



# Federal Register

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**Friday,  
November 16, 2007**

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## **Part II**

### **Department of Labor**

**Employee Benefits Security  
Administration**

**29 CFR Part 2520**

### **Department of the Treasury**

**Internal Revenue Service**

### **Pension Benefit Guaranty Corporation**

**Annual Reporting and Disclosure;  
Revision of Annual Information Return/  
Reports; Final Rule and Notice**

**DEPARTMENT OF LABOR****Employee Benefits Security Administration****29 CFR Part 2520**

RIN 1210-AB06

**Annual Reporting and Disclosure****AGENCY:** Employee Benefits Security Administration, Labor.**ACTION:** Final rule.

**SUMMARY:** This document contains amendments to Department of Labor regulations relating to annual reporting and disclosure requirements under Part 1 of Subtitle B of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The amendments contained in this document are necessary to conform the annual reporting and disclosure regulations to revisions to the Form 5500 Annual Return/Report of Employee Benefit Plan, including a new Form 5500-SF (Short Form or Short Form 5500), filed for employee pension and welfare benefit plans under ERISA and the Internal Revenue Code of 1986, as amended (Code). The changes to the Form 5500 forms and implementing regulatory amendments are intended to facilitate the transition to an electronic filing system, reduce and streamline annual reporting burdens, especially for small businesses, and update the annual reporting forms to reflect current issues, agency priorities and new requirements under the Pension Protection Act of 2006. Some of the forms revisions apply on a transitional basis for the 2008 reporting year before all of the form revisions are fully implemented as part of the switch under the ERISA Filing Acceptance System (EFAST) to a wholly electronic filing system for the 2009 reporting year. The current effective date of the electronic filing requirement under 29 CFR 2520.104a-2 also is being postponed in this document to apply to plan years beginning on or after January 1, 2009. The regulatory amendments will affect the financial and other information required to be reported and disclosed by employee benefit plans filing the Form 5500 Annual Return/Report of Employee Benefit Plan, including the Form 5500-SF, under Title I of ERISA.

**DATES:** This rule is effective January 15, 2008.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth A. Goodman or Michael I. Baird, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S.

Department of Labor, (202) 693-8523 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:****A. Background**

Under Titles I and IV of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the Internal Revenue Code, as amended (Code), pension and other employee benefit plans generally are required to file annual returns/reports concerning, among other things, the financial condition and operations of the plan. Filing the Form 5500, "Annual Return/Report of Employee Benefit Plan," together with any required attachments and schedules (Form 5500 Annual Return/Report) through the ERISA Filing Acceptance System (EFAST) generally satisfies these annual reporting requirements. The Form 5500 Annual Return/Report is the primary source of information concerning the operation, funding, assets, and investments of pension and other employee benefit plans. In addition to being an important disclosure document for plan participants and beneficiaries, the Form 5500 Annual Return/Report is a compliance and research tool for the Department of Labor (Department), Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC) (collectively, the Agencies) and a source of information and data for use by other federal agencies, Congress, and the private sector in assessing employee benefit, tax, and economic trends and policies.

On July 21, 2006, the Agencies published a notice of proposed forms revisions (July 2006 Proposal) with changes to the Form 5500 Annual Return/Report for the 2008 reporting year. 71 FR 41615. The proposed form changes were intended to: facilitate the transition to a wholly electronic filing system for the 5500 Forms, including removal of IRS-only schedules; reduce and streamline annual reporting burdens, especially for small businesses, with the establishment of a new Short Form 5500; and update the annual reporting forms to reflect current issues and agency priorities, including enhanced reporting of plan fees and expenses. The Department also published a final rule requiring electronic filing of the Form 5500 Annual Return/Report for plan years beginning January 1, 2008 (Electronic Filing Rule). 71 FR 41359 (July 21, 2006). On December 11, 2006, the Agencies published a Notice of Supplemental Proposed Forms Revisions (Supplemental Notice). The Supplemental Notice was necessary to

make changes to the Form 5500 Annual Return/Report required by the Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780 (2006), enacted on August 17, 2006 (PPA). 71 FR 71562.

The Department received 38 comment letters on the July 2006 Proposal from representatives of employers, plans, and plan service providers.<sup>1</sup> It received seven comments on the Supplemental Notice. Copies of the comments are posted on the Department's Web site at <http://www.dol.gov/ebsa/regs>.

The preamble to this Notice outlines the final amendments being adopted to the Department's annual reporting regulations to reflect the changes being adopted to the Form 5500 Annual Return/Report, the Form 5500-SF "Short Form Annual Return/Report of Small Employee Benefits Plan" (Form 5500-SF or Short Form 5500), and the required attachments and schedules (collectively, the 5500 Forms) published simultaneously. A comprehensive discussion of the changes to the 5500 Forms and instructions is in a separate notice of adoption of final revisions to the annual report/return forms (Forms Revision Notice) that is being published in today's **Federal Register**. To avoid unnecessary duplication, that discussion is incorporated herein by reference and only a general summary of the form and instruction changes is included in this preamble as background for the required cost/benefit and regulatory impact analyses.

**B. Discussion of the Revisions to 29 CFR Part 2520**

The public comments generally did not directly address the proposed regulations themselves. Rather, the comments were addressed to the scope and specifics of the proposed forms and instruction changes. As described more fully in the Form Revision Notice, the public comments generally approved of the Agencies' streamlining of the annual reporting requirements through the adoption of the new Form 5500-SF and eliminating the IRS-only schedules from the Form 5500 Annual Return/Report. The comments also generally supported the objectives of updating the annual return/report filing requirements to reflect current issues and enhancing transparency and accountability, although some commenters expressed concerns about the benefits, feasibility, and cost of complying with some of the proposed changes, particularly the

<sup>1</sup> The Department also received a comment letter from the United States Department of Commerce, Economic and Statistics Administration, Bureau of Economic Analysis (BEA), indicating that the BEA relies on the information collected in the Form 5500 to prepare certain statistics.

proposed changes to fee and expense reporting and the extension of the normal annual reporting requirements to Code section 403(b) plans. Some commenters also suggested postponing implementation of the proposed changes to allow filers and service providers more time to implement administrative procedures and alter information systems in order to comply with the new annual reporting requirements. The comments included suggestions for various technical adjustments of the forms and instructions to clarify and explain the new annual reporting requirements.

The following sections of this preamble describe the final regulations being adopted by the Department to implement the form and instruction changes, including a postponement of the current effective date of the Electronic Filing Rule to make it applicable one year later—for plan and reporting years beginning on or after January 1, 2009.

#### 1. Section 2520.103–1

The Department's annual reporting regulations, including 29 CFR 2520.103–1, generally are promulgated under the provisions of ERISA that authorize the creation of limited exemptions and simplified reporting and disclosure for welfare plans under ERISA section 104(a)(3), simplified annual reports under ERISA section 104(a)(2)(A) for pension plans that cover fewer than 100 participants, and alternative methods of compliance for all pension plans under ERISA section 110(a). *See also* ERISA section 505. To accommodate the form and instruction changes set forth in the Forms Revision Notice, regulatory amendments to 29 CFR 2520.103–1 are being made to update the references in the regulation to the annual return/report as revised.

#### (a) Short Form 5500 (Eligible Small Plan Filers)

A new two-page Form 5500–SF is being adopted to streamline the reporting requirements for certain small pension and welfare plans (generally, plans with fewer than 100 participants) that meet certain conditions regarding their investments being held or issued by regulated financial institutions and that have a readily determinable fair market value as described in the final regulation at section 2520.103–1(c)(2)(ii)(C). The Form 5500–SF is also being adopted to provide a simplified report for plans with fewer than 25 participants as required by section

1103(b) of the PPA.<sup>2</sup> A detailed description of the Form 5500–SF, and a facsimile of the form and instructions are in the Forms Revision Notice being published in today's **Federal Register**. Substantially all of the information required to be reported by employee benefit plans on the Short Form 5500 currently is included in the more comprehensive information required to be reported as part of the Form 5500 simplified report currently available to small plans. The addition of the Short Form 5500 does not eliminate the existing simplified report available for small plans but, rather, adds the Short Form 5500 as another simplified reporting option for eligible small plans.

As more fully described in the Forms Revision Notice, the IRS has advised the Department that, although there are no mandatory electronic filing requirements for the 5500 Forms under the Code or the regulations issued thereunder, the electronic filing of the 5500 Forms, in accordance with the instructions and such other guidance as the Secretary of the Treasury may provide, will be treated as satisfying the annual filing and reporting requirements under Code sections 6058(a) and 6059(a). In addition, to ease the burdens on plans that are not subject to Title I of ERISA that file the Form 5500–EZ to satisfy the annual reporting and filing obligations imposed by the Code, the IRS has advised that it will permit certain Form 5500–EZ filers to satisfy the requirement to file the Form 5500–EZ with the IRS by filing the Short Form 5500 electronically through the EFAST processing system. Eligible Form 5500–EZ filers thus will have electronic filing and paper filing options. The electronic filing option will allow eligible Form 5500–EZ filers to complete and electronically file with EFAST selected information on the Short Form 5500. Those Form 5500–EZ filers will also be able to choose instead to file a Form 5500–EZ on paper with the IRS.<sup>3</sup>

<sup>2</sup> The PPA's requirement to provide simplified reporting for plans with fewer than 25 participants is effective for plan years beginning after December 31, 2006. The Short Form 5500 will not be available for use, however, until the move to the fully electronic filing system for plan years beginning after December 31, 2008. For the interim two years, as discussed in more detail in the Forms Revision Notice, the Agencies are offering to plans with fewer than 25 participants that would meet the eligibility requirements for the Short Form 5500 a simplified reporting option within the context of the existing annual report forms.

<sup>3</sup> Under the voluntary electronic filing option, Form 5500–EZ filers filing an amended return for a plan year will have to file the amended return electronically using the Form 5500–SF if they initially filed electronically for the plan year and will have to file with the IRS using the paper Form

(b) Removal of IRS-Only Schedules from the 5500 Forms Annual Return/Report

For plan years beginning after December 31, 2008, the 5500 Forms will no longer include any of the schedules that are required only for the IRS. This change was made to help effectuate the adoption of a wholly electronic filing requirement for the 5500 Forms. Accordingly, the Schedule E (ESOP Annual Information) and the Schedule SSA (Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits) will no longer be required to be filed as part of the 5500 Forms.<sup>4</sup> Three questions on employee stock ownership plan (ESOP) information formerly reported on the Schedule E will now be on the Schedule R (Retirement Plan Information). The IRS also has advised the Department that it intends that plan administrators, employers, and certain other entities that are subject to additional filing and reporting requirements under the Code will have to continue to satisfy any applicable requirements in accordance with IRS revenue procedures, regulations, publications, forms, and instructions.

#### (c) Schedule A (Insurance Information)

Schedule A must be attached to the Form 5500 Annual Return/Report for an ERISA-covered plan if any pension or welfare benefits under the plan are provided by, or if the plan holds any investment contracts with, an insurance company, insurance service or other similar organization. As with the proposal, the Schedule A data elements are largely unchanged from the current form. The Department adopted in the final Schedule A the proposed line item to give administrators a specific space on the Schedule A to report a failure by an insurance carrier to provide necessary information. Certain other technical changes and clarifications were made to the Schedule A and its instructions to improve Schedule A as a vehicle for disclosure of insurance fees and commissions.

5500–EZ if they filed for the plan year with the IRS on a paper Form 5500–EZ.

<sup>4</sup> Schedule P (Annual Return of Fiduciary of Employee Benefit Trust) was removed from Form 5500 filings beginning with the 2006 plan year (2005 plan year for Form 5500–EZ) in anticipation of the move to electronic filing. *See*, Announcement 2007–63, 2007–30 I.R.B. 65. In addition, Schedule T (Qualified Pension Plan Coverage Information) was removed from Form 5500 filings beginning with the 2005 plan year. The IRS notes that this change was not intended to effect the applicable required or optional nondiscrimination testing (including the testing options described in Revenue Procedure 93–42), 1993–2 C.B. 540.

(d) Schedule SB (Single-Employer Defined Benefit Plan Actuarial Information) and Schedule MB (Multiemployer Defined Benefit Plan and Certain Money Purchase Plan Actuarial Information) (Formerly Schedule B)

Actuarial schedules are required for defined benefit pension plans subject to the minimum funding standards (see Code section 412 and Part 3 of Title I of ERISA). Schedules SB and MB will be required to be filed as a non-standard attachment for the 2008 plan year to meet the requirements of the PPA and, for the 2009 plan year and later, will be filed in the same manner as the other schedules under the electronic filing system.

The Schedule SB must be filed for single-employer defined benefit pension plans (including multiple-employer defined benefit pension plans).<sup>5</sup> The Schedule SB and accompanying attachments will capture identifying information about the plan and plan sponsor, the type of plan, and prior year plan size. It includes basic information about plan assets, number of participants, funding target information, and a statement by an enrolled actuary. It consists of basic actuarial worksheets designed to allow the Agencies to evaluate the plan's compliance with the funding requirements as amended by sections 101, 102, 111, and 112 of the PPA, and to ensure that the reporting requirements under ERISA, as amended by section 503 of the PPA, are included on the schedule. The material is divided into sections consisting of "Basic information," "Beginning of year carryover and prefunding balances," "Funding percentages," "Contributions and liquidity shortfalls," "Assumptions used to determine funding target and target normal cost," "Miscellaneous items," "Reconciliation of unpaid minimum required contributions for prior years," and "Minimum required contribution for current year." Airlines that have frozen pension plans electing the alternate funding schedule and plans for which the effective date of the new PPA funding rules is delayed (PBGC settlement plans, certain defense contractors, certain rural electrical cooperatives, etc.) will not be required

to fill out all of these sections. Instead, additional information related to the applicable funding rules for such plans will be provided as an attachment.

Schedule MB must be filed for all multiemployer defined benefit plans and money purchase plans (including target benefit plans) that are currently amortizing waivers. Schedule MB is similar to the existing Schedule B. New items that have been added include: (1) Accrued liability determined using the unit credit cost method; (2) information about whether the plan is in endangered, seriously endangered, or critical status, and, if so, whether the plan is complying with the applicable requirements for its funding improvement or rehabilitation plan; and (3) information required by PPA section 503.

