Dear Gentlemen,

The National Coordinating Committee for Multiemployer Plans is pleased to comment on the American Institute of Certified Public Accountants, Inc.’s Accounting Standards Board’s (the “AICPA” or “ASB”) Exposure Draft AU-C Section 703, Proposed Statement on Auditing Standards – Forming an Opinion and Reporting on Financial Statements of Employee Benefit Plans Subject to ERISA (the “ED”, “AU-C 703”). While the NCCMP applauds the AICPA’s goal of improving the quality of accounting audits of employee benefit plan financial statements, we do not believe that the proposed changes to the Auditing Standards will accomplish that goal.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the job creating employers of America and the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and welfare plans. The NCCMP’s purpose is to assure an environment in which multiemployer plans can continue their vital role in providing retirement, health, training, and other benefits to working men and women.

The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization with members, plans and contributing employers in every major segment of the multiemployer universe. Those segments include the airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, office employee, retail food, service, steel, and trucking industries. Multiemployer plans are jointly trustees by management and employee trustees.

A short summary of the topics and concerns addressed in this letter are as follows:

1. The ED should be re-proposed after the Department of Labor’s (“DOL” or the “Department”) 2016 proposed Form 5500 regulations are finalized because it is difficult to comment on the interaction between the two proposals, and the requirements proposed in the ED may moot if the Form 5500 proposed regulations are finalized in their current form;
2. The required procedures in ¶¶15-16 and the reporting of findings required in ¶¶ 119-124 will not increase the quality of audits because those auditors that already ignore the extensive AICPA guidance interpreting the existing Statements on Auditing Standards (“Audit Standards”) will not change their behavior based on the consolidation of the Standards and the already existing guidance;

3. The required procedures in ¶¶15-16 and the reporting of findings in the financial statements without regard to materiality as set forth in ¶¶ 119-124 will result in plan “compliance audits” which exceed the accountant’s role prescribed by the Employee Retirement Income Security Act of 1974, as amended (“ERISA”);

4. The required procedures in ¶¶15-16 and the reporting of findings in the financial statements without regard to materiality as set forth in ¶¶ 119-124 will have the unintended consequences of causing an increase in plan administrative costs, increase the chance of counterproductive and unwarranted litigation, and increase confusion among participants, contributing employers, plan sponsors, and other users of a multiemployer plan’s financial statements;

5. The ED requires that accountants make legal assessments beyond the scope of their expertise in order to complete an audit, and it is not appropriate to necessitate a reliance on plan counsel under the AICPA-ABA 1975 “Treaty” regarding communications between the auditor and counsel;

6. The requirements regarding Form 5500 procedures contained in ¶¶ 36-48 will result in practical administrative difficulties and increased administrative costs;

7. The scope of the ED’s requirements should not include apprenticeship and training plans since the required procedures set forth in ¶¶ 15-16 are generally not applicable to them, and such plans are generally exempt from reporting on the Form 5500;

8. The ED’s effective date is too soon since, for most plans, it will apply to the coming 2018 plan year beginning only 4 months from now.

9. The ASB should consider other alternatives to the requirements set forth in the ED, including an increase in required professional education, improved peer review procedures, and required membership in the Employee Benefit Plan Audit Quality Center.

For the ease of review and clarity, our comments are arranged by topic with reference to some specific paragraphs in the ED. However, we note that many of the paragraphs in the ED build upon each other. In addition, the ED does not clearly note which portions of the newly created Section 703 come from or are modifications of other existing sections of the Auditing Standards (e.g., from portions of AU-C Sections 800, 730, 725, 720, 708, 706, 705, 700, and 260). Similarly, the ED does not indicate which portions of the new Section 703’s terms, concepts, or specific provisions originate from the AICPA’s existing interpretative guidance contained in its 830 page Audit & Accounting Guide for Employee Benefit Plans (the “Audit Guidelines”). Without a meaningful comparison, it is difficult to assess which paragraphs or other guidance are interrelated.
with or dependent upon a particular paragraph. Thus, we ask that our comments be applied across other paragraphs that are connected or dependent upon a particular paragraph specifically cited in our comments.

