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29 CFR Parts 2520 and 2590

Annual Reporting and Disclosure; Proposed Rule

DEPARTMENT OF LABOR**Employee Benefits Security Administration****29 CFR Parts 2520 and 2590**

RIN 1210-AB63

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

SUMMARY: This document contains proposed amendments to Department of Labor (DOL) regulations relating to annual reporting requirements under Part 1 of Subtitle B of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The proposed amendments contained in this document would conform the DOL's reporting regulations to proposed revisions to the Form 5500 Annual Return/Report of Employee Benefit Plan and Form 5500-SF Short Form Annual Return/Report of Small Employee Benefit Plan, which are being published concurrently in today's **Federal Register** in a separate Notice of Proposed Forms Revisions (NPR) prepared jointly by the Department of Labor (DOL), the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC) (collectively the Agencies). The proposed regulation, and related forms revisions, would improve employee benefit plan reporting for filers, the public, and the Agencies. The revision is necessary because the annual return/report forms have not kept pace with market developments and changes in the laws covering employee benefit plans, presenting problems with outdated and missing information that negatively impact the Agencies' effective and efficient protection of employee retirement and health benefits. The proposed revisions would affect employee pension and welfare benefit plans, plan sponsors, administrators, and service providers.

DATES: Written comments must be received by the Department of Labor on or before October 4, 2016.

ADDRESSES: To facilitate the receipt and processing of written comment letters on the proposed regulation, EBSA encourages interested persons to submit their comments electronically. You may submit comments, identified by RIN 1210-AB63, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>.

Follow instructions for submitting comments.

Email: e-ORI@dol.gov. Include RIN 1210-AB63 in the subject line of the message.

Mail: Office of Regulations and Interpretations, Employee Benefits Security Administration, Attn: RIN 1210-AB63; Annual Reporting and Disclosure, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

Hand Delivery/Courier: Office of Regulations and Interpretations, Employee Benefits Security Administration, Attn: RIN 1210-AB63; Annual Reporting and Disclosure, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

Instructions: All comments received must include the agency name and Regulatory Identifier Number (RIN) for this rulemaking (RIN 1210-AB63). Persons submitting comments electronically are encouraged not to submit paper copies. All comments received will be made available to the public, posted without change to <http://www.regulations.gov> and <http://www.dol.gov/ebsa>, and made available for public inspection at the Public Disclosure Room, N-1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, including any personal information provided.

FOR FURTHER INFORMATION CONTACT:

Mara S. Blumenthal, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693-8523 (not a toll-free number) for all changes other than group health plan information; Suzanne Adelman, EBSA, U.S. Department of Labor, 202-693-8383 (not a toll-free number), for questions relating to the collection of group health plan information.

SUPPLEMENTARY INFORMATION:**I. Executive Summary***A. Purpose of the Regulatory Action*

Under Titles I and IV of ERISA and the Internal Revenue Code (Code), pension and other employee benefit plans are generally required to file annual returns/reports concerning, among other things, the financial condition and operations of the plan. Filing a Form 5500 Annual Return/Report of Employee Benefit Plan (Form 5500 Annual Return/Report), or a Form 5500-SF Short Form Annual Return/Report of Small Employee Benefit Plan (Form 5500-SF) (depending on certain plan characteristics), together with any

required schedules and attachments (together "the Form 5500 Annual Return/Report"), in accordance with their instructions, generally satisfies these annual reporting requirements. In addition to being an important disclosure document for plan participants and beneficiaries, the Form 5500 Annual Return/Report is a critical enforcement, compliance, and research tool for the DOL, IRS, and the PBGC (together "Agencies"). It is also an important 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. In the United States, there are an estimated 2.3 million health plans, a similar number of other welfare plans, and nearly 681,000 private pension plans. These plans cover roughly 143 million private sector workers, retirees, and dependents, and have estimated assets of \$8.7 trillion. The Form 5500 Annual Return/Report is the principal source of information and data concerning the operations, funding, and investments of more than 806,000 of these pension and welfare benefit plans.

Generally, the Agencies have conducted notice and comment rulemaking before making significant changes to the forms and schedules. This proposed revision to the DOL's reporting regulations is needed to implement the forms revisions proposed in the three-agency (DOL, IRS, and the PBGC) Notice of Proposed Forms Revisions (NPR), which is being published separately in today's **Federal Register**.

As noted above and discussed in detail below, because the Form 5500 Annual Return/Report has not kept pace with market developments and changes in the laws covering employee benefit plans, problems with outdated and missing information negatively impact the Agencies' effective and efficient protection of employee retirement and group health benefits. That fact is reflected in the more than 15 reports that have been issued since the publication of the last major forms revisions from the Government Accountability Office (GAO), the DOL's Office of Inspector General (DOL-OIG), the United States Treasury Inspector General for Tax Administration (the TIGTA), and the ERISA Advisory Council that all call for expanded annual reporting by employee benefit plans and improvements in the Form 5500 Annual Return/Report.¹ In

¹ See, e.g., U.S. Gov't Accountability Office, GAO-10-54, *Private Pensions: Additional Changes Could Improve Employee Benefit Plan Financial Reporting*

developing these proposed updates to the Form 5500 Annual Return/Report, the DOL, along with IRS and PBGC, carefully considered those reports in determining where changes are needed.

