VIA E-MAIL: e-ORI@dol.gov

December 5, 2016

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: RIN 1210-AB63
Annual Reporting and Disclosures, Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: **Employee Benefits Security Administration RIN 1210-AB63. Proposed Revision of Annual Information Return/Reports**

Ladies and Gentlemen:

This letter is submitted by the Society for Human Resource Management (*SHRM*) in response to the request for comments by the Employee Benefits Security Administration (*EBSA*) on the proposed changes to the Form 5500 Annual Return/Report forms.

The Society for Human Resource Management (SHRM) is the world's largest HR professional society, representing 285,000 members in more than 165 countries. For nearly seven decades, the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates. Many of our members assist in the administration of their employer's retirement and health and welfare plans.

INTRODUCTION

While SHRM appreciates efforts of the Department of Labor (*DOL*), the Internal Revenue Service (*IRS*) and the Pension Benefits Guaranty Corporation (*PBGC*) (collectively, the *Agencies*) have made in proposing revisions to the Form 5500 Annual Return/Report, SHRM is very concerned that the sweeping increased burdens and costs of compliance will discourage employers (especially small employers) from establishing and maintaining health and welfare and retirement plans for their employees. In

addition to this comment letter focused on the effects this rulemaking will have smaller employers, SHRM has also joined the comments of the Committee on Investment of Employee Benefit Assets (CIEBA) focused more specifically on larger employers, and the comments of the National Association of Professional Employer Organizations ("NAPEO") regarding multiple-employer plans.

The Preamble asserts that the Form 5500 is the principal source of information and data available to the Agencies concerning the operations, funding, and investments of over 800,000 pension and welfare benefit plans. The Agencies believe that the proposed revisions will serve the following purposes: (i) improve each Agency's enforcement, research and policy formulation programs; (ii) be an important source of data for use by other federal agencies, Congress, and the private sector in assessing employee benefits, tax and economic trends and policies; and (iii) serve as the primary means by which the operations of plans can be monitored by plan participants and beneficiaries and by the general public. (81 FR 47535)

These proposed revisions come on the heels of recent substantial compliance burdens placed on plan sponsors of retirement plans through, *inter alia*, the regulations on: (i) the change in the definition of investment advice fiduciaries and the implementation of the best interest contract exemption *(BICE)*; (ii) the reporting and disclosure rules under ERISA 404(a)(5) to educate plan participants of self-directed retirement plans about plan investment options and the various costs and fees that impact their plan accounts; and (iii) ERISA section 408(b)(2) disclosure requirements.

Moreover, there has been an avalanche of ever-changing and complex rules and regulations applicable to group health and welfare plans. The Patient Protection and Affordable Care Act (*Affordable Care Act*), the Health Insurance Portability and Accountability Act (*HIPAA*) and Title I of the Genetic Information and Nondiscrimination Act (*GINA*) are just a few of the laws (with implementing regulations) that plan sponsors are required to comply with in offering health and welfare benefits to their employees.

To add substantial additional requirements by increasing the number of plans that will now have to file Form 5500s and the amount of information required to be provided by all filers will most certainly increase the costs of maintaining employee benefit plans and convince the employers either to not to establish employee benefit plans or discontinue their sponsorship of their already existing plans.

I. THE REPORTING REQUIREMENTS SHOULD NOT BE EXTENDED TO SMALL GROUP HEALTH PLANS

Under current ERISA regulations (29 C.F.R. Section 2520.104-20), any employee welfare benefit plan which covers fewer than 100 employees and provides benefits solely from the employer's general assets or through an insurance contract (or a combination of both) is exempt altogether from filing an annual report. Small group

health plans that are funded through a trust have to file a Form 5500-SF, along with Schedule I (which does not require filers to provide detailed plan asset information).

The proposed revisions would eliminate the exemption from filing for small group health plans, including plans that claim grandfathered status and retiree-only plans. All group health plans, regardless of size or their means of funding, would be required to file a Form 5500 Annual Return/Report. Moreover, Schedule I would be eliminated altogether and small group health plans would have to complete a new Schedule J (*Group Health Plan Information*), although fully insured small group health plans would only have to answer a limited number of questions on the Form 5500 and the new Schedule J.