(e) Schedule C (Service Provider Information)

Schedule C generally must be attached to the Form 5500 Annual Return/Report filed by large plan filers to report persons who rendered services to the plan or in connection with transactions with the plan received, directly or indirectly, \$5,000 or more in compensation during the plan year, and to report terminations of plan accountants or enrolled actuaries. Consistent with recommendations of the ERISA Advisory Council Working Groups and the Government Accountability Office (GAO), EBSA has concluded that more information should be disclosed on the Form 5500 Annual Return/Report regarding plan fees and expenses. See ERISA Advisory Council Report of the Working Group on Plan Fees and Reporting on Form 5500 (November 10, 2004) (available on the Internet at: <http://www.dol.gov/ebsa/publications>); Private Pensions: Government Actions Could Improve the Timeliness and Content of Form 5500 Pension Information, GAO-05-491 (available on the Internet at: <http://www.gao.gov>).

Schedule C reporting continues to be limited to large plan filers and the \$5,000 reporting threshold has been retained. As in the proposal, the Schedule C consists of three parts. Part I of the Schedule C requires, subject to an alternative reporting option described below, the identification of each person who received, directly or indirectly, \$5,000 or more in total compensation (i.e., money or anything else of value) in connection with services rendered to the plan or their position with the plan during the plan year. To provide more informative disclosures about the types of fees being paid to or received by plan service

providers, the final Schedule C requires direct compensation paid by the plan to be reported on a separate line item from indirect compensation received from sources other than the plan or plan sponsor. In addition, in light of the fact that particular service providers may receive indirect compensation of various types from various sources, the final forms revisions expand the codes currently required on the Schedule C to better identify the types of services provided and to also require codes for types of fees received by the service provider.

As noted above, the final form revisions includes an alternative reporting option for service providers whose only compensation in relation to the plan is limited to "eligible indirect compensation" (certain specified types of common investment related fees) provided that written disclosure(s) are furnished to the plan administrator, including in electronic form, that disclose the existence of the indirect compensation; the services provided for the indirect compensation or the purpose for payment of the indirect compensation; the amount (or estimate) of the compensation or a description of the formula used to calculate or determine the compensation; and the identity of the party or parties paying and receiving the compensation. Where a particular service provider received only "eligible indirect compensation" for which the required disclosures were provided, instead of providing information on the service provider, the Schedule C may report instead identifying information on the person or persons who provided the plan with the required written disclosures.

With respect to service providers required to be listed on the Schedule C who received such eligible types of indirect compensation for which the written disclosures were not provided or any other indirect compensation, the Schedule C requires more detailed information on the indirect compensation, including, in the case of certain key service providers, information regarding the payor if the service provider received during the plan year indirect compensation from a single source of \$1,000 or more.

Although filers generally have the option of reporting a formula used to calculate indirect compensation received instead of an actual dollar amount or estimate, where a formula is used to describe indirect compensation received by one of the key service providers, the amount of indirect compensation is presumed to meet the reporting thresholds for purposes of the Schedule C reporting requirements.

<sup>5</sup> Unlike multiemployer plans within the meaning of ERISA sections 3(37) and 4001(a)(3) to which more than one employer is required to contribute, which must be maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and which must satisfy other requirements prescribed in regulations issued by the Department at 29 CFR 2510.3-37, multiple-employer plans are plans that cover the employees of two or more employers but are treated as single-employer plans for various purposes under ERISA.

As noted above, the final Schedule C includes a new Part II for plan administrators to identify each service provider that failed or refused to provide the information necessary to complete Part I of the Schedule C.

The third part of the Schedule C (Part III) is the current Part II of the Schedule C used for reporting termination information on plan accountants and enrolled actuaries.

**(f) Schedule R (Retirement Plan Information)**

As noted above, in light of the removal of the Schedule E (ESOP Annual Information), selected questions from the Schedule E are being incorporated into the Schedule R in order to continue to collect certain information regarding ESOPs as part of the Form 5500 Annual Return/Report.

As in the proposal, Schedule R has been modified to include additional questions required by section 503 of PPA and to collect information the PBGC needs to enable it to properly monitor the plans it insures. The new Part V collects PPA-required information on multiemployer defined benefit plans and additional information related to major contributing employers. Asset allocation questions for large defined benefit plans (1,000 or more participants) are included in Part VI. Such plans must provide a breakdown of plan assets by type of investment (stock, investment-grade debt, high-yield debt, real estate, and other). Information on the average duration of combined investment-grade and high-yield debt is also required. For this purpose, duration may be determined using any generally accepted methodology. Although the ESOP-related questions will not be on the Schedule R until the shift to the wholly electronic filing system effective for the 2009 plan year, the PPA-related questions and the asset allocation questions for the PBGC will be required as a non-standard attachment to the Schedule R for the 2008 plan year.

**(g) Technical and Conforming Changes for Forms and Instructions**

Various other technical and conforming changes are being adopted as part of the final changes to the 5500 Forms. Several of the more significant changes include: (1) Revision of the instructions for the Form 5500 Annual Return/Report and development of instructions for the Short Form 5500 to reflect the new structure of the returns/reports and electronic filing requirements; (2) addition of questions regarding compliance with the Department's blackout notice regulation

in 29 CFR 2510.101-3; (3) addition of a compliance question on whether the plan failed to pay benefits when due under the plan; (4) expansion of the use of codes to report plan feature information on pension and welfare benefit plans; (5) elimination of the optional entry of the form preparer's name and employer identification number (EIN); (6) requiring small plans to report administrative expenses separately from other expenses on the Schedule I; (7) addition of a question on whether any minimum funding amount reported for a pension plan will be met by the funding deadline; and (8) adoption of a standard format for use in connection with an independent qualified public accountant (IQPA) rendering an opinion on the supplemental schedule information on Line 4a of Schedule H and I relating to delinquent participant contributions.

**(h) PPA-Required Simplified Reporting for Plans With Fewer Than 25 Participants**

As noted in the Forms Revision Notice, section 1103(b) of the PPA requires a simplified report for plans with fewer than 25 participants to be available for 2007 plan year filings, i.e., filings for plan years beginning after December 31, 2006. To satisfy this requirement, the Agencies proposed giving plans covering fewer than 25 participants that would meet the conditions for being eligible to file the Short Form 5500—treating those conditions as if they applied for 2007 plan year filings—the option of filing an abbreviated version of the current Form 5500 Annual Return/Report for “small plan” filers. The abbreviated version, to a large extent, is an attempt to replicate, within the context of the existing Form 5500 Annual Return/Report structure, the information that would be required to be reported on the Short Form 5500 by allowing certain schedules to be excluded from the filing and requiring only certain line items to be completed on any required schedules. Although the Department received a comment suggesting that the Agencies satisfy the PPA requirement by instituting the Form 5500-SF for 2007 plan year filings, the Department concluded that approach would not be feasible or appropriate given the costs that would have been required to modify the current EFAST system so that it could process the Form 5500-SF. Rather, with the additional deferral in the implementation of the electronic filing requirement, the proposed simplified reporting option using the existing 5500 Forms for eligible plans with fewer than

25 participants will be available for both the 2007 and 2008 plan year filings.

Thus, for the 2007 and 2008 plan years, plans with fewer than 25 participants that meet the eligibility requirements for the Short Form 5500, treating those conditions as if they applied for 2007 and 2008 plan year filings, will be permitted to satisfy the annual reporting requirement by filing on the appropriate year form and schedules: (1) The Form 5500; (2) a Schedule A for any insurance contracts for which a Schedule A is required under current rules, completing only lines A, B, C, D and the insurance fee and commission information in Part I; (3) Schedule B for the 2007 plan year, and, for the 2008 plan year, Schedule MB for multiemployer defined pension benefit plans and certain money purchase plans, and Schedule SB for single employer defined benefit pension plans; (4) Schedule I; (5) Schedule R, completing only lines A, B, C, D, and Part II; and (6) Schedule SSA. Additional detailed guidance regarding this simplified reporting option is included in the instructions to the 2007 Form 5500 and the instructions to the 2008 Form 5500.

The Department understands that some eligible small plan filers may want to wait until the implementation of the Short Form 5500 for the 2009 plan year in order to avoid having to make changes to their annual reporting systems and procedures for 2007 and 2008 plan year filings and then adjust them again to start filing the Short Form for the 2009 plan year. The above simplified reporting alternative, accordingly, is available for plans that voluntarily take advantage of its availability. Plans with fewer than 25 participants can instead continue to file in accordance with the normal small plan rules for the 2007 and 2008 plan year.

**(i) PPA-Required Actuarial Schedules and Multiemployer Plan Reporting**

The remaining PPA-required changes in the 5500 Forms are the new actuarial information schedules (Schedules SB and MB), most of the questions on Part V of the Schedule R—Additional Information for Multiemployer Defined Benefit Pension Plans, line 18 of the Schedule R (certain liabilities to participants and beneficiaries under two or more pension plans), and line 7 of the Form 5500 (number of employers obligated to contribute to multiemployer defined benefit plans).<sup>6</sup> To comply with

<sup>6</sup> For 2008, only multiemployer defined benefit pension plans will be required to answer the new

the PPA, these reporting changes for defined benefit and multiemployer pension plans are being implemented on a transitional basis under the current EFAST system for 2008 plan year annual reports. Plans required to file an actuarial schedule will check the Schedule B box on the 5500 Forms to indicate that they are filing Schedule SB or MB (for plan years beginning with the 2008 plan year) as an attachment to their filing. Similarly, as to the new Part V and line 18 on the Schedule R, and the Form 5500 question for multiemployer plans on the total number of contributing employers, as well as the new financial questions needed by the PBGC, filers will be directed in the instructions to include answers to those questions as an attachment to the Schedule R.<sup>7</sup>

## 2. Section 2520.104a-2 Electronic Filing of Annual Reports

The proposed revisions to the Form 5500 Annual Return/Report, which include both those set forth in the Agencies' July 2006 Proposal and those in the Supplemental Notice to address changes required by the PPA, were part of the Agencies' move to a fully electronic filing and processing system to replace the existing largely paper-based EFAST system. As part of that initiative, the Department published the Electronic Filing Rule, establishing an electronic filing requirement for the Form 5500 Annual Return/Report and the Form 5500-SF for plan years beginning on or after January 1, 2008. 71 FR 41359. In adopting the final Electronic Filing Rule, the Department responded to public comments seeking a postponement in the move to a wholly electronic filing system by agreeing to a deferral of the electronic filing mandate for one year from the 2007 plan year to the 2008 plan year. The Department agreed to the deferral in order to ensure an orderly and cost-effective migration to an electronic filing system by both the Department and annual report filers. Under that deferral, the vast majority of filers would have had until at least July 2009 to make any necessary adjustments to accommodate the electronic filing of their annual report because annual

reports generally are not required to be filed until the end of the 7th month following the end of the plan year. Deferring the implementation date also provided service providers, software developers, and the Department additional time to work through electronic processing issues.

A significant percentage of the commenters on the form revision proposals, including several large industry groups representing plan sponsors and service providers, asked for a further postponement in the effective date of the forms changes, and as a consequence, the electronic filing requirement. The commenters emphasized that the PPA, including its new reporting and disclosure obligations, would require many plans and service providers to update existing information management and recordkeeping systems. They also pointed out the certain of the changes in the July 2006 proposal, especially the enhanced fee disclosure requirements in Schedule C and the increased reporting by Code section 403(b) plans (described below), would also require changes in the way plans collect and keep plan information. They argued that it would be particularly burdensome to require plans to transition to the new Form 5500 annual reporting obligations, including the move to the wholly electronic filing system, at the same time as they were working to comply with new PPA requirements. Also, complications with the procurement process and delays in completing the 2007 fiscal year appropriations impacted the timing of the EFAST2 contract award.

The Department continues to believe it is important for plans, service providers, and the Agencies to have an orderly and cost-effective migration to the EFAST2 electronic filing system. The Department, in conjunction with the other Agencies, has decided to defer for an additional one year the implementation of annual reporting forms changes not mandated by the PPA. In determining to publish this deferral in final form, the Department considered section 553 of the Administrative Procedure Act (APA), which requires that an agency provide for notice and comments prior to promulgating substantive rules does not apply when an agency, for good cause, unless it determines that such procedures are impractical, unnecessary or contrary to the public interest. 5 U.S.C. 553(b)(A) and (B). The Department has determined that in order to effectuate an orderly migration to the EFAST2 system, a deferral of the final rule for one additional year is

warranted without further notice and comment.

First, the deferral is necessitated by delays in the contracting process beyond the Department's control, including the timing of the fiscal year 2007 budget appropriations, which prevented a contract award in time to build the new system to process 2008 plan year filings as contemplated in the original rulemaking. The Agencies now have, however, received the budgetary authorization necessary to complete the procurement process, have received bids, and are actively pursuing the process. As noted in the Department's *FY 2008 Detailed Budget Documentation*, available on the Internet at <http://www.dol.gov>, the Department is on track for implementing EFAST2 system on January 1, 2010, to process filings for the 2009 plan year.

Second, when implemented, the elimination of paper filings in favor of electronic filing will result not only in significant improvements in the timeliness and accuracy of information available to workers, regulators and the public about employee benefit plans and result in operational improvements and cost savings, a direct goal of the President's E-government initiative, but it will also be used to fulfill information collection and disclosure requirements of the PPA, many of which apply for the 2008 plan year. Thus, additional delays would negatively impact orderly and cost-effective integration of the new PPA requirements and the new EFAST2 system, in light of the PPA's deadlines.

Third, publishing the deferral of the effective date on an interim basis with an opportunity for comment not only could potentially interfere with the contracting and budget process, but also could also harm plans by leading them to delay preparing for the move to the new system, when it is not practical to implement the new system either earlier or later.

