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September 19, 2006

U.S. Department of Labor  
Employee Benefits Security Administration (EBSA)  
Office of Regulations and Interpretations  
Attn: Form 5500 Regulation Revisions (RIN 1210-AB06)  
Room N-5669  
200 Constitution Avenue, NW  
Washington, DC 20210

RECEIVED  
OFFICE OF REGULATIONS  
AND INTERPRETATIONS  
2006 SEP 19 PM 1:54

Re: Notice of Proposed Rulemaking for Form 5500 Regulation Revisions and  
Notice of Proposed Forms Revisions  
(RIN 1210-AB06)

Dear Sir or Madame:

America's Health Insurance Plans (AHIP) is writing to offer comments regarding the Notice of Proposed Rulemaking (NPRM) for Form 5500 Regulation Revisions and the Notice of Proposed Forms Revisions (RIN 1210-AB06) that were published in the *Federal Register* on July 21, 2006. The Notice of Proposed Rulemaking for Form 5500 Regulation Revisions (29 CFR Part 2520) and the Notice of Proposed Forms Revisions (Form 5500 and accompanying schedules and instructions) are being made to facilitate the Department of Labor's (DOL's) transition to an electronic filing system for the Form 5500 annual reports as required by the Employee Retirement Income Security Act (ERISA).

AHIP is the national trade association representing the private sector in health care. AHIP's nearly 1,300 member companies provide health, long-term care, dental, vision, disability, and supplemental coverage to more than 200 million Americans. Many of our member companies provide health insurance coverage to or act as an administrator for ERISA group health plans sponsored by employers or employee organizations.

Generally, AHIP supports the overall objectives of the proposed regulatory changes and the updated forms, schedules, and instructions as initial prerequisites before the DOL begins migrating toward a new electronic filing system. However, because the NPRM and the Notice did not contain specific details about the Department of Labor's new electronic reporting system, we cannot comment about the electronic system or its functionality.

In reviewing the proposed regulations and forms, some of the revisions raise concerns for our members. Our detailed comments, as well as our recommendations, are included in the attached document labeled, "Attachment A." We have also provided suggested language for the forms, where pertinent, and have included them in "Attachment B."



Some of our main recommendations include:

- The DOL should create a separate reporting form for welfare plans to satisfy their annual reporting requirements.
- The final regulations and the Form 5500 instructions should clarify that group health plan administrators are responsible for completing and submitting the Form 5500 and any corresponding schedules.
- The DOL should explain that an insurance carrier or issuer satisfies its ERISA reporting obligations when it supplies a plan administrator with the necessary information for Schedule A using either a print or electronic format.
- The DOL should allow plan administrators, health insurance plans, and other affected entities at least 180 days from the time the final regulations and forms are issued to implement the new reporting requirements.

Please feel free to contact us if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Thomas J. Wilder".

Thomas J. Wilder  
Vice President, Private Market Regulation

Attachments

Attachment A

AHIP Comments and Recommendations

**U.S. Department of Labor, Employee Benefits Security Administration  
Proposed Regulations and Notice Addressing Annual Filing Requirements  
Under the Employee Retirement Income Security Act (ERISA)**

September 19, 2006

Short Form 5500

**Issue 1:** Clarify which entities may use the new, short-form version of the Form 5500 (referred to as Form 5500-SF or "Short Form 5500").

**Discussion 1:** The short form is being created to make filing easier for certain small welfare plans which generally have fewer than 100 participants at the beginning of a plan year. (71 Fed. Reg. 41393) However, existing DOL regulations (29 C.F.R. §2520.104-20) exempt certain employee benefit welfare plans from the Form 5500 annual reporting requirements if the plan:

- covers fewer than 100 participants at the beginning of a plan year; and
- pays benefits from the employer's general assets (self-funded arrangements); or
- provides benefits exclusively through insurance contracts or policies issued by an insurance company or health maintenance organization and the premiums are paid either by the employer or from both the employer and participant and beneficiary contributions (fully-insured arrangements), as long as the contributions are forwarded by the employer within three months of receipt, and participants are informed upon entry into the ERISA plan about the plan policies for refunds and such refunds are made within the mandated timeframe; or
- both.

