



November 22, 2016

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: RIN 1210-AB63 – Annual Reporting and Disclosure; Proposed Revision of Annual Information Return/Reports

The National Federation of Independent Business (NFIB) submits these comments for the record to the Employee Benefits Security Administration (EBSA), Internal Revenue Service (IRS), and Pension Benefit Guaranty Corporation (PBGC) (collectively, the Agencies) regarding the notice of proposed rulemaking: “Annual Reporting and Disclosure;” and the notice of proposed forms revision: “Proposed Revision of Annual Information Return/Reports,” (the Proposals) published in the July 21, 2016, edition of the *Federal Register*.

NFIB is the nation’s leading small business advocacy association, representing members in Washington, DC, and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate, and grow their businesses.

Proposals background

The EBSA proposes to update regulations under the Employee Retirement Income Security Act of 1974, as amended (ERISA). The proposed amendments are designed to conform the agency’s reporting regulations to proposed revisions to the Form 5500 Annual Return/Report of Employee Benefit Plan and Form 5500-SF Short Form Annual Return/Report of Small Employee Benefit Plan.

Under Titles I and IV of ERISA and the Internal Revenue Code, pension and other employee benefit plans are required to file annual returns/reports concerning, among other things, the financial condition and operations of the plan. Filing a Form 5500,

together with any required schedules and attachments in accordance with their instructions, generally satisfies these annual reporting requirements. Therefore, collectively, the Agencies propose revisions to the form that they contend is an important disclosure document for plan participants and beneficiaries, as well as necessary for enforcement, compliance, and research.

In the United States, there are an estimated 2.3 million health plans, a similar number of other welfare plans, and nearly 681,000 private pension plans, according to the Agencies. These plans cover roughly 143 million private sector workers, retirees, and dependents, and have estimated assets of \$8.7 trillion. The Form 5500 is a source of information and data concerning the operations, funding, and investments of more than 806,000 of these pension and welfare benefit plans.

Under the Proposals, the Agencies would extend reporting to all plans that provide group health benefits that have fewer than 100 participants and are covered by Title I of ERISA, most of which are currently exempt from reporting requirements. The Agencies also propose the addition of a new schedule (Schedule J) for all group health plans. All told, the Proposals would increase the number of small plans reporting from 6,200 under the current structure to 2,158,000, according to the Agencies' estimates. The Agencies estimate that aggregate annual reporting costs to this group of filers would increase from \$4,100,000 to \$227,900,000 – more than 55 times the current cost.

As a matter of practice, a small health plan is typically offered by small businesses. Therefore, the new reporting burden and associated costs described above would fall almost entirely on small businesses that offer health coverage to their employees.

Concerns with the Proposals

NFIB is concerned that the Proposals are an excessive new burden that benefits neither employers nor employees. Rather, the Proposals penalize small businesses that offer health plans to their employees by saddling them with complex and time-consuming paperwork. The Proposals are a prototypical example of the type of red tape small businesses often cite as a hindrance to their ability to operate successfully.

In the Initial Regulatory Flexibility Analysis (IRFA) of the Proposals, the Agencies estimate an average annual cost of \$37 to the 1,869,000 small health plans that are fully insured, and an average annual cost of \$547 to the 289,000 small health plans that are unfunded, combination unfunded/insured, or funded by a trust.

After analyzing the technical appendix to the Proposals,¹ NFIB believes the Agencies underestimated the costs – specifically for the small businesses with fully insured small health plans. While the technical appendix explains the wage rates it used to estimate cost – about \$98 per hour in-house and \$115 per hour using an outside accountant – it fails to clearly explain how much time it expects each business to spend. Utilizing the wage rates above, however, it appears the Agencies estimate it will take between 19 and 22 minutes to file the form. This estimate demonstrates a fundamental misunderstanding of the impact of complex regulatory paperwork on small businesses on the part of the Agencies.

According to an NFIB Research Foundation survey on paperwork and recordkeeping, 55 percent of the time the person handling the compliance paperwork is the business owner.² This individual is not an expert in filling out forms, so it will take considerably more time than the Agencies estimated to merely read the directions and understand what information he or she will have to obtain to complete it. This scenario is particularly likely for the 99.7 percent of small health plan filers that will be completing the Form 5500 the first time, according to the Agencies' estimates.

Bear in mind, the Department of Labor (DOL) recently increased penalties for non-compliance with Form 5500 under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, and the DOL's implementing regulations. Small business owners who fail to file a complete or accurate report face a maximum penalty of \$2,063 per day. The penalty amount increases the pressure on a small business owner to complete the form correctly, a difficult prospect considering nearly all filers in the first year of the new form will have never seen it before. This reality ensures that small business owners will take even more time to ensure they understand and have correctly filled out the form. Instead of several minutes, as the Agencies estimate, we believe small health plan filers will spend multiple hours on the form.

