

December 5, 2016

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

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

Re: Comments on Proposed Revision of Annual Information Return/Reports

Dear Sir or Madam:

This letter is submitted on behalf of the Employers Council on Flexible Compensation (“ECFC”) with respect to the proposed changes to the Form 5500, Annual Return/Report (“Form 5500”) as outlined by the Employee Benefits Security Administration (“ESBA”) in Federal Register Vol. 81, No. 140 on July 21, 2016 (the “Proposed Changes”).

ECFC is a membership organization dedicated to promote and protect the availability of benefit choices for working Americans through account based benefit plans which provide benefits in areas such as health care, child care and commuting. ECFC’s members include employers who sponsor employee benefit plans, including flexible spending arrangements (“FSAs”), health reimbursement arrangements (“HRAs”) and health savings accounts (“HSAs”), as well as third party administrators, health plan providers, payers, providers, payment networks, processors, financial institutions, and accounting, consulting, and actuarial companies that design or administer employee benefit plans. ECFC member companies assist in the administration of cafeteria plan and health benefits for over 33 million employees.

Under the current rules regarding the Form 5500, welfare benefit plans with under 100 participants, at the beginning of the plan year, that are unfunded, fully insured or a combination of insured and unfunded are exempt from the Form 5500 filing requirement. 29 CFR 2520.104-20. This exemption has been in place since the inception of the Form 5500 reporting requirement, and has enabled employer plan sponsors to sponsor many benefits (beyond primary health care) such as health flexible spending accounts, health reimbursement accounts, and supplemental insured benefits (such as dental, vision, accident, disability, and cancer coverage) without significant additional reporting costs. This long-standing exemption would be eliminated under the Proposed Changes and small welfare plans would now be required to file a Form 5500.

We request that ESBA reconsider the proposal in the Proposed Changes to eliminate the exemption from the Form 5500 filing requirement for small welfare benefit plans. The new requirement to prepare and file a Form 5500 would place a massive new burden on small businesses that sponsor these welfare plans. In the description to the Proposed Changes, ESBA estimates that compliance with this new requirement will place a burden on each employer that sponsors a small unfunded welfare

benefit plan of over 20 hours per year – the equivalent of three work days. Under ESBA estimates, a small employer will have to devote 3 days to fulfill this new reporting requirement. In addition, these small businesses will likely need to pay outside consultants to assist them in preparing the Form 5500. This additional cost to engage outside consultants will often outstrip the actual cost of providing the benefits to employees and in all cases will be an additional burden on these small businesses, particularly since many of these businesses are not obligated to provide these benefits to employees.

The burden of gathering considerably more plan information must be obtained from more than one entity. The small employer cannot possibly collect all the information for reporting from their own files. Additional information includes: information regarding rebates, refunds or reimbursements from service providers, individual and aggregate claims limits, and detailed payment data, including how many benefit claims were submitted, appealed, approved, and denied during the plan year. In addition, the total amount of claims paid during the plan year is also required.

We understand that there are reasons why the ESBA believes these Proposed Changes are necessary. The preamble to the Proposed Changes states that the Form 5500 serves as the principal source of information and data available to the Department of Labor, the Internal Revenue Service and the Pension Benefit Guaranty Corporation (collectively, the “Agencies”) concerning pension and welfare plans and the information received is essential to the Agencies’ enforcement, research and policy formulation programs. In addition, the preamble states that this information received through the Form 5500 Annual Return/Report is an important source of and data for use by other federal agencies, Congress, and the private sector in assessing employee benefit, tax, and economic trends and policies. However, the Agencies should realize that this is a massive new burden on small employers and relief should be provided for the small employers that voluntarily provide these benefits for their employees. While Congress did place additional burdens on the Agencies in enforcing the Affordable Care Act, it does not seem likely that Congress would have intended that small businesses should have to shoulder these additional reporting requirements for voluntarily providing employees these welfare benefits – especially for benefits that are excepted benefits exempt from the Affordable Care Act requirements.

If the Agencies are unable to continue to maintain the current exemption for small welfare plans, we encourage you to provide relief for the employers that sponsor these small supplemental welfare benefit plans by carving out ACA excepted benefits from the reporting requirements. Such an approach would better align and balance the Agencies’ need for additional information under the Affordable Care Act with the additional cost imposed by such a requirement.

We appreciate the opportunity to comment on these critical issues, especially as they relate to small businesses that voluntarily provide welfare benefits to their employees. If additional information on any of these issues would be helpful, please feel free to contact me at (202)465-6397 or at wsweetnam@ecfc.org.

Sincerely,



William F. Sweetnam, Jr.
ECFC Legislative and Technical Director