I. The ED Will Exceed the Scope of the Auditor’s Role as Prescribed by ERISA by Requiring Auditors to Perform Plan Compliance Audits

The ED creates a “compliance audit” requirement by removing an accountant’s professional judgement and the concept of materiality for reporting from the Auditing Standards for ERISA plans. The new provisions that certain procedures be performed in every plan audit regardless of the accountant’s professional judgment of risk (¶¶15-16) causes testing of compliance, not testing of issues that bear on the financial soundness of the plan. The new provisions that findings be reported without regard to materiality and that those non-material findings be included on the financial statement or a separate document to be filed with the Form 5500 (¶¶ 119-124) mandate the reporting of immaterial operational issues. Combined, those new requirements result in a compliance audit that places plan auditors in a position similar to the DOL’s position as an enforcer of ERISA. This function is far beyond and inconsistent with the role ERISA intended for auditors, and the requirements should be abandoned in favor of the alternate proposals discussed below.

The ED’s DOL inspired change to a compliance audit model is also reflected in additional required management representations. Requiring management to make compliance oriented representations and disclosures of information not material to the financial statements are also outside of the role Congress gave to independent auditors of employee benefit plans – the role of assuring the soundness of the plan’s financial statements. Accordingly, ¶12.b requiring a management representation regarding “administering the plan and determining that the plans transaction that are presented and disclosed in the ERISA plan financial statements are in conformity with the plan’s provisions” should be deleted or revised to say “materially in conformity with.” Similarly, ¶¶12c, 22.b, and A50 addressing the maintenance of “sufficient records...to determine the benefits due or which may become due to such participants” should be deleted since in many instances all such possible information may not be available in a multiemployer context.

Under ERISA, the purpose of the audit of the financial statement of an employee benefit plan is to provide assurance on the financial soundness of the plan. However, ERISA does not require independent auditors to function as ERISA compliance auditors without regard to materiality on their professional judgment as to necessary procedures. ERISA section 103(a)(3) provides that the independent audit examination extends to “any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to form an opinion as to whether the financial statements and schedules... are presented fairly in accordance with generally accepted accounting principles applied on a basis consistent with that of the preceding year...”. The auditor’s function, as prescribed by ERISA, is to ensure the financial statements are presented fairly in accordance with generally accepted accounting principles. There is absolutely no indication under the statute or the legislative history that it is the auditor’s duty to review items beyond the financial statements in the Form 5500 or to determine a plan’s compliance with ERISA.

Legislative history is also clear that Congress limited the purpose of the audit to assessing the plan’s financial soundness rather than to function as an ERISA compliance audit. (See Senate
Report 93-127 (April 18, 1973), p. 28 published in Committee Print, Legislative History of the Employee Retirement Income Security Act of 1974, Public Law 93-406 (“Legislative History”), p. 614 (stating “[T]he annual report must include an opinion of an independent auditor based on the results of a required annual audit. Such information will allow better assessment of the plan’s financial soundness by administrators and participants alike (the exemption for the books of institutes providing investment, insurance and related functions and subject to periodic examination by a government agency will prevent duplicative audit examinations by these institutions.”)). It is important to note DOL has attempted to have Congress pass laws that would eliminate the limited scope audit and that would require notice to DOL of any “irregularity” discovered by the auditors that may have occurred in the plan without regard to the materiality of those irregularities. However, Congress declined to pass these laws. See e.g. “Pension Audit Improvement Act of 1995” (S.1490, Dec. 20, 1995).