Moreover, if finalized, the Proposals would be piled on top of other notable regulatory burdens stemming from the Patient Protection and Affordable Care Act of 2010 (PPACA). Certain businesses with fewer than 100 employees are subject to the employer mandate and must comply with Forms 1094 and 1095 reporting, another IRS requirement. All businesses with fewer than 100 employees must furnish employees with a Notice of Coverage Options Document, another DOL requirement. Regrettably, in its analysis under Executive Orders 12866 and 13563, which in part requires agencies proposing regulations to analyze cumulative burdens, the Agencies failed to assess the

¹ [Technical Appendix: Documentation of the Methodology Used to Calculate the Burden Associated with the Proposed Form 5500 21st Century Initiative](#). July 21, 2016

² Dennis, William J. [NFIB National Small Business Poll: Paperwork and Record-keeping](#). NFIB Research Foundation. 2003.

Proposals' interplay with the collective impact of new healthcare mandates imposed since 2010.

NFIB is concerned that when viewed through the prism described in this section, many small businesses may determine it makes more sense to stop offering health coverage to employees than to try to comply with yet another healthcare mandate. Specifically regarding the Proposals, the prospect of multiple hours of complex paperwork, hundreds of dollars of added costs, the prospect of fines and penalties, and the lack of a clear benefit from the Proposals to employers or employees, this effort may be one that leads small business owners to get out of providing health coverage to employees. Small business offer rates declined by 25 percent between 2010³ and 2015⁴, with fewer than 30 percent of businesses with fewer than 50 employees offering group health insurance to employees. The decline can be attributed to, at least in part, the rising costs of insurance premiums and compliance burdens.

Fortunately, there are options to minimize the impact of this rule on small businesses, explained below.

Recommendations

NFIB recommends that the Agencies revise the Proposals by maintaining the current exemption for all plans that provide group health benefits that have fewer than 100 participants, which would exempt most small health plans. The Agencies have not sufficiently demonstrated any benefit to employers or employees by requiring all health plans to file Form 5500. Instead, the only putative benefits are to regulators in the form of increased enforcement capabilities, and allegedly to researchers. These narrow benefits do not justify the burden placed on small businesses. Accordingly, the Agencies should not saddle small health plans with unnecessary red tape.

Should the current exemption be discontinued, as proposed, NFIB recommends against creating the new Schedule J. Small businesses do not have access to information required on the proposed Schedule J, such as information about rebates or reimbursements from a service provider, claims payment information, and a compliance checklist for federal laws. Insurance companies possess this information – not small businesses – so it is unreasonable to expect small businesses to provide the information to the Agencies. At a minimum, the Agencies should clarify that insurance companies must provide this information to small businesses.

³ [Medical Expenditure Panel Survey series](#), Agency for Healthcare and Research and Quality, Department of Health and Human Services, 2010.

⁴ [Medical Expenditure Panel Survey series](#), Agency for Healthcare and Research and Quality, Department of Health and Human Services, 2015.

Though we maintain the current exemption should be continued, if the changes are finalized as proposed, the Agencies should protect first-time small health plan filers by providing a one-time waiver from penalties for new filers. These filers, as explained above, are far more likely to make good faith mistakes than existing filers because of their lack of familiarity with the Form 5500 and its instructions, a lack of certainty about where to obtain the required information about their plan needed to fill out the form properly, and the pressure of a recently-increased penalty. A reasonable, good faith effort standard for penalty relief is consistent with other PPACA requirements, namely the employer shared responsibility provision.⁵

Conclusion

NFIB urges the Agencies to address the concerns discussed above. The Proposals would make it more burdensome for small businesses to offer group health plans by increasing compliance time and cost with no clear benefit. Also, the Agencies have underestimated the time and costs in its economic analysis and its IRFA. Add in increased penalties, and some small businesses may decide to stop offering healthcare coverage to their employees.

We urge the Agencies to maintain the current Form 5500 exemption for small health plans. If the Agencies fail to do so, then we urge at a minimum that the Agencies provide first-time filers a one-time waiver of fines and penalties for a good faith compliance error.

Sincerely,



Daniel Bosch
Senior Manager, Regulatory Policy

cc:
Internal Revenue Service
Pension Benefit Guaranty Corporation

⁵ <https://www.irs.gov/affordable-care-act/questions-and-answers-on-information-reporting-by-health-coverage-providers-section-6055> (See question No. 3)