Accordingly, under the final regulation, the electronic filing requirement and all of the forms changes, except for those mandated by the PPA discussed in this Notice and the Forms Revision Notice, will become effective for all annual report filings made under Part 1 of Title I of ERISA for plan years (reporting years for non-plan filings) beginning on or after January 1, 2009. To effectuate the deferral of the electronic filing requirement, this final rule includes an amendment to the Electronic Filing Rule published in the **Federal Register** on July 21, 2006. Specifically, this final rule amends the Department's regulation at 29 CFR 2520.104a-2 to

question 7 on the 2009 Form 5500 (as a nonstandard attachment), as mandated by the PPA, but in 2009 and following years, all multiemployer plans will be required to answer the question as part of the electronic filing of the Form 5500, as proposed in the July 2006 Proposal.

<sup>7</sup> Because the 2007 forms will not include the new PPA required questions, a caution was added to the 2007 Form 5500 instructions to alert short plan year filers required to complete the Schedule SB, Schedule MB or the new Schedule R questions that they will have to wait until the 2008 Forms and instructions are publicly available for use for filing.

provide that the electronic filing requirement is applicable for plan years beginning on or after January 1, 2009.

Under this final rule, the vast majority of filers will now have until at least July 2010 to complete any necessary adjustments to accommodate the non-PPA required changes to the form and those required for electronic filing of their annual report because annual reports generally are not required to be filed until the end of the 7th month following the end of the plan year.

### 3. Section 2520.104-44

Section 2520.104-44 and the current Form 5500 Annual Return/Report instructions provide for limited reporting for pension plans that exclusively use a tax deferred annuity arrangement under Code section 403(b)(1), custodial accounts for regulated investment company stock under Code section 403(b)(7), or a combination of both. The exemption in section 2520.104-4(b)(3) is being eliminated, with the result that Code section 403(b) pension plans subject to Title I will now be treated the same under the regulations as any other Title I pension plan for purposes of the annual reporting requirements under Title I of ERISA.

### 4. Section 2520.104-46

In accordance with the Department's authority under section 104(a)(2)(A) and 104(a)(3) of ERISA, the Department has adopted, at 29 CFR 2520.104-41, simplified annual reporting requirements for pension and welfare benefit plans with fewer than 100 participants. In addition, the Department, at 29 CFR 2520.104-46, has prescribed for such small plans a waiver from the requirements of ERISA section 103(a)(3)(A) to engage an IQPA and to include the opinion of the IQPA as part of the plan's annual report. The waiver of the IQPA requirements for pension plans was conditioned, among other requirements, on enhanced disclosure in the Summary Annual Report (SAR) provided to participants and beneficiaries. In that regard, the Department prepared a model notice that plans could use to satisfy the enhanced SAR disclosure conditions. That model notice has been available at the EBSA's Web site at <http://www.dol.gov/ebsa>. In order to provide plan administrators with additional access to the model notice and to facilitate compliance with the audit waiver eligibility conditions, the

Department has added the model notice as an appendix to section 2520.104-46.<sup>8</sup>

### 5. Section 2520.104b-10

Section 104(b)(3) of ERISA provides in part that, each year, administrators must furnish to participants and beneficiaries receiving benefits under a plan SAR materials that fairly summarize the plan's annual report. Section 2520.104b-10 sets forth the requirements for the SAR used to satisfy that requirement and prescribes formats for such reports. The regulatory amendments described in this Notice do not include any change to the SAR content requirements. In order to facilitate compliance with the SAR requirement for Short Form 5500 filers, however, the Department is updating its cross-reference guide to correspond the line items of the SAR to the relevant line items on the Form 5500 and Short Form 5500. The cross-reference guide, as before, would continue to be an appendix to section 2520.104b-10.

### C. Findings on the Revised 5500 Forms as a Limited Exemption and Alternative Method of Compliance

Section 104(a)(2)(A) of the Act authorizes the Secretary of Labor (Secretary) to prescribe by regulation simplified reporting for pension plans that cover fewer than 100 participants. Section 104(a)(3) authorizes the Secretary to exempt any welfare plan from all or part of the reporting and disclosure requirements of Title I of ERISA or to provide simplified reporting and disclosure if the Secretary finds that such requirements are inappropriate as applied to such plans. Section 110 permits the Secretary to prescribe for pension plans alternative methods of complying with any of the reporting and disclosure requirements if the Secretary finds that: (1) The use of the alternative method is consistent with the purposes of Title I of ERISA, provides adequate disclosure to plan participants and beneficiaries, and provides adequate reporting to the Secretary; (2) application of the statutory reporting and disclosure requirements would increase costs to the plan or impose unreasonable

<sup>8</sup> The PPA requires defined benefit plans to provide an Annual Funding Notice for plan years beginning after January 1, 2008. Under the PPA, plans that provide an Annual Funding Notice will no longer have to provide an SAR. The Department has a separate regulatory initiative regarding the PPA-required Annual Funding Notice. The Department anticipates that rulemaking will provide that the enhanced disclosure required to be eligible for the waiver of the requirement for an audit by an independent qualified public accountant be included in the Annual Funding Notice for small pension plans providing that notice instead of an SAR.

administrative burdens with respect to the operation of the plan; and (3) the application of the statutory reporting and disclosure requirements would be adverse to the interests of plan participants in the aggregate. For purposes of Title I of ERISA, the filing of a completed Form 5500 Annual Return/Report, including the filing by eligible plans of the Short Form 5500, in accordance with the instructions and related regulations, generally would constitute compliance with the simplified report, limited exemption and/or alternative method of compliance in 29 CFR 2520.103-1. The findings required under ERISA sections 104(a)(3) and 110 relating to the use of the revised 5500 Forms as alternative methods of compliance, simplified report, and/or limited exemption from the reporting and disclosure requirements of Part 1 of Subtitle B of Title I of ERISA are set forth below. In revising the 5500 Forms and making the amendments in this rulemaking, the Department has attempted to balance the needs of participants and beneficiaries and the Department to obtain information necessary to protect ERISA rights and interests with the needs of administrators to minimize costs attendant with the reporting of information to the federal government. The Department makes the following findings under sections 104(a)(3) and 110 of the Act with regard to the use of the revised 5500 Forms as a simplified report, alternative method of compliance, and/or limited exemption pursuant to 29 CFR 2520.103-1(b).

The use of the revised 5500 Forms is consistent with the purposes of Title I of ERISA and provides adequate disclosure to participants and beneficiaries and adequate reporting to the Secretary. While the information that would be required to be reported on or in connection with the revised 5500 Forms deviates, as before, in some respects, from that delineated in section 103 of the Act, the information needed for adequate disclosure and reporting under Title I is required to be included on or as part of the 5500 Forms.

The use of the 5500 Forms will relieve plans subject to the annual reporting requirements from increased costs and unreasonable administrative burdens by providing a standardized format that facilitates reporting, eliminates duplicative reporting requirements, and simplifies the content of the annual report in general. The 5500 Forms are intended to reduce further the administrative burdens and costs attributable to compliance with the annual reporting requirements.

Taking into account the above, the Department has determined that application of the statutory annual reporting and disclosure requirements without the availability of the revised 5500 Forms and the new Schedules SB and MB, would be adverse to the interests of participants in the aggregate. The revised 5500 Forms provide for the reporting and disclosure of basic financial and other plan information described in section 103 of ERISA in a uniform, efficient, and understandable manner, thereby facilitating the disclosure of such information to plan participants and beneficiaries.

Finally, the Department has determined under section 104(a)(3) of ERISA that a strict application of the statutory reporting requirements, without taking into account the revisions to the 5500 Forms would be inappropriate in the context of welfare plans for the same reasons discussed above (i.e., the streamlined forms reduce filing burdens without impairing enforcement, research, and policy needs, while at the same time providing adequate disclosure to participants and beneficiaries).

#### D. Regulatory Impact Analysis

##### *Executive Order 12866 Statement*

Under Executive Order 12866, the Department must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action that is likely to result in a rule's (1) having an annual

effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of the Executive Order, it has been determined that this regulatory action is likely to have an annual effect on the economy of approximately \$100 million. Therefore, this action is being treated as "economically significant" and subject to OMB review under section 3(f)(1) of Executive Order 12866. The Department accordingly has undertaken to assess the costs and benefits of this regulatory action in satisfaction of the applicable requirements of the Executive Order and provides herein a summary discussion of its assessment.

The amendments contained in this final rule conform the annual reporting and disclosure regulations promulgated under Title I of ERISA to final revisions to the 5500 Forms and instructions being issued simultaneously with this final rule. Inasmuch as the amendments contained in this final rule implement the forms revisions contained in the

Forms Revision Notice being published simultaneously with this final rule, the Department's assessment pursuant to the Executive Order combines the regulatory amendments and the form revisions, treating these changes as a coordinated regulatory action. The Department's assessment, described below, takes into account the public comments received in response to the July 2006 Proposal and the Supplemental Notice, which are discussed in detail in the preamble of the Forms Revision Notice. That discussion, to which reference is made throughout this assessment, is hereby incorporated into this assessment by reference.

In accordance with OMB Circular A-4 (available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>), Table 1 below depicts an accounting statement showing the Department's assessment of the net annual cost reduction associated with the provisions of the final rule and forms revisions. Over the next ten years, the Department anticipates an average annual reduction in costs of \$94 million when using a 3% discount rate as suggested by OMB Circular A-4.<sup>9</sup> As described more fully below, the Department believes that the impact of these changes will affect individual employee benefit plans disparately, depending on their individual circumstances. While most employee benefit plans are likely to experience a decrease in costs, some plans may see an increase in costs due to these rules. Further information about the relative increase or decrease in costs likely for particular plan types is described below.

TABLE 1.—ACCOUNTING STATEMENT: ESTIMATED COST REDUCTION FROM THE CURRENT REPORTING REQUIREMENTS TO THE 2009 REPORTING REQUIREMENTS

[In millions]

| Category                    | Estimates        |              |               | Units       |                         |                 |
|-----------------------------|------------------|--------------|---------------|-------------|-------------------------|-----------------|
|                             | Primary estimate | Low estimate | High estimate | Year dollar | Discount rate (percent) | Period covered  |
| Benefits:                   |                  |              |               |             |                         |                 |
| Annualized Monetized .....  | 94.3             | 0.0          | 0.0           | 2009        | 7                       | 2007 and later. |
| (\$millions/year) .....     | 97.1             | 0.0          | 0.0           | 2009        | 3                       | 2007 and later. |
| Annualized Quantified ..... | 0.0              | 0.0          | 0.0           | .....       | 7                       |                 |
| Qualitative .....           | 0.0              | 0.0          | 0.0           | .....       | 3                       |                 |
| Costs:                      |                  |              |               |             |                         |                 |
| Annualized Monetized .....  | 14.8             | 0.0          | 0.0           | 2009        | 7                       | 2007 and later. |
| (\$millions/year) .....     | 15.4             | 0.0          | 0.0           | 2009        | 3                       | 2007 and later. |
| Annualized Quantified ..... | 0.0              | 0.0          | 0.0           | .....       | 7                       |                 |
| Qualitative .....           | 0.0              | 0.0          | 0.0           | .....       | 3                       |                 |

<sup>9</sup> A 7% units discount rate increases the estimate of the average annual reduction to \$97 million. Both

annualized estimates are based on aggregate cost savings of \$25.6 million in 2007, \$30.2 million in

2008, and \$97.4 million, starting in 2009 (all in 2009 Dollars).

### *Need for Regulatory Action*

As described in the preambles to the July 2006 Proposal and the Supplemental Notice, the Department is promulgating these amendments of the annual reporting regulations, the revision of the Form 5500 Annual Return/Report and its instructions, and the creation of the Short Form 5500 and its instructions, with the goal of reducing the overall burden of the statutory reporting requirements and the forms without sacrificing the quality of the information collected. This action also furthers three specific Departmental initiatives, described earlier in this preamble: (1) Creating a fully electronic filing system for processing the annual reports filed by employee benefit plans; (2) responding to reports from the GAO and the ERISA Advisory Council suggesting the need for substantive changes in the information gathered through the 5500 Forms, specifically with respect to fees and expenses of employee benefit plans; and (3) effectuating new reporting and disclosure requirements contained in the PPA.

The principal reforms contained in this final action include the adoption of the Short Form 5500, the revision of reporting requirements for Code section 403(b) plans, the creation of separate Schedules SB and MB to replace the Schedule B to report actuarial information, the elimination of IRS-only schedules, and the expansion of fee reporting in Schedule C. Because of the importance of these annual return/reports as a source of information for participants and beneficiaries, as an enforcement and research tool for the Department, and as a source of information and data for use by other federal agencies, Congress, and the private sector in assessing employee benefit, tax, and economic trends and policies, the final regulatory action increases the amount and improves the quality of information that plans must disclose. Because of the voluntary nature of the employee benefit system, however, the Department, in shaping this regulatory action, has carefully balanced the need for increased and improved disclosure and plan administrators' and sponsors' interest in minimizing reporting costs.

Specifically, the burden associated with completion of the Form 5500 Annual Return/Report can be divided into two steps: reading the instructions and completing the individual line items. The current structure of the Form 5500 Annual Return/Report, even without the introduction of the Short Form 5500, in contrast to what filers

would need to do to comply with the statute in the absence of the Form 5500 Annual Return/Report, allows filers to answer only relevant line items and quickly find the instructions relevant to the line items that they are required to complete. In the absence of the Form 5500, filers would be required to read and evaluate the statutory requirements and make judgments, without carefully targeted instructions, as to how to comply with the statutory reporting requirements. The Short Form 5500 requires not only less line item information than the Form 5500 itself, but eliminates the need to read instructions that are not associated with small plan filers. In addition, the elimination of IRS-only schedules also streamlines reporting under the new system.

The filing burden under these regulations thus is not only less than under the existing Form 5500 Annual Return/Report without revisions, but is less than that under the statute. Moreover, while requiring less information than does the statute, the information required, especially the new enhanced fee disclosure information, is carefully targeted to provide the Agencies, participants and beneficiaries, and others using the Form 5500 Annual Return/Report for research purposes, more informative data.