In addition, a significant update being made to the Form 5500 Annual Return/Report is the introduction of basic reporting requirements for all plans that provide group health benefits that have fewer than 100 participants and are covered by Title I of ERISA, most of which are currently exempt from

(2009) (available at www.gao.gov/assets/300/298052.pdf); U.S. Gov't Accountability Office, GAO-14-441, *Private Pensions: Targeted Revisions Could Improve Usefulness of Form 5500 Information* (2014) (available at www.gao.gov/products/GAO-14-441); 2013 ERISA Advisory Council Report: *Private Sector Pension De-risking and Participant Protections*, Dep't of Labor, www.dol.gov/ebsa/publications/2013ACReport2.html); Dep't of Labor Office Of Inspector Gen., 05-14-003-12-12, *EBSA Could Improve Its Usage of Form 5500 Data* (2014) (available at www.oig.dol.gov/public/reports/oa/2014/05-14-003-12-12-121.pdf); U.S. Gov't Accountability Office, GAO-14-92, *Private Pensions: Clarity of Required Reports and Disclosures Could Be Improved* (2013) (available at www.gao.gov/assets/660/659211.pdf); U.S. Gov't Accountability Office, GAO-14-92, *Private Pensions: Clarity of Required Reports and Disclosures Could Be Improved, Report to Congressional Requesters* (2013) (available at www.gao.gov/assets/660/659211.pdf); U.S. Dep't of Labor Office of Inspector Gen., 09-13-001-12-121, *Employee Benefits Security Administration Needs to Provide Additional Guidance And Oversight to ERISA Plans Holding Hard-to-Value Alternative Investments* (2013) (available at www.oig.dol.gov/public/reports/oa/2013/09-13-001-12-121.pdf); U.S. Gov't Accountability Office, GAO-12-665, *Private Sector Pensions: Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans* (2012) (available at www.gao.gov/assets/650/648285.pdf); U.S. Dep't of Labor Office Of Inspector Gen., 09-12-002-12-121, *Changes Are Still Needed In The ERISA Audit Process To Increase Protections For Employee Benefit Plan Participants* (2012) (available at www.oig.dol.gov/public/reports/oa/2012/09-12-002-12-121.pdf); U.S. Gov't Accountability Office, GAO-12-325, 401(K) *Plans: Increased Educational Outreach and Broader Oversight May Help Reduce Plan Fees* (2012) (available at www.gao.gov/products/GAO-12-325); U.S. Gov't Accountability Office, GAO-08-692, *Defined Benefit Plans: Guidance Needed to Better Inform Plans of the Challenges and Risks of Investing in Hedge Funds and Private Equity* (2012) (available at www.gao.gov/products/GAO-08-692); Treasury Inspector Gen. for Tax Administration, *The Employee Plans Function Should Continue Its Efforts to Obtain Needed Retirement Plan Information* (2011) (available at www.treasury.gov/tigta/auditreports/2011reports/201110108fr.pdf); 2011 ERISA Advisory Council Report: *Hedge Funds and Private Equity Investments*, Dep't of Labor, www.dol.gov/ebsa/publications/2011ACReport3.html; 2013 ERISA Advisory Council Report: *Locating Missing and Lost Participants*, Dep't of Labor, www.dol.gov/ebsa/publications/2013ACReport3.html#2; 2010 ERISA Advisory Council Report: *Employee Benefit Plan Auditing and Financial Reporting Models*, Dep't of Labor, www.dol.gov/ebsa/publications/2010ACReport2.html; 2008 ERISA Advisory Council Report: *Working Group on Hard-to-Value Assets and Target Date Funds*, Dep't of Labor, www.dol.gov/ebsa/publications/2008ACReport1.html.

reporting requirements, and the addition of a new schedule (Schedule J) proposed to be required for all group health plans. This reflects a new emphasis on transparency under the Affordable Care Act² and a desire to offer plan sponsors the opportunity to satisfy certain Affordable Care Act reporting requirements addressed in this proposal by a more robust Form 5500 Annual Return/Report filing for those group health plans currently required to file and by elimination of the current exemption for plans that provide group health benefits that have fewer than 100 participants that are fully insured, unfunded, or a combination. Once finalized, these proposed changes will result in annual return/report forms that are a more effective policy, enforcement, and research tool, and one that will increase transparency, accountability, and confidence in the employee benefit plan system.

The Agencies' proposed changes to the Form 5500 Annual Return/Report also should be viewed in light of the fact that the last two major revisions of the Form 5500 Annual Return/Report³ occurred in 1999 and 2009 in connection with a major shift from a paper-based filing system to the current internet-based wholly electronic filing and electronic data processing system (EFAST and now EFAST2), which is operated by a private sector contractor. For the last two major form revision cycles, the Agencies were focused on moving filers to new technologies for filing Form 5500 Annual Return/Report data. In recognition of the burden and challenges that filers would face in migrating to new filing technologies, the Agencies' generally deferred proposing major form changes that would add substantial new burdens. In fact, by deferring our current proposals until now, the new EFAST2 capabilities are making more feasible and efficient processing of both the existing and the expanded data we are proposing to collect.

² The Patient Protection and Affordable Care Act, Public Law 111-148, was enacted on March 23, 2010, and the Health Care and Education Reconciliation Act of 2010, Public Law 111-152, was enacted on March 30, 2010. These statutes generally are collectively known as the "Affordable Care Act."

³ The Agencies' last tri-agency major revision to the Form 5500 Annual Return/Report series was effective for the 2009 plan year forms. Before that, the last major revision was effective for the 1999 plan year forms and was implemented together with the initial implementation of EFAST. In interim years, the Agencies have made other focused changes, which are set forth annually in the "Changes to Note" section in the instructions.

B. Summary of the Major Revisions of the Regulatory Action

The proposed forms revisions and the DOL implementing regulations are intended to address changes in applicable laws and the employee benefit plan and financial markets, and corresponding shifts in agency priorities and needs since the last major revision. The proposed revisions are also expected ultimately to make filing and processing more efficient and accurate and to restore a greater level of transparency in the employee benefit plan market.⁴ The proposed forms revisions fall under the following general categories:

1. Modernize Financial and Investment Reporting by Pension Plans

A key component of the proposal would expand and modernize financial and investment information reported by pension plans. Reporting on the financial operations and integrity of U.S. private pension plans (both defined benefit and defined contribution) is critical given the ongoing importance of such plans to the retirement security of America's workforce. Moreover, improved transparency of financial products and investments acquired by plans is critical to the ability of the Agencies to fulfill their statutory oversight role. It is also important for ongoing monitoring of retirement plans by employers, plans, participants and beneficiaries, and policy makers. These proposed changes to financial reporting are specifically designed to improve reporting of alternative investments, hard-to-value assets, and investments through collective investment vehicles and participant-directed brokerage accounts.

