



December 5, 2016

The Honorable Phyllis C. Borzi
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210
Sent via regulations.gov

RE: RIN 1210-AB63; Proposed Revision of Annual Information Return/Reports

Dear Assistant Secretary Borzi,

The National Association of Dental Plans (NADP) appreciates the opportunity to provide comments on the proposed amendments to Department of Labor (DOL) regulations relating to annual reporting requirements under Part 1 of the Employee Retirement Income Security Act of 1974 (ERISA). The proposal would amend reporting requirements 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 (Form 5500.)

➤ **RECOMMENDATION:** The proposed regulation mandates a significant increase of data reporting by employers to the DOL requiring new health plan data, including dental. As drafted, the regulation will impose burdensome and costly requirements with a substantial impact to premiums on a voluntary benefit. Due to the impact, in the past the DOL has exempted standalone dental plans (SADP) from some reporting requirements. NADP recommends the DOL consider the ramifications and exempt dental plans from the new reporting regulations.

AUTHORITY

As HIPAA-excepted benefits, the treatment of dental plans within regulations is often not clear. To better understand the authority to include SADPs in the proposed regulation, following is a legal review of ERISA's reporting requirements and their application to dental plans:

Section 104(a)(1) of ERISA requires the "administrator" of an "employee benefit plan" subject to ERISA to file an annual report with the DOL. Section 103(a) requires the report to be published, and Section 103(b)-(g) contains rules regarding the contents of the report. Section 103(c)(5) requires the plan administrator to provide "[s]uch financial and actuarial information including but not limited to the material described in subsections (b) and (d) of this section as the Secretary may find necessary or appropriate." Section 104(a)(2)(A) adds that the

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12700 Park Central Drive • Suite 400 • Dallas, Texas 75251

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DOL is not precluded from “requiring any information or data from any such plan to which this part applies where he finds such data or information is necessary to carry out the purposes of this subchapter.”

The DOL has implemented these provisions by requiring administrators to file Form or Form 5500-SF, with any required schedules and attachments [29 C.F.R. § 2520.103-1(b)].¹ Section 104(a)(3) also allows the DOL to exempt any welfare benefit plan from all or part of the reporting requirements, or to provide for simplified reporting, if it finds that the requirements are inappropriate as applied to welfare benefit plans. The DOL has implemented this provision by allowing welfare benefit plans with fewer than 100 participants to use the simplified Form 5500-SF, [29 C.F.R. § 2520.103-1(c)] and by completely exempting welfare benefit plans with fewer than 100 participants that do not require employee contributions and are fully insured or pay benefits solely from the employer’s general assets [29 C.F.R. § 2520.104-20].

Most group health plan SADPs also are employee benefit plans under these rules. Section 3(3) of ERISA defines an “employee benefit plan” as either an “employee welfare benefit plan” or an “employee pension benefit plan” [29 C.F.R. § 2510.3-3]. Section 3(1) of ERISA defines a “welfare benefit plan” as “any plan, fund, or program . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits” or certain other benefits [29 C.F.R. § 2510.3-1]. “Employer” means the employer of the employees covered by the plan. The DOL has long taken the position that dental benefits are a type of medical or health benefits included in Section 3(1) of ERISA [DOL Advisory Opinion 95-03A (March 3, 1995); DOL Advisory Opinion 81-40A (March 6, 1981)], and courts have come to the same conclusion [*Balestracci v. NSTAR Electric & Gas Corp.*, 37 E.B.C. 2422 (1st Cir., May 31, 2006); *Davidowitz v. Delta Dental Plan of California*, 753 F Supp. 304 (N.D. Cal. 1990)].

Some group health plan SADPs might not be employee benefit plans if employer involvement is minimal. The ERISA regulations say that a program is not a “welfare benefit plan” if it is both voluntary and paid for entirely by employees, and, furthermore, “the sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer” [29 C.F.R. § 2510.3-1(j)]. Although some group health plan SADPs can qualify under this rule, many are selected and thus effectively endorsed by the employer and thus do not satisfy the third requirement. Also, some courts have held that an employer “contributes” to a plan if it provides employees with a benefit that they could not receive as individuals, e.g., a group plan at group plan rates [*Spillane v. AXA Financial, Inc.*, 648 F. Supp. 2d 690, 698 (E.D. Pa. 2009)].