As part of the DOL’s laudable efforts to improve plan audit quality (a goal which the NCCMP supports), the ED makes clear that the DOL Chief Accountant and other DOL personnel advocated adopting a compliance audit model consistent with Generally Accepted Government Auditing Standards.” (ED pg. 5) Although the DOL Audit Report “Background” section states that “Under ERISA, the Department plays no role in setting GAAP and GAAS standards. Such standards are set by institutions closely related to the accounting industry – the Financial Accounting Standards Board (FASB) and the American Institute of Certified Public Accountants (AICPA).” Nonetheless, DOL personnel not only “requested that the ASB take a fresh look at the auditor reporting model for ERISA plan audits . . .” (ED pg. 4) but also “participated in the task force and ASB deliberations and provided the task force with insights and recommendations as to areas where the DOL believes the auditor’s report can be strengthened. The task force considered this information as this proposed SAS was developed.” (ED pg. 4) It appears that DOL’s active involvement in the AICPA Task Force may have been designed to affect the information that plans must report on the Form 5500 at the same time that the DOL may have been engaged in the Form 5500 Proposed rulemaking. While the DOL’s active participation in the AICPA Task Force may appear to undermine the AICPA’s independence and the DOL’s rulemaking process, we are more concerned that the DOL’s participation resulted in provisions which will require plan auditors to perform “compliance audits” of plan operations instead of an audit of a plan’s financial statements to show the plan’s financial soundness as intended by ERISA.

II. The ED Will Not Achieve the Goal of Increasing the Quality of Plan Audits

We do not believe that the ED’s proposed changes to the Auditing Standards will increase the quality of plan audits because plan auditing failures are largely caused by auditors who already do not consider AICPA guidance. The DOL’s Employee Benefits Security Administration, Office of the Chief Accountant’s May 2015 report Assessing the Quality of Employee Benefit Plan Audits (the “DOL Audit Report”) concluded that “CPAs failed to comply with professional standards either because they were not adequately informed about employee benefit plan audits, or failed to properly utilize the technical materials that were in their possession.” Nowhere in the DOL Audit Report did the Department determine or recommend that the AICPA Auditing Standards were unclear or needed to be changed. Instead, it concluded that plan audit deficiencies are largely caused by a failure to utilize the Audit Standards and Audit Guidelines already in place. Thus, it stands to reason, based on the DOL Audit Report’s conclusions that the adoption of a new Section 703 of the Auditing Standards (including ¶20 ED) will not solve for the problem of plan audit
deficiencies brought on by auditors that failed to comply with existing standards and guidance. More Audit Standards set forth in the ED will not solve a problem caused by auditors who do not heed the existing standards and existing guidance already in their possession.

III. The ED Will Increase Plan Administrative Costs and Increase Unwarranted Litigation

We believe the required additional procedures and reporting of findings will result in increased plan administration costs and unwarranted litigation costs without a commensurate benefit to plan participants. The implementation of the ED will increase plan administration costs because plans will need to conduct both the expansive auditor compliance tests outlined in the ED and the compliance tests already conducted by other plan personnel and service providers. (¶¶ 17, 20). The requirement of these duplicative compliance tests will greatly increase costs for plan sponsors. In addition, it will increase administrative costs as plans will need to compile and submit more information to the auditor. Moreover, plan auditors will be required to perform procedures they may not have otherwise performed even though the auditor does not believe those procedures are necessary. This is likely to increase the cost of plan audits.

The ED may also result in qualified low-cost auditors exiting the market, thereby decreasing the level of diversity of auditors performing employee benefit plan audits, increasing the cost of audits by relieving the downward market pressure on accounting fees, and increasing the amount of work and cost of the audits on top of the removal of limiting market forces. In addition, we believe the consideration of what to report as a finding of noncompliance with plan provisions is a matter of legal determination, causing plans to increasingly hire legal counsel when compiling these findings and driving up plan administrative costs even more.

