

LAW OFFICES OF

DAVIS & HARMAN LLP

THE WILLARD

1455 PENNSYLVANIA AVENUE, N.W.

SUITE 1200

WASHINGTON, D.C. 20004

—
TEL (202) 347-2230

FAX (202) 393-3310

26

RECEIVED
OFFICE OF REGULATIONS
AND INTERPRETATIONS

2006 SEP 20 PM 3:05

September 19, 2006

FILED ELECTRONICALLY AND VIA MAIL

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

Re: Proposed Revisions to Form 5500 Annual Return/Report

Dear Sir or Madam:

We are writing on behalf of the Committee of Annuity Insurers (the "Committee") to comment on the recently proposed revisions to the Form 5500 annual return/report. The Committee is a coalition of life insurance companies that was formed in 1982 to participate in the development of federal policy with respect to annuities. The Committee's current 29 members represent most of the nation's largest and most prominent issuers of annuities and are among the largest issuers of annuity contracts to 403(b) and tax-qualified retirement plans. A list of the Committee's member companies is attached.

As described in more detail below, the Committee has four primary concerns about the proposed revisions to the Form 5500. First, the Committee is troubled by the proposed changes to the reporting requirements for 403(b) plans that are subject to Title I of ERISA. We strongly support preserving the long-standing simplified reporting rules applicable to such plans and believe that these rules are rooted in sound public policy. Second, the Committee believes that the compensation reporting requirements of the Schedule A (Insurance Information) should be eliminated. This information will be largely duplicated by the new compensation reporting requirements of the revised Schedule C (Service Provider Information) and we see no reason to preserve this aspect of the Schedule A. Third, we recommend additional clarifications to the revised Schedules A and C, including changes to the proposed treatment of float compensation. Fourth, the Committee believes that the effective date of the proposed revisions should be extended.

September 19, 2006

Page 2 of 7

I. The current law reporting requirements for 403(b) plans should be preserved.

The proposed revisions to the Form 5500 would dramatically increase the administrative burdens and responsibilities of charitable and other nonprofit organizations described in section 501(c)(3) of the Internal Revenue Code that sponsor section 403(b) arrangements. These new responsibilities include gathering and reporting substantial financial information, engaging a qualified public accountant to perform an annual audit, and answering a series of difficult compliance questions. As organizations that administer and service section 403(b) plans, the members of the Committee are in a unique position to appreciate the cost and complexity that would result from the proposed new requirements. These increased costs and administrative burdens have the potential to adversely impact the retirement security of employees at nonprofit organizations, and we urge you to reconsider the proposal to extend the full universe of reporting requirements to 403(b) plans.

The very idea underlying the enactment of section 403(b) was to provide charitable and other nonprofit employers with a simplified and administratively easy retirement plan. Charitable and other nonprofit organizations often have an extremely limited administrative capacity and are reluctant to take on new responsibilities that could come at the expense of their charitable mission. One of the principal purposes of section 403(b) is to encourage these organizations to sponsor retirement plans. Section 403(b) has always been intended to require limited employer involvement (whether or not the plan was covered by ERISA) and the long-standing reporting requirements for ERISA-covered 403(b) plans have appropriately reflected this concept.

The preamble to the proposed revisions indicates that the Department of Labor is considering extending the full range of reporting requirements to ERISA-covered 403(b) plans because of a concern about compliance problems in 403(b) plans. The preamble notes that the predominant issue has been the improper handling of employee contributions. It goes on to say that “[a]mending the annual reporting requirements to put Code section 403(b) plans on par with other pension plans covered by Title I of ERISA would enhance the Department’s oversight capabilities and improve compliance in this area without substantial burden.” We respectfully disagree that the proposed reporting changes will materially improve compliance or will come without substantial burden.

Even the proposed Short Form 5500 (which will apply to many 403(b) plans) involves a significant measure of information gathering, including difficult compliance questions and extensive financial information. The latter would be particularly difficult for many 403(b) plan sponsors to assemble and integrate because, unlike 401(k) plans, 403(b) plans rarely have a centralized recordkeeper and typically involve more than one unrelated financial institution. This means that the plan sponsor will be in the unenviable circumstance of having to gather the requisite financial information from a wide range of providers and piece together the Form 5500 on their own. The alternative is to hire a centralized recordkeeper (or Form 5500 preparer) and that could materially increase costs in the typical 403(b) program.

