



July 8, 2019

Delivered via email

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Re: Comments on Form 5500 (Annual Return/Report of Employee Benefit Plan)

Dear Ms. Brimmer, Mr. Auerbach and Mr. Canary:

The American Benefits Council (“the Council”) appreciates the invitation to provide comments on the Form 5500, including especially comments on ways to enhance the utility of the information collected on this form.¹ **We are writing to request that the Form 5500 be revised to include the reporting of the names and employer identification numbers (EINs) of any affiliate employers that participate in a retirement plan to which a Form 5500 relates.** As described in more detail below, the reporting of participating affiliate names through the Form 5500 reporting process – and the corresponding public disclosure of that information – would be very helpful in protecting the private employer-based retirement system and the employers that offer

¹ 84 Fed. Reg. 20,202 (May 8, 2019).

qualified retirement plans from unnecessary disruption and new administrative burdens in connection with the growing number of state-run automatic IRA (“state auto-IRA”) programs.

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or administer health and retirement benefits for virtually all Americans covered by employer-sponsored plans. As large corporations, many of the Council's members have multiple legal entities in their controlled groups and thus their employees work for a variety of affiliates under different EINs.

GROWTH IN STATE AUTO-IRA PROGRAMS PRESENTS BOTH OPPORTUNITIES AND CHALLENGES

As the Internal Revenue Service (IRS), Department of Labor (DOL) and Pension Benefit Guaranty Corporation (PBGC) (collectively, “the agencies”) are aware, an increasing number of states have enacted legislation to create retirement savings programs that generally require private-sector employers to automatically enroll employees in the state auto-IRA program (subject to employee opt out) unless the employer already offers a qualified retirement plan. Oregon, Illinois and California are well along in the process of implementing their respective programs. Three additional states – Connecticut, Maryland and New Jersey – are in the development stage and Seattle has passed a bill to create a city-wide program. Absent the enactment of similar federal legislation, the number of state auto-IRA programs is only expected to grow as several bills calling for the creation of such programs are introduced in state legislatures throughout the country each year.

The Council and its members have long supported both public and private efforts to expand access to retirement savings opportunities for workers and we believe that the private retirement system and state auto-IRA programs can – with appropriate safeguards – coexist and together make progress toward the retirement savings coverage goals that we all share. However, it is critical that these state auto-IRA programs not disrupt existing employer-provided retirement plans. In the vast majority of cases, such plans provide for employer contributions and higher contributions limits. The avoidance of disruption to plan sponsors is also important in many instances in recognizing the role of the Employee Retirement Income Security Act of 1974 (ERISA) and its broad preemption provision.

EFFORTS TO ENFORCE STATE AUTO-IRA PROGRAMS IN A MANNER THAT MINIMIZES IMPACT ON PLAN SPONSORS

We commend Oregon, Illinois and California in particular for recognizing the unintended harm that a state auto-IRA program has the potential to inflict on employer-provided retirement plans if the program is not designed and implemented in a careful manner. In this regard, we have been encouraged by the steps these states have taken to minimize the actual and potential disruption caused by these programs. But there is one concern in particular that states have encountered with respect to their programs that has been challenging for states to address in a manner that does not impose new burdens on employers that already offer a retirement plan. That concern is, how can a state determine which non-participating employers are exempt from the state auto-IRA program because they offer a retirement plan to employees and which non-participating employers are out of compliance with the program's participation requirements?

The result of this challenge in some cases has been for states to impose reporting burdens on plan sponsors that require plan sponsors to affirmatively indicate to the state that the employer is exempt from the state auto-IRA program.² Even though such a reporting requirement may be a small task with respect to a single state, that burden can quickly multiply for employers with employees in every state, as many of our members have, when there are 50 different forms to file or processes to follow, with 50 different requirements and on 50 different schedules. Even a minimal administrative burden quickly becomes a major burden when multiplied by 50 and this does not even consider the possibility that a number of cities, such as Seattle, could implement auto-IRA programs as well. Furthermore, although the potential for multiple states to partner together in offering a state auto-IRA program could streamline certain aspects of the interactions that plan sponsors have with these programs, state partnerships may also create additional complexities for plan sponsors to track that negate or even overtake any benefits of a multi-state partnership from a plan sponsor's point of view.

