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December 5, 2016

Submitted electronically via regulations.gov

Office of Regulations and Interpretations
 Employee Benefits Security Administration
 Attn: RIN 1210-AB63; Annual Information Return/Reports; Annual Reporting and Disclosure
 Room N-5655
 U.S. Department of Labor
 200 Constitution Avenue, NW
 Washington, DC 20210

RE: RIN 1210-AB63: Annual Information Return/Reports; Annual Reporting and Disclosure

In a letter dated November 15, 2016, House Republican leadership and committee chairmen warned cabinet members, key administrators, directors, and commissioners against finalizing pending rules and regulations in the waning days of the Obama administration.¹ One such regulation that should be placed on hold is the "Proposed Revision of Annual Information Return/Reports" ("Tri-Agency Proposed Rule"), proposed by the Department of Labor (DOL)'s Employee Benefits Security Administration (EBSA), the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC).² The proposed regulation would significantly expand the information employers and plan sponsors are required to report on the "Form 5500" filed annually by employee benefit plans. Similarly, DOL also proposed an accompanying "Annual Reporting and Disclosure" proposed rule ("DOL Proposed Rule") to conform DOL regulations under the *Employee Retirement Income Security Act of 1974* (ERISA) with the Tri-Agency Proposed Rule.³ This proposed rule should not be finalized.

Expert commenters have identified a myriad of deficiencies with these proposals.⁴ While we support updating the regulations to ensure important health and retirement benefits are

¹ Press Release, H. Comm. on Small Business, House Republican Leaders Warn Administration against "Midnight Regulations (Nov. 15, 2016), http://smallbusiness.house.gov/uploadedfiles/agency_letter.pdf.

² Proposed Revision of Annual Information Return/Reports, 81 Fed. Reg. 47534 (Jul. 21, 2016).

³ Annual Reporting and Disclosure, 81 Fed. Reg. 47496 (Jul. 21, 2016).

⁴ See, e.g., National Federation of Independent Businesses, Self-Insurance Institute of America, Inc., and The ERISA Industry Committee.

protected, these proposals are burdensome and overreaching, and should not be finalized by this administration.

Significant New Burdens on Small Plan Sponsors

Small health and welfare plans are currently exempt from filing the Form 5500.⁵ The agencies propose severely curtailing this exemption, even though it will place a burden on these plan sponsors, particularly small businesses. Small welfare plan sponsors would first have to determine if they qualify for the new “limited exemption,” and then either rely on a service provider to help them comply, thus adding unnecessary administrative costs, or attempt to undertake it themselves.

The administration’s estimates for the compliance costs associated with the new Form 5500 requirements are breathtakingly unrealistic. DOL estimates it will take the 2.15 million welfare plans⁶ that were previously exempt from reporting only 30 minutes to comply.⁷ But DOL admits “only time for gathering and processing information associated with the tax return/annual reporting systems, and learning about the law, was included” in the estimate of the burden.⁸ Even if small employers qualify for the new “limited exemption,” small businesses sponsoring small health and welfare plans will be required to research and verify information from one or more service providers and possibly seek costly specialized legal counsel. In all likelihood, the time required to do so will far exceed 30 minutes.

The unrealistic optimism of DOL’s estimates becomes obvious when considering the complex questions filers must answer. The agencies state they have written the instructions for the Form 5500 such that “filers generally will be able to complete Form 5500 ... by reading the instructions without needing to refer to the statutes or regulations.”⁹ This is patently inaccurate. Take, for example, the proposed revision to include a new question regarding whether the small business belongs to a “control group” with at least one other company.¹⁰ Even small employers qualifying for the “limited exemption” will have to answer this question as part of Form 5500 Part I, Annual Report Identification Information.¹¹ Contrary to the agencies’ claim that filers need only look to the instructions, the proposed instructions define a control group only by cross-referencing §414(b), (c), and (m) of the *Internal Revenue Code* (IRC) and requiring those meeting this definition to complete the Control Group Member Information attachment.¹² This exercise is far more byzantine than simply looking up §414. Instead, determining the answer will

⁵ ERISA §104(a)(3) gives the Secretary of Labor discretion to exempt any welfare benefit plan from all or part of reporting and disclosure requirements of Title I, last provided for in Annual Reporting and Disclosure; Revision of Annual Information Return/Reports; Final Rule and Notice 72 Fed. Reg. 64725 (Nov. 16, 2007).

⁶ Annual Reporting and Disclosure, 81 Fed. Reg. at 47501.

⁷ *Id.* at 47521.

⁸ Proposed Revision of Annual Information Return/Reports, 81 Fed. Reg. at 47568.

⁹ *Id.* at 47568.

¹⁰ *Id.* at 47570.

¹¹ *Id.* at 47570.

¹² *Id.* at 47608.

require an examination of a morass of complicated rules under the IRC to determine if two or more small businesses are considered a control group. The small business owner would likely be forced to hire an attorney or otherwise seek expert assistance. This additional burden will certainly take longer than 30 minutes and increase compliance costs beyond the estimated annual aggregate cost of \$69.6 million.¹³ Other questions, such as those requiring a judgment about whether a plan is “grandfathered” under the *Patient Protection and Affordable Care Act* (PPACA), will similarly require expenditures of time to research the answer to the question with a service provider.

