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Employee Benefits Security Administration

29 CFR Part 2520

Electronic Filing of Annual Reports; Proposed Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2520

RIN 1210–AB04

Electronic Filing of Annual Reports

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Proposed regulation.

SUMMARY: This document contains a proposed regulation that, upon adoption, would establish an electronic filing requirement for certain annual reports required to be filed with the Department of Labor by plan administrators and other entities. The Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code), and the regulations issued thereunder, impose certain annual reporting obligations on pension and welfare benefit plans, as well as on certain other entities. These annual reporting obligations generally are satisfied by filing the Form 5500 Series. Currently, the Department of Labor, the Pension Benefit Guaranty Corporation, and the Internal Revenue Service (the Agencies) use an automated document processing system—the ERISA Filing Acceptance System—to process the Form 5500 Series filings. As part of the Department's efforts to update and streamline the current processing system, the Department has determined that improvements and cost savings in the filing processes can best be achieved by adopting a wholly electronic filing processing system and eliminating the currently accepted paper filings. The Department believes that a wholly electronic system will result in, among other things, reduced filer errors and, therefore, reduced correspondence and potential for filer penalties; more timely data for public disclosure and enforcement, thereby enhancing the protections for participants and beneficiaries; and lower annual report processing costs, benefiting taxpayers generally. As part of the move to a wholly electronic filing system, the regulation contained in this document would, upon adoption, require Form 5500 filings made to satisfy the annual reporting obligations under Title I of ERISA to be made electronically. In order to ensure an orderly and cost-effective migration to an electronic filing system by both the Department and Form 5500 filers, under the proposal the requirement to file electronically would not apply until plan years beginning on or after January 1, 2007, with the first electronically filed forms due in 2008. Upon adoption, this regulation would affect employee pension and welfare benefit plans, plan sponsors, administrators, and service providers to plans subject to Title I of ERISA.

DATES: Written comments must be received by the Department of Labor on or before October 31, 2005.

ADDRESSES: Comments should be addressed to the Office of Regulations and Interpretations, Employee Benefits Security Administration (EBSA), Room N–5669, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attn: Form 5500 E-filing regulation (RIN 1210–AB04). Comments also may be submitted electronically to *e-ori@dol.gov* or by using the Federal eRulingmaking Portal: *http://www.regulations.gov* (follow instructions provided for submission of comments). EBSA will make all comments available to the public on its Web site at *http://www.dol.gov/ebsa*. The comments also will be available for public inspection at the Public Disclosure Room, N–1513, EBSA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Yolanda R. Wartenberg, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8510. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

Sections 104(a) and 4065 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and sections 6057(b) and 6058(a) of the Internal Revenue Code of 1986, as amended (the Code), and the regulations issued under those sections, impose certain annual reporting and filing obligations on pension and welfare benefit plans, as well as on certain other entities.[1] Plan administrators, employers, and others generally satisfy these annual reporting obligations by filing the Form 5500 Annual Return/Report of Employee Benefit Plan, together with any required attachments and schedules for the particular plan (Form 5500).[2]

Currently, the Department of Labor, the Pension Benefit Guaranty Corporation, and the Internal Revenue Service (the Agencies) use an automated document processing system—the ERISA Filing Acceptance System (EFAST)—maintained by the Department of Labor (the Department) to process annual reports. Using the EFAST system, the Department annually receives and processes approximately 1.4 million filings. For the 2002 plan year, these filings translated into approximately 25 million paper pages.

Developed in 1998 and 1999, the EFAST system relies on a mixture of filing and processing methods to accept, compile, and monitor the Form 5500 filings. The EFAST system currently accepts filings generated using any of three different formats: (1) Government printed ''hand-print'' forms, which must be filed on paper; (2) computer-generated paper forms identical in format to government-printed hand-print forms, which also must be filed on paper and are treated in processing the same as hand-print forms; and (3) computer-generated forms in which 2D bar code technology is used to encode filer data (known as the ''machine-print'' version of the forms), which may be filed either on paper or electronically. As indicated, only the computer-generated machine-print forms may be filed electronically, and the Agencies currently accept machine-print filings through any of the following electronic methods of transmission: (1) Via modem using file transfer protocol (FTP), or (2) on magnetic or optical media, such as CD–ROM, computer diskette, or magnetic tape. To process the different filing formats, the system uses a variety of computer technologies, such as optical character recognition technology to read data from the hand-print forms; 2D bar-coding technology to read coded filer information printed on the ''machine-print'' forms submitted on paper; scanning technology to retain images of paper filings; etc.

A private contractor performs the EFAST processing under a time-limited contract with EBSA. The end of the time-limited contracting cycle and the

[1] Other filing requirements may apply to employee benefit plans under ERISA or to other benefit arrangements under the Code, and such other filing requirements are not within the scope of this proposal. For example, Code sec. 6033(a) imposes an additional reporting and filing obligation on organizations exempt from tax under Code sec. 501(a), which may be related to retirement trusts that are qualified under sec. 401(a) of the Code. Code sec. 6047(e) also imposes an additional reporting and filing obligation on pension benefit plans that are employee stock ownership plans (ESOPs).

[2] For purposes of the annual reporting requirements under the Code, certain pension benefit arrangements that cover only business owners or partners (and their spouses), which are not employee benefit plans under Title I of ERISA, are permitted to file the Form 5500–EZ to satisfy filing requirements under the Code. *See* instructions to the Form 5500–EZ to determine who may currently file the Form 5500–EZ.

beginning of another contracting cycle present a significant opportunity for EBSA to evaluate the system and to make changes to take advantage of technological advances. In connection with that process, in March, 2004, the Department posted a request for public comments (Request for Comment) on its website relating to updating the current EFAST processing system.[3]

The Request for Comment set out the Department's preference for enhanced electronic filing and described in detail its understanding of the deficiencies in the EFAST design that impede use of the current electronic filing option. The Request for Comment stated that the Department's goal in developing a new processing system is to make it ''more accessible to its user base through Internet and Web-based technology, devoid of paper to the greatest extent possible, faster, less expensive, and more accurate'' and to ensure that ''electronic filing becomes more convenient and beneficial for all users and stakeholders.'' The Department noted that ''[t]he full benefits of electronic processing have not * * * been realized * * * because [EFAST's] electronic filing option has been underutilized.'' [4] The Request for Comment noted the benefits to be gained from electronic filing, explaining that, compared with electronic filings, using paper-based forms is less accurate in terms of data capture and less efficient in terms of processing—paper filings take three times as long as electronic filings to process and have nearly twice as many errors, which often trigger follow-up letters from the Agencies seeking corrections or clarifications concerning the filed information. Such filings may also result in the imposition of penalties under ERISA and the Code.

Signaling the Department's interest in moving to an electronic filing system for the Form 5500 Series, the Request for Comment specifically requested comment on whether a reduction in the available filing methods, up to and including adoption of an electronic filing mandate, would be an appropriate solution to the problems caused by underutilization of electronic filing.

In response to the Request for Comment, the Department received many constructive and useful comments from a diverse group of interested parties, including small business owners, sponsors and administrators of small and large plans, actuaries, accountants, entrepreneurs involved in the development and sale of EFAST-approved software, and firms that prepare Form 5500 filings for a wide variety of employee benefit plans.[5] Public comment was largely in accord with the Department's analysis of EFAST's technical deficiencies as laid out in the Request for Comment.

Based on what appears to be a consensus as to the current technical deficiencies of EFAST, the Department has begun the technical process necessary for the development of a new processing system. At the same time, the Agencies separately are undertaking a comprehensive review of the Form 5500 Series in an effort to determine what, if any, design or data changes should be made, in anticipation of the new processing system. Neither the technical project for development of a new processing system, nor the Form 5500 Series project, however, is the subject of this proposal.[6] Any Form or related regulation changes will be proposed for public comment as part of a separate rulemaking.