Although the Short Form 5500 appears to make filing easier for some small employee benefit plans, in practice this form may confuse administrators of small welfare plans. The corresponding instructions are not clear about whether small welfare plans are exempt from the annual filing requirements or whether they are required to file the Form 5500-SF.

**Recommendations 1:** The DOL should clearly explain in the Form 5500-SF instructions that certain welfare benefits plans are exempt from the annual Form 5500 filing requirements. The DOL should modify the Form 5500-SF instructions by: (1) using bold font in the section entitled, “Plans Exempt From Filing” (See 71 Fed. Reg. 41630); and (2) incorporate AHIP’s suggested checklist, “How to Determine If You Are Exempt From Filing a Form 5500” (See Attachment B, Recommendation 1).

**Issue 2:** Provide clear definitions in the instructions for the new Form 5500-SF and the Form 5500.

**Discussion 2:** The instructions for the Form 5500-SF (as well as the instructions for the Form 5500) provide additional guidance for plan administrators about their annual 5500 filing obligations. However, the proposed instructions do not explain several important issues.

Plan administrators are often confused about what constitutes a “plan year” (as opposed to a calendar year). In addition, plan administrators often do not understand the differences between a “plan participant” and a “beneficiary” and are uncertain about how “the number of participants” should be calculated for the annual report. The current and proposed instructions for the Form 5500 and the Form 5500-SF incorporate the regulatory language and citations but should use plain language to explain these issues.

**Recommendation 2:** The instructions for the Form 5500 and the Form 5500-SF should: (1) explain what constitutes a “plan year;” (2) provide definitions for “participant” and “beneficiary;” and (3) provide real-life examples about how to determine “the number of participants at the beginning of a plan year.” We have suggested language in Exhibit B, Recommendation 2.

### Schedule A: Missing Information

**Issue 3a:** Plan administrators need to understand their reporting obligations under ERISA.

**Discussion 3a:** Generally, a plan administrator is required to file a Form 5500 if a welfare benefit plan has 100 or more participants as of the beginning of the plan year. Schedule A must be attached to a Form 5500 report for an ERISA welfare benefits plan if the plan’s benefits are provided by, or if the plan holds any investment contracts with, an insurance company or other similar organization. The DOL is proposing to add a line item on Schedule A (Insurance Information) to give plan administrators a specific space to report the failure by an insurance carrier to provide necessary information.

In some situations, plan administrators are unaware of their annual ERISA filing obligations. Insurers and carriers often act as a point of reference to help plan administrators understand why plan-related information is being supplied to them and encourage the administrators to use the information to satisfy the DOL’s filing requirements. Some plan administrators, however, incorrectly believe that the insurance

company is obligated to file the Form 5500 and accompanying schedules on behalf of the plan. It may be helpful for the Form 5500 instructions to highlight the categories of information that the plan administrators may receive from a health insurance plan and how the administrator can use the information to fulfill the plan's annual reporting obligations.

**Recommendation 3a:** The final regulations and the Form 5500 instructions should clarify that under ERISA, plan administrators are responsible for completing and submitting the Form 5500 and any corresponding schedules. The final regulations should also advise plan administrators of their obligation to file an amended filing if the plan administrator requests or subsequently receives information from a service provider or insurance carrier after an annual filing is submitted to the DOL.

**Issue 3b:** Clarify the obligation of insurers and carriers to provide information to a plan administrator.

**Discussion 3b:** The DOL is proposing to add a line item on Schedule A (Insurance Information) to give plan administrators a specific space to report the failure by an insurance carrier to provide necessary information.

