receive such compensation for the services it renders to the plan. Instead, we believe that plan fiduciaries should be provided with a description of the situations in which affiliates may receive compensation as a result of plan transactions and should have the opportunity to request supplemental information from the service provider in order to evaluate whether these present a conflict of interest.

The Department of Labor recognized the significant infrastructure costs and impracticality associated with tracking compensation information in an omnibus trading environment in issuing its float guidance.⁸ Float is typically earned by service providers as a result of funds awaiting investment or distribution under circumstances outside of the control of the service provider (service providers have in fact instituted measures aimed at shortening the float period, for example, by educating plan fiduciaries that they can minimize the float periods by avoiding delays in providing investment or distribution instructions, by instituting ACH technology and by providing plan sponsors with reports of uncashed checks so that steps can be taken to reduce the periods that the checks are outstanding). These amounts are almost always maintained by the service provider in omnibus accounts and are not tracked per plan. In its float guidance, the DOL did not require such plan-specific tracking and advised that the disclosure parameters set out in FAB 2002-3 would serve to assist plan fiduciaries in evaluating whether service provider compensation is reasonable in this context. The industry has relied on such guidance since 2002 in not developing the technology to track float.

Schwab also is concerned that the Proposed Revisions would require costly tracking and reporting of other types of indirect compensation not previously reportable that are only remotely connected to the plan. For example, if an employee of a service provider is treated to a lunch by a vendor to discuss the services the vendor provides to the service provider's plan clients, assumedly the value of such lunch would need to be tracked to determine whether reporting is required by the service provider. Again, we question whether the cost of such tracking and potential reporting, which ultimately will be passed on to the plan and plan sponsor, is justified based on value to the plan fiduciary in evaluating the reasonableness of service provider fees.

Third, an important goal of the DOL's fee disclosure project is to ensure consistency in how fees are reported across service providers, again so that plan fiduciaries can evaluate the

⁸ U.S. Department of Labor Field Assistance Bulletin 2002-3 (Nov. 5, 2002) ("FAB 2002-3").

reasonableness of fees for services. The Proposed Rules would require that the entire amount of compensation received by the service provider be reported with respect to each plan unless the amount can reasonably be allocated between plans. If compensation can be so reasonably allocated among plans, either the actual dollar amount allocated or the estimated amount and allocation methodology must be reported. We believe that this approach could cause service providers to make inconsistent determinations of whether there is a basis for a “reasonable allocation” and also of the manner in which to make such allocations. The impact is that plan fiduciaries will have difficulty comparing and evaluating service provider compensation.

Schwab Proposal

Schwab supports the DOL goal of fee transparency and consistency of fee disclosure among service providers. We believe that the development of uniform reporting and disclosure of information meaningful to plan fiduciaries in evaluating service provider compensation is a critical regulatory initiative. However, we respectfully suggest that modification of the Form 5500 through the Proposed Revisions is not the best vehicle to reach these goals.

The Proposed Revisions would impose significant technology infrastructure costs, which as discussed above, would ultimately be passed through to the plan sponsor and plan. However, a great deal of the additional compensation information accumulated on the Form 5500 would be of limited value to the plan fiduciary in determining the reasonableness of service provider compensation. This is because under the Proposed Revisions, much of the fee information reported would be generated by factors outside of the control of the service provider, such as participant investment activity and plan operations. Also, certain of the compensation information would be only remotely connected to the plan and in other cases, is not received by the plan service provider for the services it provides. In addition, the Form 5500 reports plan year information over seven months after the close of the plan year. This information would not be timely with respect to the plan fiduciary’s determination of whether to hire and retain the service provider based on reasonableness of compensation for services provided.

Instead, Schwab believes that meaningful fee disclosure parameters should include the following factors:

- compensation information should be provided to plan fiduciaries at a time most critical to decision making with respect to selection and retention of a service provider—prior to hiring of the service provider and annually thereafter.
- Such information should be reported on a uniform basis across the industry.
- The structure for reporting should be a disclosure form based on a simplified model that requires a description of: (i) the sources of revenue (including revenue out of plan assets) and specific categories of fees that may be received by the service provider and (ii) the services covered by such fees and those not so included.
- Service providers should not be required to develop technology to track information that does not directly relate to the plan services it provides or that concerns compensation it does not directly receive, but should disclose relationships that could present the potential for conflicts of interest and provide supplemental detail to plan fiduciaries upon request.

- Similarly, expensive tracking of fees generated based on daily participant investment and plan activity should not be required. Service providers should instead be required to disclose the *basis* upon which such types of compensation may be earned. Several examples: in the case of brokerage commissions, this requirement would be satisfied by disclosure of the brokerage commission rate. In the case of float, this requirement would be satisfied by disclosure in conformity with FAB 2002-3. In the case of shareholder servicing and 12b-1 fees, this requirement would be satisfied by disclosure of revenue generated on a weighted average basis point methodology across specific plan investment options elected by the plan sponsor.
- Fee disclosure should include specific information on direct revenue to be received by the service provider in the form of both asset-based compensation (e.g. basis point charges) and hard dollar revenue.

Conclusion

Again, Schwab appreciates the opportunity to comment on the modifications to Form 5500 and may provide additional comments as we continue to review the content and implications of the Proposed Revisions. We request that in the event the comment period is not extended, the DOL accept any supplemental Schwab filing. We welcome the opportunity to work with the DOL on this important initiative, including the development of a streamlined model that incorporates the necessary and important elements of service provider compensation in a manner most helpful to plan fiduciaries. Should you have any questions about this letter, please contact the undersigned at (330) 908-4512 or at gail.mayland@schwab.com.

Sincerely,

Gail B. Mayland

Gail B. Mayland
Vice President and Associate General Counsel
CHARLES SCHWAB & CO., INC.

cc: Ann L. Combs (Assistant Secretary of EBSA)
Robert Doyle (Director of Regulations & Interpretations, EBSA)
Lou Campagna (Division of Fiduciary Interpretations & Regulations, EBSA)