In light of this, DOL’s estimate that the revised Form 5500 will only require an additional 30 minutes to determine the applicability of the “limited exemption,” severely underestimates the actual additional burden most small welfare plans will face. Therefore, a low estimate of the time necessary to complete the form further calls into question whether DOL’s estimate of 5 hours and 14 minutes of burden¹⁴ for small self-funded plans to complete Form 5500, including the new attachment specifically for health plans, is accurate as well. DOL’s inaccurate estimated compliance burden necessarily brings into doubt whether these costs are outweighed by the apparently unquantifiable benefits of providing this data.

In addition, many small businesses may be unaware of this requirement. The extent of the administration’s outreach thus far consists of a poorly-targeted webinar to alert “plan administrators, plan service providers, auditors, and others” of the proposal.¹⁵ Of note, the administration’s outreach does not target the small business employers who sponsor the 2.15 million plans that would newly be subject to reporting and the stakeholders estimated to shoulder 73 percent of the increased burden for the entire proposal.¹⁶ Plan sponsors who are currently exempt from these requirements are unlikely to be aware of the new obligation to report.¹⁷ If this administration or a future updates disclosure requirements for small plan sponsors, it should also develop an effective outreach and implementation plan to educate stakeholders.

Overreach on Stop-loss Insurance

The Tri-Agency Proposed Rule also continues the administration’s misguided attempt to regulate “stop-loss” insurance used by employers that self-fund the health insurance they provide to workers. This financial risk management tool protects employers against unusually high health care claims. Stop-loss insurance is not health insurance and therefore clearly not subject to

¹³ Annual Reporting and Disclosure, 81 Fed. Reg. at 47524.

¹⁴ *Id.* at 47521.

¹⁵ “Form 5500 21st Century Modernization & Improvement Initiative Webcast,” sponsored by the U.S. Department of Labor, Employee Benefits Security Administration, (Aug. 24, 2016), <http://mp163422.cdnmediaplatform.com/163422/wc/mp/4000/15208/30195/64900/Lobby/default.htm>.

¹⁶ Annual Reporting and Disclosure, 81 Fed. Reg. at 47501.

¹⁷ By contrast, the administration launched a broad outreach campaign after the passage of PPACA to encourage some of these same small businesses with less than 25 full-time equivalent employees to apply for the small business tax credit, that would only last for two years. Over 4 million postcards were sent out to small businesses at a reported cost of approximately \$1 million to taxpayers.

regulation under ERISA. Nevertheless, the proposed new form requests information regarding stop-loss insurance coverage, such as total premiums, attachment point, and claim limits.¹⁸ The Committee on Education and the Workforce has previously warned the administration not to regulate this insurance,¹⁹ which is beyond its purview. Therefore, a new requirement to disclose this information to the agencies makes no sense except as a precursor to yet more overreach.

Conclusion

Updates to the regulations governing employee benefit plans should help protect benefits, and the costs should be accurately measured and not outweigh the benefits. While it may be possible to amend the disclosure requirements to meet that test, these particular proposals fail to do so. The Committee on Education and the Workforce looks forward to working with the agencies in the coming years to help ensure these important benefit programs are efficiently administered for the millions of Americans that rely on them.

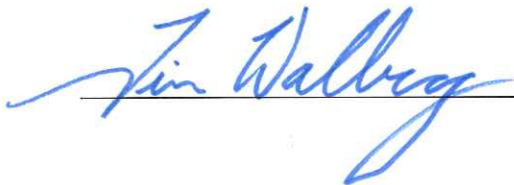
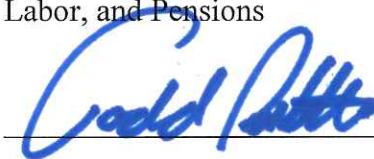
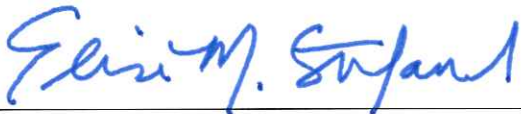
Sincerely,



JOHN KLINE
Chairman
Committee on Education and the Workforce



PHIL ROE
Chairman
Subcommittee on Health, Employment,
Labor, and Pensions



¹⁸ Proposed Revision of Annual Information Return/Reports, 81 Fed. Reg. at 47587.

¹⁹ Press Release, H. Comm. on Educ. and the Workforce, Kline, Roe Request Information on Possible Regulatory Actions Relating to Stop Loss Insurance (Jun. 6, 2013), <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=337088>.

Brett Guthrie

Jake Messers

CC: The Honorable Thomas Perez, Secretary of Labor
The Honorable Jack Lew, Secretary of the Treasury
The Honorable W. Thomas Reeder, Jr., Director of the Pension Benefit Guaranty Corporation