



January 31, 2011

Office Of Financial Research  
U.S. Department of the Treasury  
1500 Pennsylvania Ave. N.W.  
Washington DC 20220

Re: **FR Doc. 2010-30018 / Statement on Legal Entity Identification for Financial Contracts**

Ladies and Gentlemen:

The American Benefits Council (the “*Council*” or “*we*”) appreciates this opportunity to provide comments to the Office of Financial Research of the Treasury Department (the “*Office*”) regarding the Statement of Policy on Legal Entity Identifiers (the “*LEI Statement*”).<sup>1</sup> The Council is a public policy organization principally representing Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

The LEI Statement proposes to require each legal entity to obtain a Legal Entity Identifier (“*LEI*”) which will serve as a standardized method of identifying entities in reports pertaining to financial contracts.<sup>2</sup> Similar programs were recently proposed by the Commodity Futures Trading Commission (the “*CFTC*”) and the Securities and Exchange Commission (the “*SEC*”) (the “*CFTC Rule*” and the “*SEC Rule*”, respectively).<sup>3</sup>

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<sup>1</sup> Office of Financial Research; Statement on Legal Entity Identification for Financial Contracts, 75 Fed. Reg. 74146 (published Nov. 30, 2010).

<sup>2</sup> *See id.* at 7147.

<sup>3</sup> The CFTC has issued a proposed rule which is unclear as to whether the required unique identifiers would be assigned only to legal entities or to all counterparties. That rule would require each “counterparty” to a swap to use a “Unique Counterparty Identifier,” but the rule implies that these identifiers would only be used to identify legal entities. *See* Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76574, 76590 n. 59 (“...it would be used to identify the legal entities who are counterparties to a swap”); *id.* at 76591 (the system must “[r]esult in a unique identifier format that . . . [provides for] unique identification of legal entities in the financial sector”). The relevant rule from the SEC, however, describes a system that would likely assign identifiers to pension pools as well as trusts. Under that rule, every “participant” must have a “participant ID,” and “participant” is defined as “a U.S. person that is a counterparty to a [security-based swap] that is required to be reported to a registered SDR.” *See* Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 75 Fed. Reg. 75208, 75217 & n. 61.



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### 1. Summary Conclusions

- (a) **A “Counterparty Identifier” Should Be Used For Reporting and Other Purposes Rather Than A “Legal Entity Identifier” So As To Accommodate Pension Trusts and Other Legal Structures with Sub-Components**
- (b) **Requiring the Use of One Legal Identifier for A Pension Trust with Sub-Components Can Harm Pension Plans**

We agree with the Office that standardizing certain non-trade term specific data regarding swaps and other financial transactions could be beneficial to financial markets, and we therefore generally support the concept of creating a uniform system of identifying counterparties. However, because there are numerous forms of legal entities, such as pension trusts, with separate sub-components<sup>4</sup>, each of which can be a separate counterparty to a dealer, we believe there are practical and legal complications with an identifying system which focuses on a “Legal Entity Identifier.” This is particularly the case when, as suggested as a possibility in the LEI Statement, each Legal Entity is provided only one LEI. Rather, we would advocate for a system which assigns unique “Counterparty Identifiers;” such a system would allow a pension trust with separate sub-components to give each sub-component its own “Counterparty Identifier.”

### 2. Pension Trusts: Pro-Rata and Non-Pro-Rata.

The problem with assigning one LEI per one legal entity becomes clear when one considers the examples of how pension trusts are typically structured. Pension trusts generally fall into one of two categories: *pro-rata trusts* and *non pro-rata trusts* (see Annex A below – Pro-Rata Trust X).

In a pro-rata trust, two or more pension plans contribute funds to the trust and obtain a pro-rata beneficial interest in all the assets of the trust in return. Thus, if Plan A contributed \$30 million to Pool 1 in Trust Fund X, Plan A would own a 30% beneficial interest in all the assets of Trust Fund X assuming that the total assets of Trust Fund X are \$100 million.

In contrast, a trust agreement for a non pro-rata pension trust provides that the trust can be divided into sub-components (sometimes referred to as “pools” or “recordkeeping accounts”). Non pro-rata trusts with sub-component pools or recordkeeping accounts were developed in part to allow plan sponsors to hold assets of various plans held in one trust for administrative reasons but still permit various plans within such trust to use different investment strategies or the same strategies but in different percentages. Accordingly, in non pro-rata pension trusts, a percentage

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<sup>4</sup> Other examples of other Legal Entities with sub-components include Series Mutual Funds, Bank Collective Investment Fund Trusts and group trusts with sub-funds, and Farm Cooperatives.



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contribution by a Plan to a certain pool will not necessarily equal a beneficial interest in the same percentage of all the assets in the trust as a whole, *i.e.*, these pools may contain assets of different plans in different percentages within the same trust (*see Annex A* below – Non Pro-Rata Trust). For example, Plan A could represent 100% of Pool 1, Plan B and Plan C could each represent 50% of Pool 2, and Plans A, B, and C could each represent Pool 3 with Plan A representing 70%, Plan B representing 20% and Plan C representing 10%.<sup>5</sup>

### 3. **Pools in Non Pro-Rata Trusts Are Not Separate Legal Entities But Are Separate Counterparties to Dealers.**

Pools in a non pro-rata pension trust are not individual legal entities; only the pension trust is a legal entity and the pools are sub-components of such legal entity. As noted, these pension trusts frequently enter into financial contracts, including swaps, on behalf of the individual *pools*, as opposed to the trust as a whole. Because the pool is not a legal entity, however, the party to the transaction is actually the trust *on behalf of the pool*. Critical to this practice, though, is the fact that when the trust enters into a swap on behalf of a pool, the swap agreement would generally indicate that the trust had entered into the agreement on behalf of particular recordkeeping account or pool such as Pool 1 and that the dealer counterparty will, due to ERISA concerns discussed below, only have recourse to the assets in Pool 1 and not to all the assets in other pools of the trust.

