

December 1, 2016

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W., Room N-5655
Washington, D.C. 20210

**Re: Proposed Revision of Annual Information Return/Reports (Form 5500 Series)
RIN 1210-AB63**

The American Retirement Association (ARA) is submitting this letter in response to the request for comments on the proposal to modernize and improve Form 5500 (“Proposal”) made by the Department of Labor (“DOL”), Internal Revenue Service (“IRS”) and Pension Benefit Guaranty Corporation (“PBGC”) (collectively, “Agencies”). The comments below are provided to the Agencies to outline the ARA’s primary overarching concerns with the Proposal. While the Agencies extended the comment period from October 4, 2016 to December 5, 2016, the Proposal is so expansive, the extension time did not adequately provide for the comprehensive line by line analysis that is needed. The ARA intends to provide additional comments regarding specific line items in the near future

The ARA is a national organization of more than 20,000 members who provide consulting and administrative services to American workers, savers, and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisors, consultants, administrators, actuaries, accountants, and attorneys. The ARA is the coordinating entity for its four underlying affiliate organizations, the American Society of Pension Professionals and Actuaries (“ASPPA”), the National Association of Plan Advisors (“NAPA”), the National Tax-deferred Savings Association (“NTSA”) and the ASPPA College of Pension Actuaries (“ACOPA”). ARA members are diverse but united in a common dedication to America’s private retirement system.

The Proposal adds or modifies questions regarding plan operations, service provider relationships, and financial management of plans. The stated goals of the Proposal are (1) modernizing financial information filed regarding plans; (2) updating fee and expense information on plan service providers, with a focus on harmonizing annual reporting requirements with the DOL's final disclosure requirements at 29 CFR 2550.408b-2; (3) enhancing mineability of data filed on annual return/reports; (4) requiring reporting by all group health plans covered by Title I of ERISA, including adding a new Schedule J (Group Health Plan Information); and (5) improving compliance under ERISA and the Code through selected new questions regarding plan operations, service provider relationships, and financial management of the plan. The ARA is concerned that the Proposal significantly underestimates the cost and burden to comply with the reporting requirements and that there is insufficient time to make the technology and procedural updates required for the proposed 2019 plan year effective date.

Overall Time and Cost Burden

The Proposal substantially underestimates the time and cost burden associated with complying with the new requirements. The Proposal is subject to the Paperwork Reduction Act of 1995 (“PRA”) (44 U.S.C. 3506(c)(2)(A)). The intent of PRA is to assist in minimizing the reporting burden in terms of time and financial resources and to assess the impact on respondents. As part of the required PRA statement, the

Proposal concludes that there is no additional recordkeeping burden. The Proposal provides, as an example, that “most businesses or financial entities maintain, in the ordinary course of business, detailed accounts of assets and liabilities, and income and expenses for the purposes of operating the business or entity. These recordkeeping activities were not included in the calculation of burden because prudent business or financial entities normally have that information available for reasons other than federal tax or Title I annual reporting.”

The conclusion that there is no additional recordkeeping burden is a wholly inaccurate assumption and reflects a fundamental misunderstanding of the current state of the industry and the way in which it continues to evolve. The time, financial, and technology burden which would result from the implementation of the Proposal is staggering. Many service providers have transitioned to an electronic information request, where that data automatically feeds into the software that prepares the Form 5500 series; therefore, the addition of any item to the information request requires technology and programming resources. In addition, although recordkeeping systems may maintain records about assets and liabilities in the normal course of business, the information is not readily available at the granular level required by the Proposal.

The determination of burden must recognize that every question being added to or modified on the Form 5500 series requires careful analysis to determine where or how to source the information for the appropriate response. While the underlying information may be available, unless there is sufficient time to budget for, plan, design, and build data capture/integration for these new elements, someone must manually collect, interpret, and enter the data somewhere so that it can be maintained for future years. In addition, the Proposal does not appear to consider that additional time will be required on an annual basis to complete the proposed reporting requirements. While plan sponsors generally engage service providers to assist with the preparation of the Form 5500 series, there are a number of new data elements that the average service provider cannot answer without specific input from the plan sponsor. This factor alone makes it highly likely that the Proposal will force service providers to increase staff in order to support the collection of such manual data elements and also to coordinate receipt of manual data elements from other service providers. These types of data elements are a step back from the modernization and technology investments (i.e., efficiencies) that many service providers have been able to make since the implementation of EFAST2. These efficiencies aid in providing cost effective and accurate Form 5500 preparation services.