Retaining the existing efficient format of the annual return/report, with most of the information broken out into separate schedules, along with the introduction of the Short Form 5500 for small plans invested in assets with a readily determinable market value should reduce, relative to reporting in the absence of the Form 5500 Annual Return/Report, as revised, the time required to read the instructions because filers will now be more able to skip over the instructions for schedules that do not apply to them. It is, however, expected that filers for whom major changes apply (i.e. Short Form eligible filers, Schedule SB, MB, and C filers, and Code section 403(b) plan administrators) will require additional time in the initial year of filing to thoroughly read the instructions and to familiarize themselves with the revised Form 5500 Annual Return/Report. It is assumed, however, that most filers will not require this additional time in subsequent years. Entry of the information required by the Form 5500 Annual Return/Report, including the Short Form 5500, is made from financial and other records maintained by plans. Sound accounting and general business practices would generally dictate that all or most of these records be

maintained even in the absence of a reporting requirement.

As a result, these final changes are anticipated to result in an aggregate reduction of reporting costs for filers as compared with the reporting costs before promulgation of these changes. As explained below, the Department's assessment results in a conclusion that the benefits to be derived from this regulatory action justify the costs that the action imposes on the public.

### *Regulatory Alternatives*

Executive Order 12866 directs federal agencies promulgating regulations to evaluate regulatory alternatives. The Department and the other Agencies have done so in the process of developing this final action.<sup>10</sup> The preambles to the July 2006 Proposal and the Supplemental Notice describe the regulatory alternatives that were considered in making those proposals, including the possibilities of different eligibility criteria for the Short Form 5500; different approaches for satisfying the PPA requirements for additional actuarial and asset information reporting; and different types of reporting requirements for Code section 403(b) plans. In moving from the proposals to final action, the Department also considered alternatives set forth in public comments, weighing their costs and benefits against the initial proposed actions. The final decisions regarding the regulatory amendments and forms revisions are set forth and explained elsewhere in this document and in the Forms Revision Notice issued simultaneously with this document and are assessed further below. The following summarizes major alternatives considered but not adopted in finalizing these proposals.

*Eligibility for Short Form 5500 for certain plans with fewer than 25 participants.* In considering public comments in response to both the July 2006 Proposal and the Supplemental Notice, several alternatives to the proposal regarding eligibility to file the Short Form 5500 were considered but not adopted. Specifically, alternatives considered included: (1) relaxing the proposed eligibility requirement, applicable to all small plans (with fewer than 100 participants), that 100 percent of the plan's assets be invested in

<sup>10</sup> As explained elsewhere in this preamble and in the preamble to the Forms Revision Notice, the IRS and the PBGC act jointly with the Department in promulgating the 5500 Forms. The assessment under E.O. 12866 described in this preamble, therefore, makes reference to the three Agencies' decisions in finalizing the forms changes, as well as the Department's decisions in finalizing the amendments to the reporting regulations under Title I of ERISA.

secured, easy to value assets and (2) permitting all plans with fewer than 25 participants to file the Short Form 5500, regardless of whether the plan's investments were so invested.

As described more fully in the preamble to the Forms Revision Notice, the benefits to be gained through the ability to exercise oversight of small plans that invest in other types of assets justifies not diminishing the current burden for plans with fewer than 25 participants by having them continue to file the same information currently required on those assets. Permitting plans with employer securities or other assets that are difficult to value to file the limited information in the Short Form 5500 would be inconsistent with important policy objectives, which are underscored by the PPA's emphasis on increasing plan transparency, more accurately measuring plan assets, increasing participant control over the disposition of employer securities in defined contribution plans, and expanding the annual reporting requirements for multiemployer plans. Valuation of difficult-to-value assets, such as employer securities, may provide an opportunity for abuse or mismanagement that is not lessened by a plan's smaller size. The additional oversight possible through increased reporting responsibilities justifies the additional burden on such plans.

In any event, as described in the Forms Revision Notice, the Department estimates that 95 percent of single-employer non-403(b) plans will qualify to file the Short Form 5500, about 75 percent of which will be plans with fewer than 25 participants. Expanding Short Form filing eligibility to the remaining plans with fewer than 25 participants would only affect about 25,000 additional plans. Further, restricting Short Form 5500 eligibility based on the nature of a plan's asset investments will not deprive those non-eligible small plans of simplified annual filing methods. Those small plans will still be entitled to use the other simplified reporting available to them under the Form 5500 Annual Return/Report. Taking these other simplified options into account, we estimate that this option would only have saved filing plans approximately \$4.8 million per year, starting in 2009.<sup>11</sup> We have concluded that this is a reasonable cost to meet the important policy goal of ensuring proper disclosure for small

multiemployer plans and for plans with difficult-to-value assets.

*Scope of Code section 403(b) plan reporting.* The Department considered, but rejects, alternatives, suggested by commenters, to its proposal regarding expanded reporting requirements for Code section 403(b) plans that would have retained the current limited reporting requirements for such plans or modified the proposal to permit such plans their current exemption from annual audit and accountant's opinion requirements. The Department rejects these alternatives because they would significantly reduce or eliminate the benefit that will flow from expanded reporting by Code section 403(b) plans, which the Department believes will result in significant improvements in the administration of Code section 403(b) plans covered by Title I of ERISA, reducing the rate of violations currently being found in investigations of Code section 403(b) plans and increasing benefit security for such plans' participants and beneficiaries.

*Scope of Schedule C reporting obligations.* The Department considered and rejects several alternative approaches to the reporting of direct and indirect compensation on the Schedule C prior to developing the final decisions embodied in this action. Specifically, the Department considered and rejects alternatives that would have limited reporting of indirect compensation, including requiring reporting of only indirect compensation received by providers with direct service relationships with the plan; adding a "de minimis" exception for reporting cash compensation under a certain dollar amount; and reinstating the "top 40" provider limitation. The Department assessed the potential cost savings of these and other alternatives that would have reduced the amount and detail of information on indirect compensation required to be reported against the benefits to be gained through increased transparency regarding compensation paid to plan service providers by third parties. The Department believes that the increased transparency that will flow from the indirect compensation reporting required by this final rule will assist plan fiduciaries in assessing the value and appropriateness of their service provider relationships, making more efficient transactions possible and preventing abuses that might arise through receipt of indirect compensation. The Department's modification of its proposals on Schedule C disclosures, described in detail in the Forms Revision Notice, represents a compromise that balances

the need for additional disclosure in this area against the cost to the regulated entities that additional disclosure would likely impose.

#### *Benefits and Costs*

The Department believes that the benefits to be derived from this final regulatory action, including the final amendments to the reporting regulations and the final adoption of forms revisions, justify their costs. The Department further believes that these revisions to the existing reporting requirements will both reduce aggregate reporting costs and enhance protection of ERISA rights. The Department conducted a thorough assessment of the costs and benefits of these changes as originally proposed. The major proposed changes from the July 2006 Proposal that are promulgated in this final rule essentially as proposed include: (1) Adoption of the Short Form 5500; (2) removal of the IRS-only schedules; and (3) adoption of fuller reporting requirements for Code section 403(b) plans.

Changes proposed in the Supplemental Notice that are being finalized herein without substantial change include: (1) adoption of separate Schedules MB and SB to replace Schedule B; and (2) adoption of the Short Form 5500 as one method of compliance to effectuate the PPA's directive to establish simplified reporting for plans with fewer than 25 participants.

The discussion below under *Benefits* and *Costs* presents the Department's assessment of this final action as a whole and provides discussion of the major aspects of the final action that contributed to the assessment. The discussion also makes note of some of the modifications to the proposed changes that are incorporated into the final action and describes the extent to which those modifications have affected the Department's assessment of this action's costs and benefits.

*Benefits.* As previously described in the July 2006 Proposal and in the Supplemental Notice, the regulatory amendments and revised versions of the 5500 Forms announced today will provide a standardized, streamlined alternative means of compliance with applicable statutory reporting requirements and will also provide appropriate simplified annual reports and exemptions under section 104(a)(2) and (3) of ERISA. The revised Form 5500, the Short Form 5500, and their schedules will ease plan administrators' compliance with reporting requirements and greatly enhance the utility and accessibility of information reported to

<sup>11</sup> Due to the staggered implementation of the form changes, the savings in 2007 and 2008 are estimated to be about \$250,000 annually.

the government, participants and beneficiaries, and others. Together with the Department's planned program for assisting filers in the preparation and electronic submission of filings, the revised 5500 Forms will give plan administrators clear guidance and a supportive, routine mechanism for satisfying their reporting obligations. The revised 5500 Forms also are designed so that the Department can efficiently capture the information electronically and assemble it into an electronic database so that the information can be processed and analyzed in many beneficial ways. These include monitoring compliance with ERISA's reporting and other requirements; targeting and carrying out prompt and effective enforcement actions; informing participants and beneficiaries of the characteristics, operations, and financial status of their benefit plans; producing statistics on the employee benefit system, monitoring trends therein, and informing the public; and assembling information and conducting research that advances knowledge and fosters the formulation of sound public policies toward employee benefits.

*Removal of the IRS-only schedules.* As explained in the Forms Revision Notice published simultaneously with this final rule, the elimination of the IRS-only schedules (Schedule E and Schedule SSA) beginning with returns/reports for the 2009 plan year facilitates the change to mandatory electronic filing, which is expected to yield substantial benefits. Title I information that was previously collected in the eliminated schedules will be collected in other parts of the 5500 Forms. The Department understands that the IRS is currently considering whether to continue to collect some of the omitted IRS-only information via other Treasury or IRS vehicles. The impact of the removal of these schedules, therefore, is anticipated to reduce reporting costs, as estimated below, while preserving ERISA protections.

*Establishment of a Short Form 5500 for certain small plans.* The Short Form 5500 will substantially reduce reporting costs (as estimated below) for eligible filers, while continuing the collection of sufficient information to preserve ERISA protections, and satisfying the enforcement, research, and regulatory needs of the Agencies, as well as the disclosure needs of participants and beneficiaries. The small single-employer plans targeted for eligibility (those that invest solely in secure assets that are held or issued by regulated financial institutions and have a fair market value that is easily determined) are less at risk

of harm through abuse or mismanagement and can benefit through the reduced filing costs. The eligibility conditions for filing the Short Form 5500, including the requirements relating to security and valuation of the plan's investments, ensure both adequate disclosure to participants and beneficiaries in plans using the Short Form 5500 and adequate annual reporting to the Agencies. Small plans that are not eligible to file the Short Form 5500 remain eligible to file simplified reports under currently available methods of filing, such as filing Schedule I instead of Schedule H and eligibility for the waiver from filing the report of an independent qualified public accountant by virtue of enhanced bonding.

*Elimination of the special reporting rules for Code section 403(b) plans.* As noted below, this revision is expected to increase reporting costs for affected plans. The Department believes, however, that these added costs are justified by the need to better protect the participants and beneficiaries of these plans. As discussed in the preamble to the Notice of Adoption of Forms Revisions, increased reporting by Code section 403(b) plans is anticipated to provide substantial benefits through better administration of those plans and increased oversight by the Agencies and the public. Amending the annual reporting requirements to place Code section 403(b) plans on par with other ERISA-covered pension plans will achieve these results. The Department anticipates that most small Code section 403(b) plans will be eligible to use the Short Form 5500, and thus will only have to meet that limited filing obligation. The result of this change is therefore only a modest increase in the annual reporting burden on small Code section 403(b) plan filers.

*Schedule C fee and compensation reporting.* In developing the final Schedule C fee and compensation reporting requirements, the Department modified certain aspects of the proposal as it concerned additional reporting of indirect compensation and fees paid to plan service providers on Schedule C to reach a balance between the cost to plans and providers of gathering the required information and the need for increased transparency regarding such fees and their potential effect on plans. The final form, as did the proposal, keeps the existing \$5,000 threshold for reporting direct and indirect compensation, but now has separate line items for reporting direct and indirect compensation to reduce the possibility of duplicative reporting. In addition, the final forms revision adds

to the Schedule C an alternative disclosure option. Where the plan administrator has received required disclosures of eligible indirect compensation, the plan administrator now has the option of reporting the person providing the required disclosures as an alternative to having the amount of the eligible indirect compensation reported on the Schedule C itself. These modifications reduce reporting burden for indirect compensation, especially the potential burdens associated with indirect compensation that is difficult to track on a plan-by-plan basis (e.g., "float" and "soft dollars"). As discussed above, the Department has also clarified that health and welfare plans exempt under 29 CFR 2520.104-44 are not required to file the Schedule C. The Department believes that the final forms revisions for Schedule C, which will improve disclosure of both direct and indirect compensation without overburdening the efficient delivery of necessary services to plans, will provide substantial benefits to plans and their participants and beneficiaries. Plan administrators, the Department, and the public will be better able to monitor the compensation arrangements of plan service providers, better able to understand the impact of fees on plan assets, and better able to evaluate the value of purchased services. In addition, it is expected that plan administrators should be better able to negotiate fair prices for necessary plan services.

*Creation of separate actuarial schedules for single-employer defined benefit plans and multiemployer defined benefit and certain money purchase plans (Schedules SB and MB) to reflect PPA changes in funding and annual reporting requirements.* Certain changes to Schedule B were proposed in the July 2006 Proposal. After passage of the PPA, these proposals for Schedule B were revised in the Supplemental Notice to effectuate the additional reporting requirements of the PPA, with the Schedule B being divided into two separate schedules, one for multiemployer defined benefit plans and certain money purchase plans (the Schedule MB) and another for single-employer defined benefit plans (the Schedule SB). As noted below, the adoption of this change is expected to decrease reporting costs for single-employer plans and slightly increase reporting costs for multiemployer plans. The Department concludes, however, that the small cost increases for multiemployer plans are justified by the need to better monitor plan funding. This information is needed by

participants, beneficiaries, and the Agencies, particularly the PBGC, to improve their ability to assess the financial condition of the plan.

*Additional data elements reported on Schedule R.* Consistent with the PPA, the new Schedule R will require increased reporting by multiemployer defined benefit pension plans regarding contributing employers, multiemployer plan mergers, withdrawing employers and their withdrawal liabilities, and participants for whom no employer makes contributions. Large single-employer and multiemployer defined benefit plans with 1,000 or more participants will also have to report on their plans' asset allocations, and the duration of debt portfolios. These latter data elements are requested by the PBGC and are not part of the PPA requirements. As noted below, these

revisions will increase reporting costs for affected plans. The PPA requires multiemployer defined benefit plans to report this additional information, which is needed by participants, beneficiaries, and the Agencies, particularly the PBGC, to assess the financial risk posed to the plan by a financial collapse or withdrawal of one or more contributing employers.<sup>12</sup> The need for and benefit of these PPA required disclosures are essential to making accurate assessments of the potential risks to which these plans are exposed.

