



December 3, 2016

The Honorable Thomas Perez  
Secretary of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

The Honorable Jacob J. Lew  
Secretary of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, D.C. 20220

RE: RIN-1210-AB63 - Submitted electronically via [www.regulations.gov](http://www.regulations.gov)

Dear Secretaries Perez and Lew:

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefit specialists nationally. The members of NAHU work on a daily basis to help individuals and employer groups purchase, administer and utilize health insurance coverage. As such, we are pleased to have the opportunity to provide comments on the notice of proposed rulemaking titled "Proposed Revision of Annual Information Returns and Reports" published on July 21, 2016, in Volume 81, Number 140 of the *Federal Register*.

NAHU greatly appreciates the willingness of the Departments of Labor and Treasury (the Departments) to accept comments from stakeholders about the proposed changes to the Form 5500 Annual Return/Report forms. NAHU members routinely help employers of all sizes on health plan establishment, implementation and compliance issues. This includes assisting employers currently subject to the Form 5500 requirements with the preparation and submission of the applicable reporting forms. We have consulted with our members extensively to prepare this letter, so please note that our comments, which are organized by topic below, reflect the views of experts in the field who fully understand group employee benefits.

### **Summary**

Even though NAHU understands the desire of the Departments to modernize the Form 5500 series and improve its readability and effectiveness for the Departments, employers, employees and the public, overall NAHU opposes this unprecedented expansion of federal requirements on employer-sponsored health benefit plans. Our members believe that the Departments have neither the need nor resources to handle the vast new data collections this proposed rule would impose. Furthermore, the proposed rule would impact over two million new American businesses and would be extraordinarily costly and burdensome on both currently exempt small-employer plans and on larger employers that are already subject to mandatory annual information-reporting requirements. The proposed rule will force employers to devote untold resources toward compliance, raise employer coverage premiums and expose employers of all sizes to new penalty and legal liability. NAHU members have significant concerns that this rule, if finalized as proposed, could dissuade



thousands of employers from continuing to provide health coverage to their employees. We urge additional public review of this measure through a public hearing, an extended regulatory comment process and extensive employer testing of any new reporting and filing requirements.

### **Proposed Increased Scope of the Form 5500 Data Collection**

The proposed rule would dramatically expand the scope of the data collected from employer-sponsored benefit plans, which raises great concern among our members. NAHU does not believe that the proposed rule adequately explains what the Departments will do with the new data they intend to collect or how you will manage, store, analyze or effectively use such data. While the preamble to the proposed rule claims that the newly collected data will be used to enhance plan-enforcement and compliance efforts, the Departments do not make it at all clear where you will get the increased expertise and analytic resources needed to actually use this new data for plan enforcement or any other purpose. Nor do you explain where increased plan-enforcement resources, such as the manpower to conduct more plan audits, will come from. Until the Departments can clearly articulate not only what will happen with this exhaustive amount of new data to be collected, but also how it will be processed and utilized both immediately and long-term, NAHU believes that no new data should actually be required to be collected from employer-sponsored plans. While the vast majority of this employer-plan data will not be required to be reported until the 2019 plan year (with the filing due in 2020), it is not at all clear that the Departments will be any way prepared to handle the data by then, so we oppose its collection.

### **Proposed Expansion of the Number of Plans Required to Complete Form 5500**

In addition to dramatically increasing the amount of data that will be collected from employer-sponsored benefit plans, the proposed rule would eliminate the current exemption from reporting for certain group health plans covered by Title I of ERISA. This means that all group health plans covered by Title I of ERISA will be required to file a Form 5500 Annual Return/Report, even though right now the vast majority of employer plans that provide group health benefits to fewer than 100 participants are exempt. By the Departments' own estimates, the elimination of current exemptions will increase the number of American employers subject to the Form 5500 filing requirements by 2,151,200. This enormous proposed expansion of the scope of covered entities raises significant concerns with the membership of NAHU and the millions of small and midsize business owners our members have as clients.