Under the ERISA statute, if a welfare benefit plan has 100 or more participants as of the beginning of the plan year an insurance carrier or other similar organization is required to: (1) transmit the information necessary to enable the plan administrator to complete the Schedule A within 120 days after the end of the plan year; and (2) certify that the information provided to the plan administrator is accurate. (29 U.S.C. §1023) The statute does not specify a method by which the insurer or organization must provide information to the plan administrator.

In some situations (for example, if the group health plan has multiple insurance carriers providing coverage), an insurance carrier or other similar organization may not know the total number of participants in a welfare plan or whether a plan administrator is required to file the Form 5500. Although health insurance plans take active steps to provide plan administrators with information needed to complete the Form 5500 report, there are instances where the provision of such information may be inadvertently delayed or omitted.

For these reasons, we believe it is appropriate for the DOL to provide both plan administrators and insurance carriers with clear instructions regarding the obligations to provide information needed to complete Form 5500. We suggest that the insurance carrier or other similar organization be required to provide information to the plan administrator if the carrier or organization provides coverage to 100 or more individuals participating in the welfare plan and upon request of the plan administrator. We are also recommending changes to the language of the Form 5500 to make clear that the plan administrator should report situations where it believes the insurance carrier may have not provided information needed to complete Form 5500. The DOL should encourage plan administrators to contact the health insurance company if information needed to complete the Form 5500 is not received.

**Recommendations 3b:** The DOL should update their regulations, Form 5500 instructions, and other guidance to state that an insurance carrier or other similar organization satisfies the ERISA reporting requirements if it: (1) provides the plan administrator with the information necessary to complete the Schedule A when the insurance carrier or other similar organization insures or otherwise provides coverage to 100 or more individuals participating in the ERISA plan as of the end of the plan year; (2) provides information upon request to all other plan administrators; and (3) supplies the plan administrator with the necessary information for Schedule A using either print or electronic format.

In addition, we suggest that the DOL revise the language on Schedule A as stated in Attachment B (See Recommendation 3b).

#### **Schedule A: Reporting of Fees and Commissions**

**Issue 4a:** Schedule A and the corresponding instructions should exempt “de minimus” payment amounts for certain fees and commissions from the annual Form 5500 reporting requirements.

**Discussion 4a:** Schedule A must be attached to a Form 5500 report for an ERISA welfare benefits plan if the plan’s benefits are provided by, or if the plan holds any investment contracts with, an insurance company or other similar organization. Fees and commissions are reported on this Schedule. On February 24, 2005, the DOL posted Advisory Opinion 2005-02A on its website that clarified insurance carriers' obligations under ERISA to report information to plan administrators regarding fees and commissions paid to brokers, agents or other persons.

The DOL is proposing to modify the reporting to specifically require the “amount of sales and base commissions” and the “fees and other commissions” paid to specific agents, brokers, and other persons. However, neither the schedule nor the instructions exempt insignificant payments or gifts (i.e., “de minimus” amounts less than \$500.00) from the reporting requirements.

Tracking and reporting insignificant amounts presents an administrative burden. For example, if an employer sponsors a health plan for employees located in multiple states, numerous producers can be entitled to very small commissions amounts (i.e., substantially less than \$500 dollars) for providing service to the various geographical locations of an employer's facilities. Schedule A can elicit more-effective reporting if it captures the bulk of compensation paid by a welfare benefits plan to brokers, agents or other persons instead of insignificant compensation amounts.

**Recommendations 4a:** The DOL should exempt “de minimus” payment amounts from the Schedule A reporting requirements.

**Issue 4b:** Clarify that payments to a general agent or manager are exempt from reporting when they are made for “managing an agency” or for “performing other administrative functions” for an insurer.

**Discussion 4b:** The DOL Advisory Opinion 2005-02A explains the following:

It is also the view of the Department that the terms “general agent” and “manager” as used in the Schedule A instructions do not include brokers representing insureds. Further, for payments to a “general agent” or “manager” to be exempt from Schedule A reporting, they must only be for “managing an agency” or for “performing other administrative functions” for the insurer. Amounts paid to a general agent or manager would be required to be reported on the Schedule A if they were calculated under a formula based, in whole or in part, on the value of contracts or policies placed with or retained by ERISA plans, even if such amounts were labeled override commissions, salaries, or bonuses.