The subject of this proposal is the Department's determination that any new processing system designed to replace EFAST must have as its core component a requirement that all Form 5500s be submitted through electronic means. The Department's determination that electronic filing must be the sole method available under the new processing system is not dependent on the extent or type of data that will be required of filers or the form or forms in which it must be provided; nor is it dependent on the exact software or hardware that will ultimately be devised to accommodate electronic filing, either by the Federal government or by the private sector. Rather, this determination arises from the Department's conclusion that electronic filing will benefit plan sponsors, participants and beneficiaries, and the taxpayer, based on the Department's investigation and analysis, described more fully below, of the practical alternatives. The proposal for an electronic filing requirement contained in this notice is therefore being published in advance of the other projects related to the Form 5500 Series and processing because the Department has concluded, based on considerations explained more fully below, that it is essential to the success of any redesign of EFAST that it provide filers and other affected parties adequate time to make the transition to a fully electronic method of filing the Form 5500 Series. Given the importance of the contemplated transition, the Department is publishing this proposal separately to describe the reasoning behind its conclusion and to solicit public comment on how best to proceed with the transition to electronic filing.

B. Public Comment and Alternatives

Virtually all of the public comments submitted in response to the Request for Comment recognized the value of electronic filing over paper filing and expressed support for increasing the use of electronic filing. The majority of comments also endorsed the concept of a gradual transition to 100 percent electronic filing. A clear consensus among commenters further favored the development of a secure Internet website on which a filer could file the Form 5500 through direct input of data, provided it was cost-free to the filer. Nonetheless, the commenters opposed an immediate mandate of electronic filing as the next step in EFAST development. The commenters argued that an immediate mandate would impose economic burdens on small businesses and small plans, which may not have easy access to the Internet. The commenters urged the Department to make only incremental changes, building on the current system and taking into account the substantial investments that the filing public has already made to accommodate EFAST. One representative commenter, speaking on behalf of a large number of large employers and service providers to employers of all sizes, suggested that, although electronic filing provides

[3] The Request for Comment may be reviewed at: *http://www.efast.dol.gov/efastrfc.html.*

[4] The Department specifically identified technical deficiencies involving the process for obtaining and using electronic signatures, the use of outdated transmission methods, and the continued use of paper for post-filing communications. The Request for Comment suggested various technical design changes to address these and other deficiencies, including creating an Internet-based method of filing; requiring that approved software be designed only for Internet transmission of computer-generated filings; adopting improved data exchange technology based on widely-accepted standards, such XML; improving the technical handling of third-party attachments and attestations; and eliminating differences in treatment between paper and electronic filings with respect to acceptance and rejection.

[5] Comments received in response to the Request for Comment may be reviewed at: *http://www.dol.gov/ebsa/regs/cmt_efastrfc.html.*

[6] In connection with this proposal, the Department is providing in this document further information respecting the technical design and Form 5500 content projects underway within the Department concerning the Form 5500 Series. The Department believes the information about those two other projects will assist the public in evaluating this proposal; however, the Department notes that it is not asking for public comment at this time on those two separate projects. The proposal contained in this notice concerns only the mandate of electronic filing. The public will have adequate separate opportunity for public comment on the Form 5500 regulatory initiative prior to its finalization and ample time to make necessary practical changes prior to implementation of the new processing system.

many advantages to both the public and the government, the Department should phase in any mandate over time by market segment, starting first with the largest employers who are already familiar with electronic filing, such as is required by the Securities and Exchange Commission. Other commenters asked the Department to allow sufficient time for experimentation and testing before inaugurating a mandate.

In developing this proposed regulation, the Department sought to advance two main goals. One was to maximize the speed, efficiency, and accuracy with which annual reports are transmitted, accepted, and processed, thereby enhancing the protection of participants' rights. The other was to minimize the burden placed on filers. In pursuit of these goals, the Department considered and analyzed several alternatives, taking into account the costs and benefits attendant to each. These included the following: (1) Creating a new processing system that could continue to process both electronic and paper submissions without limitation; (2) continuing the present, primarily paper-based processing system on an interim basis alongside a new, solely electronic processing system; (3) developing a new, primarily electronic processing system with a temporary capacity to process a limited number of paper filings, which would be made available under criteria targeting those filers most likely to desire a longer transition period; and (4) transitioning to a new, solely electronic processing system under a uniformly applicable requirement to file electronically.

The Department considered the costs and benefits of each of these alternatives, and its economic analysis is described below under the heading ''Regulatory Impact Analysis.'' Based on its analysis of the alternatives, the Department has concluded that the maintenance of any paper filing system, even on a reduced scale and/or for limited periods of time, which would be required under any of the first three alternatives, would be inherently inefficient and unnecessarily costly. It is also the Department's view that any economic benefit that might accrue to some class of filers under those alternatives would be outweighed by the benefits to participants and beneficiaries at large, and to the Department and taxpayers generally, of implementing a single, wholly electronic system. Accordingly, the Department has decided to propose adoption of a uniform requirement to file electronically, as detailed further below.[7]

In so doing, the Department believes that transitioning to a new wholly electronic processing system will not present the problems suggested by the public responses to the Request for Comment. First, as explained more fully below, the Department intends to ensure that the new processing system will remedy the existing technical difficulties that underlie the perceived limitations of EFAST's current electronic filing design and will provide an electronic filing process that will be simpler, easier, and more attractive to filers.

Second, the Department does not believe that transitioning to the new processing system will impose undue burdens on small plans or small employers. Rather, the Department's analysis indicates that filers' costs of transitioning from paper filing to electronic transmission will be relatively modest and surpassed by benefits that will accrue in subsequent years.

Finally, the Department intends to delay implementation of any electronic mandate until the due date for the filing of Form 5500 Series for the plan year beginning in 2007, generally July 2008 or later. The Department believes that this substantial time delay of the proposed full electronic mandate will provide the public with adequate time to make adjustments in advance of the implementation of the new filing system.

The Department's conclusions concerning the public comments and alternatives are grounded in the Regulatory Impact Analysis presented below.

The Department invites comment on the need for an exception to accommodate any potentially significant impediments to some filers' transition to electronic filing. Commenters are encouraged to provide specific examples of such impediments, as well as to address the specific conditions for, and necessary scope of, relief under a hardship exception.

C. Electronic Filing

After careful consideration of the comments on the Request for Comment, as well as the need to develop a more efficient, cost-effective processing system for annual return/reports, the Department has determined, consistent with the goals of E-government, as recognized by the Government Paperwork Elimination Act[8] and the E-Government Act of 2002,[9] to require electronic filing of the Form 5500 to satisfy the reporting requirements of section 104(a) of Title I of ERISA. A mandate of electronic filing of benefit plan information, among other program strategies, will facilitate EBSA's achievement of its Strategic Goal of ''enhancing pension and health benefits of American workers.'' EBSA's strategic goal directly supports the Secretary of Labor's Strategic Goals of ''protecting workers benefits'' and of ''a competitive workforce,'' as well as promoting job flexibility and minimizing regulatory burden.[10] A cornerstone of our enforcement program is the collection, analysis, and disclosure of benefit plan information. Requiring electronic filing of benefit plan information, with the resulting improvement in the timeliness and accuracy of the information, would, in part, assist EBSA in its enforcement, oversight, and disclosure roles, which ultimately enhance the security of plan benefits. As the Government Accountability Office noted in its June, 2005, report on the Form 5500 Series,[11] the current necessity for handling paper filings under EFAST creates a substantial delay between receipt of a filing and the availability of its information for any enforcement and oversight purposes. Stating that ''the abundance of paper filings results in long processing times,'' the GAO estimated, for purposes of illustration, that the processing time for a paper filing under EFAST averages 90 days from date of receipt where no filing errors are detected.[12] Electronic filing would eliminate virtually all of this processing time, improving outcomes for all of the users of the Form 5500 information. In this regard, the PBGC has advised the Department that

[7] This approach is congruent with recommendations of the Government Accountability Office, which, in a June, 2005, Report to Congressional Committees, stated that ''[g]iven the improved timeliness and reduced errors associated with electronic filing, Labor, IRS and PBGC should require the electronic filing of the Form 5500.'' *See Private Pension—Government Actions Could Improve the Timeliness and Content of Form 5500 Pension Information* (GAO–05–491) at 44. The Report went on to state ''[i]n doing so, Labor should also make improvements to the current electronic filing process to make it less burdensome, such as revising the procedure for signing and authenticating an electronic filing.''