In addition, while the Proposal intends to harmonize the financial disclosure requirements at 29 CFR 2550.408b-2 (“408b-2 Disclosures”), it fails in this regard. As proposed, the Schedule C does not allow the usage of formulas to express indirect compensation in the same way that is permitted in the 408b-2 Disclosures provided to plan sponsors. This failure results in the need for the industry to invest and design the necessary technology infrastructure to express the information in dollar amounts, which creates a significant burden.

On the whole, it is clear that the Proposal will require large scale changes to investment platforms, trust accounting systems, recordkeeping systems, reporting systems, and the software that supports the preparation of the Form. The cost of these substantial changes would likely be passed to the plan and, ultimately, to plan participants and beneficiaries.

The ARA recommends that the Agencies review the cost impact to the recordkeeping and reporting infrastructure when quantifying the cost increase of the Proposal and reconsider the extent of the changes in light of these cost considerations.

Impact on Small Plan Filers

Since 2009, small plan filers are able to qualify for a simplified Form 5500 filing (i.e., the Form 5500-SF) if the plan covers fewer than 100 participants at the beginning of the plan year and the investments are limited to so-called “eligible assets.” Plans that are not eligible to file Form 5500-SF must file the full Form 5500. The full Form 5500, which is generally filed by large plans, also requires the plan administrator to complete Schedules A, C, D, G, H, and R, and to develop other attachments. The Executive Summary to the Proposal provides that Form 5500-SF is filed by 86% of retirement plan filers (621,800 out of 723,300 total retirement plan filers).

The Proposal creates a substantial burden for small plan filers, particularly those defined contribution plans, including 401(k) plans, with participant directed investments. While the estimates of burden outlined in the Executive Summary to the Proposal show no anticipated reduction in the number of small plan filers eligible to file the Form 5500-SF, the Proposal modifies the definition of “eligible assets” in such a way that the majority of participant directed defined contribution plans would, in fact, be required to switch from filing Form 5500-SF to filing the longer, and more data intensive, full Form 5500.

The Proposal provides that Common Collective Trusts (“CCTs”) and Pooled Separate Accounts (“PSAs”) must be invested primarily in readily marketable securities in order to meet the definition of “eligible assets” for purposes of determining whether a small plan filer may submit Form 5500-SF. There is widespread use of target date (or other *fund of funds* approaches) offerings that are structured as CCTs (or PSAs) that invest in other CCTs (or PSAs). While not every *fund of funds* type investment offering would fail to be an “eligible asset” under this new definition, it is clear that a significant number of small plan filers would find themselves failing to qualify for the Form 5500-SF option.

Such *fund of funds* arrangements are often designed to offer participants an investment option which facilitates diversification at a lower cost and in a simpler fashion than managing a variety of individual fund choices. The fees and expenses associated with such *fund of funds* investment options are fully disclosed to participants as provided by 29 CFR 2550.404a-5 and to plan sponsors under the 408b-2 Disclosures.

In addition, it is unclear in the Proposal whether such vehicles would be deemed “hard to value,” which could also have an impact on the large plan market. Depending on the nature and number of such *fund of funds* investment offerings, it may hinder the plan’s ability to rely on the limited scope audit exemption.

The cost and time burdens of the Proposal will weigh heavily upon small businesses and the participants in plans impacted by this apparently intentional change in the definition of “eligible assets.” From a policy perspective, these changes could have the unintended consequence of plans being terminated or small employers choosing not to sponsor a new plan.

The ARA recommends that the Agencies consider the substantial impact of the Proposal on small plan filers.

Cost-Benefit and Risk Analysis and Compliance with Executive Order 13563

Signed in January of 2011, Executive Order 13563 (“Order”) seeks to improve regulation and regulatory review. It directs that the regulatory system “must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative.” Further the Order provides criteria where the primary concern is the effect of regulations on businesses, especially small businesses.

A cost-benefit and risk analysis should be undertaken as the costs of the Proposal will ultimately be borne by plan participants and beneficiaries. Executive Order 13563 requires, that a federal agency “...must,

among other things (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs ...; [and] (2) tailor its regulations to impose the least burden on society consistent with obtaining regulatory objectives taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;”¹ As described above, the ARA vigorously disagrees with the statement in the Proposal that there no recordkeeping costs needed to be considered. For this reason, the ARA recommends that the Agencies conduct a comprehensive cost-benefit and risk analysis taking into account the true costs of the Proposal. Much of the new information requested in the Proposal is available to the Agencies or participants by less burdensome means. While the needs of stakeholders, such as researchers and marketing organizations, are understandable, the costs of their research and marketing intelligence should not be borne by plans, participants, or beneficiaries.