*Electronic filing and Web site display of certain Form 5500 information.* The requirement to post information electronically will give participants and beneficiaries an additional method of monitoring the financial status of their pension plans. They will be able to

access important information instantaneously and without any additional costs involved, as plans must be capable of electronic public disclosure beginning with the 2009 reporting year.

*Costs.* Although the costs to plans of satisfying their annual reporting obligations will be lower under these regulations than they would be under regulations previously in force, they will still be substantial. As shown in Table 2 below, the aggregate cost of such reporting under the regulations and forms previously in force is estimated to be \$425.34 million annually, shared across the 780,000 filers subject to the filing requirement. The Department estimates that the regulations and forms revisions announced today will impose an annual cost burden on the 780,000 filers of only \$327.98 million.<sup>13</sup>

TABLE 2.—SUMMARY OF ANNUAL COSTS: REQUIREMENTS PREVIOUSLY IN EFFECT VS. NEW REQUIREMENTS

|                                                                         | Total costs in dollars<br>(in millions) | Total costs in hours<br>(in millions) |
|-------------------------------------------------------------------------|-----------------------------------------|---------------------------------------|
| Reporting Requirements Prior to this Action .....                       | \$425.34                                | 5.32                                  |
| Change in Costs due to this Action (as of 2009 Plan Year Filings) ..... | – 97.36                                 | – 1.24                                |
| Reporting Requirements in effect for Plan Year 2009 Filings .....       | 327.98                                  | 4.08                                  |

Note: Number of affected plans: 780,000.

Because this final action makes substantial changes to the requirements previously in effect, filers will experience some one-time transition costs. The Department examined similar transition cost issues in connection with the last major revision to the Form 5500 Annual Return/Report, which was for plan years beginning in 1999. See 65 FR 5026 (Feb. 2, 2000). Based on information provided by plan service providers and Form 5500 Annual Return/Report software developers at that time, the Department concluded that such costs are generally loaded into the prices paid by plans for affected services and products, spread both across plans and across the expected life of the service and product changes. The Department's estimates provided here are therefore intended to reflect such spreading and loading of these transition costs. That is, the gradual defrayal of the transition costs is included in the annual cost estimates here.

The Department has analyzed the cost impact of the individual revisions. In

doing so, the Department took account of the fact that various types of plans would be affected by more than one revision and that the sequence of multiple revisions would create an interaction in the cumulative burden on those plans. For example, both large and small Code section 403(b) plans are affected by the elimination of the limited reporting rules for section 403(b) plans, but small Code section 403(b) plans are also affected by the introduction of the Short Form 5500. The Department quantified the individual revisions as described below.

*Removal of the IRS-only schedules.* Elimination of the IRS-only schedules beginning with filings for the 2009 plan year will reduce costs on the whole, even though some of the information previously collected in those schedules will continue to be collected by the Department elsewhere in the forms and schedules. The net effect of these changes will be to reduce the total burden for 198,000 affected filers by 530,000 hours. Applying an hourly labor rate of \$86 for service providers

and \$59 for plan sponsors, the Department estimates that this revision will lower the aggregate annual reporting cost by an estimated \$39.34 million.<sup>14</sup>

*Establishment of a Short Form 5500 for certain small plans.* An estimated 594,000 of the 629,000 total small plan filers will be eligible to use the Short Form 5500. Of these filers, 9,000 plans are estimated to be small Code section 403(b) plans that will also be subject to increased filing requirements. Their annual reporting burden is estimated to increase, as a result, by about \$1.44 million. For the remainder of the Short Form 5500 eligible plans (585,000 plans), the annual reporting burden is reduced by \$72.33 million. This leads to an estimated aggregate saving due to the Short Form 5500 of \$70.90 million (877,000 hours) annually.

*Elimination of the special reporting rules for Code section 403(b) plans.* While approximately 16,000 Code section 403(b) plans will be subject to increased reporting requirements, about 9,000 small Code section 403(b) plans

<sup>12</sup> The addition of some of the new data elements was included in the July 2006 Proposal based on the apparent deterioration of the financial condition of multiemployer plans and the PBGC's belief in the need to monitor better companies that are major contributors to those plans.

<sup>13</sup> The cost and burden hour estimates for the baseline as well as for the new reporting requirements are much lower than the estimates reported in the July 2006 Proposal and the Supplemental Notice. In the estimates reported in this document, the Department is able to take advantage of updated data, some changes to the

model and comments with respect to the burden estimates. More detail about the cost estimates can be found in the section "Assumptions, Methodology, and Uncertainty."

<sup>14</sup> The appropriateness of the labor rates used in the calculations, as well as on other assumptions, is discussed in the Technical Appendix.

will be eligible to use the new Short Form 5500 and will also be eligible for waiver of the audit requirement. The impact of the changes on the small Code section 403(b) plans is quantified above. Seven thousand large Code section 403(b) plans will be required to file a Form 5500 Annual Return/Report similar to those filed by Code section 401(k) plans and will be subject to the audit requirement. Annual reporting costs for large Code section 403(b) plans will increase by an estimated \$7.7 million (100,000 hours).

**Establishment of Schedules SB and MB to replace Schedule B.** Schedule B will be replaced by two separate schedules: A Schedule SB for single employer (including multiple-employer) defined benefit plans and a Schedule MB for multiemployer defined benefit plans and certain money purchase plans. Overall costs will be reduced by having two separate schedules, each of which is tailored more precisely to a separate targeted group of filers. The 42,000 filers of Schedule SB will therefore see a total annual burden reduction of almost 52,000 hours. Applying an hourly labor rate of \$86 for service providers and \$59 for plan sponsors, the Department estimates that this will lower the annual reporting cost by an estimated \$4.36 million for Schedule SB filers. The 2,300 Schedule MB filers will see a total burden increase of 600 hours because these filers will be required to complete new items. Applying an hourly labor rate of \$86 for service providers and \$59 for plan sponsors, the Department estimates

that this will increase the annual reporting cost by an estimated \$47,000. On the whole, replacing Schedule B with new Schedules SB and MB will decrease the aggregate total annual burden by 51,000 hours, or by an estimated \$4.31 million.

**Revision of Schedule C (Service Provider Information).** Schedule C revisions are intended to clarify the reporting requirements and improve the information plan officials receive regarding amounts being received by plan service providers. The expanded reporting requirements are expected to increase the reporting burden for Schedule C filers by about \$2.44 million. This increase is partly offset by a reduction in burden of \$475,000, resulting from the Department's clarification that welfare plans that meet the conditions of 29 CFR 2520.104-44 are not required to file Schedule C. Jointly, these changes are anticipated to add annual reporting costs of \$1.97 million (25,000 hours) for 48,000 affected plans.

**Additional Data Elements on Schedule R.** Changes to Schedule R, which include moving three questions on ESOPs from Schedule E to Schedule R, with an offset for deleting one question, are expected to add \$828,000 in costs (11,000 hours) for 91,000 affected filers.<sup>15</sup> On average, the reporting burden of affected plans is estimated to increase by less than 7 minutes per plan. While some of the affected plans may experience only minimal burden increases, others (particularly very large multiemployer

defined benefit plans) will experience an estimated increase in burden of up to three hours.

**Adoption of various technical revisions and other miscellaneous revisions to the Form 5500 Annual Return/Report to improve and clarify existing reporting requirements.** Several additional questions regarding insurers that fail to supply information, plan failures to pay benefits due, schedules of delinquent participant contributions, blackout compliance, mutual fund dividends, fees paid to administrative service providers, and the number of contributing employers, as well as additional pension plan characteristic codes, were added to the Form 5500 and Schedules A, H, and I. Together these changes are estimated to add \$6.68 million (85,000 hours) to annual reporting costs and affect approximately 187,000 plans.

**Electronic Filing and Website Display of Form 5500 Information.** These requirements are not anticipated to add any additional costs, as plans are already required to be capable of electronic filing and disclosure beginning with the 2009 reporting year under the electronic filing rule. See 71 FR 41359 (July 21, 2006). The costs and benefits of electronic filing have previously been assessed in connection with promulgation of that rule.

Table 3 contains a summary of the changes in costs, expressed both in dollars and in hours, allocated to the changes outlined above and the number of employee benefit plans affected.

TABLE 3.—SUMMARY OF CHANGES TO THE REPORTING REQUIREMENTS: DOLLARS, HOURS, AND AFFECTED PLANS

| Revisions effective for 2009 plan year filings       | Change in costs in dollars (in millions) | Change in costs in hours | Number of affected plans |
|------------------------------------------------------|------------------------------------------|--------------------------|--------------------------|
| Removal of IRS-Only Schedules .....                  | – \$39.34                                | – 530,000                | 198,000                  |
| Short Form (small non-Code Sect. 403(b) Plans) ..... | – 72.33                                  | – 895,000                | 585,000                  |
| Short Form (small Code Section 403(b) Plans) .....   | 1.44                                     | 18,000                   | 9,000                    |
| Large Code section 403(b) Plans .....                | 7.70                                     | 100,000                  | 7,000                    |
| Schedule MB .....                                    | 0.047                                    | 600                      | 2,000                    |
| Schedule SB .....                                    | – 4.36                                   | – 52,000                 | 42,000                   |
| Schedule C .....                                     | 1.97                                     | 25,000                   | 48,000                   |
| Schedule R .....                                     | 0.828                                    | 11,000                   | 91,000                   |
| Technical and Miscellaneous Revisions .....          | 6.68                                     | 85,000                   | 187,000                  |
| <b>Total .....</b>                                   | <b>– 97.36</b>                           | <b>– 1,237,400</b>       | <b>780,000</b>           |

**Note:** Some displayed numbers do not sum up to the totals due to rounding.

The final action does not otherwise alter reporting costs. Plans currently exempt from annual reporting

requirements (such as certain small unfunded or fully insured welfare plans and certain simplified employee

pensions) will remain exempt. Also, except for Code section 403(b) plans, plans eligible for limited reporting

<sup>15</sup> The introduction of the Short Form 5500 eliminated the requirement of filing the Schedule R for almost 300,000 small plans previously filing Schedule R (about 94 % of all small plans filing

Schedule R). This reduction in burden was included in the decrease of reporting burden due to the introduction of the Short Form 5500. The moving of questions from Schedule E to Schedule

R (ESOP questions) is counted as a reduction of burden in connection with the removal of the IRS-only schedules and as an increase in burden for Schedule R filers.

options (such as certain IRA-based pension plans) will continue to be eligible. The revised Form 5500 Annual Return/Report will retain the structure that is familiar to individual and corporate taxpayers—a simple main form with basic identifying information necessary, along with a checklist of the schedules being filed. The structure is designed to aid filers by allowing them to assemble and file a return customized to their plan.

*Form 5500 Annual Return/Report Changes Effective for the 2007 and 2008 Plan Year Filings*

The sections above describe reporting changes that will become effective for the 2009 plan year filings. As discussed in the preamble of the Forms Revision Notice, the Agencies are making some changes to the reporting requirements for the 2007 and 2008 plan year filings as mandated by the PPA, along with adding a few new Schedule R items for the 2008 plan year filings.<sup>16</sup> Plans with fewer than 25 participants that would meet the conditions for being eligible to file the Short Form 5500 will have the option in their 2007 and 2008 plan year filing of filing an abbreviated version of the Form 5500 Annual Return/Report for “small plan” filers. In addition, defined benefit pension plans and certain money purchase plans will file, for the 2008 plan year, the new actuarial information schedules (Schedules SB and MB, as appropriate) instead of Schedule B. In addition, certain filers will be required to answer most of the new questions on Schedule R (Questions 13 to 19 of the 2009 Schedule R).<sup>17</sup>

The Department has calculated the burden for the 2008 plan year return/reports as described generally above with respect to the 2009 plan year filings, but appropriately modified for the difference in filing requirements. The Department estimates that the reduction in burden resulting from the simplified filing requirements for the 2007 and 2008 plan year filings will be about half the burden reduction that will result from the introduction of the 2009 Short Form 5500, for two reasons. First, for the 2009 plan year filings, eligible filers will fill out only the Short Form 5500 and Schedules SB or MB, as applicable. While the simplified filing

requirements for plan years 2007 and 2008 generally will be similar data items as are on the Short Form 5500, the items to be completed are spread over several schedules, requiring filers to review all of the instructions to those schedules.<sup>18</sup> Second, use of the simplified filing alternative for the 2007 and 2008 plan years is optional. The Department has assumed that not all small plan filers will take advantage of this option, given that it will be available only for the 2007 and 2008 plan years.

For the 2007 filing year no other form changes that impacted the burden analysis are being made. The Department estimates a burden reduction due to the simplified filings for plans with less than 25 participants of about \$38.00 million (471,000 hours). Assuming an additional 30 minute transition burden for reviewing the simplified filing requirements, the estimate for the burden reduction is reduced to \$25.62 million (317,000 hours).

Without taking any transition burdens into account, the Department has estimated that the revisions for the 2008 plan year will reduce the filing burden by about \$41.54 million (511,000 hours). Assuming an additional 30 minute transition burden for reviewing the simplified filing requirements, 150 minutes for Schedule SB, 90 minutes for Schedule MB, and 60 minutes for Schedule R, the Department estimates that for the 2008 plan year the reporting burden will fall by \$30.23 million from the \$425.34 million that is estimated under prior rules and forms, to an aggregate burden of \$395.11 million.<sup>19</sup>

*Assumptions, Methodology, and Uncertainty*

The cost and burden associated with the annual reporting requirement for any given plan will depend upon the specific information that must be provided, given the plan's characteristics, practices, operations, and other factors. For example, a small, single-employer defined contribution pension plan filing the new Short Form 5500 should incur far lower costs than a large, multiemployer defined benefit pension plan that holds multiple insurance contracts, engages in numerous reportable transactions, and pays fees in excess of \$5,000 to a

number of service providers. The Department separately considered the cost to different types of plans in arriving at its aggregate cost estimates. The Department's basis for these estimates is described below.