[8] Title XVII, Pub. L. 105–277, 112 Stat. 2681 (Oct. 21, 1998).

[9] Pub. L. 107–347, 116 Stat. 2899 (Dec. 17, 2002).

[10] For further information on the Department of Labor's Strategic Plan and EBSA's relationship to it, *see http://www.dol.gov/_sec/stratplan/main.htm.*

[11] *See* fn. 7, above.

[12] *See Private Pensions—Government Actions Could Improve the Timeliness and Content of Form 5500 Pension Information* (GAO–05–491) at 28, fig. 9 at 32. GAO also noted that, where errors in a filing are detected, additional processing delays of up to 120 more days occur.

electronic filing will enable PBGC to receive important information about defined benefit plans more quickly and efficiently, improving the PBGC's ability to monitor plan funding; calculate bankruptcy claims; estimate the impact of non-bankruptcy reportable events; evaluate exposure and expected claims; study plan formation and termination trends; and assess compliance with PBGC premium requirements.

In order to ensure an orderly and cost-effective migration to an electronic filing requirement and a new processing system, the requirement to file the Form 5500 electronically would apply only to annual return/reports required to be filed under ERISA section 104(a) for plan years beginning on or after January 1, 2007.

For purposes of the annual reporting requirements under section 4065 of Title IV of ERISA, the Pension Benefit Guaranty Corporation (PBGC) has advised the Department that a plan administrator's electronic filing of a Form 5500 for purposes of ERISA section 104(a), together with the required attachments and schedules and otherwise in accordance with the instructions to the Form, will be treated as satisfying the administrator's annual reporting obligation under section 4065 of Title IV of ERISA.[13] Similarly, for purposes of the annual filing and reporting requirements of the Code, the Internal Revenue Service (IRS) has advised the Department that, although there are no mandatory electronic filing requirements for a Form 5500 under the Code or the regulations issued thereunder, the electronic filing of a Form 5500 by plan administrators, employers, and certain other entities for purposes of ERISA section 104(a), together with the required attachments and schedules and otherwise in accordance with the instructions to the Form, will be treated as satisfying the annual filing and reporting requirements under Code sections 6058(a) and 6059(a). The IRS intends that plan administrators, employers, and certain other entities that are subject to various other filing and reporting requirements under Code sections 6033(a), 6047(e), and 6057(b) must continue to satisfy these requirements in accordance with IRS revenue procedures, publications, forms, and instructions.

With respect to annual reporting and filing obligations imposed by the Code but not required under section 104(a) of ERISA, such as are currently satisfied by the filing of the Form 5500–EZ, the IRS has advised the Department that it is currently working with taxpayers to explore how best to make a transition from paper filing to electronic filing in a manner that minimizes the burdens on taxpayers and practitioners. In this regard, the IRS has promulgated regulations mandating or permitting electronic filing of certain returns filed by pension and welfare benefit plans.[14]

With regard to the development of a new annual return/report electronic processing system, the Department is committed to resolving the electronic filing impediments identified by commenters on the Request for Comment, in particular those impediments relating to electronic signatures, attachments, and attestations furnished by third parties (e.g., accountants, actuaries, etc.).

It is anticipated that the new electronic filing system will incorporate the Internet as the sole medium for transmission of all filings and that the system will incorporate immediate validity and accuracy checks that will reduce both the error and rejection rate of filings and eliminate much of the costly post-filing paper correspondence and related potential penalties. The Department does not anticipate charging any filing fees in connection with the new system.

It is intended that the new electronic filing system will provide more than one vehicle for the electronic submission of annual return/reports. First, it is intended that the new filing system will offer users of approved, privately developed Form 5500 computer software (service providers to plans as well as plan administrators) a secure Internet-based method for transmission of Form 5500s created through the use of the software. This Internet-based transmission process will supercede all of the other currently available methods of transmitting machine-print versions of the Form 5500, including use of computer diskette, CD–ROM, magnetic tape, and modem. As the Department made clear in the Request for Comment, in making a transition to 100 percent electronic filing, the Department does not intend to supplant private software developers, vendors, or service providers to plans. Rather, it is contemplated that the new system will continue to provide support to these private industries, and the Department believes that filers will continue to rely on a variety of privately developed software products and services to facilitate plan administration, including the preparation and filing of the annual return/report. Indeed, it is expected that third-party software will remain the primary means of producing Form 5500s, with the simple difference that the reports will be filed electronically rather than through the use of paper. It is intended that service providers and software developers that provide value-added services for plan sponsors will be able to incorporate the new system's method of transmission into their services effectively and efficiently. Software file specifications will be non-proprietary so that users of different software may freely share information across different platforms. In this regard, the Department specifically invites public comment on how best to configure the new electronic filing architecture to provide the necessary flexibility to accommodate the needs of the diverse community of employee benefit plans.

Second, the Department also intends to include in the new system, as a separate filing method, a dedicated, secure Internet website through which plan administrators (or other return/report preparers) will be able to input data and to complete and submit Form 5500 filings on an individual plan-by-plan basis. It is anticipated that the Internet website will provide the filer with the capability of entering and saving data for an individual filing through multiple sessions, authorizing input for that filing from multiple parties (service providers, accountants, actuaries, etc.), uploading attachments, saving return/reports to a repository, and retrieving, updating, and editing stored filings, as well as creating and submitting amended filing data to EBSA.

As mentioned above, in connection with implementation of the redesign of EFAST, the Department, in coordination with the IRS and the PBGC, is conducting a thorough content review of the Form 5500. This review will be conducted as a three-agency regulatory initiative and will provide notice and comment opportunities for the public. The Department intends to consider, in conducting the content review of the Form 5500, changes that would facilitate electronic filing, as well as recommendations made by the ERISA Advisory Council on electronic reporting and on reporting by health

[13] It should be noted that all administrators of plans required to file reports under ERISA sec. 4065 also are required to file reports for purposes of sec. 104(a) of ERISA.

[14] *See*, e.g., 26 CFR 301.6033–4T (mandating electronic filing of certain corporate income tax returns and returns of organizations required to be filed under Code sec. 6033); 26 CFR 1.6033–4T (returns required to be filed on magnetic media under 26 CFR 301.6033–4T must be filed in accordance with IRS revenue procedures, publications, forms, or instructions).

and welfare plans.[15] That regulatory project will undertake to produce revised forms to be used for annual return/reports for the 2007 plan year, which will be due to be filed in 2008, when the new processing system will be implemented and the electronic filing requirement will begin to apply. Within the next few months, the Department intends to publish a separate notice inviting public comment on proposed changes to the Form 5500 and related rules.

D. Proposed Rule

The proposed rule contained in this notice is necessary to establish a requirement for the electronic filing of the Form 5500 for purposes of the annual reporting provisions of Title I of ERISA. Although at this time it is not possible to provide full technical details regarding the new electronic filing system, as many of the technological aspects of the redesign are still in development, filing requirements and compliance instructions will be provided to filers in advance of any due date for filing the Form 5500 under a final regulation requiring electronic submissions.