The ED will also increase the chance of counterproductive and unwarranted litigation. Plan participants may become confused and overreact to the findings report, even though the findings could be only routine operating errors. The reporting of such minor findings also ignores the Internal Revenue Service’s voluntary correction programs’ rules that allow for self-correction because such issues are not significant. Because the auditor’s report will be attached to the plan’s Form 5500 online filing, which is publicly available, it is foreseeable that plaintiffs’ lawyers will review the audit reports to gather information for possible lawsuits against plan sponsors. While we understand that an increase in meritorious litigation is not a proper reason to remove a reporting requirement, the increased chance of creating unwarranted litigation based on immaterial technical issues which almost all plans routinely encounter should be a cost that the ASB weighs against the negligible (if any) benefit of the ED’s requirements.

IV. The ED Should Be Re-Proposed After Form 5500 Regulations are Finalized

We respectfully ask the AICPA to delay finalizing the ED until the DOL completes the process of finalizing its proposed changes to the Form 5500. As the AICPA is aware, the DOL proposed changes to the regulations and forms related to the Form 5500 in 2016 in an effort to modernize the form. 81 Fed. Reg. 47534 (July 21, 2016); 81 Fed. Reg. 47496 (July 21, 2016) (collectively, “Proposed Form 5500 Changes”). DOL has publicly stated that it intends to review public comments it received on the Proposed Form 5500 Changes in January of 2018, suggesting that the DOL could finalize the Proposed Form 5500 Changes sometime next year.
We ask for this delay because there are several inconsistencies and redundancies between the ED and the Proposed Form 5500 Changes from DOL. For example, the Proposed Form 5500 Changes require the plan administrator to identify whether he was advised by the auditor of certain problems, including qualification issues, errors, illegal acts, etc. See 81 Fed. Reg. at 47583. At the same time, ¶¶ 15, 16 and 120 of the ED require that the auditor report certain findings related to specified plan provisions in the auditor’s report, or an attachment to the report, to be filed with the Form 5500 and become a publicly available document. We believe that the requirement to report findings on the auditor’s report is redundant under circumstances where the plan administrator is already required to indicate whether the auditor communicated issues within the Form 5500 itself.

In addition, the Proposed Form 5500 Changes would require the plan administrator to attach a copy of the financial institution’s limited scope audit certification to the Form 5500. 81 Fed. Reg. 47534 at 47565. DOL has stated that the purpose of this requirement is to enable DOL to engage in a “robust” review of the adequacy of limited scope audit certifications. Id. In addition, ¶ 20 a. of the ED requires the auditor to obtain from management and review the certification from the plan’s financial institution. Under ERISA, it is the plan administrator who has fiduciary responsibility and liability in connection with reviewing the financial institution’s certification and determining whether the plan is entitled to rely on ERISA’s limited scope audit rules. ERISA § 103(a)(3)(C); 29 C.F.R. 2520.103-5; 29 C.F.R. 2520.103-8. If the Proposed Form 5500 Changes and the ED are finalized in their present form, that means that three entities will independently be reviewing the sufficiency of certifications—the plan administrator, the auditor and the DOL. We believe this redundancy will cause undo complexity and delay in the completion of audits and can be avoided if the AICPA delays its process until the Form 5500 changes are finalized. Again, this supports delaying the AICPA’s final action until DOL finalizes its Form 5500 modernization project.

V. The ED Requires Accountants to Make Legal Judgments Beyond the Scope of Their Expertise

To the extent that the ED requires that auditors interpret terms and provisions of ERISA, the ED requires auditors to make legal judgments beyond the scope of their expertise. For example, ¶20 requires the auditor to determine whether a financial institution “holds” assets. That is a term which is subject to legal determination. Similarly, the application of ERISA prohibited transaction rules to allocations as required by ¶¶ 15-16 must involve a legal analysis beyond the expertise of an auditor.