*Assumptions Underlying this Analysis.* The Department's analysis assumes that all benefits and costs will be realized in the first year of the reporting cycle to which the changes apply and within each year thereafter. This assumption is premised on the requirement that each plan annually will complete a filing. The Department has used a “status quo” baseline for this analysis, assuming that the world absent the regulations will resemble the present.<sup>20</sup>

*Methodology.* Mathematica Policy Research, Inc. (MPR), developed the underlying cost data, which has been used by the Agencies in estimating burden related to the Form 5500 Annual Return/Report during recent years. See 65 FR 21068, 21077–78 (Apr. 19, 2000); Borden, William S., “Estimates of the Burden for Filing Form 5500: The Change in Burden from the 1997 to the 1999 Forms,” Mathematica Policy Research, submitted to U.S. Dept. of Labor May 25, 1999.<sup>21</sup> The cost information was derived from surveys of filers and their service providers, as modified due to comments, which were used to measure the unit cost burden of providing various types of information. Aggregate estimates were produced by interacting these unit cost measures with historical counts of Form 5500 Annual Return/Report filers who provided the respective types of information.<sup>22</sup>

Actuarial Research Corporation (ARC) assembled a new model for estimating burden, based on the Form 5500 Burden Model that MPR most recently used for estimating burdens in October 2004. ARC assembled a simplified model, drawing on implied burdens associated with subsets of filer groups represented in the MPR model. The ARC model is described in broad terms below. Further details about the model are explained in the Technical Appendix which can be accessed at the Department's Web site at <http://www.dol.gov/ebsa>.

To estimate aggregate burdens, types of plans with similar reporting requirements were grouped together in various groups and subgroups. As shown in Table 4, calculations of aggregate cost were prepared for each of

<sup>16</sup> As mandated by the PPA, the simplified filing option for small plans with fewer than 25 participants will become effective for 2007 plan year return/reports. No other changes to the Forms and Schedules are being made for that filing year, except for a few updates to the Schedule B instructions.

<sup>17</sup> Filers will be required to provide the answers to these new questions as an attachment.

<sup>18</sup> As described further in the instructions, those small plans required to file the Schedules SSA or E will still have to file the schedules as part of their Form 5500 Annual Return/Report filings in 2007 and 2008.

<sup>19</sup> Hours are estimated to fall from the 5.32 million estimated under prior rules and forms, to about 4.94 million hours, a reduction of about 374,000 hours.

<sup>20</sup> Further detail can be found in the Technical Appendix.

<sup>21</sup> The Mathematica report can be accessed at the Department's Web site at <http://www.dol.gov/ebsa>.

<sup>22</sup> The Department did not attempt to project the number of filers into the future.

the various subgroups both under requirements in effect prior to this action and under the forms as revised. Table 4 also shows the number of plans within each subgroup affected by the revisions. The Total line in Table 4 shows that the aggregate cost under prior and new regulations, respectively, add up to \$425.34 million and \$327.98 million. The universe of filers was divided into three basic plan types: defined benefit pension plans, defined contribution pension plans, and welfare

plans. Each of these major plan types was further subdivided into multiemployer and single-employer plans. Defined contribution Code section 403(b) plans were treated separately from other defined contribution plans. Since the filing requirements differ substantially for small and large plans, the plan types were also divided by plan size. For large plans (100 or more participants), the defined benefit plans were further divided between very large (1,000 or

more participants) and other large plans (at least 100 participants, but fewer than 1,000 participants). Small plans were divided similarly, except that they were divided into Short Form 5500 eligible and Short Form 5500 ineligible plans, as applicable. For each of these sets of respondents, burden hours per respondent were estimated for the Form 5500 Annual Return/Report itself and for up to seven schedules.

TABLE 4.—NUMBER OF AFFECTED FILERS AND COSTS UNDER PRIOR AND NEW REQUIREMENTS

| Type of plan                                | Number affected | Aggregate cost under prior requirements (in millions) | Aggregate cost under new requirements (in millions) |
|---------------------------------------------|-----------------|-------------------------------------------------------|-----------------------------------------------------|
| 5500 Large Plans (>=100 participants) ..... | 152,000         | \$177.16                                              | \$175.99                                            |
| DB, ME, 100–1,000 participants .....        | 600             | 1.40                                                  | 1.33                                                |
| DB, ME, > 1,000 participants .....          | 900             | 1.99                                                  | 2.13                                                |
| DB, SE, 100–1,000 participants .....        | 7,000           | 15.38                                                 | 13.10                                               |
| DB, SE, > 1,000 participants .....          | 3,400           | 7.08                                                  | 7.21                                                |
| DC, ME, non-403(b) .....                    | 1,700           | 2.56                                                  | 2.45                                                |
| DC, ME, Code section 403(b) .....           | 80              | 0.0035                                                | 0.10                                                |
| DC, SE, non-403(b) .....                    | 57,000          | 75.09                                                 | 65.14                                               |
| DC, SE, Code section 403(b) .....           | 7,200           | 0.30                                                  | 8.38                                                |
| Welfare, ME .....                           | 4,100           | 5.64                                                  | 5.94                                                |
| Welfare, SE .....                           | 69,000          | 67.71                                                 | 70.21                                               |
| 5500 Small Short Form Eligible .....        | 594,000         | 234.25                                                | 139.03                                              |
| DB, SE .....                                | 34,000          | 35.71                                                 | 24.33                                               |
| DC, SE, non-403(b) .....                    | 544,000         | 195.65                                                | 111.64                                              |
| DC, SE, Code section 403(b) .....           | 8,800           | 0.37                                                  | 1.81                                                |
| Welfare, SE .....                           | 6,000           | 2.52                                                  | 1.25                                                |
| 5500 Small Short Form Ineligible .....      | 35,000          | 13.92                                                 | 12.96                                               |
| DB, ME .....                                | 200             | 0.16                                                  | 0.18                                                |
| DB, SE .....                                | 1,800           | 1.91                                                  | 1.76                                                |
| DC, ME, non-403(b) .....                    | 3,200           | 1.09                                                  | 1.02                                                |
| DC, ME, Code section 403(b) .....           | 100             | 0.0042                                                | 0.0045                                              |
| DC, SE, non-403(b) .....                    | 29,000          | 10.45                                                 | 9.68                                                |
| Welfare/ME .....                            | 400             | 0.17                                                  | 0.18                                                |
| Welfare/SE .....                            | 300             | 0.13                                                  | 0.14                                                |
| Total .....                                 | 780,000         | 425.34                                                | 327.98                                              |

Note: Some displayed numbers do not sum up to the totals due to rounding.

DB—defined benefit plans.

DC—defined contribution plans.

SE—single-employer plans.

ME—multiemployer plans.

Large plans—100 participants or more.

Small plans—fewer than 100 participants.

We also separately estimated the costs for the form and for each schedule. When items on a Form 5500 Annual Return/Report schedule are required by more than one Agency, the estimated burden associated with that schedule is allocated among the Agencies. This allocation is based on whether only a single item on a schedule is required by more than one agency or whether several or all of the items are required by more than one agency. The burden associated with reading the instructions for each item also is tallied and allocated accordingly.

The reporting burden for each type of plan is estimated in light of the circumstances that are known to apply or that are generally expected to apply to such plans, including plan size, funding method, usual investment structures, and the specific items and schedules such plans ordinarily complete. For example, the annual report for a large fully insured welfare plan typically would consist of only a few questions on the Form 5500, Schedule A (Insurance Information), and Schedule G, where applicable. The requirement that this plan provide very limited information on the Form 5500

Annual Return/Report is reflected in the estimates of reporting burden time. By contrast, a large defined benefit pension plan that is intended to be tax-qualified and that uses a trust fund and invests in insurance contracts would be required to submit an annual report completing almost all the line items of the Form 5500, plus Schedule A (Insurance Information), Schedule B (Actuarial Information), Schedule C (Service Provider Information), Schedule D (DFE/Participating Plan Information), possibly the Schedule G (Financial Transaction Schedules), Schedule H (Financial Information), and Schedule R

(Retirement Plan Information), and would be required to submit an IQPA's report and opinion. In this way, the Agencies intend meaningfully to estimate the relative burdens placed on different categories of filers.

Burden estimates were adjusted for the proposed revisions to each schedule, including items added or deleted in each schedule and items moved from one schedule to another. The burden for the new Short Form 5500 was derived summing the burden estimates for the comparable line items contained in the current Form 5500 Annual Return/Report.

The Department has not attributed a recordkeeping burden to the 5500 Forms in this analysis or in the Paperwork Reduction Act analysis because it believes that plan administrators' practice of keeping financial records necessary to complete the 5500 Forms arises from usual and customary management practices that would be used by any financial entity and does not result from ERISA or Code annual reporting and filing requirements.

The aggregate baseline burden, as calculated by the ARC model, is the sum of the burden per form and schedule as filed prior to this action multiplied by the estimated aggregate number of forms and schedules filed.<sup>23</sup> The model then estimated the burden impact of changes in the number of filings (particularly those associated with the introduction of the Short Form 5500 for most small filers) and of changes made to the form and the various schedules. The model uses data from the Form 5500 Annual Return/Report for plan year 2003, which is the most recent year for which complete data is available.

The model estimated that the proposed revisions will lead to aggregate costs of \$327.98 million, which represents a cost reduction of \$97.36 million from the baseline. While overall costs will be reduced, some large plans may experience cost increases, while small plans will likely experience cost reductions. The total burden estimates, as well as the burden broken out by type of plan, can be found in Table 4, above.

*Uncertainty within Estimates.* Because the Department has access to the historical Form 5500 Annual Return/Report filing information, the Department has good data for the number of filers that file the various schedules and the types of plans those filers represent. However, there is some

uncertainty regarding the expected number of filers in the future and the unit cost estimates. The Department believes that it does not have sufficient information that would allow making good projections of the number of pension plans in the future. Also, the Department has no direct measure for the unit costs and uses a proxy adapted from the existing MPR model, which was developed in the late 1990s. In addition, some uncertainty is inherent in any revision to the existing form, and the level of uncertainty increases with the novelty of the revision in question. For example, there is a lesser degree of uncertainty regarding the impact of revisions that delete existing items or move existing items from one schedule to another, while there is greater uncertainty regarding wholly new items of information, such as those involving indirect compensation.

Most of the key assumptions of the model like the wage rates, hour burden estimates, and the number of filers are entering the model in a direct and transparent way. If, for example, the wage rate increases by 10%, the reduction in costs also increases by 10%.<sup>24</sup> Therefore, the Department did not perform additional sensitivity tests. The Department could not quantify uncertainty because formal estimates of errors are not available. However, the Department believes that the actual burden could very well be 10% higher or lower than the estimates, based on the Department's experience in this program and past trends in filings.

#### *Peer Review*

In December 2004, OMB issued a Final Information Quality Bulletin for Peer Review, 70 FR 2664 (January 14, 2005) (Peer Review Bulletin), establishing that important scientific information shall be peer reviewed before it is disseminated by the Federal government. The Peer Review Bulletin applies to original data and formal analytic models used by agencies in regulatory impact analyses. The Department determined that the data and methods employed in its regulatory analysis constituted "influential scientific information" as defined in the Peer Review Bulletin. Accordingly, a peer review was conducted under Section II of the Bulletin. The peer review report concluded that the methodology and data generally were sound and produced plausible estimates, which supported the

Department's conclusion that the proposed form changes should reduce the aggregate burden relative to the previous forms. The analysis here for the final regulations and forms revisions uses the same methodology as did the proposal, and the Department, accordingly, is relying on the Peer Review prepared for the Proposal. The Peer Review Report can be accessed at the Department's Web site at <http://www.dol.gov/ebsa>.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 et seq.) and that are likely to have a significant economic impact on a substantial number of small entities. In accordance with section 603 of the RFA, the EBSA presented an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities and seeking public comment on such impact. After reviewing and considering the public comments submitted in response to the proposal and the changes that are incorporated into the final regulation, the Department has prepared a final regulatory flexibility analysis, which is presented in this document as part of the broader economic analysis. The objectives of these amended regulations and the associated forms revisions are to streamline reporting and reduce aggregate reporting costs, particularly for small plans, while preserving and enhancing protection of ERISA rights. These purposes are detailed above in this preamble and in the Forms Revision Notice published simultaneously with these regulations.

For purposes of analysis under the RFA, EBSA continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Under ERISA section 104(a)(3), the Secretary may also provide for exemptions or for simplified reporting and disclosure for welfare benefit plans. Pursuant to the authority of ERISA section 104(a), the Department has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46, and 2520.104b–10 certain simplified reporting provisions and limited exemptions from reporting

<sup>23</sup> To the extent that plans may currently file schedules that are not required, such filings were disregarded in calculating the baseline reporting burden and the final burden.

<sup>24</sup> If the hourly labor costs for service providers increases from \$86 to \$95 and for plan sponsors from \$59 to \$65 (10% increase), then the reduction in costs increases from about \$97 million to \$107 million (10% increase).

and disclosure requirements for small plans, including unfunded or insured welfare plans, that cover fewer than 100 participants and satisfy certain other requirements.

Further, while some large employers may have small plans, in general small employers maintain most small plans. Thus, EBSA believes that assessing the impact of these requirements on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 et seq.). Prior to the proposal, EBSA consulted with the SBA Office of Advocacy concerning use of this participant count standard for RFA purposes, see 13 CFR 121.902(b)(4), and EBSA received no comments suggesting use of a different size standard. The following subsections address specific requirements of the RFA.