The proposal, upon adoption, would add a new section 2520.104a–2, Electronic Filing of Annual Reports, to Subpart E of Part 2520 of Title 29 of the Code of Federal Regulations. The proposal provides that any Form 5500 Annual Return/Report to be filed with the Secretary of Labor (Secretary) for any plan year beginning on or after January 1, 2007, shall be filed electronically in accordance with instructions and such other guidance as the Secretary may provide, applicable to such annual report. Because the Form 5500 is also filed by certain non-plan entities, such as common or collective trusts, pooled separate accounts, and entities described in 29 CFR 2520.103–12, which file for the fiscal year ending with or within the plan year for which a plan's annual report is filed, the proposal makes further reference to the first ''reporting year'' beginning on or after January 1, 2007, for such entities.

The proposal is intended to ensure that all Form 5500s filed with the Department, as well as any statements or schedules required to be attached to the report, including those filed by administrators (29 CFR 2520.103–1(a)(2) and (e)), group insurance arrangements (29 CFR 2520.103–2), common or collective trusts and pooled separate accounts (29 CFR 2520.103–3, 2520.103–4, and 2520.103–9), and entities described in 29 CFR 2520.103–12, are required (to the extent of the Department's authority) to be filed electronically. Following the development of a new electronic filing system, the Department intends to provide specific instructions and guidance concerning methods of filing in the instructions for the annual report form(s) and via its website.

As indicated above in the discussion under ''Electronic Filing,'' the proposal would not apply to any reporting requirements imposed solely under the Code (i.e., not required under section 104(a) of ERISA). As discussed above, issues relating to transition from paper filing to electronic filing for such reporting requirements are under consideration at the IRS. Accordingly, the regulation would not apply to any attachment, schedule, or report required to be completed by a tax-qualified pension benefit plan solely in order to provide the IRS with information concerning compliance with Code section 410(b) for a plan year, even if such attachment, schedule, or report is required to accompany the Form 5500 Annual Report/Return for that year. The proposal also would not apply to attachments, schedules, or reports that the IRS requires (1) under Code section 6033(a) to be filed by a trustee of a trust created as part of an employee benefit plan described in Code section 401(a) or by a custodian of a custodial account described in Code section 401(f), or (2) under Code section 6047(e) to be filed with respect to an employee stock ownership plan (ESOP).

The proposal, at 29 CFR 2520.104a–2(b), makes clear that the requirement to file annual reports electronically does not affect a person's record retention or disclosure obligations. In other words, the obligations of persons to retain records for purposes of sections 107 and 209 of ERISA would not be altered by the fact that the annual report would be required to be filed in electronic form. Similarly, a plan administrator's obligation to make the latest annual report available for examination and to furnish copies upon request, in accordance with sections 104(b)(2) and 104(b)(4) of ERISA, will not be affected by an electronic filing requirement.

Conforming changes are being proposed to 29 CFR 2520.103–1(f) [contents of the annual report], 2520.103–2(c) [contents of the annual report for a group insurance arrangement], 2520.103–9(d) [direct filing for bank or insurance carrier trusts and accounts], and 2520.103–12(f) [limited exception and alternative method of compliance for annual reporting of investments in certain entities].

E. Regulatory Impact Analysis

Summary

The Department has considered the potential costs and benefits of this proposed regulation. Costs to plans would consist mainly of a one-time, transition or start-up cost to make the change to electronic filing, generally to be incurred in 2008, which is estimated to be $23 million. Benefits to plans would include ongoing savings on material and postage and efficiency gains from the early detection and correction of more potential filing errors in the course of electronic filing, estimated to total $10 million annually, and realized each succeeding year beginning in 2008. Over time the ongoing savings attributable to this proposed regulation are expected to outweigh its one-time transition costs. Aggregate savings are estimated to exceed aggregate costs by $23 million over the first five years (discounting future savings at a rate of 7 percent).

Additional benefits are expected to accrue to the government and the public in the forms of substantially reduced processing costs and more timely availability of accurate filing data for use in enforcement and for other purposes of benefit to plans and participants.

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 subject to review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a ''significant regulatory action'' is an action that is likely to result in a rule (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

[15] *See*, e.g., *Report of the ERISA Advisory Council Working Group on Electronic Reporting* (Nov. 8, 2002), at *http://www.dol.gov/ebsa/publications/AC_1108a02_report.html.*

Order. OMB has determined that this action is significant under section 3(f)(4) because it raises novel legal or policy issues arising from the President's priorities. Accordingly, the Department has undertaken below an analysis of the costs and benefits of the proposed regulation.

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 which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposed rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present 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. Small entities include small businesses, organizations, and governmental jurisdictions.

For purposes of analysis under the RFA, EBSA proposes to continue 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 section 104(a)(3) of ERISA, the Secretary may also provide for exemptions or simplified annual reporting and disclosure for welfare benefit plans. Pursuant to the authority of section 104(a)(3), 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 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 proposed rules 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.*). EBSA therefore requests comments on the appropriateness of the size standard used in evaluating the impact of these proposed rules on small entities.

These proposed rules may have a significant impact on a substantial number of small entities. The Department has therefore prepared an initial regulatory flexibility analysis, presented below under the heading ''Small Plans.'' Additional relevant material also appears below under the heading ''Alternatives Considered.''

Costs and Benefits

The Department has considered the potential costs and benefits of this proposed regulation. Costs to plans would include a one-time transition or start-up cost to make the change to electronic filing, estimated to be $23 million. Benefits would include ongoing savings on material and postage and efficiency gains from the early detection and correction of more potential filing errors in the course of electronic filing, estimated to total $10 million annually. Over time the ongoing savings attributable to this proposed regulation are expected to outweigh its one-time transition costs. Aggregate savings are estimated to exceed aggregate costs by $23 million over the first five year (discounting future savings at a rate of 7 percent). Additional benefits are expected to accrue to the government and the public in the forms of reduced processing costs and more timely availability of accurate filing data. Beyond that, it is not immediately clear how the costs and benefits of mandatory electronic filing will compare with that of current filing modes, and the Department invites comments on this point.

The costs and benefits of this proposed regulation would accrue primarily to 832,000 plans that file Form 5500.[16] Non-plan entities that file Form 5500 generally do so in their capacity as service providers to plans and therefore are expected to pass their own costs and benefits from the regulation on to the plans they serve.[17]

Transition Costs

The proposed regulation would entail some one-time transition costs, incurred in making the transition to electronic filing. The magnitude of the transition costs is likely to vary with filers' previous filing methods, reflecting the extent to which their existing filing infrastructure supports electronic filing. It is also expected that different filers will make the transition to electronic filing in different ways, depending on their circumstances and preferences. It is intended that all filers will have a number of methods of electronic filing from which to choose. For example, filers may enter information directly into a government-provided web site (using their own Internet service or one available for a fee at a local business center or free of charge at a public library or other facility). They may use commercial software equipped for electronic filing. They may hire a service provider (or rely on an existing relationship with a service provider) to provide electronic filing services.

In 2002, the bulk of all filings, 87 percent, were submitted on machine-print forms; 12 percent were submitted on hand-print forms; and 1 percent were submitted electronically.

Hand-print Filers—Hand-print filers as a group are likely to face larger transition costs than others. These filers by and large currently file government printed forms, filled out by hand or by using a typewriter.[18] Like all other filers, they will have the option of preparing and submitting their filings via a government provided web site. It is likely that many (but not all) already have the electronic infrastructure (mainly a personal computer and Internet service) to support electronic filing. It is also likely that others will have access to the Internet at no charge at a local library or other location.[19] Nonetheless, hand-print filers are likely to incur some expense to learn about the new requirement, and some will incur additional costs, such as in locating and becoming familiar with Internet access,

[16] The economic analysis of the proposed regulation pertains only to those plans that file a Form 5500 to satisfy filing requirements under Title I of ERISA. Because the Form 5500–EZ is filed to satisfy filing requirements under the Code, data related to Form 5500–EZ filers is not included in this analysis.