The new Schedule J requires group health plans to report a wide range of information about plan operations and compliance with both ERISA and the Affordable Care Act that are not now required to be reported. The new information includes, *inter alia*:

(i) The number of individuals offered and receiving COBRA coverage;
(ii) Whether the Plan offers coverage for employees, spouses, children and retirees;
(iii) The nature of the Plan's funding and benefit arrangements (i.e., whether the benefits are insured or paid through a trust or from the general assets of the employer);
(iv) The type of group benefits offered under the Plan;
(v) Information regarding participant and employer contributions;
(vi) The grandfathered status of the Plan and whether the Plan includes a high deductible health plan, a health FSA, or an HRA;
(vii) Information regarding rebates, refunds, or reimbursements from service providers (e.g., a medical loss ratio *(MLR)* rebate or offset rebates from favorable claims experience) and ,if so, the amount received and how such rebates were used;
(viii) The identity of any service provider to the Plan not already reported on Schedules A or C (e.g., third party administrator/claims processor, mental health benefits manager, wellness program manager, substance use disorder benefits manager, pharmacy benefit manager/drug provider and/or independent review organization);
(ix) Detailed claims payment data and information regarding how many benefit claims were submitted, appealed, approved and denied broken out by the type of claim (i.e., pre-service claim, post-service claim);
(x) Information on the Plan's paid and unpaid benefit claims during the Plan Year and any delinquent payments to insurers and whether the delinquencies resulted in a lapse of coverage;
(xi) Information on total premiums paid for stop loss insurance, and individual and aggregate claim limits; and
(xii) A number of specific compliance questions.

We outlined the various information that would have to be provided to demonstrate the sheer breadth of the information that, for the most part, will not be in the employer's possession. Employers retain insurance policies or maintain self-funded plans through ASO contracts with insurers to avoid being involved in the provision of benefits other than paying for them. Requiring all small group health plans to file Form 5500 and Schedule J will certainly require the employers to have more intimate involvement in providing health insurance to their employees. They cannot just delegate the filing of the Form 5500s to the insurance companies, since they are required to vouch for its accuracy by signing the Form.

SHRM believes that there should not be an annual return reporting requirement for small group health plans currently exempt from such requirements. The filing of Form 5500 and Schedule J requiring an immense amount of information would impose substantial compliance burdens on small employers. To the extent that the employers have to secure the information from the insurers or their third party administrators/claims processors and pay for someone to complete and file the Form 5500 and Schedules, this will add substantial additional costs to the provision of health benefits to employees.

Moreover, if small employers fail to file the Form 5500 or complete Schedule J, the Employer would be subject to substantial penalties under ERISA. In 2016, the penalties for non-filing of the Form 5500 increased to $ 2,063 per day, and will be adjusted annually for inflation. Once small employers understand the financial risks attendant with these regulations and the added time and costs in complying, they would likely terminate their group health plans for their employees.

II. SMALL PLANS NOT ELIGIBLE TO FILE FORM 5500-SF SHOULD NOT BE REQUIRED TO FILE SCHEDULES H AND C

Currently, small plans that are not eligible to file Form 5500-SF are permitted to file a Schedule I which is an abbreviated financial information form. The Agencies state in the Preamble that "since small plan filers are the majority of annual return/report filers overall, this shortcoming impairs the utility of the Form 5500 as a tool to obtain a meaningful picture of small plan investments in hard-to-value and other assets" and "the limited financial information on the Schedule I creates a challenge for participants, beneficiaries, oversight agencies, researchers, and other users of the Form 5500 or Form 5500 data." (81 F.R. 47549.) Thus, the Schedule I is being eliminated altogether and these small plans will be required to file the newly revised and expanded Schedule H. In order to minimize the increased burden, the Agencies noted that small plans would continue to be eligible for a waiver of the annual independent audit requirement.

The proposed revisions would also require a Schedule C to be filed by small pension plans that are not eligible to file Form 5500-SF, small welfare plans that provide group health benefits that are not unfunded or insured (e.g., funded through a trust) and other small welfare plans that are not unfunded or insured plans and are not eligible to

file Form 5500-SF. The Agencies recognize the burdens on small plans, but say such a requirement "would address some of GAO's concerns that not all critical information on indirect compensation is being reported to the Agencies." (81 F.R. 47549.)

SHRM urges the Agencies to reconsider the imposition of additional onerous Schedules for small employers of pension and certain welfare plans. The rationales for these sweeping changes are based on a nebulous belief that this information is imperative for their enforcement of ERISA and to acquire additional information to "mine" for participants and beneficiaries and other interested parties. But the rationale does not take into account the fact that the additional burdens of filing a detailed financial statement will be costly, increase the time needed to complete the Form 5500 and discourage plan sponsors, especially small employers, from establishing and maintaining employee benefit plans for their employees. The fact that small employers will not be required to incur the costs of an independent audit does not mean that costs associated with tracking and compiling all the additional information being required will not be as substantial and onerous. Without a compelling and demonstrated need for the information on the Schedules H and C (other than it will assist in finding out more about small plan investments and compensation, both direct and indirect, provided to their service providers), the Agencies should not risk that this onerous information collection effort will result in fewer employee benefit plans for employees, especially of small employers.