It is unclear whether payments made to general agents and managers are reportable on the Schedule A when they are being made for managing an agency or for performing other administrative functions for an insurer but are based on the “value of policies placed.”

**Recommendations 4b:** The Schedule A Instructions should clearly define the terms “general agent” and “manager.” In addition, the Schedule A instructions should explain that payments to a general agent or manager are exempt from Schedule A reporting when the payments are made for “managing an agency” or for “performing other administrative functions” for an insurer, even if the payments are calculated and based on the “value of policies placed” by the agent or manager.

### Schedule C

**Issue 5a:** Clarify the requirements of service providers to report direct and indirect compensation (i.e., money or anything else of value) paid during a plan year for services rendered to an ERISA benefits plan or a person within the plan.

**Discussion 5a:** In the preamble to the proposed regulations, the DOL notes that it is proposing a new section on Schedule C to require disclosure of the source and nature of compensation in excess of \$1,000 for key service providers (including investment managers, consultants, brokers, trustees, and fiduciaries). (See 71 Fed. Reg. 41394) However, the Interagency notice appears to take a different approach and explains that Schedule C will require filers to “indicate for all service providers whether the service provider received any compensation attributable to the person’s relationship with or services provided to the plan from a party other than the plan or plan sponsor.” (71 Fed. Reg. 41621) Based on the difference in language, it is unclear what compensation the DOL is intending to capture on Schedule C.

Health insurance plans often have business relationships with multiple plan administrators to provide administrative services to the group health plans. These arrangements are based on individual, confidential contract and payment terms. The final regulations and the instructions for Schedule C should clearly explain that the DOL does not expect plan administrators to report compensation received by service providers when that compensation is unrelated to the administrator's benefits plan (e.g., contracts and compensation received from other plan administrators).

**Recommendation 5a: The final regulations and Schedule C instructions should clarify that a plan administrator is only responsible for reporting a service provider's compensation that is attributable to the service provider's relationship with or services provided to the plan.**

**Issue 5b:** Revise the language in Schedule C and the accompanying instructions for plan administrators to identify each fiduciary or service provider who failed to provide information necessary to complete the Schedule.

**Discussion 5b:** As discussed above in Issue 3b, in some situations, an insurance carrier or other similar organization may not know the total number of participants in a welfare plan or whether a plan administrator is required to file Form 5500. For example, in some situations a plan administrator can have more than one insurance company providing benefits to participants in a welfare plan. We believe the DOL should take affirmative steps to educate plan administrators and fiduciaries and service providers of their obligation to provide information necessary to complete Schedule C. We have also recommended language for the Schedule C to clarify situations where the plan administrator believes the service provider has failed to provide such information. In these situations, the DOL should encourage plan administrators to contact the health insurance company if information needed to complete the Form 5500 is not received.

**Recommendations 5b: The DOL should increase its education and outreach to: (1) inform plan administrators about their Form 5500 reporting obligations; and (2) to encourage plan administrators to work with their service providers to obtain information necessary to meet their annual reporting obligations.**

**In addition, we have suggested language to revise Schedule C (See Attachment B, Recommendation 5b).**

**Issue 5c:** Schedule C and the accompanying instructions should be revised to add new plan codes for health insurance plans.

**Discussion 5c:** The codes are intended to improve classification of individuals and entities and thus improve reporting detail. However, the proposed codes do not appear to have a category for health insurance plans that provide services to an employee benefits plan.



**Recommendation 5c: The DOL should add a code to Schedule C for entities that provide administrative services to employee benefits plans.**

### **Schedule I**

**Issue 6:** The Schedule I instructions should clearly state that certain small welfare plans do not have to file Schedule I.

**Discussion 6:** Schedule I must be attached to a Form 5500 filed for employee benefit plans that covered fewer than 100 participants as of the beginning of the plan year, subject to the exemptions listed above in Issue 1. The DOL is adding a compliance question to identify plans with potentially serious management or funding problems.