In most cases the employer that sponsors the group health plan SADP, and not the dental carrier, is legally responsible for filing the Form 5500. The obligation to file the Form 5500 falls on the

¹ Section 4064 of ERISA and Sections 6058 and 6059 of the Internal Revenue Code of 1986 (the “Code”) contain similar reporting requirements, which likewise are satisfied by filing Form 5500. However, they apply only to pension plans and therefore are not relevant for purposes of these comments.



“administrator” of the group health plan. Section 3(16) of ERISA defines an “administrator” in relevant part as “the person specifically so designated by the terms of the instrument under which the plan is operated; [or] if an administrator is not so designated, the plan sponsor” [29 C.F.R. § 2510.3-16].² Some circuits have accepted the argument that insurance companies can become “de facto” plan administrators when employers allow them to perform all significant aspects of plan administration, even if their contracts state that they have no discretion and are not fiduciaries or plan administrators [*Rosen v. TRW, Inc.*, 979 F.2d 191 (11th Cir. 1992); *Law v. Ernst & Young*, 956 F.2d 364 (1st Cir. 1992); *Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073 (5th Cir. 1990); but see *Davis v. Liberty Mut. Ins. Co.*, 871 F.2d 1134, 1138 (D.C. Cir. 1989) (“it is manifest that Liberty Mutual cannot be the target of such a claim because, as the insurer, it is not the plan ‘administrator’ within the meaning of ERISA. . . . Liberty Mutual is nowhere designated by the plan as ‘administrator,’ nor has it been suggested that Liberty Mutual fits within the statutory definition of ‘plan sponsor.’”)]. But even in those circuits whether this is true depends on the facts of the particular situation.

While the ERISA summary illustrates the ambiguity of the inclusion for SADPs, the proposed regulation states, “plans that offer excepted benefits that consist of limited scope dental or vision benefits must still file a Schedule J.” And while the preamble to the proposed form asserts the DOL needs the additional information to better enforce its regulations and develop new health care guidance, it does not address the need for dental reporting. Many of the requirements to be applied to group health plan SADPs are not relevant or applicable.

NADP challenges the application of the proposed changes to group health plan SADPs, as the content requirements for the annual report in Section 103(b)-(g) of ERISA and within the preamble, require the collected information to be “necessary or appropriate” [81 Fed. Reg. at 47495 et seq], which is not illustrated for SADPs in the regulation. In addition, while general cost estimates are provided, the ramifications specific to SADPs were not assessed, and would be much more detrimental due to the low premium cost (roughly 1/12 of medical premium) and voluntary nature of the benefit. In fact, in the DC Circuit Court, the Court ruled against a government agency, saying the SEC “was arbitrary and capricious... and did not adequately assess the economic effects of a new rule [in that it] inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters” [*Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011)].

SADPs are not subject to the portability provisions of HIPAA, GINA, MHPAEA, Newborns’ and Mothers’ Health Protection Act of 1996, Women’s Health and Cancer Rights Act of 1998, Michelle’s Law, or to most of the substantive requirements of the ACA and yet the proposed rule would require carriers to answer compliance questions related to the aforementioned regulations that are not applicable to dental. Also, the more general information collection requirements in Sections 2715A and 2717 of the PHSA, which the DOL describes as a major motivation for Schedule J, do not apply to SADPs.

² The plan administrator is responsible for all aspects of plan administration and for all “plan assets” except those held in trust (which are the trustee’s responsibility), [DOL Reg. § 2509.75-8, Qs&As D-3 & FR-12], except to the extent that the plan documents allocate those responsibilities to other named fiduciary [ERISA §§ 402 & 405; DOL Reg. § 2509.75-8, Q&A FR-13].



FORM 5500 REQUIREMENTS

The new Schedule J has multiple Parts, many of which cannot be applied to dental plans, or will require extensive and therefore expensive IT changes:

Part I:

- Requires reporting numbers of dependents, which SADPs do not collect. Dental plans offer a family plan and do not collect data on spouses, children or dependents.
- Clarifications are necessary, for example a “plan year” is not described and could be calculated as a policy year or calendar year, as is the term “delinquency” which can be interpreted in multiple ways. A separate request is to report on HSAs and HDHPs, while another is on rebates, all of which cannot be completed by SADPs.

Part II:

- Requests include reporting on wellness programs and stop loss insurance all of which cannot be completed by SADPs.

