



AMERICAN BENEFITS  
COUNCIL

May 31, 2016

Tuawana Pinkston  
Internal Revenue Service  
Room 6129  
1111 Constitution Avenue NW.  
Washington, DC 20224

**Re: Proposed changes to Annual Return/Report of Employee Benefit Plans –  
Form 5500 Series**

Dear Ms. Pinkston:

This letter is submitted on behalf of the American Benefits Council (the Council) regarding the proposed changes to the Form 5500. The Council is a national nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large multistate U.S. employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs. Virtually all of our members file one or more Forms 5500 or assist plan sponsors in preparing and filing them.

The Council appreciates that the Internal Revenue Service (the Service) has removed or proposed changes to the questions that were originally added to the 2015 Form 5500 and, ultimately, made optional in that form. However, the changes continue to raise several concerns. While we welcome the proposed changes for 2016 reporting, several questions contain technical ambiguities. While we believe these ambiguities may be easily resolved, clarification will be needed before service providers that produce the Form 5500 for plan sponsors can implement the changes. In addition, any changes of this nature will need significant systems development, making it very difficult to implement them properly without the appropriate lead time. That lead time will need to be provided after any proposal is finalized and the additional guidance is provided.

In this letter, we have highlighted some of our concerns and we urge the Service to consider delaying the changes to the forms. Specifically, we request delayed implementation until EFAST3 is rolled out to allow service providers to coordinate their programming for the proposed questions with the necessary programming EFAST3 will require. Alternatively, we request that the changes be delayed until two reporting years after the date on which they are finalized and made public, giving plans and their service providers that produce the forms sufficient time to revise their systems. At the very least, the revised proposed questions should be made optional for the time period indicated above. Below in summary form is a description of issues we have identified. We would be happy to discuss these further with you if you have any questions.

- 1. Required preparer name:** This identification was initially proposed for the 2015 reporting year and ultimately made optional. The Council's service provider members (as well as individual plan sponsor employees who prepare the form) remain concerned that this change will call into question previous guidance that preparing the 5500 does not make the preparer a "tax return preparer" (e.g., Notice 2008-13, Notice 2011-6 and June Service website updates). These members are also concerned the change will subject Form 5500 preparers to additional liability and, in the case of service providers, allow others to obtain their client lists. The Council urges the Service to continue to make this optional or propose the change through the regulatory process instead of making changes in a form. If the purpose of the change is to identify someone the Service can speak with, the Service should propose a method where the plan sponsor has actually authorized someone to speak to the IRS.
- 2. Proposed/revised questions:** Some of the proposed questions require clarification of ambiguities. For example, Question 5 is for "Defined Benefit Plan or Money Purchase Pension Plan only" and it is unclear whether this would apply to a defined contribution plan with a frozen Money Purchase Pension Plan account. Regardless, it is unclear whether the question can be left blank without an invalidation error in the EFAST2 system. In addition, the Service should clarify whether the question was intended to ask about an employee "who has NOT attained age 62" since in-service distributions beginning at age 62 are now permitted if the plan allows it.
- 3. Substantial programming and information collection:** For many plan sponsors, the Form 5500 is prepared by recordkeepers, who produce the Form systematically for their clients. For many, the information to answer new or newly revised questions are not in a system that currently connects to the system that generates the Form 5500. In some cases,

larger recordkeepers are producing Form 5500 for thousands of clients. As a result, Form 5500 preparation is often highly systemized and any changes or additions to the Form 5500 require programming, which requires significant resources and time. Some programming may need to be in place as of the first day of a reporting period for that reporting to be accurate. In addition, in several cases responding to the questions will require gathering information from clients for whom the recordkeeper does not perform testing, requiring manual intervention to produce the Form. The reverse can be true if the client prepares the Form 5500 but the service provider has all of the records. The Council urges the Service to make any new or changed questions optional for two years after the final forms and clarifying guidance have been published.

4. **Material change to 2015 Schedule H, line 4l instructions:** While the Service has postponed many of the initially proposed 2015 compliance questions, the Service left in place a material change to the 2015 Schedule H instructions. Line 4l asks the question, "Has the plan failed to provide any benefit when due under the plan?" The instructions have been expanded for 2015 to add, "This would include minimum required distributions to 5% owners who have attained 70½ whether or not retired and/or non-5% owners who have attained 70½ and have retired or separated from service, see section 401(a)(9) of the Code." The new language is problematic for several reasons. Most mature pension plans do have some missing participants over age 70 ½ who have not commenced their benefits. While some plans have used deemed forfeiture provisions to remove such missing participants from the benefit rolls, it is unclear what adjustments, if any, the Service intends to allow for Line 4l. Furthermore, the total amount of unpaid benefits (including outstanding amounts for previous years) is not easily determined, but the amount must be entered on the form. Consequently, it may be perilous for a plan administrator to sign the Form 5500, "Under penalties of perjury and other penalties set forth in the instructions". We suggest that any change of this magnitude should be part of a regulatory project, and delayed to a future year.
5. **Question 7, Dates of last amendments and determination letters:** It would be helpful for the Service to explain why the Form 5500 requires the date of the last determination letter for individually designed plans since the Service is terminating the determination letter program. For master and prototype plans, Council members need clarification of whether the date of the letter and the serial number is as of the "beginning date" or "ending date" of the plan year. Clarification is also

needed if a plan has utilized more than one preapproved plan in the same year.

We look forward to discussing these issues with you as you move forward. Thank you for the opportunity to provide our views and suggestions.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jan Jacobson  
Senior Counsel, Retirement Policy

cc: Robert Choi