The proposed new filing requirement for group health benefit plans serving fewer than 100 participants will be incredibly expensive and burdensome for small and midsize employers to take on. Most of the employers that will newly be subject to Form 5500 filing requirements have limited or no dedicated benefit staff and few compliance resources. These smaller employers have little to no bandwidth to take on new reporting requirements, especially those that come along with significant penalties for filing failures and are designed to bring additional federal regulatory and public scrutiny on their specific benefit plan practices, including compliance liabilities. While the proposed rule would only require fully insured group benefit plans with less



than 100 participants to complete a limited portion of the updated Form 5500 and the new schedule J related to health benefit plans, they would still be required to provide participation data, coverage details, insurance company information and benefit structure information. In most cases, these exempt small-employer plans do not currently have mechanisms in place to track and report this data and, in many instances, they will need to rely on their health insurance issuer to provide it. When you consider this proposed expansion of Form 5500 filing to smaller-employer health plans from the small or midsize business owner's perspective, it is hard not to think that the Departments aren't setting them up to fail.

Actually, though, in the preamble to the proposed rule, the Departments indicate that the objective in eliminating the small-employer exemption is to fill an information gap and increase their ability to enforce the ERISA requirements that apply to group health plans. While NAHU can appreciate why the Departments would like to collect more information about smaller-employer group health benefit plans to improve plan compliance, our members wonder whether or not this is actually the most effective and least expensive way to do it. If the true goal is to protect consumers and improve the design and administration of group benefit plans of all sizes, shouldn't the Departments focus on ensuring that group plans are compliant when they are initially constructed?

Most Americans in employer-sponsored health insurance coverage plans are covered through fully insured health insurance products. Most of the employers that purchase these fully insured health plans are currently exempt from the Form 5500 filing requirements, although many larger employers that have to file Form 5500 currently offer fully insured coverage options to their employees as well. Every single fully insured health policy sold in this country is subject to state regulation designed, among other things, to ensure compliance with federal and state consumer-protection requirements. State regulators handle this state-based review and enforcement of health plan construction during both the policy filing and review process and during market-conduct examinations. If the Departments would focus their significant resources on working with health plan issuers upfront on health plan design, as well as with helping state regulators and their professional association, the National Association of Insurance Commissioners with effective plan screening, then you could help establish consistency in market-conduct examinations and policy-review processes relative to ERISA and its subsequent amendments relative to all fully insured health benefit plan products sold nationwide at the issuer level. The result would be the assurance that the vast majority of health plans sold in this country were compliant with most federal consumer protections before they were ever marketed to a single employer.

In the preamble, the Departments express the hope that they will better able to "determine which plans might be affected by noncompliant plan provisions... [and] better coordinate its enforcement efforts with affected service providers and other federal and state agencies." Rather than require smaller businesses to undergo an extensive and expensive reporting process that will also be time-consuming and costly for the federal government to implement and review, wouldn't a better and less expensive course of action be for the



Departments to simply start out with outreach to all issuers and all state regulators right away? NAHU notes that when the final recommendations of the White House Task Force on Mental Health and Substance Use Disorder Task Force were released on October 28, 2016, they were accompanied by the awarding of \$9.3 million in federal grant funds to states to help insurance regulators monitor compliance with the mental health and substance use disorder parity protections. These funds were awarded because the task force recognized that increased support of both issuers and state regulators would be a very cost-effective and efficient way to ensure wider parity compliance and protections for a huge number of Americans. We would encourage the Departments to follow the lead of this task force with regard to ensuring widespread consumer-protection compliance among millions and smaller and fully insured plans rather than focusing huge, burdensome and punitive enforcement efforts at the small-employer level.