² To date, Oregon and Illinois are the two states seeking to verify when a non-participating employer is exempt because it already offers a retirement plan by, for example, requiring a plan sponsor to affirm its exempt status through a separate website or on an existing tax form. California, however, has indicated that it will not require plan sponsors to take such affirmative action. Although the Council and its members prefer California's approach because it does not impose additional reporting burdens on plan sponsors, we recognize that Oregon and Illinois want to more proactively affirm whether a non-participating employer is indeed exempt and any additional states that reach the implementation stage of a state auto-IRA program may wish to do the same.

FORM 5500 DATA HELPS STATES MINIMIZE BURDEN ON PLAN SPONSORS, BUT LACK OF PARTICIPATING AFFILIATE INFORMATION IS KEY LIMIT TO FORM'S USEFULNESS

To help alleviate this reporting burden on employers with retirement plans, Oregon and Illinois have each developed a process to use data from the public Form 5500 filings to help identify employers that sponsor a plan. In fact, Oregon recently revised the regulations governing its program, OregonSaves, to give Oregon the option to “presumptively” exempt an employer when a Form 5500 match is made, which in most cases means that the employer is no longer required to take separate reporting action with respect to the state auto-IRA program.³ However, states’ ability to use Form 5500 data to reduce the reporting burdens on employers that already offer a retirement plan is, of course, limited by the data available.

In this regard, the key limitation that states face in using Form 5500 data to exempt employers from a state auto-IRA program is the lack of information regarding which affiliates of the sponsoring member listed on page 1 of the Form 5500 also offer that retirement plan to their employees. Hundreds of affiliate employers may have employees that participate in a single retirement plan, but the name and EIN of only one employer is provided on the Form 5500 today. Based on feedback from our members, we believe that many corporate families would welcome the opportunity to provide a list of participating affiliates as part of their Form 5500 filing if doing so was likely to substantially reduce or even eliminate the state-level reporting requirements associated with state auto-IRA programs.

For the reasons described above, the Council asks the agencies to add a reporting mechanism to the Form 5500 through which participating affiliate employer names and EINs would be provided.⁴ Although we suggest that providing affiliate information should be a required aspect of Form 5500 reporting, if the agencies would find it simpler to accomplish this change from a procedural perspective by making affiliate reporting optional on an initial and temporary basis, we would also support that approach.

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³ O.A.R. 170-080-0020(3) (*available at* <https://www.oregon.gov/retire/SiteAssets/Pages/Rules/OregonSaves%20rules%20revised%20March%202019.pdf>).

⁴ The Council’s request to provide a mechanism for reporting participating affiliate information on the Form 5500 is based on feedback from our members that controlled groups would generally welcome and make use of such an option. Our request for expanded public reporting does not extend, for example, to Forms 5500 submitted by professional employer organizations (“PEOs”) with respect to a multiple employer plan sponsored by the PEO, where concerns over potential harm to PEO small business customers and workers, as well as the desire to keep proprietary business information of the PEO private, outweigh the considerations otherwise discussed in this letter.

Thank you for your consideration of our comments. If you would find it helpful to discuss any of these matters with us, please contact me at 202-289-6700 or jjacobson@abcstaff.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson".

Jan Jacobson
Senior Counsel, Retirement Policy

Cc: Tobias Read, Treasurer, Oregon State Treasury
Michael Parker, Executive Director, Oregon Savings Network
Michael Frerichs, Treasurer, Illinois Office of the Treasurer
Courtney Eccles, Director, Illinois Secure Choice
Fiona Ma, Treasurer, California State Treasurer's Office
Katie Selenski, Executive Director, CalSavers