*Need for the rule and its objectives.* The Department is amending the regulations relating to the annual reporting and disclosure requirements of section 103 of ERISA and revising the 5500 Forms that are included in the Forms Revision Notice being published simultaneously with these regulations. The Department continually strives to tailor reporting requirements to minimize reporting costs, while ensuring that the information necessary to secure ERISA rights is adequately available. The optimal design for reporting requirements to satisfy these objectives changes over time. Benefit plan designs and practices evolve over time in response to market trends, including trends in labor markets, financial markets, health care and insurance markets, and markets for various services used by plans. Partly as a result, the nature and mix of compliance issues and risks to ERISA rights change over time. Changes to ERISA, the Code, and to associated regulations also change the parameters of ERISA rights and the methods needed to protect those rights; in particular, this amendment and the forms revisions are necessary, in part, to implement provisions of the PPA. In addition, the technologies available to manage and transmit information continually advance. It is incumbent on the Department to revise its reporting requirements from time to time to keep pace with such changes. The Department is adopting these regulations and associated forms revisions to readjust its reporting

requirements to take into account certain recent changes in markets, the law (including the PPA), and technology, many of which are referred to above in this preamble and/or in the Forms Revision Notice published simultaneously with these regulations.

*Agency assessment of significant issues raised by public comments and changes to rule in response to such comments.* Commenters were mostly supportive of the adoption of a Short Form 5500. Some commenters objected to excluding certain small plans from eligibility for filing the Short Form 5500, that is, those small plans holding employer securities and other difficult-to-value assets. As discussed elsewhere in this preamble, excluding this small subset of small plans is justified by the nature of these assets, and it would be inappropriate for the Agencies to compromise important Congressional and regulatory policies, leaving participants covered by these small plans with insufficient protection of their retirement savings. The Agencies have taken other steps to reduce the burden on the excluded small plans as much as possible, however, including continuing to allow these plans to qualify for other simplified reporting options. In addition, because the Short Form 5500 will not be available until the 2009 plan year, the Agencies are planning to issue separate guidance for plans with fewer than 25 participants that would permit filing of an abbreviated version of the Form 5500 for the 2007 and 2008 plan years.

While expanding reporting obligations for Code section 403(b) plans, the Agencies have attempted to minimize the burden on small Code section 403(b) plans by not excluding small Code section 403(b) plans from any simplified reporting option for which such plans are otherwise eligible. In other words, small Code section 403(b) plans will be eligible to avail themselves of simplified reporting options to the same extent as any other similarly situated plan.

As discussed elsewhere in this preamble, the Agencies are rejecting commenters' suggestion to subject small plans to Schedule C disclosure requirements that do not currently apply to small plans. The Agencies conclude that the comment record in support of the suggestion was insufficient to outweigh the added burden that would be placed on small plans.

The Agencies also are making clarifying changes to instructions for the Short Form 5500, in response to comments, to provide a clearer description of the plans exempt from

filing, including small welfare plans, but is refraining from adding similar clarifications to the instructions for individual schedules in order to avoid adding unnecessary review burden for filers.

*Description and estimate of number of small entities to which rule will apply.* This final action does not alter the number of small plans required to comply with the annual reporting requirements, although it implements a new Short Form 5500, which is designed specifically to further streamline the limited reporting requirements presently applicable to small plans. The Department estimates that almost six million small, private-sector employee pension and welfare benefit plans are covered under Title I of ERISA. A large majority of these, however, are fully insured or unfunded welfare benefit plans, which currently are exempt from annual reporting requirements and will continue to be exempt under this final action. Approximately 629,000 small plans, including small pension plans and small funded welfare plans, currently are required to file annual reports and will continue to be so required under this action. Of these, an estimated 594,000 will be eligible to use the new Short Form 5500. Use of the Short Form 5500 is expected to reduce these plans' reporting costs, while preserving or enhancing the protection of their participants' ERISA rights.

Among small plans, perhaps the most affected by this action will be the approximately 9,000 small Code section 403(b) plans. As explained above, such plans are currently subject only to limited annual reporting requirements. This action will increase these plans' reporting costs, although the cost to these plans will be comparable to that currently borne by similar small plans that are not operated under Code section 403(b). As discussed above, the Department believes the added cost to Code section 403(b) plans is justified by the need to strengthen protections under ERISA for those plans' affected participants and beneficiaries. The numbers and types of small plans affected by these regulations and the magnitude and nature of the regulations' effects are further elaborated below.

*Description of projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirements and the types of professional skills necessary for preparation of the report or record.* The reporting requirements applicable to small plans are detailed above and in the associated Forms

Revision Notice. For a large majority of the 629,000 small plans subject to annual reporting requirements, or an estimated 563,000 plans, submission of the Short Form 5500 alone will fully satisfy their annual reporting requirements. All of these plans are eligible for the waiver of audit requirements, and none are defined benefit pension plans. For such plans, therefore, satisfaction of the applicable annual reporting requirements is not expected to require the services of an IQPA or auditor, but will require the use of a mix of clerical and professional administrative skills. For an additional 30,000 small defined benefit pension plans and about 500 money purchase

plans that will be eligible to use the streamlined Short Form 5500, satisfaction of the reporting requirements will require additional services of an actuary and submission of the Schedule SB or Schedule MB, as applicable. The remaining 35,000 small plans will not be eligible to use the Short Form 5500 and will continue to be required to file the Form 5500 Annual Return/Report. Of these, fewer than 2,000 are defined benefit plans that must use an actuary and file Schedule MB or Schedule SB. All will require a mix of clerical and professional administrative skills to satisfy their reporting requirements.

Satisfaction of annual reporting requirements under these regulations is not expected to require any additional recordkeeping that would not otherwise be part of normal business practices.

Table 5 below compares the Department's estimates of small plans' reporting costs under the requirements in effect prior to this action with those under the new requirements for various classes of affected plans. As shown, costs under the new requirements will be lower on aggregate and for most classes of plans. These estimates take account of the quantity and mix of clerical and professional skills required to satisfy the reporting requirements for various classes of plans.

TABLE 5.—SMALL PLAN REPORTING COSTS UNDER PRIOR AND NEW REQUIREMENTS

| Class of small plan                                             | Number affected                       | Aggregate cost under prior requirements (in millions) | Aggregate cost under new requirements (in millions) |
|-----------------------------------------------------------------|---------------------------------------|-------------------------------------------------------|-----------------------------------------------------|
| Defined Benefit Pension, Short Form eligible .....              | 34,000 .....                          | \$35.71                                               | \$24.33                                             |
| Defined Benefit Pension, Short Form ineligible .....            | 2,000 .....                           | 2.07                                                  | 1.93                                                |
| Code Section 403(b) .....                                       | 9,000 .....                           | 0.38                                                  | 1.81                                                |
| Other Defined Contribution, Short Form eligible .....           | 544,000 .....                         | 195.65                                                | 111.64                                              |
| Other Defined Contribution Pension, Short Form ineligible ..... | 32,000 .....                          | 11.54                                                 | 10.70                                               |
| Funded Welfare .....                                            | 7,000 .....                           | 2.83                                                  | 1.58                                                |
| Other Welfare .....                                             | None of approximately 6 million ..... | .....                                                 | .....                                               |
| Total for All Affected Small Plans .....                        | 629,000 .....                         | 248.17                                                | 151.99                                              |

Note: Some displayed numbers do not sum up to the totals due to rounding.

The Department notes that the estimated reporting costs amount to about \$240 on average for each of the 629,000 small plans subject to annual reporting requirements, or just \$27 if averaged across all of the approximately 5.7 million small plans covered by Title I of ERISA. This compares with roughly \$1,200 on average for each of the 152,000 affected large filers.

The Department is unaware of any relevant federal rules for small plans that duplicate, overlap, or conflict with these regulations.

*Description of steps the agency has taken to minimize impact on small entities.* In developing and finalizing these regulations and the associated forms revisions, the Department considered a number of alternative provisions directed at small plans, many of which are discussed elsewhere in this preamble and in the Forms Revision Notice. For example, as discussed in the Forms Revision Notice, the ERISA Advisory Council suggested that the Department consider exempting welfare plans from reporting requirements, or, alternatively, subjecting all welfare plans to new, separately designed reporting requirements. The Department opted instead to retain both the

requirement that small funded welfare plans submit annual reports and the exception from annual reporting requirements for other small welfare plans. Annual reporting by the relatively small number of small funded welfare plans is necessary, in the Department's view, to protect ERISA rights in connection with the assets that such plans hold. A requirement that the remaining approximately six million small welfare plans report annually is not justified insofar as these plans have no assets that need protection and insofar as the vast majority of the plans are fully insured and therefore separately protected by state oversight of the insurance contracts they hold and the insurers that issue them. The Department also considered both narrower and broader eligibility criteria for use of the Short Form 5500, settling on criteria that limit eligibility to plans holding relatively safe and protected assets, which nonetheless includes a large majority of small plans. The Department also considered the inclusion of more or fewer of the items of information formerly collected from small plans in the Form 5500 Annual Return/Report, retaining only those items it believes to be necessary and

adequate to the protection of small plan participants' ERISA rights.

#### *Paperwork Reduction Act Statement*

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)), the July 2006 Proposal solicited comments on the information collections included in the proposed amendments to the Department's regulations relating to annual reporting and disclosure requirements under Part 1 of Subtitle B of Title I of ERISA and in the proposed revision of the Form 5500 Annual Return/Report pursuant to Part 1 of Subtitle B of Title I and Title IV of ERISA and the Internal Revenue Code. The Department also submitted an information collection request (ICR) to OMB in accordance with 44 U.S.C. 3507(d), contemporaneously with publication of the July 2006 Proposal, for OMB's review of the Department's information collections previously approved under OMB Control No. 1210-0110.<sup>25</sup> Public comment on the

<sup>25</sup> On August 29, 2006, OMB issued a notice indicating that it would continue its approval of the information collections approved under Control No. 1210-0110 as currently in effect, but would not approve the Department's request for approval of

information collections contained in the Supplemental Notice was also solicited in connection with the publication of that Notice in December, 2006.

In connection with publication of this final rule, the Department has submitted an information collection request (ICR) to OMB for its review of the changes in burden estimates for the information collections currently approved under OMB Control No. 1210-0110 that are the result of this final regulatory action and the Forms Revision Notice published simultaneously with this rule. In order to avoid unnecessary duplication of public comments, the PRA information published in the associated Forms Revision Notice is incorporated herein by this reference in its entirety. The public is advised that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The Department intends to publish a notice announcing OMB's decision upon review of the Department's ICR.

A copy of the ICR can be obtained by contacting the Office of Policy and Research, Employee Benefits Security Administration, U.S. Department of Labor, Room N-5718, 200 Constitution Avenue, NW., Washington, DC 20210, Telephone: (202) 693-8410; Fax: (202) 219-4745 or at <http://www.RegInfo.gov>. These are not toll-free numbers.

#### *Congressional Review Act*

The final rules being issued here are subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to the Congress and the Comptroller General for review.

#### *Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Order 12875, these rules do not include any Federal mandate that may result in expenditures by state, local, or tribal governments in the aggregate of more than \$100 million, adjusted for inflation, or increased expenditures by the private sector of more than \$100 million, adjusted for inflation.

#### *Federalism Statement*

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires adherence to specific criteria by federal agencies in

the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. These rules do not have federalism implications because they would have no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in these rules do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the national government and the States.

#### **List of Subjects in 29 CFR Part 2520**

Accountants, Disclosure requirements, Employee benefit plans, Employee Retirement Income Security Act, Pension plans, Pension and welfare plans, Reporting and recordkeeping requirements, and Welfare benefit plans.

■ In view of the foregoing, the Department amends 29 CFR part 2520 as set forth below:

#### **PART 2520—RULES AND REGULATIONS FOR REPORTING AND DISCLOSURE**

■ 1. The authority citation for part 2520 is revised to read as follows:

**Authority:** 29 U.S.C. 1021–1025, 1027, 1029–31, 1059, 1134, and 1135; and Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2520.101–2 also issued under 29 U.S.C. 1132, 1181–1183, 1181 note, 1185, 1185a–b, 1191, and 1191a–c. Secs. 2520.102–3, 2520.104b–1, and 2520.104b–3 also issued under 29 U.S.C. 1003, 1181–1183, 1181 note, 1185, 1185a–b, 1191, and 1191a–c. Secs. 2520.104b–1 and 2520.107 also issued under 26 U.S.C. 401 note, 111 Stat. 788.

■ 2. In § 2520.103–1, revise paragraphs (a)(2), (b)(1) and (c) to read as follows:

#### **§ 2520.103–1 Contents of the annual report.**

(a) \* \* \*

(2) Under the authority of subsections 104(a)(2), 104(a)(3) and 110 of the Act, and section 1103(b) of the Pension Protection Act of 2006, a simplified report, limited exemption or alternative

method of compliance is prescribed for employee welfare and pension benefit plans, as applicable. A plan filing a simplified report or electing the limited exemption or alternative method of compliance shall file an annual report containing the information prescribed in paragraph (b) or paragraph (c) of this section, as applicable, and shall furnish a summary annual report as prescribed in § 2520.104b–10.

(b) \* \* \*

(1) A Form 5500 “Annual Return/Report of Employee Benefit Plan” and any statements or schedules required to be attached to the form, completed in accordance with the instructions for the form, including Schedule A (Insurance Information), Schedule SB (Single-Employer Defined Benefit Plan Actuarial Information), Schedule MB (Multiemployer Defined Benefit Plan and Certain Money Purchase Plan Actuarial Information), Schedule C (Service Provider Information), Schedule D (DFE/Participating Plan Information), Schedule G (Financial Transaction Schedules), Schedule H (Financial Information), Schedule R (Retirement Plan Information), and other financial schedules described in Sec. 2520.103–10. See the instructions for this form.

\* \* \* \* \*

(c) *Contents of the annual report for plans with fewer than 100 participants.*

(1) Except as provided in paragraph (c)(2) of this section and in paragraph (d) of this section, and in §§ 2520.104–43 and 2520.104a–6, the annual report of an employee benefit plan that covers fewer than 100 participants at the beginning of the plan year shall include a Form 5500 “Annual Return/Report of Employee Benefit Plan” and any statements or schedules required to be attached to the form, completed in accordance with the instructions for the form, including Schedule A (Insurance Information), Schedule SB (Single-Employer Defined Benefit Plan Actuarial Information), Schedule MB (Multiemployer Defined Benefit Plan and Certain Money Purchase Plan Actuarial Information), Schedule D (DFE/Participating Plan Information), Schedule I (Financial Information—Small Plan), and Schedule R (Retirement Plan Information). See the instructions for this form.