Schedule I and the accompanying instructions can mislead plan administrators of small welfare plans into believing that they are required to file the Schedule and the Form 5500 annual report. The instructions for Schedule I must clearly re-state the filing exemptions for small welfare plans.

**Recommendation 6: The instructions for Schedule I should clearly state that small welfare plans are exempt from the annual filing requirements.**

### **No Separate Form for Welfare Plan Reporting**

**Issue 7:** A specific report format should be designed for welfare plans.

**Discussion 7:** The preamble states that the DOL recognizes that the current 5500 reporting framework does not capture information on the entire universe of welfare plans but believes that generally retaining the current reporting requirements is important for the agency and for participants and beneficiaries.

Using a single form for both pension and welfare plan reporting has created confusion within the industry and for individuals. The dual form used for reporting pension and welfare benefits information is confusing because information required for financial pension plan reporting is quite different from benefit and funding mechanisms for welfare plans. Welfare plan administrators, plan participants, and beneficiaries often struggle to understand why information is required for the 5500 report and schedules. Even though information is accurately reported, the information does not effectively help individuals and entities understand how their welfare benefits plan is funded or how it operates.

**Recommendation 7: The DOL should create a separate form for welfare plans to satisfy their annual reporting requirements.**

## **Miscellaneous**

**Issue 8:** Plan administrators, health insurance plans, and other entities should be given sufficient time to come into compliance with the new filing requirements.

**Discussion 8:** Once the final regulations are published, plan administrators, health insurance plans, and other affected entities will need adequate time to implement the requirements.

**Recommendation 8:** The DOL should allow plan administrators, health insurance plans, and other affected entities at least 180 days from the time the final regulations and forms are published in the *Federal Register* to implement the new reporting requirements.

America's Health  
Insurance Plans



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Exhibit B

AHIP Proposed Instruction Language

September 19, 2006

**Recommendation 1: The DOL should clearly explain in the Form 5500-SF instructions that certain welfare benefits plans are exempt from the annual Form 5500 filing requirements. The DOL should modify the Form 5500-SF instructions by: (1) using bold font in the section entitled, "Plans Exempt From Filing" (See 71 Fed. Reg. 41630); and (2) incorporate AHIP's suggested checklist.**

How to Determine If You Are Exempt From Filing a Form 5500

Question	Yes	No
1. Are you an administrator for a "welfare plan" that is sponsored by an employer or by an employee organization, or both, for the benefit of employees and their dependents (plan participants and beneficiaries)?		
2. Does the benefits plan, fund, or program pay for any of the following: medical, surgical, hospital care, sickness, accident, or disability benefits?		
3. At the beginning of the plan year, did you have fewer than 100 participants in the plan? (A "participant" is any employee or former employee, or any member or former member of an employee organization, who: (1) was eligible to receive a benefit under the employee benefit plan; or (2) was not covered by the employee benefit plan but who had a beneficiary that was eligible to receive a plan benefit?)		
4. Did the plan pay benefits from any of the following: (1) the employer's general assets (self-funded arrangements); or (2) insurance contracts or policies issued by an insurance company or a health maintenance organization (fully-insured arrangements); or (3) a combination of both of these arrangements?		
*If you are an administrator for a self-funded welfare benefits plan and answered yes to questions 1 - 4, stop here. <b>You DO NOT have to file a Form 5500.</b> *If you are an administrator for a fully-insured arrangement or a plan that uses both fully-insured and self-funded arrangements, continue to question 5.		
5. If benefits were provided through a fully-insured arrangement, in whole or in part, were the premiums paid either: (1) solely by the employer; or (2) from both employer and participant and beneficiary contributions?		
6. Were any premiums or contributions forwarded by the employer to the insurance company within three months of receipt?		
7. Are plan participants informed about the plan policies for refunds when they join the ERISA plan and are such refunds made within the mandated timeframes?		
If you are an administrator for a fully-insured arrangement or a plan that uses both fully-insured and self-funded arrangements, and you answered yes to questions 1 - 7, you <b>DO NOT have to file a Form 5500.</b>		