An overriding objective of these proposed revisions to the financial

⁴ In addition, this rulemaking and forms revisions are being coordinated generally with a re-bid and updating of the ERISA Filing Acceptance System (EFAST2)—the wholly electronic Form 5500 Annual Return/Report filing and processing system. Unlike the 1999 and 2009 forms revisions, the re-bid of EFAST2 does not involve major changes in the EFAST2 key system requirements, capabilities, and functions. Rather, although there are some changes to the system, the re-bid process is largely being undertaken in response to Federal Acquisition Regulation (FAR) requirements on periodic re-bidding of longer term contracts. Under these circumstances, there may be opportunities to implement various form changes either before or after the re-bid EFAST2 contract is awarded. The timing of the re-bid of EFAST2 and implementation of form changes may also be affected by whether funds necessary for the re-bid or form implementation are appropriated as part of the Agencies' respective budgets. Accordingly, although the overall objective is to implement these proposed form changes as part of a re-bid EFAST2 contract, rulemaking and budget issues may require the Agencies to consider a more staged approach.

information collected as part of the annual return/report is to present plan financial and balance sheet information, including the currently required schedules of assets, in a way that better reflects the investment portfolios and asset management practices of employee benefit plans. The basic objective of ERISA's mandatory financial reporting is to provide information about the reporting entity for the Agencies' enforcement, research, and policy formulation programs; for other federal agencies, Congress, and the private sector to assist them in assessing employee benefit, tax, and economic trends and policies; and for plan participants and beneficiaries and the general public to understand and monitor better the activities and investments of employee benefit plans. As reflected in the various reports from the GAO, the DOL-OIG, the ERISA Advisory Council, and the TIGTA, the current information collected on the Form 5500 Annual Return/Report and Form 5500-SF is insufficient to satisfy those objectives.

The financial statements contained in the current Schedule H (Large Plan Financial Information) and Schedule I (Small Plan Financial Information) are based on data elements that have remained largely unchanged since the Form 5500 Annual Return/Report was established in 1975. Over the past four decades, the U.S. private pension system has shifted from defined benefit (defined benefit or DB) pension plans toward defined contribution (defined contribution or DC) pension plans, often participant-directed 401(k)-type DC pension plans. The financing of retirement benefits has changed dramatically coincident with the shift from DB to DC pension plans. In 1978, when legislation was enacted authorizing 401(k) plans that allow employees to contribute to their own retirement plan on a pre-tax basis, participants contributed only 29 percent of the contributions to DC pension plans and only 11 percent of total contributions to both DB and DC pension plans. "In the years following 1978, employee contributions to DC pension plans steadily rose to a peak of approximately 60 percent in 1999, where it has remained." See *Dep't of Labor, Private Pension Plan Bulletin Abstract of 2012 Form 5500 Annual Reports*, at 1 (2015). Simultaneously, the number of single-employer DB pension plans has decreased from 92,000 in 1990 to just under 29,000 single-employer pension plans in 2009. See *U.S. Gov't Accountability Office, GAO-09-291, Defined Benefit Pensions: Survey*

Results of the Nation's Largest Private Defined Benefit Plan Sponsors Highlights (2009) (available at <http://www.gao.gov/new.items/d09291.pdf>).

The shift from DB pension plans to DC pension plans—and the corresponding increase of participants' own contributions to those plans as opposed to employer contributions—has led to increased responsibility for participants to manage their own retirement savings, which includes having to select among investment options in their retirement plans. See *Private Pension Plan Bulletin Abstract of 2012 Form 5500 Annual Reports*, at 2 (Of the 516,000 section 401(k)-type plans in 2012, 87.8 percent allowed participants to direct investment of all of their assets, and 3.1 percent allowed participants to direct investment of a portion of their assets.) The need for more relevant and comparable financial information is not limited to 401(k) and other DC pension plans; it also extends to DB pension plans. Reports cited above from GAO, the DOL-OIG, the TIGTA, and the ERISA Advisory Council also have focused on the need for increased transparency and accountability generally in connection with employee benefit plan investments in hard-to-value and alternative assets, as well as assets held through pooled investment vehicles.

Further, the Agencies need better information to effectively oversee and enforce existing rules and regulations. For example, as part of the 1999 and 2009 forms revisions, the Agencies stopped collecting a variety of information regarding ESOPs. ESOPs, however, continue to be a significant enforcement focus and concern for both DOL and the Department of Treasury (Treasury)/IRS. Under the proposal, ESOPs would be required to again report information, on the Schedule E, about their employer stock acquisitions. Plan investment in hard-to-value and other alternative investments, such as derivatives, limited partnerships, hedge funds, private equity, and real estate, was highlighted as an oversight risk by both GAO and the DOL-OIG. Plans invested in derivatives, limited partnerships, hedge funds, private equity, real estate, and other alternative investments would be required under the proposal to identify such investments specifically. Having plans and direct filing entities (DFEs) report this information would be a significant improvement; the Agencies would no longer be limited to identifying issues involving investments in derivatives and other hard-to-value assets by opening investigations on a plan-by-plan basis. For example, regulators

would be able to search the data base for particular investments or managers where there were indications that there were problems with such investment or manager for all plans that made such investments. The improved financial transparency in the proposed revisions to the Form 5500 Annual Return/Report data collection in general would better enable public and private data users to identify patterns and trends in plan investments and behavior.