[17] Economy theory predicts that producers in competitive markets pass costs and savings on to buyers.

[18] A very small fraction of all hand-print filers, typically a few percent, files computer-generated forms that are similar to and processed in the same way as government printed forms. These filers might tend to incur smaller transition costs than other hand-print filers. Because of their small numbers and the difficulties in separately identifying them in the data used for this analysis, the Department did not attempt to adjust its estimates to reflect this possible difference. This omission may slightly bias upwards the estimated aggregate transition cost for hand-print filers.

[19] This assumption is consistent with observations made by the ERISA Advisory Council Working Group on Electronic Reporting in its Nov. 8 Report. *See* fn. 15, above.

as well as in establishing a secured filing account.

For the 104,000 current hand-print filers, the Department estimates a one-time, aggregate transition cost to electronic filing of $12 million. This assumes that a professional-level employee, who costs the plans on average $58.80 per hour in wages, benefits, and overhead,[20] would require on average two hours to make the transition to electronic filing. The cost might be devoted to one or more one-time, transition activities such as learning about the electronic filing system, registering for a secure filing account, selecting and acquiring software, selecting and hiring a service provider, or locating an Internet access site and becoming familiar with a web-based interface. Different types of transition activities will have different costs. Selecting and hiring a service provider might be an example of a potential activity that would cost more than average, while registering for a secure account might be an example of one that would cost less. The activities and the cost will vary from filer to filer. For example, transition activities might be limited and costs low for a filer that is a highly experienced Internet user already carrying out other aspects of business management (such as buying supplies and selling products, reporting wages to SSA, etc.) on line. Activities might be more extensive and costs higher for a filer lacking Internet and computing expertise who needs to acquire a computer and Internet connection or select and hire a service provider. The Department invites comments on transitional activities and costs.

Machine-print Filers—Machine-print filers as a group are likely to incur smaller transition costs than hand-print filers. It is likely that a large proportion of machine-print filings are prepared by service providers, while the remainder are prepared by filers using commercial software. Filers that currently rely on service providers to prepare and submit their filings may opt to continue in this manner, relying on the service provider to file electronically. Service providers' transition costs will be passed back to and spread across the filers they serve. Other machine-print filers may rely on the vendors of their software to incorporate electronic filing features into the 2007 plan-year software (probably as part of an otherwise normal annual software update typically carried out to incorporate any form and instruction changes). It is likely that a majority already have the Internet service required for such software features to function, and some that currently do not have such service would have acquired it by the time the plan-year 2007 filings are due (for reasons unrelated to this regulation). For many machine-print filers the transition to electronic filing will be largely transparent, but will nonetheless entail at least some activities, such as registration for a secure filing account.

For the 726,000 current machine-print filers, the Department estimates a one-time, aggregate transition cost to electronic filing of $11 million. This assumes that one-half of machine-print filers will rely entirely on their existing service providers to make the transition and that the service providers will spread their own transition costs across the filers they serve. The Department, lacking data on the number of affected service providers, did not attempt to estimate their transition cost, and such costs are not included here. Because these costs would be spread across filers, the amount passed on to any single filer is expected to be minimal. The remaining one-half of machine-print filers are assumed to shoulder the transition costs themselves. The Department's estimate assumes that these filers will require on average thirty minutes of a professional-level employee's time to make the transition to electronic filing. The Department invites comments on these transition costs.

Ongoing Costs and Benefits

Preparation Costs—This proposed regulation pertains to the filing, and not to the preparation, of the Form 5500. However, it is possible that, for some filers, mandatory electronic filing would prompt changes in preparation methods. For example, hand-print filers may currently prepare their filings using a government printed form and a typewriter. Such filers might prepare future filings by entering information into a government website. The Department considered the cost of making such transitions in preparation methods to be part of the overall transition cost of the proposed regulation, included in the estimates presented above.

With respect to ongoing preparation costs, it is likely that some filers will incur higher costs in connection with new preparation methods prompted by this regulation and enabled by the new electronic filing system than with their current methods, but that others will incur lower costs. For example, it is not immediately determinable whether entering information into a website will take more or less time than typing it onto a paper form. The Department expects that commercial preparation software will incorporate features that ease preparation, such as integrated access to form instructions and automatic filling of data fields based on entries in other fields or in prior filings. The Department also intends that the new government filing website interface will be designed with attention to ease of preparation. Lacking an immediate basis to quantify the magnitude or costs and savings from possible changes in preparation methods, the Department did not attribute any such costs or savings to this proposed regulation, but invites comments on the potential magnitude of any such costs and benefits.

Filing Cost Savings—Filing costs generally are expected to be reduced by the implementation of this proposed regulation. Savings are foreseen from the elimination of materials and mailing costs and from a reduction in filing errors and subsequent corrections.

Electronic transmission will eliminate certain costs otherwise attendant to paper filing, including materials and postage. The Department estimates that, by changing to electronic filing, 829,000 plans will benefit from approximately $900,000 in cost-savings annually, assuming savings of $0.0167 per sheet of paper and $0.57 for postage per filing.

In addition, automated checks for errors and omissions upon electronic transmission, together with automated error checks and integrated instructions common to filing preparation software, will ease compliance with reporting requirements. Importantly, these features will reduce the need for subsequent amendments to submitted filings, as well as helping to avoid reporting penalties that might otherwise be assessed for deficient filings.

Historically, filers that use a software-based system generally have fewer filing errors. In 2002, 7 percent and 16 percent of electronic and machine-print filings, respectively, had filing errors compared to 40 percent of hand-print filings. The filing errors include items such as missing signatures, attestations, schedules, or back-up documents that resulted in an incomplete filing. As a result of filer errors and the need for

[20] The total labor cost is derived from wage and compensation data from the Bureau of Labor Statistics' (BLS) 2004 National Occupational Employment and Wage Estimates from the Occupational Employment Survey and BLS 2004 Employment Cost for Compensation. This data can be found at: *http://www.bls.gov/news.release/ocwage.t01.htm* and *http://www.bls.gov/news.release/archives/ecec_09152004.pdf.* The estimate assumes a 3 percent annual rate of compensation growth and includes an overhead component which is a multiple of compensation based on the Government Cost Estimate.

additional information or clarifications about Form 5500 filings for the 2002 plan year, the Department mailed 160,000 letters to filers requesting corrections or additions. This process ultimately delays the final submission and requires plans to incur additional costs to address deficiencies. The electronic filing system's intended error detection capability may largely eliminate the Department's need to forward correspondence to plans with deficient filings. This enhancement is likely to save time for filers. If the need for correspondence can be eliminated, the aggregate annual cost savings to affected filers could be as high as $10 million, assuming elimination of correspondence with the Department saves an average of one hour of a professional's time, at an average of $58.80 per hour, plus the value of associated postage and materials. A disproportionate share of this savings, estimated at $2.4 million, would accrue to current hand-print filers (reflecting their historically higher filing error rates), while $7.1 million would accrue to machine-print filers. The Department (and by extension taxpayers) would realize additional savings from this reduced need to correct filing errors.

Societal Benefits

Additional benefits are expected to accrue to the government and the public in the forms of reduced processing costs and more timely availability of accurate filing data.

Participants will benefit from the transition to a fully electronic method of filing. The new filing procedures will provide participants and beneficiaries with access to more accurate plan information since software-based forms are generally less prone to error, the new system will process filings more quickly, and reports disclosing information about plans' administrative and financial status will be available to the public sooner than would otherwise be possible. This improved access can enhance the quality of interaction between plans, participants, and beneficiaries.

