



December 5, 2016

Joe Canary, Director  
Office of Regulations and Interpretations  
Employee Benefit Security Administrator  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210  
Email: [e-ORI@dol.gov](mailto:e-ORI@dol.gov)

Re: Proposed Comments Request for the Annual Return  
Report of Employee Benefit Plans  
RIN: 1210-AB 63

Dear Mr. Canary,

On July 21, 2016, the Department of Labor (DOL) published a Notice of Proposed Rulemaking proposing changes to the Form 5500 annual report for employee benefit plans. The proposal included a new Schedule J. Employee Benefit Management Services, Inc. (EBMS) is a third party administrator for self-funded welfare benefit plans. On behalf of its employer clients, EBMS submits the following comments.

EBMS recognizes that the DOL has the authority to establish additional reporting and disclosure requirements for ERISA welfare benefit plans, but respectfully requests that the DOL take into consideration the amount and breadth of the information required to accurately report on the proposed Schedule J and the extensive system changes that will be necessary for employers to undertake so that Schedule J reporting will provide meaningful and consistent data. Because the DOL proposes to eliminate the Form 5500 reporting exception for small unfunded welfare plans, this extends this significant and administratively burdensome reporting requirement to a large number of smaller employers of 100 employees or fewer. EBMS urges the DOL to balance the reasonableness of its requests for information to the resources of these smaller employers to provide the information.

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Small employers will need to take significant measures to secure the great amount of information that would be necessary to complete this new Schedule J --a daunting task for any employer and nearly impossible for those smaller employers. Therefore, EBMS strongly recommends the DOL consider a long implementation period with extended time for small employers that previously had an exemption from the Form 5500 reporting requirement. EBMS suggests a three year implementation period for large employers with an additional year for smaller employers to give the vendor community and employers the necessary time to change systems and make the adjustments necessary to report accurately for Schedule J.

We also recommend the DOL review the information it proposes to collect and design the questions in Schedule J to elicit consistent responses across all plans. Recognizing that employers will encounter definitional and data collection challenges as they work with their third party administrators and vendors, EBMS urges the DOL to work with the entire industry of claims processing entities to ensure the needs of all employers, not just the large institutional employers, are taken into consideration. EBMS suggests, if the DOL is not currently working closely with trade organizations such as the Society of Pension Benefit Administrators (SPBA), that it consider doing so. SPBA is a trade organization of third party administrators that offer services to a wide range of employers, ranging from the very small to the large sized employers. EBMS is a long-time member of SPBA and recommends the DOL consult the collective industry knowledge that SPBA represents.

While EBMS is appreciate of the DOL's efforts to garner better knowledge of the self-funded market, EBMS is concerned the DOL could use this new proposed Schedule J as a mechanism to collect information that would otherwise be unavailable because of the U.S. Supreme Court's decision in *Gobeille v. Liberty Mutual Ins. Co.* Schedule J should not be used by Vermont's and other state-mandated all-payer health claim databases to do an end-run around the *Gobeille* decision. Specifically, we do not believe Schedule J should serve as a substitute for the reporting obligation of a health plan to one of the state all-payer all claims databases. Likewise, we do not believe it appropriate for the DOL to implement pilot studies with these databases to develop a common data format. This is particularly of concern in Part IV, Health Benefit Claims Processing and Payment questions.

EBMS is concerned that questions will require the employer or its vendor to provide a legal opinion in order to answer the question and place itself in a position of considerable liability for its response should the DOL disagree with the response. For example, Part V, Compliance Information, Question 22 requires an employer to make the determination as to whether plan assets were "held in trust", a determination for which limited guidance exists, or incur the not insignificant expense of experienced benefits counsel to opine on this matter.

We have similar concerns with Question 23 for compliance with the new Summary of Benefits and Coverage. Consider the following statement in the instructions preceding Version April 2017 of the SBC -- "To the extent a plan's terms that are required to be in the SBC template cannot reasonably be described in a manner consistent with the SBC template and instructions, the plan or insurer must accurately describe the relevant plan terms while using its "best efforts" to do so in a manner that is still consistent with the instructions and template format as reasonably



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possible." As you may be aware, "best efforts" is open to interpretation; this is also true for the term "reasonably possible". This is potentially another matter for which an employer may find it compelled to incur the expense of experienced benefits counsel or place itself in a position of considerable liability for its answer.

On behalf of its employer clients, EBMS appreciates the opportunity to submit comments to the Department of Labor.

Sincerely,

A handwritten signature in black ink, appearing to read "Terri Hogan", with a long, sweeping flourish extending to the right.

Terri Hogan, JD, MBA

Employee Benefit Management Services, Inc.