Additionally, if increased small-employer plan compliance is truly the Departments' goal rather than simply the imposition of penalties, then NAHU believes it would be very beneficial to employers and their group benefit plan beneficiaries if the Departments would devote more resources to helping the small-employer plans comply with the requirements of ERISA and its subsequent amendments up front. Not all compliance violations will be found through monitoring fully insured plans at the issuer level, since clearly ERISA and its subsequent amendments impose requirements directly on employer plans, including small-employer plans. If the goal is truly to ensure that all group health plan beneficiaries receive the protections afforded to them under the law, then greater education for health plan administrators is warranted. Creating more sample compliance materials, checklists, online resources and guidance to make ERISA compliance generally simpler and less intimidating up front would be much more effective than imposing extremely burdensome and costly reporting requirements on small and midsize employers and non-compliance penalties after the fact.

### **New Compliance Responsibilities for Large-Employer Health Benefit Plans and the Proposed New Schedule J**

The proposed rule doesn't just negatively impact small-employer benefit plans. It would also impose immense new compliance burdens on employer group health benefit plan sponsors that are already subject to the Form 5500 filing requirements. The new Schedule J requirements alone are estimated to impact 2,205,900 group health benefit plans of all sizes, and the Departments estimate that the filing costs for these entities will increase by \$202.6 million dollars. NAHU members believe that your estimate is actually very low, as it just covers the increased costs employer plans will need to pay to compliance vendors for form preparation and submission.

The estimated compliance costs for current health benefit plan filers do not take into account the development of systems to track data that will be required by the new Schedule J, which is not currently readily available to most employer-plan sponsors. For example, data on denied claims and appeals would not normally be readily available to any employer, given that almost all plan sponsors delegate claims processing to third-party administrators and/or health insurance issuers for many reasons, not least of which are health information privacy requirements. Even if some claims data is available, employers do not routinely track



claims data in the manner outlined by the new proposed Schedule J, and neither do TPAs or issuers. The data needed to complete Schedule J as outlined is not necessarily easily retrievable from existing claims-processing systems either, but now sponsors of larger plans and self-funded plans will have to develop a means of doing so and absorb all related time and technology costs.

### **Financial Impact on Plans**

Plan compliance costs do not represent the only financial impact this proposed rule will have on employer group health plans. The new requirements will not only have a human resource cost on employers that offer coverage; health insurance carriers and plan third-party administrators will need to increase staff to be able to handle the new volume of data that will be required too. Based on the content of the proposed rule, almost every group health policy sold nationally will need to be reflected on a new Schedule J, and third-party administrators and health insurers will need to be prepared to provide employers with the data needed to complete all of these Schedule J filings. Surely, this will impact employer and employee premium costs as increased carrier and TPA fees are typically shifted to the plan sponsor via premium increases. Furthermore, since the proposed rule does little or nothing to make the actual process of Form 5500 series filing easier on an employer that wishes to file independently, the proposed rule essentially strengthens the position of filing vendors and will likely lead to price increases from those vendors.

### **Enforcement and Penalty Relief**

Other significant financial consideration this proposed rule poses for employer plan sponsors are penalty and legal liability costs. First, employer plans may be penalized for general Form 5500 filing violations and errors, and the fines involved are significant. Complicating that is the fact that the Departments use the Form 5500 series data they collect to initiate large-scale audits and enforcement actions against employers, and the excise tax penalties for plan violations are extremely significant. Even plans that are fully compliant today would face unanticipated and likely significant costs if subjected to a federal audit. Finally, since Form 5500 filings are public information and the data from Form 5500 filings is already routinely mined, including by plaintiff attorneys, employers are rightly concerned that the more information, the more likely that their health plan data will be used against them by an attorney bringing a suit by a disgruntled employee.

The increased information-reporting requirements and potential new audit risks for employers also beg the question as to what will happen if the employer's process of completing new and/or expanded Form 5500 filing requirements exposes a previously unnoticed compliance gap. Will employers that notice and report compliance gaps on a timely basis via the Form 5500 filings or other means be given a grace period to remedy prior mistakes? Or will they be subject to fines and enforcement action immediately? NAHU strongly recommends the imposition of a good-faith compliance standard for at least the entirety of each plan year for the first full new compliance period. Additionally, we recommend the suspension of fines for violations that occurred prior to the effective date of the final rule, are discovered during the compliance process and reported on a timely basis.