The ARA recommends that the Agencies take a considered review of the benefit to be achieved by the Proposal versus the cost to comply with the increased reporting requirements and evaluate the modest risk of continuing with the existing reporting structure or some structure much less burdensome than has been proposed.

Proposal Implementation Timeline

Under the Proposal, the form revisions would begin with the Plan Year 2019 Form 5500 and are generally being coordinated with the procurement process related to the Electronic Filing Acceptance System (EFAST). It is common for a plan to engage a variety of service providers to facilitate recordkeeping, compliance, and Form 5500 preparation. When multiple computerized systems are utilized and multiple service providers are engaged by a plan, such businesses must arrange to reprogram systems and to coordinate collection and sharing of the required information. Before any business will invest the necessary resources to create new systems and processes, however, the forms and instructions must be published in final format. It generally takes 6-12 months for the approval of the capital investment and personnel allocations necessary to implement the required system changes. Thereafter, the extensive technology, communication, and procedure changes dictated by the Proposal will take, at a minimum, an additional 12 to 24 months for providers to develop and implement.

Given the lead time requirements, the earliest the Proposal should be effective is for the first plan year that begins no earlier than 24 to 36 months after publication of the final version of the forms and instructions. Otherwise, the “rush to publish” will unnecessarily increase the costs and burdens associated with providing the information solicited on the form and schedules. Even with this timeline, transition relief with good faith compliance must be provided until systems and processes are adapted to ensure that accurate and useful data are being submitted.

The ARA recommends that additional time be provided to transition into the significant technology changes the Proposal will require and that the effective date should be deferred at least 24 to 36 months following the final release of both the forms and instructions.

Public Disclosure Considerations

In Section C of the Employer Information Report and Burden Reduction Subgroup Report (see the 2016 Information Reporting Program Advisory Committee (IRPAC) Public Report²), the IRPAC highlights its concerns about the need to protect sensitive information from data mining thieves. In today’s digital environment, large and small businesses are facing an onslaught of data attacks and attempted fraud. In

¹ Executive Order 13563, January 18, 2011.

² <https://www.irs.gov/tax-professionals/2016-irpac-public-report>

part, the report states that *“It should be mandated that the FEIN ... be truncated to eliminate criminals from phishing and obtaining business IDs.”*

In addition, certain investment fund (or other) identifiers may be subject to redistribution rights of the issuers. Public disclosure of such information could violate business licenses or agreements, which is surely an unintended consequence of the Proposal.

New data elements in the Proposal also have the propensity to provide sensitive business or participant information. As an example, the Proposal asks for detailed contribution formula that, while not confidential, provides competitive business information to the public. There are also data elements that can be reverse engineered to determine participant compensation or account balances if there are a small number of participants, for example, that are employed by a related employer or utilize a self-directed brokerage feature.

The ARA recommends that the Agencies consider the potential for fraud and the disclosure of sensitive information that arises from the type of data being collected and made public through its Public Disclosure website (and the related Form 5500 Data Sets available through the EBSA website).

Other Missed Opportunities for Modernization

The ARA notes the Agencies did not use this modernization platform to promote other improvements.

Instructions. There is a general lack of clarity in the instructions and ambiguity in the terms used. For example, there must be clear definitions of fair value, contract value, and what constitutes "hard to value." The Agencies should consider not only industry standards but take into account how the Fair Accounting Standards Board (“FASB”) and, in general, the accounting/auditing community approaches these matters.

While the intent is that the instructions be sufficient to enable filers to complete the Form without needing to refer to statutes or regulations, the Proposal falls short of that mark. There are a number of instructions that refer to a regulation or statute without further explanation of the information that is required to be reported. In addition, many lines have no instruction or provide only a recitation of the question as the instruction, which is not helpful to the filer and its preparer.

Format. The Proposal does not enhance the user’s experience of the forms and schedules. For example, a more user-friendly format could be achieved by creating separate “compliance” schedules for (1) defined contribution retirement plans, (2) defined benefit retirement plans, and (3) welfare benefit plans. Such schedules could incorporate items currently shown at line 9 of the proposed Form 5500, as well as Parts II, IV and V of the proposed Schedule H, and the entire Schedule R, but only those items relevant to the particular plan type would appear on the specialized schedule. This approach would allow the reader to see only those questions relevant to the plan type rather than being left to search through various schedules which, by design, display questions for all plan types with often no obvious reason for the flow of such data elements.