Further, we doubt the proposal will improve compliance, particularly if, as the preamble indicates, the core issue is delinquent participant contributions. Many nonprofit organizations maintain two 403(b) plans -- one to receive salary reduction contributions and one to receive non-elective employer contributions. The salary-reduction-only plan is typically exempt from ERISA.¹ The result is that participant contributions are very often made to a non-ERISA plan and expanding the Form 5500 reporting requirement for the ERISA-covered arrangement will do nothing to address perceived problems with delinquent participant contributions. It could even create an incentive for employers that currently maintain a single 403(b) plan for both employer and salary-reduction contributions to establish separate salary-reduction-only arrangements that are exempt from ERISA.

More generally, we seriously question the extent to which there are significant Title I compliance problems in 403(b) plans. One of the distinguishing features of 403(b) plans is that these plans can only be funded through annuity contracts and mutual fund custodial accounts. The fact that amounts are held exclusively by financial institutions that are extensively regulated under state and federal law provides a fundamental backbone of compliance. We recognize that many ERISA-covered 403(b) plans have historically operated with relatively informal plan documents and that, to some extent, this lack of a written plan document may have created compliance issues. However, as you know, the Internal Revenue Service and the Treasury Department are close to issuing final regulations that are expected to require a more formal written plan document and generally require a heightened level of employer involvement. It makes little sense to make further changes to improve compliance before the changes required by the pending regulations are effective and can be evaluated.

We also note that the proposed revisions to the Form 5500 will place enormous pressure on identifying whether a 403(b) plan falls within the regulatory exemption from ERISA for salary-reduction-only arrangements that have limited employer involvement.² Today, there are a number of variables that an employer must consider in evaluating whether to maintain a level of employer involvement that subjects a 403(b) plan to ERISA. These considerations include ERISA preemption of state law, fiduciary responsibility under Title I of ERISA, annual reporting requirements and mandated disclosures to participants (e.g., SPDs). In our experience, many employers choose to actively involve themselves in their 403(b) plans and therefore subject their plans to ERISA after considering the benefits and burdens of ERISA coverage. This directly and significantly benefits participants through enhanced disclosure, careful fiduciary monitoring and selection of plan investments, and oversight of fees and expenses. The proposed revisions to the Form 5500 will greatly affect this calculus. Today, the Form 5500 requirements for 403(b) plans are not a material factor; however, the proposed revisions will undoubtedly be a significant consideration that will argue for limited employer involvement. We fear that the result will be fewer ERISA-covered 403(b) plans and fewer participants benefiting from the active fiduciary oversight of the plan sponsor. It is even possible that some employers

¹ See DOL Reg. section 2510.3-2(f).

² See, e.g., Advisory Opinion 94-30A (Aug. 19, 1994).

September 19, 2006

Page 4 of 7

who would otherwise make modest contributions will, on balance, choose not to make an employer contribution to avoid ERISA and any reporting requirements.

For these reasons, we urge you to preserve the current law reporting requirements for 403(b) plans subject to Title I of ERISA. Retirement plans maintained by charities and other nonprofit employers should not be treated like retirement plans maintained by for-profit employers. There are very real differences between these two types of plan sponsors, including their relative sensitivity to administrative burdens and costs. The current law reporting system recognizes these differences and should be preserved.

II. The portion of the Schedule A that requires reporting of insurance contract fees and commissions should be eliminated because it duplicates information that will be reported on the Schedule C.

The compensation reporting requirements of Schedule A of the Form 5500 have long been a sore spot for the insurance industry because the Schedule A applies only to insurance contracts and requires expansive reporting of fees and commissions paid on such contracts. The proposed revisions to the Form 5500 begin to conform the compensation reporting requirements for insurance contracts and other plan investments by imposing parallel requirements under the Schedule C, including mandated reporting of fees and commissions received from third-parties in connection with mutual funds. However, the proposed revisions preserve much of the inequitable treatment of insurers and we urge you to create a level playing field.