## **Overall Detrimental Impact on Employer-Sponsored Coverage**

NAHU members believe the significant new compliance responsibilities and costs this proposed rule would place on small-employer plans that are currently exempt from the Form 5500 filing requirements and larger-employer plans that already have Form 5500 reporting obligations may act as the last straw in dissuading many employers from continuing to sponsor group health benefit plans. When plan sponsors start taking into account the increased time, resources and costs that will be required to learn the new requirements and gather all of this new information, as well as the costs involved to have the forms prepared, they will be daunted. When they factor in their increased risk for significant compliance penalties and the reality that increased filing responsibilities may well result in plan audits and/or litigation, it's easy to see why some employers might elect to cease offering healthcare benefits to employees, particularly if they are not already subject to IRC §4980H. NAHU urges the Departments to carefully weigh the impact this proposed rule could have on the employer-based health insurance marketplace as a whole, and the detrimental impact this rule could have on millions of health coverage beneficiaries should employers decide to terminate their group health benefit plan offerings to avoid its compliance and liability burden.

## **Need for Additional Input from Stakeholders**

While NAHU understands and appreciates that the intent of this proposal is to modernize the Form 5500 series and to make the data it yields more useful for the Departments, employers and the public generally, we have significant concerns about the proposed changes to the Form series. In many cases, the proposed changes are inconsistent and unclear. Furthermore, they request health plan information that employers do not have readily accessible. NAHU strongly believes that additional public input from stakeholders is needed before the Departments move forward with any revisions to this proposed rule or any final form requirements.

We request that the Departments schedule a public hearing so that stakeholders representing all those who will be impacted by these proposed changes may be heard. Small and midsize business owners in particular are very unlikely have the resources to review a proposal of this magnitude thoroughly and submit formal comments for consideration. However, a public hearing would give the Departments the opportunity to hear from businesses owners directly about the costs, burdens and liabilities this proposal would place on them, as well as the impact it will have on their continued ability to offer group health insurance coverage to employees.

We also urge the Departments to, following a public hearing, issue a new and clearer proposed rule that takes into much greater consideration the practical concerns of affected business owners. NAHU believes that a revised proposal with a much more limited scope could meet the Departments' stated objective of modernizing the Form 5500 series and still increase its value to both the Departments and others while not overly burdening American employers.



One of the best ways to ensure that any revised Form 5500 series would be workable for all affected employer plans would be to build a comprehensive employer-testing process into the regulatory revision and finalization process. This would help the Departments ensure that the Form series instructions are clear, that the data the revised forms requests is reasonable and accessible to plan sponsors, and that the filing process is smooth. Extensive testing with a wide range of employer plans of varying industries, locations, sizes and types of benefit plans components will also help the Departments correct any unintended consequences and common compliance hurdles employers may face. Finally, testing will help the Departments much more accurately assess the time and implementation costs this proposed expansion of the Form 5500 requirements will cause. It would help pinpoint the true monetary cost and human capital expenses both employers and the Departments will encounter if we were to move forward with a Form 5500 series revision and expansion.

NAHU would be happy to assist the Departments with any revised Form 5500 series testing processes that may be developed. Our members would be able to provide their perspectives both as independent business owners who would be directly impacted by the expanded requirements and as those who routinely assist employers with their current Form 5500 compliance obligations.

NAHU sincerely appreciates the opportunity to provide comments on the proposed rule. We look forward to providing additional input via a public hearing and working with you on the testing and implementation of any changes to the Form 5500 Annual Return/Report forms that are to come. If you have any questions about our comments or need more information, please do not hesitate to contact me at either (202) 595-0787 or [jtrautwein@nahu.org](mailto:jtrautwein@nahu.org).

Sincerely,

A handwritten signature in black ink, which appears to read "Janet Stokes Trautwein".

Janet Stokes Trautwein  
Executive Vice President and CEO  
National Association of Health Underwriters