III. ADDITIONAL INFORMATION SHOULD NOT BE ADDED TO FORM 5500 AND FORM 5500-SF AND SCHEDULE R FOR PENSION PLANS

In addition to the new Schedules that will have to be filed by small plans, there are also proposals to require more information on the Form 5500, the Form 5500-SF and the Schedule R for retirement plans on participation, contributions, asset allocation by age, and participant-level diversification. Again, detailed information will have to be provided on, *inter alia*:

(i) The number of participants making catch-up contributions, investing in default investment options, maximizing the employer match, and deferring compensation;
(ii) The number of participants with account balances as of the beginning of the Plan Year and on the number of participants that terminated employment during the Plan Year that had their entire account balance distributed; and
(iii) Whether the Plan uses a default investment alternative for participants who fail to direct assets in their accounts and which type of investment alternative is used.

The Agencies' justification for this additional information being required is that it is "intended to collect better information on pension plan coverage and performance as retirement savings vehicles." (81 F.R. 47549.)

SHRM believes that this additional information is not compelled for any legitimate reason, but rather like the other proposed revisions, would discourage employers from establishing and maintaining retirement plans.

IV. THE CHANGES TO SCHEDULE C CONFORMING THE REPORTING OF SERVICE PROVIDER COMPENSATION TO THE DISCLOSURES UNDER ERISA SECTION 408(B)(2) WILL BE HELPFUL TO PENSION PLANS.

The Agencies proposed changes to the information reported on Schedule C of the Form 5500 to harmonize them with the information provide by covered service providers on the disclosure and reporting requirement under the regulations implement ERISA 408(b)(2). The changes include:

(i) Reporting will only be for "covered" service providers and for compensation that is required to be reported to be disclosed in 29 CFR 2550.408b-2(c)(1);
(ii) Reporting on "eligible indirect compensation" has been eliminated under the Schedule C, instead the reporting will be direct and indirect compensation received to conform to the disclosures under section 408(b)(2);
(iii) Reporting of indirect compensation permits any reasonable method of allocations to be used to estimate indirect plan level fees as look as the provider discloses the method to the plan administrator;
(iv) Reporting for covered service providers would have to be made if they received
$1,000 or more in direct and indirect compensation;
(v) Separate Schedule Cs would have to be filed for each covered service provider;
(vi) Requiring the reporting of contact information for service providers that are not natural persons;
(vii) Requiring the filing of information about any relationship that the service provider has to the plan (e.g., employer, plan sponsor employee, plan employee, named fiduciary, etc.);
(viii) Requiring the disclosure of whether the service providers are fiduciaries to the plan;
(ix) Adding a new service type for "information technology /computer support; and
(x) Adding a question that specifically asks whether ERISA recapture or budget accounts are used to offset total amounts of direct compensation received by service providers;
(xi) Adding a question that specifically asks whether the recordkeeping services to the plan are provided without explicit compensation for some

or all of such recordkeeping services with compensation for such recordkeeping offset or rebated in whole or in part based on compensation received by the service provider;

(xii) Reporting a dollar amount of compensation the service provider received for recordkeeping;

(xiii) Reporting on the total compensation received by the covered service provider in connection with services to the plan, including charges against plan investments; and

(xiv) Total indirect compensation would have to be reported as a dollar, even it is an estimate, and the filer would have to provide the formula under which the estimate was provided.

Overall, SHRM agrees with the Agencies' proposed revisions to conform the Schedule C with the disclosures that are provided by covered service providers to Plan Administrators under ERISA Section 408(b)(2). There has been much confusion over the years because of the differences between the two separate disclosure and reporting requirements. Nevertheless, SHRM does not believe these requirements should be imposed on small employers for the reasons already described in these comments.

CONCLUSION

While SHRM understands that the information required currently by the Form 5500 and Form 5500-SF may not as helpful as it could possibly be in providing detailed information on small pension and health and welfare plans, SHRM understands that there are good reasons for having less strenuous requirements for small plans. Simply put, imposing the revised changes as delineated above, even with the tax incentives in the current Internal Revenue Code, would discourage small employers from setting up or maintaining such employee benefit plans for their workers. For that reason alone, the Agencies should reconsider the revisions with an eye toward encouraging small employers to stay in the game. The Agencies should look for ways to simplify the reporting requirements for small employers. Even for large employers, the Agencies should be not be willing to impose new information requirements on them without compelling reasons to support those changes.

Respectfully submitted,

Michael P. Aitken

Vice President of Government Affairs
Society for Human Resource Management
1800 Duke Street
Alexandria, VA 22314
703.548.3440