



October 14, 2005

VIA FACSIMILE and ELECTRONIC MAIL

The Honorable Ann L. Combs
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Notice of Proposed Rulemaking Form 5500 E-Filing Regulation (RIN 1210-AB04)

Dear Assistant Secretary Combs:

The Office of Advocacy of the U.S. Small Business Administration (SBA) offers the following comments in response to the above-referenced notice of proposed rulemaking (NPRM) published by the U.S. Department of Labor’s Employee Benefits Security Administration (EBSA).

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. The Regulatory Flexibility Act (RFA) was enacted in 1980. In general, the RFA requires Federal agencies to evaluate the impact their rules will have on small entities. Section 612 of the RFA requires Advocacy to monitor Federal agencies’ compliance with the RFA requirements. The President also highlighted the importance of agency compliance with the RFA and Advocacy’s role on August 13, 2002 when he signed Executive Order 13272, entitled “Proper Consideration of Small Entities in Agency Rulemaking.” The Office of Advocacy is an independent office within the SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

Advocacy regularly disseminates information to, and solicits comments from, small businesses regarding Federal rules affecting them. Advocacy holds roundtables as one means of gathering information from small entities. On September 29, 2005

Advocacy hosted a roundtable to listen to small business comments and concerns about the Form 5500 E-Filing Regulation. The comments obtained during the roundtable are the basis of this letter.

The NPRM will mandate electronic filing of annual Form 5500 by all employers that sponsor an employee benefits plan. The rule will apply to forms filed for plan years starting on or after January 1, 2007. Electronic filing will impose significant start-up costs on sponsors of employee benefit plans. EBSA defines a small plan as any plan with fewer than 100 participants. The basis of this definition is grounded in Section 104(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA).

Section 603 of the RFA requires Federal agencies to complete an Initial Regulatory Flexibility Analysis (IRFA) to measure the impact their rules will have on small entities and requires the agencies to consider less burdensome alternatives to the rule. The IRFA contained in the Regulatory Impact Analysis section of the NPRM determined that the proposed regulation will have a significant economic impact on a substantial number of small plans by requiring small plans to incur significant start-up costs to comply.

EBSA's analysis appropriately considers the impacts of the NPRM on small plans. As part of EBSA's IRFA three alternatives were discussed. One alternative was to redevelop the current electronic filing system that processes both electronic and paper submissions. EBSA considered continuing the current electronic filing system concurrently with developing a new system that would solely process electronic filings for a few years. The final alternative approach considered by EBSA was to have a system that could handle both electronic and paper filings, but limit the paper filings to small plans that previously submitted paper handwritten filings. However, EBSA has rejected all identified alternatives as imposing too high a burden on the government. Mandatory, single approaches to regulations generally do not favor small businesses because of economies of scale. For this reason Advocacy recommends EBSA consider additional alternatives.

Advocacy urges EBSA to reconsider delayed applicability of the NPRM to small plans. Participants at the roundtable expressed concern about the inevitable flaws a new

electronic filing system will have. As flaws are discovered small plans will have to bear the expense of making corrections. For this reason, there was unanimous belief that small plans should not be subjected to the failings of a new system. To prevent small plans from suffering through this process, and therefore reduce the cost of compliance, it was suggested that small plans be given a one year voluntary participation period. Additionally, small plans will have an increased period of time in which to plan for the start-up cost of complying with mandatory electronic filing.

In addition, Advocacy suggests that EBSA consider providing small plans a one time exemption from penalties for unintentional filing violations caused by lack of familiarity with the new filing process. Technical difficulties can be caused by lack of familiarity with the technology. During the roundtable discussion concern was expressed that small plans will suffer a greater economic burden due to technical difficulties in the filing process. The roundtable participants believe that small plans should not have to bear this expense. A one time exemption from penalties will reduce the reluctance some small plan sponsors have to participating in an unfamiliar process. Limiting penalties is consistent with existing law that permits Federal agencies to provide for waivers or reductions in penalties for violations by small businesses in some circumstances (see, Section 223 Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121).

Advocacy believes that these alternatives will help alleviate burden on small plans affected by this rule. If you have any questions or require additional information, please contact Candace Ewell at 202-401-9787 or candace.ewell@sba.gov. Thank you for this opportunity to contribute to the rulemaking process.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Candace B. Ewell
Assistant Chief Counsel

cc: The Honorable John D. Graham, Administrator, Office of Information and
Regulatory Affairs