The Federal government and the public at large will also benefit from the change to electronic filing. The decrease in correspondence will constitute immediate savings to the Federal government that will, in turn, yield savings to the taxpayers. Finally, improvements in the accuracy of the data contained in submitted filings and the expected acceleration in processing may make possible more timely production of reliable national statistics on private employee benefit plans. Such statistics historically have been produced at a substantial lag of up to four years after the end of the filing year.

Additional Considerations

Proliferation of Technology—In proposing this regulation, and in assessing its economic impacts, the Department took into consideration the high and increasing rates of use of electronic information technologies by businesses, including by small businesses in particular. Such technologies include office computing hardware and software that process, organize, store, and transmit information electronically. The proliferation of such technologies, and of expertise and familiarity with using them, is expected to moderate the cost of compliance with this proposed regulation.

The Department believes that most filers already have access to a computer and the Internet. The use of computers and the Internet has become the norm among U.S. businesses. Most or all industries in the economy are beginning to use the Internet as a means of conducting at least some of their daily operations and to remain competitive. Moreover, it is possible that plan sponsors as a group are more likely than other companies to be using information technologies. The Department believes that few, if any, plan sponsors will purchase a computer or subscribe to Internet service for the sole purpose of electronically filing their Form 5500. (If some do, they may realize collateral benefits as they put their newly acquired technologies to additional uses.) Furthermore, the Department believes that the number of firms offering pension and welfare plans that do not have a computer and/or Internet access is a relatively small number, especially given the substantial growth of computer and Internet usage over the past decade. The Department also believes that the number of plans that will not have a computer or Internet access by the year 2008 will be small.

The Department's views on the proliferation of technologies are grounded in its review of various studies of the topic.

According to a 2002 study for the SBA,[21] the Internet offers unparalleled new opportunities for small businesses. Fifty-seven percent of small businesses already used the Internet; of those most had their own websites; and more than one-third were selling their products on line.[22] Of those not using the Internet, two-thirds did use computers.[23]

The most popular uses of the Internet among small firm users were communicating with customers and suppliers (83 percent), gathering business information (80 percent), and purchasing goods and services (61 percent).[24] Some also used the Internet to conduct banking or other financial transactions (27 percent) or bid on contracts (21 percent). Most firms with websites either broke even financially or made money through use of the sites.

Also according to this study, use of Internet technology is growing. Among small firms with websites, two-thirds had been operating the site for less than one year.[25] Business use of on-line technologies is being driven up by increasing use of such technologies by consumers. Increasing availability and use of affordable, fast broad-band Internet services is helping to drive both trends. Market forecasters predicted rapid growth in world e-commerce, reaching as much as several trillion dollars by 2004.[26]

A 2003 report by SBA [27] found that self-employed computer users numbered 10.5 million in 2000, up from 9.2 million two years earlier. Over the same two years, self-employed individuals' access to the Internet increased by 50 percent, reaching 83 percent of all such individuals.

A 2004 study for SBA [28] of small firms with fewer than 500 employees found that only 27 percent did not currently subscribe to Internet service.

Benefits of E-government—The proposed regulation will advance the goals of administration articulated in the Government Paperwork Elimination Act and the E-Government Act of 2002.

The Department expects this proposed regulation to advance the general trend toward the efficiencies of E-government. Federal, State, and local government agencies have already implemented numerous E-government initiatives.[29] These initiatives reduce

[21] Joanne H. Pratt, ''E-Biz: Strategies for Small Business Success'' 32 (2002) (prepared for the SBA Office of Advocacy), available at *http://www.sba.gov/advo/research/rs220tot.pdf.*

[22] Id. at 6.

[23] Id.

[24] Id. at 6–8.

[25] Id. at 11.

[26] Id. at 23–24.

[27] SBA Office of Advocacy, ''Self Employment and Computer Usage,'' 3 (2003), available at *http://www.sba.gov/ADVO/stats/sepc.pdf.*

[28] Stephen B. Pociask, TeleNomic Research, LLC, ''A Survey of Small Businesses' Telecommunications Use and Spending'' 71 (2004) (prepared for SBA Office of Advocacy), available at *http://www.sba.gov/advo/research/rs236tot.pdf.*

[29] *See*, e.g., ''Electronic Government: Challenges Must Be Addressed with Effective Leadership and Management,'' Hearing on S.803 Before the Senate Comm. in Governmental Affairs, 106th Cong. 1 (July

Continued

the government's burden on businesses by eliminating redundant collection of data. Citizens receive faster, more convenient services from a more responsive and informed government.[30] According to one study, citizens see the most important benefits of E-government as increased government accountability to citizens (36 percent), greater public access to information (23 percent), and more efficient/cost-effective government (21 percent).[31] The GAO has indicated that government agencies that reported using the Internet as a medium for core business operations delivered information and services more quickly, less expensively, and to wider groups of users.[32]

Another study suggests that one of the most powerful ways to reduce compliance costs is through E-government. Web-enabling can save businesses and citizens a considerable amount of time and money, as the following examples demonstrate: (1) The State of Oregon's on-line permitting and reporting process for building construction approvals saved Oregon's construction industry $100 million annually. Deloitte's estimate suggests that if governments at all levels were to follow Oregon's lead, the United States' construction industry, as a whole, could save in the range of $15 billion to $20 billion annually. (2) The SBA's Business Compliance One Stop website saves businesses about $526 million a year, by helping them find, understand, and comply with regulations. (3) In Canada, the province of British Columbia's OneStopBC website cuts down on government paperwork costs for businesses by allowing on-line business license registrations. The cost savings to businesses are estimated to be in the range of $14 million to $27 million annually.[33]

Time Rebates—Time considerations affect all interactions and activities in business. When citizens and businesses can go on line, instead of waiting in line, they can obtain faster, more convenient access to government services.[34] E-government can provide what has come to be described as a ''time rebate''—cutting down on the time it takes to comply with government regulations and to complete transactions.

For example, the Commonwealth of Pennsylvania's ''PA Open for Business'' website allows a business to enter all the information needed to register with the State in one place, instead of having to go to five different agencies. A process that once took days or weeks has been reduced to one hour.[35]

The Department intends that the new electronic filing system will be equipped to streamline submissions and reduce time and burden on filers. The proposed regulation should benefit all parties because the information contained in the Form 5500 would be directly entered into the Department's records. This would improve transaction accuracy, reduce cycle times, improve cost efficiencies, enhance information accessibility, and provide more timely availability of the information contained in the Form 5500 return/reports.

Alternatives Considered

As noted earlier in this preamble, before electing to pursue the approach taken in this proposed regulation, the Department considered alternative options for reconfiguring the filing methods for the Form 5500 Series, focusing in particular on the gradual approach advocated generally in the public comments. The following discusses three such alternatives that the Department considered but rejected, along with the reasons why each was rejected in favor of a uniform requirement to file electronically beginning with filings for the 2007 plan year. Fuller discussion of the third alternative, which would provide a time-limited exception from mandatory electronic filing for certain small plans, follows under the heading ''Small Plans.''

First, the Department considered developing a new processing system that could continue to process both electronic and paper submissions without limitation. Such a system might be popular with the filing public and might result over time in virtually complete conversion to electronic filing, provided that the new system successfully incorporated the contemplated technological advances. Such a ''dual method'' processing system would permit filers to choose between electronic and paper filing. It therefore would likely appear to some filers to be more cost-efficient than the uniform requirement to file electronically that the Department is proposing. However, while a ''dual method'' processing system might be popular with some filers, such a system would perpetuate the inefficiencies inherent in paper filings—larger number of filing errors, required correspondence with filers, increased likelihood of civil penalties, delays in reviews of filings, and increased risks to participants and beneficiaries resulting from erroneous data or delayed enforcement. It therefore does not appear to be in the interest of plans or participants to maintain such a system. In addition, the maintenance of such a system would entail additional costs for the Federal government (and by extension taxpayers) because it would be necessary to incorporate into the system the ability to receive and process a potentially large number of paper filings. In the Department's view, the additional costs for such a complex processing system would be virtually prohibitive for the Federal government in light of current budgetary constraints on the Federal government generally and on the Department in particular. Under such constraints, maintaining a paper filing system would consume resources that would be better devoted to enhancing the system's electronic filing capabilities or carrying out other Department functions.

