



September 26, 2013

Yvette Lawrence
Internal Revenue Service
Room 6129
1111 Constitution Avenue, NW
Washington, DC 20224

Ian Dingwall
Chief Accountant
Employee Benefits Security Administration
Suite 400
200 Constitution Ave, NW
Washington, DC 20210

Re: Comment Request for the Annual Return/Report of Employee Benefit Plan (OMB 1545-1610)

Dear Ms. Lawrence and Mr. Dingwall:

The American Benefits Council (the "Council") appreciates the opportunity to provide comments to the Internal Revenue Service (the "Service") and the Department of Labor (the "Department") (collectively the "Agencies") on Form 5500 and its related schedules.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

We believe that the Form 5500 has proven a valuable resource for the government, participants, plans and other stakeholders in the voluntary pension and welfare system. This letter makes three suggestions regarding Form 5500 and its related schedules which the Council believes would enhance the Form's effectiveness. First, the Agencies should revise Schedule C so that the information required of pension plans is consistent with the information provided pursuant to the Department's regulations under ERISA section 408(b)(2). Second, the Agencies should consider expanding the small plan threshold for filing purposes from 100 participants to 250 participants. Finally, the Agencies should *not* remove the ability of plans to use a limited scope audit.

The Agencies should revise Schedule C so that the information required of pension plans is consistent with the information provided under ERISA section 408(b)(2).

A number of years ago, the Department embarked on a three-part regulatory project to enhance disclosure of plan fees. The first of these projects to be completed was revision of Schedule C of Form 5500. Since Schedule C reflects fee information as of the end of the plan year, ideally this would have been the last project to be completed by the Department, but the Department wished to complete it as part of the move to fully electronic filing via EFAST2. Schedule C now requires reporting of certain service provider direct and indirect compensation information. This includes reporting to the plan administrator of “eligible indirect compensation.”

The final ERISA section 408(b)(2) regulations that the Department adopted on February 2, 2012 require reporting of certain direct and indirect fee information by covered service providers prior to a plan fiduciary entering into a contract or arrangement with a covered service provider.¹ The information required under the 408(b)(2) regulation is different from that required under Schedule C. Among other things, Schedule C’s “eligible indirect compensation” concept does not correlate precisely with the reporting of “indirect” compensation under the 408(b)(2) regulations. For example, although management fees paid by a registered mutual fund to its investment adviser constitute indirect compensation for Schedule C purposes (subject to treatment as eligible indirect compensation), the investment adviser would not be a covered service provider under the 408(b)(2) regulations.

This inconsistency can, and does, result in duplicative information being collected and provided to plan sponsors of pension plans. Plan sponsors may receive disclosures from vendors that give historical information for purposes of completing Schedule C and prospective information for purposes of ERISA section 408(b)(2) disclosure, with the information often overlapping but also containing notable differences.

The Agencies should consider, for example, whether Schedule C reporting should be limited to “covered service providers” as defined in the 408(b)(2) regulation – at least as to reporting of indirect compensation – as these are the entities the Department concluded after a deliberative process should be the focus of enhanced disclosure.² In addition, the Agencies should consider lining up the kinds of compensation that can qualify as “eligible indirect compensation” for Schedule C purposes with the definition of indirect compensation in the 408(b)(2) regulation. It would streamline Schedule C filing, and reduce time and cost for plan sponsors and service providers, if all indirect

¹ 29 C.F.R. § 2550.408b-2; 77 Fed. Reg. 5632 (Feb. 3, 2012).

² See 74 Fed. Reg. 41600, 41604 (July 16, 2010).

compensation qualified for the eligible indirect compensation reporting structure.³ This would harmonize the Schedule C reporting of indirect compensation because, under the current rules, there is an artificial distinction between types of indirect compensation.⁴ It would also ensure plan administrators received consistent disclosures from service providers during the Form 5500 process.

Receiving duplicative and interrelated information makes it difficult for plan sponsors to determine which information should be reported, and for what purpose. Furthermore, plan service providers (particularly those with arrangements that renew annually, and hence require frequent ERISA section 408(b)(2) disclosures) are faced with the complex task of providing this duplicative and interrelated information. Therefore, the Council recommends that the Agencies revise Schedule C so that the information required of pension plans is consistent with the information provided under ERISA section 408(b)(2).⁵

The Agencies should consider expanding the small plan threshold for filing purposes from 100 participants to 250 participants.

For many years, the Form 5500 reporting thresholds have turned on whether or not a plan has 100 or more participants. Plans with 100 or more participants face *significantly* higher reporting burdens, including the requirement to have a plan audit for pension plans and to file a report for self-funded or fully insured welfare plans. The Council believes the Agencies should explore increasing the threshold to 250 participants.