For defined contribution pension plans, especially participant-directed plans, the proposal also would provide better information on employee participation rates in 401(k)-type plans and more relevant information on the types of investment alternatives available in such plans (including information on each designated investment alternative in the plan, information on qualified default investment alternatives, and information on whether the investment alternatives are actively managed or passively managed index funds). As Form 5500 Annual Return/Report information is required by Title I of ERISA to be publicly available, not only would expanded data collection assist in the Agencies' research and policymaking objectives, public access to this information would enable interested private sector and other governmental stakeholders to perform data-based research or help plan sponsors, fiduciaries, and participants and beneficiaries better understand their plan and plan investments. For example, it would be more feasible to compare performance of plans based on types of investments, and get information on how certain plan investment options and structures might correlate to participation, overall performance, or best preparation of workers for retirement.

2. Support Oversight of Group Health Plans and Ongoing Implementation of the Affordable Care Act

The proposed forms revisions and DOL implementing regulations would expand Form 5500 reporting by group health plans⁵ by eliminating obsolete

⁵ Under the proposed changes, all "group health plans" that meet the definition in 733(a) of the Act, including plans that claim "grandfathered" status under 29 CFR 2950.715-1251, are required to file some or all of the Form 5500 Annual Return/Report and applicable schedules, including the Schedule J, regardless of whether such plans are exempt from certain market reform requirements under ERISA § 732(a) (exemption for certain small group health plans that have less than 20 participants who are current employees) or ERISA § 733(c) (group health plans consisting solely of excepted benefits). Employee welfare benefit plans as defined in ERISA § 3(1) that do not meet the definition of "group

exemptions for certain plans from Form 5500 reporting. Specifically, most private employer-sponsored group health plans with fewer than 100 participants that are fully insured, unfunded, or a combination of the two, currently do not file the Form 5500 Annual Return/Report under the terms of the current DOL exemptions. As a result, for policy formulation, research, and regulatory impact analyses, the DOL must rely on surveys, instead of Form 5500 Annual Return/Report data, to generate even basic estimates of the size of the ERISA group health plan universe that is a major part of the nation's health care delivery system. The current lack of information collected on the Form 5500 Annual Return/Report from group health plans impairs the effectiveness of EBSA's ability to develop health care regulations and complicates the DOL's ability to enforce such regulations and educate plan administrators regarding compliance.

In addition, section 1253 of the Affordable Care Act requires the Secretary of Labor to prepare an annual report that includes certain general information on self-insured group health plans using data collected from the Form 5500 Annual Return/Report (the "Self-Insured Health Plan Report"). Current Form 5500 Annual Return/Report data provides the basis only for an incomplete assessment of self-insured plans. For example, information about the amount of outstanding claims for a self-insured plan, a proposed new data element on the Schedule J, would be a critical flag that would identify the need for further inquiry or investigation of a group health plan that may be unable to pay outstanding claims. Early intervention by EBSA could prevent a participant from facing bankruptcy over unpaid medical expenses that otherwise would have been covered had the group health plan been properly funded.

We expect more group health plan filings will help the DOL allocate enforcement resources and streamline enforcement actions. For example, these additional filings will enable the DOL to correlate information reported by different group health plans to help identify widespread noncompliance perpetuated by a common service provider rather than relying on multiple investigations of client plans to detect a pattern of non-compliance by a single service provider. Obtaining a correction by going directly to the service provider makes the correction process more

health plan" under 733 of the Act (*i.e.*, they do not provide benefits for medical care) are not subject to the proposed enhanced reporting requirements applicable to group health plans.

efficient for the service provider and the Department and results in uniform and efficient corrective action for participating plans. EBSA anticipates that Form 5500 Annual Return/Report data may similarly be used in future versions of the biennial Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act (MHPAEA) Report to Congress on the compliance of group health plans and health insurance coverage offered in connection with such plans with the requirements of MHPAEA. The proposed changes to group health plan reporting thus are important to the government's ability to accomplish oversight obligations under the Affordable Care Act and other federal laws governing group health plans, to more effectively monitor health policy issues as they pertain to ERISA-covered plans, and to provide Congress with accurate information about self-insured plans and whether the plan is complying with the protections of MHPAEA.

3. Reporting To Satisfy Public Health Service Act Sections 2715A and 2717

Sections 2715A and 2717 of the Public Health Service Act (PHS Act), as added by the Affordable Care Act and incorporated into ERISA section 715,⁶ include important new reporting requirements for group health plans and health insurance issuers in the group and individual markets. Specifically, section 2715A of the PHS Act incorporates the transparency provisions of section 1311(e)(3) of the Affordable Care Act to require non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage to make available to the DOL, the Department of Health and Human Services (HHS), Treasury, State insurance commissioner, and the public a host of information on health plan enrollment and claims.⁷

⁶ Sections 2715A and 2717 of the PHS Act are also incorporated into section 9815(a)(1) of the Code.

⁷ Information required under sections 2715A and 2717 of the PHS Act that is provided as part of a Form 5500 Annual Return/Report would be made available to the public and to the plan's participants and beneficiaries. Section 104(b)(4) of ERISA requires the plan administrator, on written request of a participant or beneficiary, to furnish among other documents, a copy of the latest annual report. See also 29 CFR 2520.104b-1(b)(2). The DOL's regulation at 29 CFR 2520.104b-30 provides that the plan administrator of an employee benefit plan may impose a reasonable charge that is not to exceed 25 cents per page to cover the cost of furnishing the latest annual report, but also provides that participants and beneficiaries must be provided at no charge a copy of the statement of the assets and liabilities of the plan and accompanying notes, and the statement of income and expenses of