## Recommendation 2:

- **The instructions for the Form 5500 and the Form 5500-SF should explain what constitutes a “plan year.”**

For Form 5500-SF instructions, insert the following language in the “General instructions” section on page 1 after the second sentence. For the Form 5500 instructions, insert the following language in the “When to File” section on page 4, after the second sentence:

*Under ERISA, the term “plan year” or “fiscal year of the plan” mean the calendar, policy, or fiscal year for the plan and the year for which the records of the plan are being reported. (See 29 U.S.C. §1002)*

- **The instructions for the Form 5500 and the Form 5500-SF should provide explanations about the definitions of a “participant” and a “beneficiary.”**

In the Form 5500-SF instructions, insert the following language in the “Plans Exempt From Filing” section on after the first sentence (See 71 Fed. Reg. 41630). For the Form 5500 instructions, insert the following language in the “Welfare Benefit Plan” section on page 3, after the second sentence:

*The following terms are used throughout these instructions and on the corresponding forms. The term “participant” means any employee or former employee, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employer-sponsored benefit plan, or whose beneficiaries may be eligible to receive any such benefit. This definition can include current employees, retired employees, or former employees who participate in an employer-sponsored health benefits plan under the Consolidated Omnibus Budget Reconciliation Act (COBRA).*

*A “beneficiary” is a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit under the plan. For example, this category can include an employee’s spouse, children, and any dependents.*

- **The instructions for the Form 5500 and the Form 5500-SF should provide explanations and real-life examples about how to count the number of participants at the beginning of a plan year.**

In the Form 5500-SF instructions, insert the following language in the “Note” under the “Plans Exempt From Filing” section after the first sentence (See 71 Fed. Reg. 41630). For the Form 5500 instructions, insert the following language in “Section 5: What to File” on page 7, before the paragraph that lists “Exceptions.”

*(Example.) A welfare plan has 75 participants at the beginning of the plan year and 105 participants at the end of the plan year. Plan benefits are fully insured and premiums are paid directly to the insurance company by the employer pursuant to an insurance contract purchased with premium payments derived half from the general assets of the employer and half from employee contributions (which the employer forwards within three months of receipt). Refunds to the plan are paid to participating employees within three months of receipt as provided in the plan and as described to each participant upon entering the plan.*

*The plan appoints the employer as its plan administrator. The employer, as plan administrator, provides summary plan descriptions to participants and beneficiaries. He or she also makes copies of certain plan documents available at the plan's principal office and such other places as necessary to give participants reasonable access to them. The plan is exempt from the Form 5500 filing requirements, even though the plan has more than 100 participants at the end of the plan year. The exemption applies because the plan had fewer than 100 participants at the beginning of the plan year and met the other conditions to qualify for the reporting exemption. (See 29 C.F.R. 2520.104-20.)*

**Recommendation 3b:**

- **AHIP recommends adding the following language to Schedule A:**

*Part II. Filing a Form 5500 Based on Incomplete Information.  
Line 2. Provide, to the extent possible, the following information for each fiduciary or service provider who you believe may have failed to provide information necessary to complete Part I of this Schedule.*

*(a) Name*

*(b) Enter EIN or, if reported person does not have an EIN, address and telephone number*

*1. EIN*

*2. Address and Phone Number ( ) – Ext.*

**Recommendation 5b:**

- **We suggest adding the following language to Schedule C:**

*Part II. Filing a Form 5500 Based on Incomplete Information.  
Line 2. Provide, to the extent possible, the following information for each fiduciary or service provider who you believe may have failed to provide information necessary to complete Part I of this Schedule.*

*(a) Name*

*(b) Enter EIN or, if reported person does not have an EIN, address and telephone number*

*1. EIN*

*2. Address and Phone Number ( ) – Ext.*