The ED suggests that the auditors will need to consult with the plan’s legal counsel to assist indeterminations of whether the Form 5500 contains a material misstatement of fact. This inclusion in the ED appears to suggest that such determinations involve the practice of law. Further, ¶A76 anticipates that the auditor himself may need to involve legal counsel with respect to such determinations, illustrating the risk of legal challenge for the auditor that the ED may create. However, plan’s counsel is prevented by professional ethics from discussing such matters with an auditor because of the duties of confidentiality and the need to protect attorney-client privilege and attorney work product. Such communications would be prohibited by the 1975 “Treaty” between the AICPA and American Bar Association. Thus, multiemployer Boards of Trustees will be deprived of the collaborative roles of plan counsel and the plan’s accountants.
because of the ED’s requirement to report even immaterial findings on the plan’s financial statements which are publicly available on the Form 5500.

VI. The ED’s Requirements with Respect to Form 5500 Reporting Will Create Practical Administrative Difficulties and Increase Plan Administrative Costs

It appears that ¶¶ 36 – 37 of the ED require the auditor to make arrangements to obtain the current Form 5500 to be filed prior to releasing his report, and to review that Form 5500 for material inconsistencies with the audited financial statements. While we understand that auditor’s currently may review the prior year’s Form 5500 as part of a plan audit, this new requirement will create significant timing issues. The Form 5500 is usually being completed by plan management contemporaneously with the financial statement audit. Requiring the auditor to review the to-be-filed Form 5500 before issuing his report will only delay what is already a highly complex reporting process requiring input from many different individuals and divisions within a plan sponsor. Plans will have to revise their annual filing procedures in order to accommodate this change which will result in increased costs, greater burden, and increased liability for plan administrators without a cost justifying benefit. We note that under recent changes to the civil penalty provisions of ERISA, a plan administrator can be held personally liable for civil penalties of up to $2,063 per day for a late Form 5500. See ERISA section 502(c)(2). A plan administrator who is assessed substantial civil penalties in connection with a late Form 5500 as a result of an auditor’s delay in reviewing the form would seek to hold the auditor responsible for these penalties. We believe that an explicit requirement for the auditor to review the current, to-be-filed Form 5500 prior to issuing his report will substantially increase the auditor’s potential liability in connection with reviewing the form.

However, our concerns with paragraphs 36-48 go beyond mere timing issues. These paragraphs appear to extend the scope of the auditor’s responsibility from a review of the financial statements and related financial schedules on the prior Year’s Form 5500 that were previously considered “other information” to the entire Form 5500 itself, a report that contains operational compliance questions unrelated to the plan’s financial condition. Extending the auditor’s responsibility to the Form 5500 as a whole in addition to the financial statements arguably extends the plan auditor’s responsibility far beyond what ERISA intended for the auditor to review. See ERISA § 103I(a)(3).

We are particularly troubled by ¶ 42 which gives the auditor explicit authority to withhold his report, or withdraw from the engagement, if the auditor perceives a “material inconsistency” between the Form 5500 and the financial statements that management refuses to resolve to the auditor’s satisfaction. Nonetheless, the ED provides no guidance on how to identify such a “material inconsistency.” As the AICPA is aware, the Form 5500 currently contains several compliance questions that require the plan administrator to identify certain specific compliance issues. See Form 5500, Schedules H and G. Scores of new compliance questions would be added to the Form 5500 under DOL’s recent Proposed Form 5500 changes. See 81 Fed. Reg. at 47572 – 47599. For example, a current question on the Form 5500 asks whether the plan failed to pay any benefits when due. If the auditor identifies an issue with calculating eligibility, but this box is not affirmatively checked, would the auditor be permitted to withhold his report or withdraw from the engagement? A question that would be added to the form under the Proposed Form 5500 Changes asks whether the plan has any uncashed checks and the amount. If the Form 5500 indicates that uncashed checks exist, but the financial statements do not show an amount payable,
would the auditor be within his rights to withhold the report? We are concerned that ¶ 42 gives
the auditor far too much control over the Form 5500, and far too much liability in connection with
filing delays and failures that could inevitably result.