This includes: (1) Claims payment policies and practices; (2) periodic financial disclosures; (3) data on enrollment and disenrollment; (4) data on the number of denied claims; (5) data on rating practices; (6) information on cost-sharing and payments with respect to any out-of-network coverage; (7) information on enrollee and participation rights; and (8) other information as determined by the Secretary. Moreover, section 2717 of the PHS Act generally requires non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage to report annually to the DOL, HHS and the Treasury and to enrollees under the plan whether the benefits under the plan: (A) Improve health outcomes through the implementation of activities such as quality reporting, effective case management, care coordination, chronic disease management, and medication and care compliance initiatives, including through the use of the medical homes model as defined for purposes of section 3602 of the Affordable Care Act, for treatment or services under the plan or coverage; (B) implement activities to prevent hospital readmissions through a comprehensive program for hospital discharge that includes patient-centered education and counseling, comprehensive discharge planning, and post discharge reinforcement by an appropriate health care professional; (C) implement activities to improve patient safety and reduce medical errors through the appropriate use of best clinical practices, evidence based medicine, and health information technology under the plan or coverage; and (D) implement wellness and health promotion activities.

These regulations propose conforming amendments in 29 CFR 2590.715-2715A and 29 CFR 2590.715-2717 to clarify that compliance with the reporting requirements in 29 CFR 2520.103-1 (including filing any required schedules to the annual report) by plans subject to ERISA would satisfy the reporting requirements of PHS Act sections 2715A and 2717, incorporated in ERISA through ERISA section 715(a)(1).⁸ As explained in FAQs issued

the plan and accompanying notes. See also 29 CFR 2520.104b-10(d)(3) and (4).

⁸ The Treasury Department and the IRS intend to publish proposed regulations in 26 CFR 54.9815-2715A and 54.9815-2717 clarifying that group health plans required to file an annual report pursuant to section 104 of ERISA that comply with the reporting requirements in 29 CFR 2520.103-1 (including filing any required schedules to the

Continued

August 11, 2015,⁹ HHS proposed an information collection for public comment in connection with the transparency provisions of section 1311(e)(3) of the Affordable Care Act. The proposed data collection would collect certain information from Qualified Health Plan (QHP) issuers in Federally-facilitated Exchanges and State-based Exchanges that use the federal eligibility and enrollment platform. The HHS proposal explained that other reporting requirements would be proposed at a later time, through a separate rulemaking with respect to non-Exchange coverage, including those that extend to health insurance issuers offering non-grandfathered group or individual health insurance coverage outside of the Exchanges and non-grandfathered group health plans (including large group and self-insured health plans).¹⁰

This rulemaking proposes transparency and quality reporting for non-grandfathered group health plans under PHS Act sections 2715A and 2717, as incorporated in ERISA. It takes into account differences in markets and other relevant factors to streamline reporting under multiple reporting provisions and reduce unnecessary duplication. The DOL is proposing to collect and provide high-value data to participants, beneficiaries, and regulators, such as information about benefits and plan design characteristics, funding, grandfathered plan status, rebates received by the plan (such as medical loss ratio rebates), service provider information (including information regarding any third party administrators, pharmacy benefit managers, mental health benefit

annual report) would satisfy the reporting requirements of sections 2715A and 2717 of the PHS Act, as incorporated in the Code. Group health plans that are not required to file an annual report pursuant to section 104 of ERISA but that are subject to sections 2715A and 2717 of the PHS Act as incorporated in the Code, will not be required to do any reporting to comply with sections 2715A and 2717 of the PHS Act, as incorporated in the Code, unless and until the Treasury Department and the IRS issue subsequent further guidance or rulemaking regarding any such reporting by such plans.

⁹ See FAQs about Affordable Care Act Implementation (Part XXVIII), available at <http://www.dol.gov/ebsa/faqs/faq-aca28.html> and <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQ-Part-XXVIII-transparency-reporting-final-8-11-15.pdf>.

¹⁰ Nonfederal governmental plans (as defined in PHS Act section 2791(d)(8)(C)) and health insurance issuers (as defined in PHS Act section 2791(b)(2) and ERISA section 733(b)(2)) are not required to file annual reports pursuant to ERISA sections 103 or 104. Accordingly, any reporting required of such plans and issuers to satisfy PHS Act sections 2715A and 2717 will be addressed separately by HHS in future rulemakings and/or guidance.

managers, and independent review organizations), information on any stop loss insurance, claims processing and payment information (including number of claims filed, paid, appealed and denied), wellness program information, and other compliance information. In addition to improving DOL's oversight and enforcement activities, the collection of high-value data will lead to greater transparency for consumers, which may assist them in making a decision whether to elect the coverage or opt for another plan such as through their spouse's employer, with the caveat that these data will be collected a number of months after the end of the plan year they describe and thus will not be timely for use in concurrent oversight, enforcement, or consumer choice activities. The DOL may propose collecting additional data in the future. The DOL requests comments regarding other plan characteristics that may be helpful for participants to have information on in evaluating their plan. Further, as noted above, this document includes proposed conforming amendments in 29 CFR 2590.715–2715A and 29 CFR 2590.715–2717 to clarify that compliance with the proposed annual reporting requirements by plans subject to ERISA that provide group health benefits would satisfy the ACA reporting requirements under PHS Act sections 2715A and 2717 incorporated in ERISA through ERISA section 715(a)(1). The Department is specifically seeking public comments on those conforming amendments and the proposed annual reporting requirements for plans that provide group health benefits, including the new Schedule J, in light of the Supreme Court's recent decision in *Gobeille v. Liberty Mutual Insurance Co.*, 136 S. Ct. 936 (2016).

4. Modernize Data Collection and Usability

This project would standardize and structure the Form 5500 Annual Return/Report to make key retirement and health and welfare benefit data, including information on assets held for investment, more available and usable in the electronic filing and data environment. Modernization is consistent with the Administration's "Smart Disclosure" effort. *Executive Office of the President of the United States, Nat'l Science and Technology Council, Smart Disclosure and Consumer Decision-making: Report of the Task Force on Smart Disclosure* (2013). The proposed changes would enable private sector data users to develop more individualized tools for employers to evaluate both their retirement and welfare plans and for

employees to manage their retirement savings and welfare plan choices.