The ARA recommends that the Agencies conduct testing to clarify and improve the Proposal instructions and to enhance the format and user friendly nature of the forms. In order to reduce the ambiguity, the Agencies should consult with industry stakeholders to craft definitions that are consistent with industry standards.

Requirement to Obtain Manual (Wet) Signatures

EFAST2 currently imposes a manual signature requirement on the plan administrator/plan sponsor when a service provider is signing on behalf of the plan administrator/sponsor and on the actuary of a defined benefit plan. Under the Proposal, the manual signature requirement may be imposed on even more parties.

This manual signature requirement imposes a burden which involves manual transmission of a document from the preparer to the signer and the manual return of the document from the signer to the preparer. This is a time consuming and costly process.

Both the United States Electronic Signatures in Global and National Commerce (ESIGN) Act and the Uniform Electronic Transactions Act (UETA) provide that an electronic signature be recognized as valid under U.S. law. ESIGN and UETA provide similar requirements for an electronic signature to be recognized as valid. In addition, many commercial vendors, including DocuSign, Adobe, and others, provide electronic signature software that complies with ESIGN and UETA. Two sets of standards are involved in these statutes: those used in a business to business setting, and those used in a consumer setting.

The ARA recommends that the Agencies develop guidance to explicitly permit electronic signatures related to the processing of Form 5500 series described above that comply with ESIGN and UETA.

Additional Input Opportunities

As noted in its letter of September 14, 2016, the ARA again respectfully requests that the Agencies hold a public hearing on the Proposal following the close of the written comment period. Upon initial review of the Proposal (and its preamble), it is difficult to ascertain the purpose and underlying goal for collecting the information being solicited by many of the questions and schedules. The give and take between commentators and regulators at a public hearing would provide an opportunity for interested parties to better understand the Agencies' objectives. A public hearing also would allow stakeholders to review and respond to comments submitted by other parties. The expectation is that this process will enable refinement of comments in a way that will increase the accuracy, utility, and efficiency of the data and collection process (and ultimately reduce the costs and burdens of collection).

In addition, the Agencies should conduct testing of the proposed questions to ensure that they are capturing the necessary information in the least burdensome method possible. Focus groups, surveys, and other methods of gaining stakeholder input should be utilized. The Government Accountability Office ("GAO") made the following recommendation:

To ease the burden on preparers and ensure the collection of consistent and reliable data, we recommend that the Secretaries of DOL and Treasury, and the Director of PBGC conduct advance testing—such as focus groups, in-person observations and users' perception of forms and questions—as appropriate and before proposing major changes to the form for public comment, in addition to its other outreach efforts.³

Similarly, the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, in an August 9, 2012, memo to the heads of executive departments and federal agencies advised with respect to the promulgation of information collections subject to the PRA:

To the extent feasible and appropriate, especially for complex or lengthy forms, agencies shall engage in advance testing of information collections, including Federal forms, in order (1) to ensure that they are not unnecessarily complex, burdensome, or confusing, (2) to obtain the best available information about the likely burdens on members of the public (including small businesses), and (3) to identify ways to reduce burdens and to increase simplification and ease of comprehension. Such advance

³U.S. Gov't Accountability Office, GAO-14-441, Private Pensions: Targeted Revisions Could Improve Usefulness of Form 5500 Information, at 37 (2014).

testing should occur either before proposing information collections to the public or during the public comment period required by the PRA.⁴

This outreach would provide the opportunity for interested parties to engage with the Agencies and to ensure that the questions elicit the data that the Agencies intended to be collected and provide practical utility with the least burden. Once the testing has been completed, a revised Proposal should be presented for additional public comment.

The ARA recommends that the Agencies hold a public hearing on the Proposal, conduct testing, and allow additional public comment so that the information can be gathered in the least costly and burdensome manner.

These comments were prepared by ASPPA's Reporting and Disclosure Subcommittee of the ASPPA Government Affairs Committee, Kizzy Gaul, Chair, on behalf of the ARA. Please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at the ARA at (703) 516-9300, ext. 128, if you have any comments or questions regarding the matters discussed above.

Thank you for your time and consideration.

Sincerely,

/s/

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⁴ August 9, 2012, Memo from Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs within the Office of Management and Budget, available at <https://www.whitehouse.gov/sites/default/files/omb/inforeg/memos/testing-and-simplifying-federal-forms.pdf>