(2)(i) The annual report of an employee benefit plan that covers fewer than 100 participants at the beginning of the plan year and that meets the conditions in paragraph (c)(2)(ii) of this section with respect to a plan year may, as an alternative to the requirements of paragraph (c)(1) of this section, meet its

revisions to the ICR until after consideration of public comment on the July Proposal and promulgation of a final rule, describing any changes.

annual reporting requirements by filing the Form 5500-SF "Short Form Annual Return/Report of Small Employee Benefit Plan" and any statements or schedules required to be attached to the form, including Schedule SB (Single Employer Defined Benefit Plan Actuarial Information) and Schedule MB (Multiemployer Defined Benefit Plan and Certain Money Purchase Plan Actuarial Information), completed in accordance with the instructions for the form. See the instructions for this form.

(ii) A plan meets the conditions in this paragraph (c)(2)(ii) with respect to the year if the plan:

(A) Does not hold any employer securities at any time during the year;

(B) Satisfies the audit waiver conditions in §§ 2520.104-46(b)(1)(i)(A)(1), (b)(1)(i)(B) and (b)(1)(i)(C);

(C) Had at all times during the plan year 100 percent of the plan's assets held for investment purposes invested in assets that have a readily determinable fair market value. For purposes of this section, the following shall be treated as assets that have a readily determinable fair market value: Shares issued by an investment company registered under the Investment Company Act of 1940; investment and annuity contracts issued by any insurance company, qualified to do business under the laws of a State, that provides valuation information at least annually to the plan administrator; bank investment contracts issued by a bank or similar financial institution, as defined in § 2550.408b-4(c) of this chapter, that provides valuation information at least annually to the plan administrator; securities (except employer securities) traded on a public exchange; government securities issued by the United States or by a State; cash or cash equivalents held by a bank or similar financial institution, as defined in § 2550.408b-4(c) of this chapter, by an insurance company, qualified to do business under the law of a State, by an organization registered as a broker-dealer under the Securities Exchange Act of 1934, or by any other organization authorized to act as a trustee for individual retirement accounts under section 408 of the Internal Revenue Code; and any loan meeting the requirements of section 408(b)(1) of the Act and the regulations issued thereunder; and

(D) Is not a multiemployer plan.

\* \* \* \* \*

■ 3. Amend § 2520.104-44 by revising (b)(1)(iii) and (b)(2), and removing (b)(3) to read as follows:

**§ 2520.104-44 Limited exemption and alternative method of compliance for annual reporting by unfunded plans and by certain insured plans.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(iii) Partly in the manner specified in paragraph (b)(1)(i) of this section and partly in the manner specified in paragraph (b)(1)(ii) of this section; and

(2) A pension benefit plan the benefits of which are provided exclusively through allocated insurance contracts or policies which are issued by, and pursuant to the specific terms of such contracts or policies benefit payments are fully guaranteed by an insurance company or similar organization which is qualified to do business in any State, and the premiums for which are paid directly by the employer or employee organization from its general assets or partly from its general assets and partly from contributions by its employees or members: *Provided*, That contributions by participants are forwarded by the employer or employee organization to the insurance company or organization within three months of receipt and, in the case of a plan that provides for the return of refunds to contributing participants, such refunds are returned to them within three months of receipt by the employer or employee organization.

\* \* \* \* \*

■ 4. In § 2520.104-46, add a new paragraph (e) and a new appendix to the section to read as follows:

**§ 2520.104-46 Waiver of examination and report of an independent qualified public accountant for employee benefits plan with fewer than 100 participants.**

\* \* \* \* \*

(e) *Model notice.* The appendix to this section contains model language for inclusion in the summary annual report to assist plan administrators in complying with the requirements of paragraph (b)(1)(i)(B) of this section to avail themselves of the waiver of examination and report of the independent qualified public accountant for employee benefit plans with fewer than 100 participants. Use of the model language is not mandatory. In order to use the model language in the plan's summary annual report, administrators must, in addition to any other information required to be in the summary annual report, select among alternative language and add relevant information where appropriate in the model language. Items of information that are not applicable to a particular plan may be deleted. Use of the model language, appropriately modified and

supplemented, will be deemed to satisfy the notice content requirements of paragraph (b)(1)(i)(B) of this section.

**Appendix to § 2520.104-46—Model Summary Annual Report Notice (Plan Administrators Will Need to Modify the Model to Omit Information That Is Not Applicable to the Plan)**

The U.S. Department of Labor's regulations require that an independent qualified public accountant audit the plan's financial statements unless certain conditions are met for the audit requirement to be waived. This plan met the audit waiver conditions for the plan year beginning (insert year) and therefore has not had an audit performed. Instead, the following information is provided to assist you in verifying that the assets reported on the (Form 5500 or Form 5500-SF—select as applicable) were actually held by the plan.

At the end of the (insert year) plan year, the plan had (include separate entries for each regulated financial institution holding or issuing qualifying plan assets):

[Set forth amounts and names of institutions as applicable where indicated], [(insert \$ amount) in assets held by (insert name of bank)], [(insert \$ amount) in securities held by (insert name of registered broker-dealer)], [(insert \$ amount) in shares issued by (insert name of registered investment company)], [(insert \$ amount) in investment or annuity contract issued by (insert name of insurance company)].

The plan receives year-end statements from these regulated financial institutions that confirm the above information. [Insert as applicable—The remainder of the plan's assets were (1) qualifying employer securities, (2) loans to participants, (3) held in individual participant accounts with investments directed by participants and beneficiaries and with account statements furnished to the participant or beneficiary at least annually, or (4) other assets covered by a fidelity bond at least equal to the value of the assets and issued by an approved surety company.]

Plan participants and beneficiaries have a right, on request and free of charge, to get copies of the financial institution year-end statements and evidence of the fidelity bond. If you want to examine or get copies of the financial institution year-end statements or evidence of the fidelity bond, please contact [insert mailing address and any other available way to request copies such as e-mail and phone number].

If you are unable to obtain or examine copies of the regulated financial institution statements or evidence of the fidelity bond, you may contact the regional office of the U.S. Department of Labor's Employee Benefits Security Administration (EBSA) for assistance by calling toll-free 1.866.444.EBSA (3272). A listing of EBSA regional offices can be found at <http://www.dol.gov/ebsa>.

General information regarding the audit waiver conditions applicable to the plan can be found on the U.S. Department of Labor Web site at <http://www.dol.gov/ebsa> under the heading "Frequently Asked Questions."

■ 5. Amend § 2520.104a-2(a) to read as follows:

**§ 2520.104a-2 Electronic filing of annual reports.**

(a) Any annual report (including any accompanying statements or schedules) filed with the Secretary under part 1 of

title I of the Act for any plan year (reporting year, in the case of common or collective trusts, pooled separate accounts, and similar non-plan entities) beginning on or after January 1, 2009, shall be filed electronically in accordance with the instructions applicable to such report, and such

other guidance as the Secretary may provide.

\* \* \* \* \*

■ 6. Revise the Appendix to § 2520.104b-10 to read as follows:

**§ 2520.104b-10 Summary Annual Report.**

\* \* \* \* \*

**APPENDIX TO § 2520.104b-10.—THE SUMMARY ANNUAL REPORT (SAR) UNDER ERISA: A CROSS-REFERENCE TO THE ANNUAL REPORT**

| SAR item                                                                                 | Form 5500 large plan filer line items                           | Form 5500 small plan filer line items                  | Form 5500-SF filer line items                   |
|------------------------------------------------------------------------------------------|-----------------------------------------------------------------|--------------------------------------------------------|-------------------------------------------------|
| <b>A. PENSION PLAN:</b>                                                                  |                                                                 |                                                        |                                                 |
| 1. Funding arrangement .....                                                             | Form 5500-9a .....                                              | Same .....                                             | Not applicable.                                 |
| 2. Total plan expenses .....                                                             | Sch. H-2j .....                                                 | Sch. I-2j .....                                        | Line 8h.                                        |
| 3. Administrative expenses .....                                                         | Sch. H-2i(5) .....                                              | Sch. I-2h .....                                        | Line 8f.                                        |
| 4. Benefits paid .....                                                                   | Sch. H-2e(4) .....                                              | Sch. I-2e .....                                        | Line 8d.                                        |
| 5. Other expenses .....                                                                  | Sch. H-Subtract the sum of 2e(4) & 2i(5) from 2j. ....          | Sch. I-2i .....                                        | Line 8g.                                        |
| 6. Total participants .....                                                              | Form 5500-6f .....                                              | Same .....                                             | Line 5b.                                        |
| 7. Value of plan assets (net): .....                                                     | Sch. H-1l [Col. (b)] .....                                      | Sch. I-1c [Col. (b)] .....                             | Line 7c [Col. (b)].                             |
| a. End of plan year. ....                                                                |                                                                 |                                                        |                                                 |
| b. Beginning of plan year .....                                                          | Sch. H-1l [Col. (a)] .....                                      | Sch. I-1c [Col. (a)] .....                             | Line 7c [Col. (a)].                             |
| 8. Change in net assets .....                                                            | Sch. H-Subtract 1l [Col. (a)] from 1l [Col. (b)]. ....          | Sch. I-Subtract 1c [Col. (a)] from Col. (b)]. ....     | Line 7c-Subtract Col. (a) from Col. (b).        |
| 9. Total income .....                                                                    | Sch. H-2d .....                                                 | Sch. I-2d .....                                        | Line 8c.                                        |
| a. Employer contributions .....                                                          | Sch. H-2a(1)(A) & 2a(2) if applicable. ....                     | Sch. I-2a(1) & 2b if applicable .....                  | Line 8a(1) if applicable.                       |
| b. Employee contributions .....                                                          | Sch. H-2a(1)(B) & 2a(2) if applicable. ....                     | Sch. I-2a(2) & 2b if applicable .....                  | Line 8a(2) & 8a(3) if applicable.               |
| c. Gains (losses) from sale of assets. ....                                              | Sch. H-2b(4)(C) .....                                           | Not applicable .....                                   | Not applicable.                                 |
| d. Earnings from investments .....                                                       | Sch. H-Subtract the sum of 2a(3), 2b(4)(C) and 2c from 2d. .... | Sch. I-2c .....                                        | Line 8b.                                        |
| 10. Total insurance premiums .....                                                       | Total of all Schs. A-6b .....                                   | Total of all Schs. A-6b .....                          | Not applicable.                                 |
| 11. Unpaid minimum required contribution (S-E plans) or Funding deficiency (ME plans):.. | Sch. SB-39 .....                                                | Same .....                                             | Same.                                           |
| a. S-E Defined benefit plans. ....                                                       |                                                                 |                                                        |                                                 |
| b. ME Defined benefit plans .....                                                        | Sch. MB-10 .....                                                | Same .....                                             | Not applicable.                                 |
| c. Defined contribution plans .....                                                      | Sch. R-6c, if more than zero ...                                | Same .....                                             | Line 12d.                                       |
| <b>B. WELFARE PLAN</b>                                                                   |                                                                 |                                                        |                                                 |
| 1. Name of insurance carrier .....                                                       | All Schs. A-1(a) .....                                          | Same .....                                             | Not applicable.                                 |
| 2. Total (experience rated and non-experience rated) insurance premiums. ....            | All Schs. A-Sum of 9a(1) and 10a. ....                          | Same .....                                             | Not applicable.                                 |
| 3. Experience rated premiums .....                                                       | All Schs. A-9a(1) .....                                         | Same .....                                             | Not applicable.                                 |
| 4. Experience rated claims .....                                                         | All Schs. A-9b(4) .....                                         | Same .....                                             | Not applicable.                                 |
| 5. Value of plan assets (net): .....                                                     | Sch. H-1l [Col. (b)] .....                                      | Sch. I-1c [Col. (b)] .....                             | Line 7c [Col. (b)].                             |
| a. End of plan year. ....                                                                |                                                                 |                                                        |                                                 |
| b. Beginning of plan year .....                                                          | Sch. H-1l [Col. (a)] .....                                      | Sch. I-1c [Col. (a)] .....                             | Line 7c [Col. (a)].                             |
| 6. Change in net assets .....                                                            | Sch. H-Subtract 1l [Col. (a)] from 1l [Col. (b)]. ....          | Sch. I-Subtract 1c [Col. (a)] from 1c [Col. (b)]. .... | Line 7c-Subtract [Col. (a)] from 7c [Col. (b)]. |
| 7. Total income .....                                                                    | Sch. H-2d .....                                                 | Sch. I-2d .....                                        | Line 8c                                         |
| a. Employer contributions .....                                                          | Sch. H-2a(1)(A) & 2a(2) if applicable. ....                     | Sch. I-2a(1) & 2b if applicable .....                  | Line 8a(1) if applicable.                       |
| b. Employee contributions .....                                                          | Sch. H-2a(1)(B) & 2a(2) if applicable. ....                     | Sch. I-2a(2) & 2b if applicable .....                  | Line 8a(2) if applicable.                       |
| c. Gains (losses) from sale of assets. ....                                              | Sch. H-2b(4)(C) .....                                           | Not applicable .....                                   | Not applicable.                                 |
| d. Earnings from investments .....                                                       | Sch. H-Subtract the sum of 2a(3), 2b(4)(C) and 2c from 2d. .... | Sch. I-2c .....                                        | Line 8b.                                        |
| 8. Total plan expenses .....                                                             | Sch. H-2j .....                                                 | Sch. I-2j .....                                        | Line 8h.                                        |
| 9. Administrative expenses .....                                                         | Sch. H-2i(5) .....                                              | Sch. I-2h .....                                        | Line 8f.                                        |
| 10. Benefits paid .....                                                                  | Sch. H-2e(4) .....                                              | Sch. I-2e .....                                        | Line 8d.                                        |
| 11. Other expenses .....                                                                 | Sch. H-Subtract the sum of 2e(4) & 2i(5) from 2j. ....          | Sch. I-2i .....                                        | Line 8g.                                        |

Signed at Washington, DC, this 30th day of  
October, 2007.

**Bradford P. Campbell,**

*Assistant Secretary, Employee Benefits  
Security Administration, U.S. Department of  
Labor.*

[FR Doc. E7-21765 Filed 11-15-07; 8:45 am]

**BILLING CODE 4510-29-P**