5. Updating and Improving Reporting of Service Provider Fee and Expense Information

The DOL has been engaged in a long term initiative focused on transparency and oversight of service provider and investment fees and expenses. The fee initiative has focused on reporting indirect compensation received by service providers (2009 Form 5500 Annual Return/Report revisions), disclosures about service provider compensation to plan fiduciaries (DOL's regulation, effective in 2012, at 29 CFR 2550.408b–2), and plan disclosures to participants and beneficiaries particularly in 401(k)-type plans (DOL's regulation, effective in 2012, at 29 CFR 2550.404a–5).

The fee disclosure regulations were finalized after the publication of the 2009 forms changes. The 2009 indirect compensation reporting requirements permitted filers to disclose rather than report most indirect compensation. This was in response to commenters concerns about potentially inconsistent requirements in Form 5500 reporting and disclosure under the then proposed disclosure regulations. Accordingly, the 21st Century initiative includes proposed revisions that are designed to harmonize Form 5500 reporting requirements with the now final disclosure regulations, especially the ERISA section 408b–2 regulation. The GAO, in particular, recommended that the DOL require plans to report all indirect compensation received by certain of their service providers and to harmonize the ERISA section 408b–2 regulation disclosure and annual reporting requirements. *U.S. Gov't Accountability Office, GAO–14–441, Private Pensions: Targeted Revisions Could Improve Usefulness of Form 5500 Information* (2014) (available at www.gao.gov/products/GAO-14-441).

A key purpose of the required fee disclosures in the ERISA section 408b–2 regulation is to help make sure that pension plan fiduciaries can more effectively negotiate service provider fees based on a better understanding of compensation that the service provider expects to receive, including from third-party sources that might represent a conflict of interest. We believe that annually reporting compensation received by a service provider and its sources on the Form 5500 Annual Return/Report will provide a powerful tool and economic basis for improved evaluation of investment, recordkeeping, and administrative service arrangements. We have already

seen innovative uses of Form 5500 Annual Return/Report data by private sector companies that have created tools for evaluating and benchmarking employee benefit plans. Further, service provider failures to disclose indirect compensation as required under the ERISA section 408b-2 regulation have resulted in EBSA obtaining corrective monetary recoveries to plans. Comparing disclosures of anticipated compensation under the ERISA section 408b-2 regulation to compensation received as reported on the Form 5500 Annual Return/Report may uncover disparities between anticipated and actual compensation, which may provide the basis for improved targeting of our enforcement actions.

6. Improving Employee Benefit Plan General Compliance With ERISA and the Code

The Form 5500 Annual Return/Report and related financial audit requirements historically have served to establish discipline for plan fiduciaries by requiring an annual examination of the employee benefit plan's financial and administrative operations. The proposed forms revisions and DOL implementing regulations would add selected new questions regarding plan operations, service provider relationships, and financial management of plans. These questions are intended to compel fiduciaries to evaluate plan compliance with important requirements under ERISA and the Code and to provide the Agencies with improved tools to focus oversight and enforcement resources. The proposed regulations would also update the requirements for certifications for limited scope audits under 29 CFR 2520.103-8.

C. Costs and Benefits

The regulatory impact analysis includes a qualitative discussion of the benefits associated with the proposed rules' five primary objectives. Under the current regulations and forms, the Form 5500 Annual Return/Report annually collects data from approximately 816,000 large and small plan filers—pension and all types of welfare plans, including group health—and DFEs with an aggregate annual cost of \$488.1 million. The Form 5500 Annual Return/Report is a central part of the Agencies' enforcement programs, but the benefits of an updated Form 5500 Annual Return/Report would extend beyond the value of enhanced enforcement. A modernized Form 5500 Annual Return/Report that is more aligned with current investment practices and reflects the requirements of current law also has benefits for plan sponsors, plan

participants, Congress, academics, and others, as explained in more detail below.

As with the current reporting scheme, the proposed revisions are crafted to limit burden increases for small plans, both pension and welfare, including group health plans. The burden increase for small pension plans that are eligible to file the Form 5500-SF is much less than it is for those pension plans filing the Form 5500 Annual Return/Report that have complex portfolios that include alternative and hard-to-value assets or are employee stock ownership plans, which plans are of greater concern with respect to retirement security of their participants. Similarly, the burden increase for fully insured welfare plans that provide group health benefits with fewer than 100 participants, is much less than it is for welfare plans that provide group health benefits and are fully or partially self-insured, which are at greater risk for non-payment of benefit claims. As is discussed in more detail below, the burden increase for small pension plans that are invested in simple, Form 5500-SF eligible portfolios is very modest, and the changes that apply to those plans (which will mostly apply to all filers) will provide much needed information about the operations, compliance, and asset allocations of such plans. Similarly, welfare plans that provide group health benefits with fewer than 100 participants and that are fully insured, which are currently exempt from filing any Form 5500 Annual Return/Report, would file limited identifying and coverage information. The changes were intentionally limited in order that the burden would be as minimal as possible, while still getting the crucial information about that significant component of the nation's healthcare delivery system and reinforcing for the fiduciaries responsible for many of those plans the need to satisfy important consumer protections required by Title I of ERISA and the Affordable Care Act-related health care benefits. The proposed changes involve only a nominal burden increase for welfare plans other than group health.

Under the proposed regulations and revised forms, the Form 5500 Annual Return/Report would collect data from approximately 2.97 million filers with an aggregate annual cost of \$817.0 million. New reporting requirements for the 2.15 million welfare plans that provide group health benefits that we estimate are currently covered under Title I of ERISA, but exempt under current Form 5500 annual reporting rules, represent over 73 percent of the

increased burden for the entire proposal. That increase is largely due to the number of new filers and not the per plan cost. Other than the initial filing year burden for learning the new reporting requirements, the burden per plan for even these new filers, almost all of which are fully insured plans with fewer than 100 participants, is very limited because they are only required to provide registration-type and other nominal benefit coverage information.