The Department's own data suggests that the total number of plans with 50-99 participants and 100-249 participants is similar.⁶ According to the Form 5500 Abstract, in 2011 there were a total of 67,400 total plans with 50-99 participants and 43,455 with 100-249 participants.⁷ Defined benefit plans sponsorship is even closer: In 2011, there

³ On Schedule C, the plan administrator would indicate that the 408(b)(2) disclosures were provided, rather than, under the current Schedule C, that the "eligible indirect compensation" disclosures were provided.

⁴ Some types of indirect compensation are "eligible" under the Schedule C instructions, and some are not. The distinction is not reflected in the 408(b)(2) regulations.

⁵ Our comments relate solely to pension plans. The Council has recommended that the Department proceed deliberately and cautiously in considering whether, and if so, how, to apply the disclosure rules in the 408(b)(2) regulations to health and welfare plan services arrangements. See Testimony of Allison R. Klausner on behalf of American Benefits Council, Hearing on Reasonable Contracts or Arrangements for Welfare Benefit Plans under Section 408(b)(2) (Dec. 7, 2010), <http://www.dol.gov/ebsa/pdf/1210-AB08-ABCa.pdf>.

⁶ See Private Pension Plan Bulletin, Abstract of 2011 Form 5500 Annual Reports, DOL, June 2013, available at <http://www.dol.gov/ebsa/pdf/2011pensionplanbulletin.pdf>

⁷ *Id.* at 11.

were 2,321 single employer defined benefit plans with 50-99 participants compared to 2,550 single employer defined benefit plans with 100-249 participants.⁸ The next category of plans, consisting of plans with 250-499 participants, accounts for 17,663 of the total plans filing Form 5500s.⁹ In other words, the key threshold, at least in terms of the number of plans, seems to be at the 250 participant level, not 100 participants.

The Agencies have asked for information on the burdens of the Form 5500. We think that the burdens of full reporting, and a plan audit, fall hardest on small employers in the 100-250 participant range. This is particularly true for non-profit employers sponsoring 403(b) plans that are now subject to an expensive plan audit.

Plans with between 80 to 120 participants are allowed to use the status (large or small) that applied in the prior year.¹⁰ This is an important administrative convenience that should be preserved and perhaps expanded. If the Agencies were to increase the small plan filing threshold to 250 participants, the Department should continue to permit small plan filings for filers that experience a small growth in the number of participants. The Department also should consider expanding the range of participant variability to preserve small plan filing status for filers that experience participant growth in a plan year, from 20 participants to 50 participants. For example, in connection with raising the threshold to 250 participants, the Department may consider using a range of 200 to 300 (rather than 230 to 270).

Although ERISA section 104(a)(2)(A) refers to simplified reporting for plans of less than 100 participants, we do not think that this precludes the Agencies from providing simplified reporting for other plans if doing so is consistent with ERISA's goals and in the best interests of all stakeholders. If the Agencies believe they do not have the authority to make this change, they should seek a change in the law from Congress.

The Agencies should not remove the ability of plans to use a limited scope audit. The statutory and regulatory requirements for auditing an ERISA-covered plan are unique from other company and entity audits. ERISA specifically provides for what has become known as a "limited scope audit."¹¹ The limited scope audit allows plan administrators to instruct the auditor to perform limited auditing with respect to investment information prepared and certified by a bank or similar institution or by an insurance carrier that is regulated, supervised, and subject to periodic examination by a state or federal agency.

⁸ *Id.*

⁹ *Id.*

¹⁰ See 29 C.F.R. 2520.103-1(d) (permitting a plan administrator that has between 80 and 120 participants (inclusive) as of the beginning of the plan year, to elect to file the same category of annual report as the previous year.)

¹¹ ERISA § 103(a)(3)(C).

If the Agencies were to eliminate the ability of plans to utilize the limited scope audit process it is nearly certain that there will be increased audit costs, which, in the case of defined contribution plans, would likely be passed on to participants. Thus, participant's accounts would be reduced without adding meaningful value to participants. Removing the use of a limited scope audit is also of particular concern to 403(b) plans that are subject to the audit requirement.

In 2010, the ERISA Advisory Council recommended that the limited scope audit not be repealed.¹² The Advisory Council stated that "[t]he primary rationale for the Council's conclusion that the limited scope audit should not be repealed was a deficiency of specific material evidence of participant harm caused by limited scope audits and the concern for possible increased costs that could result from a full scope audit." The Council agrees with the Advisory Council's conclusion and would oppose eliminating the ability of plans to use a limited scope audit.

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Again, we appreciate the opportunity to comment on the Form 5500 and its related schedules. We believe that the Council offers an important and unique perspective of both the employer sponsors of retirement plans and the service providers that assist them, and we look forward to working with you on these important changes.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson", with a stylized, flowing script.

Jan M. Jacobson
Senior Counsel, Retirement Policy
American Benefits Council

¹² DOL, ERISA Advisory Council, Employee Benefit Plan Auditing and Financial Reporting Models, 2010 available at <http://www.dol.gov/ebsa/publications/2010ACreport2.html>