### 4. **Employee Retirement Income Security Act of 1974 (“ERISA”) Considerations.**

If only one LEI is assigned per each legal entity and is required for regulatory reporting or contractual purposes such as confirmations, it could prevent ERISA pension plans which hold their assets in non-pro-rata trusts from being able to enter into important hedging positions to protect the assets of specific pension plans in a pool. For example, if only one LEI is permitted for confirmations for a swap trade, a pension trust with sub-component pools may not be able to designate on the confirmation that the trade was for a particular sub-component pool. If the trade confirmation did not clearly specify that the trade was for a particular pool, the dealer could arguably have recourse to all the assets of the trust when the trade was intended for the benefit of only certain, but not all, the plans in the trust. Providing recourse to the assets of one pension plan to benefit another pension plan would violate the “exclusive benefit” and “prohibited transaction” rules of ERISA and subject fiduciaries which do so to severe financial consequences under ERISA. However, a Counterparty Identifier which could be used to identify a particular

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<sup>5</sup> As another example, in a defined contribution/401(k) plan trust, the trust will commonly be subdivided by establishing designated investment options, each with a different investment strategy, that are made available for investment direction by the plan’s participants. Plan participants will have non-pro rata investments in the designated investment options. For example, 401(k) Plan Trust 1 could have Equity Investment Option A, Fixed Income Investment Option B, Global Investment Option B, *etc.*, and participant 1 could invest 100% in Option A, participant 2 could invest 100% in Option B, *etc.* Likewise, in a group trust, the group trust could establish multiple investment funds each of which may include as investors different pension trusts than any of the other investment funds established under the group trust.



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sub-component pool of a pension trust, e.g. “Pension Trust A on behalf of Pool 1”, would not create the same ERISA issues.

### 5. **Recommendations.**

We therefore urge the Office to adopt an identification system which would provide enough flexibility for non-pro-rata pension trusts to identify the relevant sub-component pool on whose behalf a trade is done. The Office could do so, for example, by issuing LEIs for particular legal entities and permitting such entity to identify individual sub-components with hyphenated numerical identifiers for every non-legal entity on whose behalf such entity trades. (*E.g.*, if the LEI for Trust X is 1, the identifier for Pool A in Trust X could be 1-1).

Alternatively, the Office could require the issuance of identifiers for every “counterparty” to a trade. This would be almost identical to the current LEI Statement in practice but would permit unique identifiers for sub-component pools within a particular pension trust. In either event, though, these non-legal entity identifiers must be official, recordable, and public, so that counterparties are on notice that they will not have recourse to the assets of a trust as a whole, but only the individual pool.

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We appreciate the opportunity to submit this comment letter on the LEI Statement and to share our concerns of the impact of the LEI proposal on the pension fund industry. We hope that you will consider our alternative proposals. We would be happy to meet with the Department of Treasury staff to discuss the issues addressed in this letter. If you have any questions or comments, please do not hesitate to contact Lynn Dudley, Senior Vice President, Policy, at 202-289-6700 or at [ldudley@abcstaff.org](mailto:ldudley@abcstaff.org).

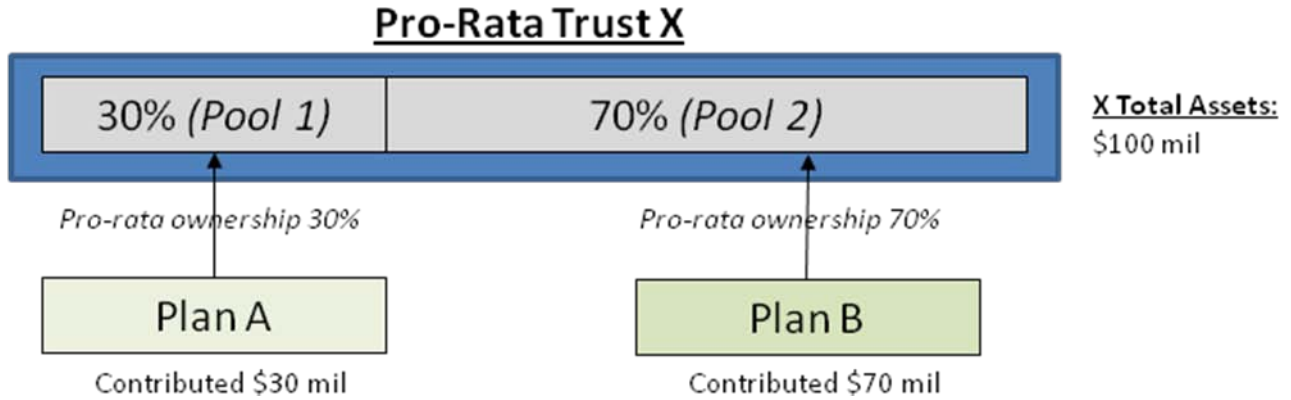
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## Annex A

### Pro-Rata Pension Funds



### Non Pro-Rata Pension Funds