This expansion in the number of first-time filers that are plans that provide group health benefits that have fewer than 100 participants represents new data on group health care issues that is otherwise unavailable or not gathered in a way that is readily usable for ERISA compliance, policy, and enforcement purposes. From a compliance perspective, requiring reporting will be useful to educate plan sponsors and fiduciaries of their obligations with respect to group health plans. Getting first time information on the full breadth of plans providing health benefits that are subject to ERISA will be key data for policy-making regarding such plans and their participants. From an enforcement perspective, data analysis could lead to detection and intervention in a distressed health plan, which could help minimize financial harm suffered by participants when medical claims are unpaid by such plans. Medical bills contribute to a large and increasing share of personal bankruptcies in the United States.¹¹ Moreover, the potential burden for new filers is expected to be overcome by satisfying, to some extent, data collections required by Congress in the Affordable Care Act. Sections 2715A and 2717 of the PHS Act, as added by the Affordable Care Act, significantly expand reporting requirements for group health plans subject to ERISA. EBSA is coordinating with HHS on using the Form 5500 Annual Return/Report as an alternative mechanism to satisfy these reporting requirements.¹²

¹¹ David U. Himmelstein, M.D., Deborah Thorne, Ph.D., Elizabeth Warren, JD, and Steffie Woolhandler: *The American Journal of Medicine, Medical Bankruptcy in the United States, 2007: Results of a National Study*. Available online at [http://www.amjmed.com/article/S0002-9343\(09\)00404-5/abstract?cc=y](http://www.amjmed.com/article/S0002-9343(09)00404-5/abstract?cc=y).

¹² Section 2715A of the PHS Act extends the transparency reporting provisions set forth in section 1311(e)(3) of the Affordable Care Act (applicable to issuers of "qualified health plans" offered on Exchanges) to non-grandfathered group health plans and non-grandfathered group or individual health insurance coverage offered through or outside of Exchanges. As more fully described on pages 13-14 herein, section 2717 of the PHS Act generally requires non-grandfathered group health plans and health insurance issuers

Revisions to the financial schedules (Schedule H and related investment asset reporting changes) and service provider reporting (Schedule C changes) impact predominantly large plans with complex investment portfolios (often involving alternate investments, hard-to-value assets and employer securities). These changes comprise the second and third largest shares of the burden increase, respectively, adding \$57.6 million and \$12.9 million. Small pension plans that are subject to expanded reporting under these proposed revisions are a small

percentage of total small pension plan filers and the additional burdens are generally limited to those plans that choose to invest in alternative and hard-to-value assets, which present more risk and demand more transparency.

Revisions to Schedule D and DFE reporting represent the largest burden reduction within the proposed changes. These changes affect all DFEs and those plans that invest in DFEs and reduce aggregate burden by \$10.1 million.

In addition, it is important to note that the total burden associated with the Form 5500 Annual Return/Report has

risen from \$327.98 million to \$488.1 million since the last rulemaking in November 2007 primarily due to the increase in wage rates and the number of plan filers over the last eight years under the current rule. In other words, approximately 90 percent of the \$160.1 million increase to the baseline burden since the last RIA was prepared is simply due to changes in the broader economy over the past decade, not this rulemaking.

Estimated Burden Change

Estimated Total Burden Change

	Annual costs (millions)	Annual burden hours ¹³
Total for current reporting requirements	\$488.1	4.4 million.
Change due to proposed GHP requirements	241.6	2.2 million.
Change due to all other Proposed Requirements	87.2	798,000.
Total for Proposed Reporting Requirements	817.0	7.2 million.
Increase in baseline since 2007 due to update in wage rates	127.0	0.
Increase in baseline since 2007 due to update in number of plans (not including plans subject to new GHP reporting).	16.9	149,000.

Estimated Burden Change by Type of Filer

Type of filer	Number of filers under current (thousands)	Number of filers under proposed (thousands)	Aggregate annual cost under current requirements (millions)	Aggregate annual cost under proposed requirements (millions)	Aggregate annual cost change (millions)
Form 5500 Large Plans	148.5	148.5	\$252.4	\$309.3	\$56.9
Pension/Large	75.1	75.1	141.2	174.6	33.5
Welfare/Large Health	47.9	47.9	91.7	114.2	22.5
Welfare/Large Non-Health	25.6	25.6	19.6	20.5	1.0
Form 5500 Small Pension and Non-Health Plans	29.7	29.7	14.4	38.3	23.9
Pension ESOP	3.8	3.8	1.8	5.8	4.1
Pension Non-ESOP	22.6	22.6	11.1	29.9	18.8
Welfare/Non-Health	3.3	3.3	1.5	2.5	1.0
Form 5500-SF Small Pension and Non-Health Plans	622.4	622.4	205.8	227.3	21.5
Pension	621.8	621.8	205.6	227.0	21.4
Non-Health Welfare	0.7	0.7	0.2	0.2	0.0
Form 5500 Small Health	6.2	2,158.0	4.1	227.9	223.86
Fully Insured Health	0.0	1,869.0	0.0	69.6	69.6
Other Health	6.2	289.0	4.1	158.2	154.2
DFEs	9.4	8.9	11.4	14.2	2.8
Overall Total	816.3	2,967.5	488.1	817.0	328.8

Note: Some displayed numbers do not sum up to the totals due to rounding.
 Large plans—100 participants or more.
 Small plans—generally fewer than 100 participants.

Estimated Burden Change by Form Revision

offering non-grandfathered group or individual health insurance coverage to submit annual reports to the DOL, HHS and the Treasury regarding quality of care programs offered by the plan.