VII. The ED Should Not Apply to Multiemployer Apprenticeship and Training Plans

Multiemployer apprenticeship plans should not be covered by the ED’s new required procedures,
management representations, and findings reporting. While apprenticeship plans are covered
under ERISA §3(1), they are generally not required to file a Form 5500 if they make a one-time
filing with the Department of Labor under DOL Regulation 2520.104-22. Thus, the provisions
regarding Form 5500 reporting are inapplicable. In addition, the procedures required by ¶¶ 15-16
are likely inapplicable to a multiemployer apprenticeship plan. For example, it is a difficult legal
decision to determine exactly who is a participant of an apprenticeship plan. Such a person may
not currently even be an employee. Also, the specific provisions of eligibility and vesting are not
applicable since eligibility for apprenticeship is determined by a selection process and there is no
vesting for training benefits. And, too, employer contributions to a multiemployer apprenticeship
plan are normally determined by a collective bargaining agreement outside of the plan terms. Since
the required testing is inapplicable to multiemployer apprenticeship plans, there is also no reason
to obtain representations from the plan with respect to those areas, to require that those procedures
be performed, or to require that they be reported. Thus, we respectfully request that multiemployer
apprenticeship plans be excluded from coverage by the ED even though they are technically
covered by ERISA. The existing Audit Guidelines guidance would still apply even if the ED
excluded multiemployer apprenticeship and training plans.

VIII. Alternative Suggestions

The NCCMP agrees that improving the audit quality of multiemployer plan statements is a
worthwhile goal. However, we concur with the conclusions of the DOL Audit Report that
increased education requirements for auditors of employee benefit plans and improved procedures
for peer reviews would be a better approach than the changes to the Auditing Standards in the ED.
While a change in the Auditing Standards may make it easier for state professional bodies to
discipline auditors who perform deficient audits of employee benefit plans, it will not likely
increase the quality of audits by those who otherwise ignore the existing Audit Standards and Audit
Guidelines.

One way the AICPA could improve plan audit quality is by requiring auditors to join the AICPA
Employee Benefit Plan Audit Quality Center. The DOL Audit Report concluded that “[m]embers
of the AICPA’s Employee Benefit Plans Audit Quality Center (EBPAQC) tend to conduct fewer
audits containing multiple GAAS deficiencies. Additionally, non EBPAQC member firms tend to
have more GAAS deficiencies per audit engagement than EBPAQC members.” (DOL Audit
Report, pg. 22) This will ensure that auditors are up to date on the standards and procedures of
ERISA audits, as one of the biggest issues leading to “failed” audits is that auditors do not follow
the standards set by the AICPA.

We also recommend that the AICPA increase the continuing education requirements for all
auditors of employee benefit plans. We suggest that the ASB consider requiring an accountant to
have 24 hours of employee benefit plan CPE before she is considered to be qualified to perform an audit of a plan.

Finally, we agree with the DOL Audit Report’s recommendation that AICPA “streamline” its peer review process. As you may recall, the DOL Audit Report specifically recommended that the AICPA “ensure that CPAs who are required to undergo a peer review have in fact had an acceptable peer review” and that AICPA staff “identify those CPAs who have not received an acceptable peer review and refer those practitioners to the applicable state licensing boards of accountancy.” (DOL Audit Report, pg. 23).

In our view, multiemployer plan participants would be better served by an increase in the education and peer review efforts by the AICPA than the proposed changes to the Auditing Standards contained in the ED. Education and enforcement improvements would increase the quality of plan audits while avoiding the increased costs, burdens, and concerns described above.

Thank you for your time and consideration. We would like to work collaboratively with the AICPA on the proposed ED going forward. To that end and if possible, the NCCMP would like to present to the ASB as it considers comments to AU-C 703.

Sincerely,

Michael D. Scott
Executive Director

cc: Charles E. Landes, AICPA Vice President, Professional Standards and Services
    Linda Delahanty, AICPA, Senior Manager, Audit and Attest Standards - Public