Second, the Department considered the alternative of continuing the present paper processing system on a short-term interim basis during the initial years of operating a new, solely electronic processing system. This alternative would enable filers to gain familiarity with the new paperless system as part of the transition process. As with the prior approach, this approach would continue, albeit for a limited period, the current inefficiencies of a paper system and the substantial costs of maintaining tandem operations, particularly since continuing the old processing system would require ''sole source'' non-competitive yearly contractual negotiations with the current contractor, with ever increasing additional costs. For example, in fiscal year 2006 the Department requested an additional $2.1 million to maintain current

11, 2001) (statement of David McClure, Director, Information Technology Management Issues, GAO), available at *http://www.gao.gov/new.items/d01959t.pdf.*

[30] Susie Trinkle, Capella Univ., ''Moving Citizens from in line to Online: How the Internet is Changing How Government Serves its Citizens'' (Sept. 10, 2001, available at *http://oma.od.nih.gov/ma/bps/bpkm/Resource/Y_MovingCitizens FromLineOn.doc.*

[31] Hart-Teeter, ''E-Government: the Next American Revolution'' (Sept. 28, 2000) available at *http://www.excelgov.org/displaycontent.asp?keyword=mReleases&NewsItemID=2559.*

[32] Testimony of David A. McClure, GAO, before the Subcommittee on Government Management, Information and Technology, Committee on Government Reform, House of Representatives (2000), as reported in Karen Laynea and Jungwoo Leeb, *Government Information Quarterly* 18 (2001), 122–136.

[33] William D. Eggers, Global Director, Deloitte Research-Public Sector, ''Citizen Advantage: Enhancing Economic Competitiveness Through e-Government'' 1 (2004).

[34] Gassan Al-Kibsi; Kito de Boer; Mona Mourshed; Nigel P. Rea; ''Putting citizens on-line, not in line,'' McKinsey Quarterly 2001 no. 2.

[35] *See* Eggers, supra note 25 at 7, 14.

operations in the first year of a sole source contract.

Third, the Department considered developing a new processing system that would have the temporary capacity to process paper filings from a targeted group of filers under an exception from the electronic filing requirement. For reasons described below under ''Small Plans,'' the Department considered it appropriate to limit the exception to small plans that had previously filed government printed ''hand-print'' forms and that are not subject to the audit requirement. The Department believes that making such an exception available, at least for the first few years of operating the new processing system, might provide a small net benefit to at least some proportion of this class of filers. However, the Department believes this potential benefit, which could amount (as explained further below) to as little as $14 per plan on average for 74,000 plans or as much as $249 per plan on average for 7,400 plans, is outweighed by the benefits to participants and beneficiaries at large, and to the Department and taxpayers generally, of implementing a single, wholly electronic filing system beginning with reports for the 2007 plan year. The maintenance of any paper system, even on a reduced scale, is inherently inefficient and unnecessarily costly and could undermine full realization of the potential benefits of electronic filing for ERISA compliance and enforcement, thereby exposing some plans and participants to unnecessary risk. Accordingly, the Department rejected this alternative, along with the other two considered alternatives, in favor of a uniform requirement to file electronically.

The Department's consideration of this third alternative, and its basis for rejecting it in favor of a uniform requirement to file electronically, is detailed below under the heading ''Small Plans.''

Small Plans

The Department believes this regulation may have a significant impact on a substantial number of small plans. As for all other plans, costs and benefits for small plans are expected to vary with the plans' circumstances. Most will likely incur moderate transition costs and subsequently realize moderate ongoing savings. Some, however, may experience larger impacts, including both larger transition costs and/or ongoing net cost increases rather than ongoing net savings. For example, some small plans may lack experience with or easy access to the Internet. Such plans may incur larger than typical transition costs to gain access to the Internet (or to enlist a service provider with access) and may find it more time consuming, and therefore more costly, to prepare their filing on a government website (or to interact with a service provider) than to prepare their filing using a government printed form that is completed ''by hand'' and filed on paper through the mails. The Department expects that only a minority of plans might be so affected, but that minority might nonetheless represent a substantial number.

The Department therefore conducted an initial regulatory flexibility analysis, repeating the above analysis while limiting the scope to include only small plans—that is, those with fewer than 100 participants. On that basis, it is estimated that 667,000 small plans will incur one-time transition costs of $18 million, including $9 million for 78,000 current hand-print filers and $9 million for 589,000 current machine-print filers. It is further estimated that small plans would realize ongoing materials and postage savings of approximately $700,000 annually and could realize up to $7 million in savings annually from the elimination of the need to correct deficient filings (including $2 million accruing to hand-print filers and $5 million to machine-print), for a total of approximately $8 million in annual savings. As with all other plans, over time the aggregate ongoing savings realized by small plans are expected to outweigh their aggregate one-time transition costs. Over five years, savings are estimated to exceed costs by $17 million (discounting future savings at a rate of 7 percent). The Department believes that impacts may vary among small plans, depending for example on their (or their service providers') access to and familiarity with associated technologies, and possibly on their size. The Department, however, lacks a basis on which to estimate such variations. The Department invites comments on this assessment of the impact of the proposed regulation on small plans.

The Department also assessed the costs and benefits of alternative approaches. As noted above, the Department considered proposing a temporary exception from the requirement to file electronically for certain small plans. The Department undertook to develop as an alternative to a uniform electronic filing requirement an exception provision that would maximize benefits and minimize costs to affected parties including plans, participants, and taxpayers.

The Department first considered the criteria that should be adopted to designate filers eligible to continue to file on paper under the exception. The Department selected as the first criterion plan size. Small plans (and the small businesses that sponsor them) may be less likely than large ones to use computers and the Internet or to have current expertise in such usage. They may be harder pressed to devote resources to making a transition to electronic filing. Moreover, transition costs may be largely fixed costs (invariant to plan size) and therefore more burdensome to small than to large plans. The Department considered alternative plan size thresholds, including plans with fewer than 100, fewer than 25, or fewer than 10 participants. The threshold of fewer than 100 participants seemed most desirable. It is consistent with the threshold used for other distinctions in annual reporting requirements and therefore would not add additional complexity to reporting requirements. In addition, the overall systems requirements associated with an exception for plans with fewer than 100 participants would be expected to differ little from those associated with an exception limited to smaller plans. The cost of building, maintaining and periodically updating a system capable of accepting and processing paper filings is largely invariant to the number of paper filings to be accepted. Moreover, the number of plans eligible for the exception would not vary much across the thresholds considered. Among plans not subject to the audit requirement and filing by the hand-print method, the Department estimates that 74,000 have fewer than 100 participants, 59,000 fewer than 25, and 46,000 fewer than 10.

The second criterion identified by the Department was past filing method. As noted above, it is likely that hand-print filers will confront higher average transition costs than machine-print filers. Machine-print filers currently prepare their filings electronically, even if they do not file them electronically. In contrast, some fraction of hand-print filers may be entirely without computing infrastructure.

A third criterion identified by the Department was potential risk to participants. As noted above, hand-print filings are more prone to error than machine-print or electronic filings. In addition, processing of paper filings is inherently slower than processing of electronic filings. Therefore, continued acceptance of paper filings has the potential to slow both detection of ERISA violations and enforcement

actions to address such violations.[36] The Department therefore considered approaches that would limit the exception to situations where risks of violations (and associated threats to participants) were less, such as in connection with plans that, because of the presence of other safeguards and/or absence of certain risks, were not required to provide financial audits with their annual reports.