The proposed (and current) Schedule A requires reporting of all fees and commissions paid to brokers, agents, or other persons that are directly or indirectly attributable to a contract between a plan and an insurance company, insurance service or similar organization. This is true regardless of whether the fees are paid by the plan, the insurer or a third-party.³ As proposed, it appears that the same (and much more expansive) information would also be reported on the Schedule C. In this regard, the revised Schedule C would require reporting of all compensation paid to service providers to the plan, including commissions and fees charged to the plan on purchase, sale and exchange transactions. Like the Schedule A, this would be true regardless of whether those fees are paid by the plan or a third party. To the best of our knowledge, fees and commissions that are paid to brokers, agents and other persons are invariably paid for services rendered to the plan and would therefore be reported on the revised Schedule C.⁴ For this reason, the Committee believes that the compensation portion of the Schedule A should be eliminated. This would simplify the Form 5500 and create parity in treatment between insurers and other plan service providers.

³ See Advisory Opinions 2005-02A (February 24, 2005) and 86-17A (April 28, 1986).

⁴ Unlike the Schedule A, the Schedule C provides an exception from reporting where the compensation received by the service provider is less than \$5,000. We see no reason for this difference, which is another illustration of the different treatment of insurers under the proposed Form 5500.

September 19, 2006

Page 5 of 7

The instructions to the proposed Schedule C recognize that the information required under the Schedule A overlaps with the information required under the Schedule C. In this regard, an exception is provided from double reporting where the only compensation paid to a service provider is reported on the Schedule A. If, however, the broker, agent or other person receives other service provider compensation, then it appears that the instructions to the Schedule C would require double reporting of the same compensation information, *i.e.*, reporting would be required on both the Schedules A and C. We respectfully submit that this mandatory double reporting of compensation will not provide meaningful compensation information to plan sponsors and other users of the Form 5500. Compensation information that is reported twice is opaque at best and misleading at worst.

Moreover, regardless of whether the Schedule A compensation requirement is preserved, we urge you to reconsider the requirement that Schedule A compensation information be reported on the Short Form 5500. This will be the form used by many plans and, unless changed, it would continue the disparate treatment of insurers and other financial institutions. There is no comparable requirement on the Short Form 5500 for the Schedule C compensation information and, as discussed above, there is no basis for treating fees paid in connection with insurance contracts differently than fees paid in connection with other types of plan investments.

III. Further clarifications to the Schedules A and C are needed to allow insurers and other plan service providers to accurately report compensation.

As financial institutions that provide services to retirement plans, the members of the Committee are also concerned about the extensive changes that have been proposed to the Schedules A and C. The Committee strongly supports full and meaningful disclosure of the compensation earned by service providers to plans. However, it is important that the revised Form 5500 provide plan sponsors with useful information and create clear guidelines for providing service provider compensation information.

Notice of Failure to Provide Required Information. The proposed Form 5500 would create an entry on the Schedules A and C to allow plan sponsors to identify insurers and service providers that fail to provide the required compensation information. We suggest conditioning use of the entry upon notice by the plan sponsor to the insurer or other service provider. In our experience, plan sponsors frequently misunderstand the compensation reporting requirements and/or the products or services purchased by the plan. We are concerned that the new entry will generate numerous "false positives" with plan sponsors checking the box based on a misapprehension about the reporting requirements. Many of these mistaken entries could be avoided if the sponsor provided notice to the insurer or service provider to allow the parties to address any misunderstandings in a timely fashion.

Affiliated Entities. A separate issue relates to the treatment of affiliated entities under the proposed Schedule C. The instructions to the proposed Schedule C are unclear regarding the treatment of affiliated entities and the extent to which separate Schedule C reporting of payments between affiliated companies will be required. The Committee believes that all members of a controlled group of corporations should be treated as a single entity for

September 19, 2006

Page 6 of 7

Schedule C reporting purposes and we urge you to clarify the final revised Form 5500 instructions on this point.

