



December 5, 2016

Submitted Electronically via Email: e-ORI@dol.gov

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

RE: Comments on Proposed Revisions of the Annual Information Return/Report

To Whom It May Concern:

The Self-Insurance Institute of America, Inc. (“SIIA”) respectfully submits these comments in response to the Notice of Proposed Rulemaking on suggested revisions to the annual information return/report, more commonly referred to as the Form 5500. In particular, our comments focus on the proposed requirement that plan sponsors of self-insured “group health plans” covered by Title I of the Employee Retirement Income Security Act (“ERISA”) provide specific information about stop loss insurance coverage on the newly proposed Schedule J.

SIIA is a member-based association dedicated to protecting and promoting the business interests of companies involved in the self-insurance/alternative risk transfer marketplace. SIIA’s membership includes self-insured employers, third party administrators, and stop-loss/reinsurance carriers, among other industry service providers.

I. Comments

SIIA recognizes that the motivation to revise the Form 5500 is driven in part by the Department of Labor’s (the “Department’s”) interest in upgrading the ERISA Filing Acceptance System, and recompeting the contract for the new, “EFAST2” filing system. SIIA also understands the Department’s interest in collecting certain information from group health plans so the Department can fulfill its responsibility of enforcing ERISA, as well as other recently enacted laws, including the Patient Protection and Affordable Care Act (“ACA”). And, SIIA is supportive of the Department’s efforts to reduce duplicative reporting by allowing plan sponsors of group health plans to satisfy the new reporting obligations under Public Health Service Act (“PHSA”) sections 2715A and 2717 by filing a completed Form 5500 and Schedule J (and providing this information to certain parties, including the Department of Health and Human Services, the Department of Treasury, State Insurance Commissioners, enrollees, and the public).

However, SIIA believes that many of the proposed revisions to the Form 5500 significantly increase the burden of sponsoring a group health plan, especially for employers sponsoring a plan with fewer than 100 participants. SIIA also believes that some of the information that the Department is seeking to collect falls outside the Department's jurisdiction, and therefore, the collection of such information is unnecessary for ERISA and/or ACA enforcement purposes. This includes specific information about stop loss insurance coverage on the newly proposed Schedule J.

A. *The Department Does Not Have Enforcement Authority Over Stop Loss Insurance Coverage*

It is important to emphasize that the Department does not have any enforcement authority over stop loss insurance coverage. Rather, the States have primary jurisdiction over stop loss policies, and therefore, stop loss coverage is exclusively regulated by State Departments of Insurance; not the Department.

By the Department's own admission, the Department defers to the States when it comes to regulating stop loss insurance coverage. Specifically, Technical Release 2014-01 – issued on November 6, 2014 – provides that the Department takes the view that States may regulate insurance policies issued to plan sponsors, including stop-loss insurance policies.¹ Technical Release 2014-01 further provides that in the Department's view, a State law regulating stop loss insurance would not be preempted by ERISA.

B. *Stop Loss Insurance Policies Are Not "Plan Assets" As Defined Under ERISA*

It is also important to emphasize that stop loss insurance policies are not considered "plan assets" under ERISA, and therefore, stop loss insurance coverage is in no way governed by ERISA.

In DOL Advisory Opinion 2015-02A, the Department was asked whether stop loss insurance policies purchased by a plan sponsor to manage risk associated with a self-insured contributory group health plan (i.e., an arrangement under which employees pay a portion of the premium for coverage under the plan) would constitute "plan assets." In short, the Department found that so long as certain conditions are met,² the stop loss policies would *not* constitute "assets of the plan."

¹ See also, Kentucky Association of Health Plans Inc. v. Miller, 538 U.S. 329 (2003) (finding that States may regulate insurance policies issued to plans or plan sponsors, including stop-loss insurance policies, if the law regulates the insurance company and the business of insurance).

² DOL Advisory Opinion 2015-02A provides that in the case of a contributory self-insured group health plan, stop loss policies will *not* be considered "plan assets" if (1) the arrangement meets the criteria set forth in DOL Advisory Opinion 92-02A; (2) the sponsor utilizes an accounting system wherein participant contributions are not, in any way, used to pay stop loss premiums; (3) the plan continues to pay benefits and the stop loss insurer does not pay participant claims; and (4) the stop loss policies reimburse the plan sponsor only if it pays claims from its general assets without reimbursement from the insurer for claim amounts paid with participant contributions.

In addition, in DOL Advisory Opinion 92-02A, the Department first opined that a non-contributory self-insured contributory group health plan (i.e., an arrangement under which employees do *not* pay any portion of the premium for coverage under the plan) would *not* constitute “plan assets,” so long as certain conditions are met.³

In practice, plan sponsors obtaining stop loss insurance coverage are adhering to the conditions set forth in DOL Advisory Opinions 92-02A and 2015-02A. As a result, in most if not all cases, the stop loss insurance coverage is not an ERISA “plan asset.”

C. *SIIA Sees No Need for the Department To Collect Information on Stop Loss Insurance Coverage*

If States – which have the sole authority to regulate stop loss coverage – requested specific information about stop loss insurance policies obtained by a particular self-insured plan sponsor, as a general matter, SIIA would not question the motives for collecting this information. But, because the Department does not have jurisdiction over stop loss insurance (as evidenced by Technical Release 2014-01) – and because stop loss insurance is not governed by ERISA (as evidenced by DOL Advisory Opinions 92-02A and 2015-02A) – it is reasonable to question the Department’s motives here. Is the Department seeking to modify Federal law to somehow pull stop loss insurance coverage into the Department’s jurisdiction?

The Department has assured SIIA on a number of occasions that the Department is not seeking to regulate stop loss policies. If the Department’s position has changed, SIIA respectfully requests that for the sake of transparency, the Department specifically articulates any efforts to regulate stop loss insurance through the normal rulemaking process, and not through proposed revisions to the Form 5500.

SIIA recognizes that an argument can be made that the Department is asking for the specific information about stop loss insurance coverage for the Department’s internal data-mining purposes. And, the Department may also be seeking this information so it may include these data points in the annual report on self-insured plans the Department is directed to provide Congress in accordance with the ACA. While SIIA recognizes that these reasons may be benign, the burden associated with collecting specific information about a plan sponsor’s stop loss insurance coverage outweighs the need for possessing this data. Especially when the Department is not the primary regulator of stop loss insurance.

³ DOL Advisory Opinion 92-02A provides that in the case of a non-contributory self-insured group health plan, stop loss policies will *not* be considered “plan assets” if (1) the insurance proceeds are only paid to the employer who is the named insured under the policy; (2) the employer has all rights of ownership under the policy, and the policy would be subject to the claims of the employer’s creditors; (3) neither the plan nor any participant or beneficiary has any preferential claim against the policy or any beneficial interest in the policy; (4) the policy is not used to provide plan benefits or as security for payment of benefits; and (5) the benefits associated with the plan are not limited or governed by the amount of insurance proceeds received by the employer.

Thank you in advance for considering these comments. Please do not hesitate to contact me if you have questions, or if members of SIIA can serve as a resource on these very important matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Ferguson", with a long horizontal flourish extending to the right.

Mike Ferguson
President and Chief Executive Officer
Self-Insurance Institute of America, Inc.