Part III:

- All reporting would need to be filed by the employer, not the carrier.

Part IV:

- Most of the data requested, such as claims paid and denials would require extensive IT changes to be able to report per employer.
- Numerous clarifications would be needed, including defining ‘pending’ or ‘late,’ or determining appeal timing – whether it’s ERISA or state defined.

Part V:

- The majority of reporting would need to be by the employer, not the carrier. The remaining questions are not applicable to dental plans.

As seen above, the new Schedule J is not appropriate for SADPs, much of the information is not applicable, detailed clarifications are necessary, pulling the data will be extremely costly, and the remaining questions would need to be reported by the employer, not the carrier.

ADDITIONAL CONCERNS

- There are discrepancies among and between Schedule A and Schedule J.
 - The time period used for the Schedule A may not align with the time period that should be used for Schedule J. Currently, carriers are allowed to provide Schedule A information based on the insurance contract or policy year, while compensation may be reported on a calendar year. Schedule J should align clearly with Schedule A and allow for carrier flexibility moving forward.
 - Schedule A includes new questions that need specific clarifications, such as 11 which seems to require reporting when a premium is delinquent – which can happen on occasion without triggering a lapse in coverage, whereas reporting lapses in coverage from non-payment of premium is more appropriate. The reporting basis for delinquent premium should be the same for both Schedule A and Schedule J.
 - There is no clarification on carriers reporting lines of business to employers. If a carrier is offering medical and dental, or long term care and dental, are carriers required to report these products separately to the employer? To make adequate comparisons, this policy needs to be clarified within the requirements.

National Association of Dental Plans

12700 Park Central Drive • Suite 400 • Dallas, Texas 75251

972.458.6998 • 972.458.2258 [fax]

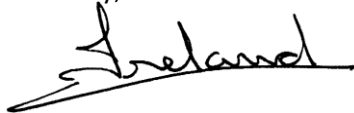


- At a time when employers are still implementing regulatory changes due to the Affordable Care Act (ACA), to add additional reporting on small employers may risk their willingness to continue to offer voluntary benefits. As more than 40 percent of companies offering dental coverage are small employers, NADP is deeply concerned of the implications on this community. The addition of small employers will increase some carriers administrative reporting by seven fold, and raise administrative costs, such as system changes and hiring personnel, significantly.
- The proposed regulation mentions the recently decided Supreme Court decision - *Gobeille v Liberty Mutual Insurance Company* which prohibits a state's All Payer Claims Database (APCD) from requiring the reporting of health care claims data by self-funded companies. Not all state APCDs collect dental data, and for states that do, there is not a uniform process to collect claims data. Until APCDs become more standardized (beyond a pilot program as suggested in comments), they should not be considered an alternative.
- The timeline as proposed initiates requirements in 2019 with reports being filed in 2020. Due to the enormous work needed on clarifications throughout the regulations and the substantial infrastructure changes needed by carriers to implement reporting requirements, the timeline needs to be postponed by at least three years past final regulatory passage.

RECOMMENDATION: NADP recommends the DOL exempt SADPs from the proposed regulations. The Department has not illustrated why dental plans were included as costs and impacts of reporting requirements were not detailed. There remains confusion on the integration of Schedule J with the current Form 5500 requirements and the application to SADPs. As well, the hardship specific to small employers offering SADPs is likely to have further ramifications than cost by reducing coverage and negatively impacting this segment of the population's oral health. These issues exemplify the additional problems created throughout the proposed regulations for voluntary SADPs.

NADP appreciates the opportunity to provide our comments to the proposed amendments to the DOL's Form 5500 as it relates to dental plans, and we look forward to future discussions. For any follow up, please contact NADP's Director of Government Relations, Kris Hathaway at khathaway@nadp.org or (972)458-6998 x111.

Sincerely,



Evelyn F. Ireland, CAE
Executive Director
National Association of Dental Plans

NADP Description

NADP is the largest non-profit trade association focused exclusively on the dental benefits industry, i.e. dental PPOs, dental HMOs, discount saving plans and dental indemnity products. NADP's members provide

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972.458.6998 • 972.458.2258 [fax]



dental benefits to more than 92 percent of the 205 million Americans with dental benefits. Our members include the entire spectrum of dental carriers: companies that provide both medical and dental coverage, companies that provide only dental coverage, major national carriers, regional, and single state companies, as well as companies organized as non-profit plans.

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