Finally, the Department considered the appropriate duration of such an exception. To accommodate such an exception, the Department's new processing system would need to incorporate an ability to receive and process some number of paper filings. The incorporation of this ability into the system would entail a relatively large, up-front development cost, followed by smaller but substantial ongoing costs to process paper filings. It therefore seemed reasonable to consider as the duration of such an exception the expected minimum ''lifetime'' of the new system (which corresponds to the expected duration of the contract that will develop and maintain it), which is five years. The Department next considered whether a five-year exception would be sufficient to accomplish the exception's goal of easing small plans' transition to electronic filing. Assuming continued rapid proliferation of computer and Internet usage, it seems likely that five years would be sufficient to accomplish this goal.

Based on this reasoning, the Department considered, as an alternative to a uniform 100 percent electronic filing requirement, a five-year exception for plans that: (1) Have fewer than 100 participants, (2) previously filed their annual reports using government printed ''hand-print'' forms, and (3) are not subject to the audit requirement for annual reporting under Title I of ERISA. The Department estimates that use of these criteria would create a class of 74,000 filers eligible for the temporary exception from electronic filing.

As noted above, small plans are estimated to face an aggregate transition cost of $18 million, followed by ongoing annual savings of $8 million. Over time the aggregate savings will outweigh the cost. But, also as noted above, a disproportionate share of the transition cost, $9 million, is estimated to accrue to the small minority of small plans that file via the hand-print method. The savings accruing to these filers, being attributable to reduced materials and postage and, more important, reduced filing errors, if proportionate to their numbers, will amount to $2 million.

The Department undertook to carefully consider the potential costs and benefits to small plans of the exception defined above. Approximately 74,000 plans could be eligible for the exception. The Department considered two potential scenarios.

In the first scenario, the Department assumed that all eligible plans would file on paper, for an average of three of the five years for which paper filings would be permitted. The Department assumed further that these plans' average transition costs and ongoing savings would be the same as the average assumed earlier for all small plan hand-print filers.[37] The Department also assumed that, by taking advantage of the exception, these filers would reduce their transition cost to the level assumed earlier to be incurred by machine-print filers, but would delay commencement of the ongoing savings available through electronic filing until they began filing electronically (on average after three years). In this scenario, the 74,000 filers taking advantage of the exception would reduce their transition costs by $6.5 million on aggregate, while sacrificing $5.5 million in potential ongoing savings, thereby realizing a net benefit of approximately $1 million, or $14 per filer.

In the second scenario, the Department considered the possibility that the transition cost might vary widely across filers. The Department assumed that just 10 percent of eligible filers would take advantage of the exception (again for an average of three years), but that these filers would face a transition cost (absent the exception) of three times the average assumed for all hand-print filers. Other assumptions were the same as in the first scenario. In this scenario, 7,400 filers taking advantage of the exception would reduce their transition costs by $2.4 million on aggregate, while sacrificing $550,000 in potential ongoing savings, thereby realizing a net benefit of approximately $1.8 million, or $249 per filer.

On the basis of these scenarios, the Department believes that some filers would likely benefit from the exception. However, as noted above, the potential net benefit to a given filer from the exception would be modest. In the first scenario, the average net benefit would amount to just $12 per plan using the exception; in the second, $249 per plan. Further, the availability of the exception would create significant risks to participants and costs to the government (and taxpayers). As discussed above, the maintenance of any paper system, even on a relatively small scale, is inherently inefficient and costly. Also, as discussed above, paper filings take longer to process and therefore pose unnecessary compliance risks. Therefore, the Department concluded that the potential benefit of a limited exception would be outweighed by the associated cost to the government (and to taxpayers) and the potential risks to participants and that adoption of a limited exception could not be justified. For these reasons, the Department rejected the alternative of providing an exception in favor of a uniform requirement to file electronically.

Paperwork Reduction Act

This proposed regulation does not introduce, or materially modify, any information collection requirement, but furthers the Department's goal of automating the submission of the Form 5500 return/report. As such, this notice of proposed rulemaking is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) because it does not contain a ''collection of information'' as defined in 44 U.S.C. 3502(3).

Congressional Review Act

The notice of proposed rulemaking being issued here is subject to the provisions of the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and, if finalized, will be transmitted to the Congress and the Comptroller General for review.

Unfunded Mandates Reform Act

Pursuant to provisions of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), this rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or the private sector, which may impose an annual burden of $100 million or more.

List of Subjects in 29 CFR Part 2520

Employee benefit plans, pensions, reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Department proposes to amend 29 CFR part 2520 as follows:

[36] This concerns not merely reporting violations, but all potential ERISA violations, including those which might directly jeopardize plan assets or participants' benefits.

[37] This assumption seems reasonable insofar as an estimated 94 percent of all small hand-print filers were not subject to the audit requirement and therefore would be eligible for the exception.

1. The authority section of Part 2520 continues to read as follows:

Authority: 29 U.S.C. 1021–1025, 1027, 1029–31, 1059, 1134, and 1135; 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. Add § 2520.104a–2 after § 2520.104a–1 to read as follows:

§ 2520.104a–2 Electronic Filing of Annual Reports.

(a) Any Form 5500 Annual Return/Report (including accompanying statements or schedules) to be filed with the Secretary for any plan year (or reporting year, in the case of common or collective trusts, pooled separate accounts, and similar non-plan entities) beginning on or after January 1, 2007, shall be filed electronically in accordance with the instructions, and such other guidance as the Secretary may provide, applicable to such report.

(b) Nothing in paragraph (a) of this section is intended to alter or affect the duties of any person to retain records or to disclose information to participants, beneficiaries, or the Secretary.

3. Amend § 2520.103–1 by revising paragraph (f) as follows:

§ 2520.103–1 Contents of the annual report.

* * * * *

(f) *Electronic filing*. Except as provided in § 2520.104a–2 of this chapter, the Form 5500 ''Annual Return/Report of Employee Benefit Plan'' may be filed electronically or through other media in accordance with the instructions accompanying the form, provided the plan administrator maintains an original copy, with all required signatures, as part of the plan's records.

4. Amend § 2520.103–2 by revising paragraph (c) as follows:

§ 2520.103–2 Contents of the annual report for a group insurance arrangement.

* * * * *

(c) *Electronic filing*. Except as provided in § 2520.104a–2 of this chapter, the Form 5500 ''Annual Return/Report of Employee Benefit Plan'' may be filed electronically or through other media in accordance with the instructions accompanying the form, provided the trust or other entity described in § 2520.104–43(b) maintains an original copy, with all required signatures, as part of the trust's or entity's records.

5. Amend § 2520.103–9 by revising paragraph (d) as follows:

§ 2520.103–9 Direct filing for bank or insurance carrier trusts and accounts.

* * * * *

(d) *Method of filing*. Except as provided in § 2520.104a–2 of this chapter, the Form 5500 ''Annual Return/Report of Employee Benefit Plan'' may be filed electronically or through other media in accordance with the instructions accompanying the form, provided the bank or insurance company which maintains the common or collective trust or pooled separate account maintains an original copy, with all required signatures, as part of its records.

6. Amend § 2520.103–12 by revising paragraph (f) as follows:

§ 2520.103–12 Limited exemption and alternative method of compliance for annual reporting of investments in certain entities.

* * * * *

(f) *Method of filing*. Except as provided in § 2520.104a–2 of this chapter, the Form 5500 ''Annual Return/Report of Employee Benefit Plan'' may be filed electronically or through other media in accordance with the instructions accompanying the form provided the entity described in paragraph (c) of this section maintains an original copy, with all required signatures, as part of its records.

Signed at Washington, DC, this 23d day of August, 2005.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration.

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