Float Compensation. The members of the Committee are also concerned about the new reporting requirements that require monetizing and allocating float compensation to plans. Today, service providers generally do not track float at the plan level. However, in the normal course, float compensation is fully described to the plan fiduciary in a written policy that meets the standards described in Field Assistance Bulletin 2002-3. The Committee believes that this approach is appropriate and that monetizing float compensation will do little to expand the understanding of plan fiduciaries. More generally, any possible gain from monetizing and allocating float compensation should be balanced against the incredibly burdensome systems changes that would be necessary to allow for a plan-level allocation of float. In this regard, one member of the Committee has indicated that it would need to reprogram at least five different computer systems in order to capture the required float information. Among others, the systems would need to identify how and when a service provider received plan contributions, distinguish plans covered by Title I of ERISA from other plans, calculate the daily interest rates and store the amounts calculated. For these reasons, we recommend eliminating the new reporting requirements for float compensation.

If the Department determines that float compensation must be monetized and allocated to individual plans, additional guidance is needed on how this should be done. The Committee appreciates that the proposed Form 5500 would allow service providers to estimate float compensation information with disclosure of the method of estimation. However, the proposed revisions are far from clear as to the scope of permitted estimation. For example, it is not clear whether financial institutions may make estimates based solely on the size of the plan or whether the new Form 5500 would require an effort to match up the actual float paid by a particular plan. Accordingly, at a minimum, we suggest providing additional guidance, including examples of estimation methodologies that financial institutions may rely upon.

IV. The effective date of the proposed revisions to the Form 5500 should be delayed.

As financial institutions that provide recordkeeping and other administrative services to retirement plans, the members of the Committee are apprehensive that the new Form 5500, as proposed, would be effective for plan years beginning in 2008. The new Form 5500, when finalized, will require massive recordkeeping and related systems changes. These changes will affect many different recordkeeping systems and will need to be fully operational by the first day of the first plan year covered by the new rules. It is unlikely that the final rules for the new Form 5500 will be issued before 2007, in part, because the proposed Form 5500 will need another round of extensive revisions to take into account the changes required by the Pension Protection Act of 2006. As a result, it appears that service providers will have less than a year to make all of the necessary changes. At an absolute minimum, service providers should have one full year between the effective date and the date the final rules are published to make these changes.

September 19, 2006

Page 7 of 7

We also suggest that the Department consider re-opening the comment letter period. The proposed revisions to the Form 5500 were released on July 21 and comments were due on September 19. We have some concern that stakeholders affected by the proposed revisions have not had the opportunity to focus on the revisions, particularly in light of the attention and resources that have been needed to review the Pension Protection Act of 2006, which was signed into law on August 17.

* * * *

Thank you for your time and consideration of these matters. Please do not hesitate to contact the undersigned if you have any questions.

Sincerely,



Joseph F. McKeever



Jason K. Bortz

The Committee of Annuity Insurers
The Willard Office Building
Suite 1200
1455 Pennsylvania Ave., NW
Washington, D.C. 20004

Aegon USA Inc., Baltimore, MD
AIG American General, Wilmington, DE
Allstate Financial, Northbrook, IL
AmerUs Annuity Group Co., Topeka, KS
AXA Equitable Life Insurance Company, New York, NY
F & G Life Insurance, Baltimore, MD
Fidelity Investments Life Insurance Company, Boston, MA
Genworth Financial, Richmond, VA
Great American Life Insurance Co., Cincinnati, OH
Guardian Insurance & Annuity Co., Inc, New York, NY
The Hanover Insurance Group, Worcester, MA
Hartford Life Insurance Company, Hartford, CT
ING North America Insurance Corporation, Atlanta, GA
Jackson National Life Insurance Company, Lansing, MI
John Hancock Life Insurance Company, Boston, MA
Life Insurance Company of the Southwest, Dallas, TX
Lincoln Financial Group, Fort Wayne, IN
Merrill Lynch Life Insurance Company, Princeton, NJ
Metropolitan Life Insurance Company, New York, NY
Nationwide Life Insurance Companies, Columbus, OH
New York Life Insurance Company, New York, NY
Northwestern Mutual Life Insurance Company, Milwaukee, WI
Ohio National Financial Services, Cincinnati, OH
Pacific Life Insurance Company, Newport Beach, CA
The Phoenix Life Insurance Company, Hartford, CT
Protective Life Insurance Company, Birmingham, AL
Prudential Insurance Company of America, Newark, NJ
Sun Life of Canada, Wellesley Hills, MA
USAA Life Insurance Company, San Antonio, TX