¹³ The Burden Hours column shows the amount of time necessary to fulfill filing requirements, whether that burden is incurred by the plans themselves or by outside service providers hired by

the plans. The Cost column shows the monetized version of those burden hours.

Revisions	Change in annual costs (millions)	Change in annual burden hours (thousands)	Filers under current requirements (thousands)	Filers under proposed requirements (thousands) ¹⁴	Annual cost per affected filer
Changes in Schedule H (Including changes to Schedules of Assets and Reportable Transactions) and Eliminate Schedule I	\$57.6	535.4	115.1	114.6	\$502
Schedule C	12.9	116.6	82.4	100.2	128
DFE Reporting Changes (Including changes to Schedule D)	- 10.1	- 94.2	61.1	8.9	- 1,137
Schedule E	2.5	22.0	0.0	6.7	374
Completion of lines 1–5 on Form 5500 and lines 1–8 on Schedule J by fully insured GHPs with fewer than 100 participants	69.6	623.0	0.0	1,869	37
Completion of Form 5500 by GHPs with fewer than 100 participants that are unfunded, combination unfunded/fully insured, or funded with a trust and GHPs with 100 or more participants	39.0	349.1	54.1	336.9	116
Completion of Schedule J by GHPs with fewer than 100 participants that are unfunded, combination unfunded/fully insured, or funded with a trust and GHPs with 100 or more participants	133.0	1,179.2	0.0	336.9	395
All Other Revisions	24.4	217.9	1,076.7	1,024.2	24

II. Discussion of the Proposed Revisions to 29 CFR Part 2520

ERISA section 103 broadly sets out annual financial reporting requirements for employee benefit plans. The Form 5500 Annual Return/Report and the DOL's related regulations generally are promulgated under the ERISA provisions authorizing limited exemptions to these requirements 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. The forms, instructions, and related regulations are also promulgated under the DOL's general regulatory authority in ERISA sections 109 and 505.

The forms, schedules, and instructions, in addition to providing an alternative method of compliance under ERISA section 110 for the mandatory reporting requirements under section 103, also serve to help the DOL carry out its statutory directives under sections 506 and 513 of ERISA. Specifically, section 506(a) of ERISA authorizes the Secretary of Labor to coordinate with other Agencies to avoid unnecessary expense and duplication of functions among Government agencies;

the Form 5500 Annual Return/Report is designed to simultaneously satisfy annual reporting requirements for each of the three Agencies and help the Agencies more effectively and efficiently (from both an Agency and a public perspective) enforce the provisions of ERISA and the Code. Section 506(b) gives the DOL responsibility for detecting and investigating civil and criminal violations of Title I of ERISA. The Form 5500 Annual Return/Report is one of the important tools the DOL uses to effectuate its responsibility to detect and investigate such violations. Section 513(b)(2) of ERISA specifically directs DOL to undertake research studies relating to pension plans, including but not limited to (A) the effects of this subchapter upon the provisions and costs of pension plans, (B) the role of private pensions in meeting the economic security needs of the Nation, and (C) the operation of private pension plans including types and levels of benefits, degree of reciprocity or portability, and financial and actuarial characteristics and practices, and methods of encouraging the growth of the private pension system. The Form 5500 Annual Return/Report is the most important overall tool DOL has to fulfill this statutory imperative, and the changes in the proposal are essential for required research, as well as enforcement.

The proposed changes to the Form 5500 Annual Return/Report and regulations are designed to: (1) Modernize financial information filed regarding plans; (2) harmonize information on fees and expenses that plans pay to service providers with the

information that service providers disclose to plans under 29 CFR 2550.408b-2; (3) enhance mineability of data filed on the Form 5500 Annual Return/Report; (4) require reporting by all plans covered by Title I of ERISA that provide health benefits, including adding a new Schedule J (Group Health Plan Information); and (5) focus filers on compliance with certain ERISA and Code provisions through new questions on plan operations, service provider relationships, and financial management. If adopted, the changes generally would apply for plan years beginning on or after January 1, 2019. See the regulatory impact analysis in this document for a discussion of how the proposed amendments and the proposed form revision address these goals. These revisions are being proposed in conjunction with recompeting the contract for operation of the ERISA Filing and Acceptance System (EFAST2), which is expected to begin processing Plan Year 2019 forms, beginning January 1, 2020. Certain changes may be made earlier, particularly those changes collecting information under the Code or Title IV of ERISA that do not require amendment to DOL regulations to implement (but not those related to group health plans). The Notice of Proposed Forms Revisions published concurrently in today's **Federal Register** sets forth a comprehensive discussion of form and instruction changes that relate to this proposed regulation.

1. Section 2520.103-1

Section 2520.103-1 generally describes the content of the Form 5500 Annual Return/Report as a limited

¹⁴ The elimination of the concept of Master Trust Investment Account reporting and requiring reporting by a master trust instead, whose burden change is accounted for in the DFE Reporting Changes row, results in a reduction in the number of schedules attached. These reductions are reflected in the rows specific to the schedule affected.

exemption and alternative method of compliance for ERISA-covered employee benefit plans to satisfy annual reporting requirements under Title I. To accommodate the form, schedule, and instruction changes in the Notice of Proposed Forms Revisions, the proposed regulatory amendments in this document would update form and schedule references in § 2520.103-1. The proposal would also require all plans that provide group health benefits, regardless of size, to file the Form 5500 Annual Return/Report in accordance with the instructions. Group health plans, regardless of size, would not be eligible to file the Form 5500-SF.¹⁵ The proposal would also require pension benefit plans with fewer than 100 participants that are required to file the Form 5500 Annual Return/Report to file the Schedule C (Service Provider Information). It would also generally require both large and small employee stock ownership plans to file the Schedule E (ESOP Information). Under the proposal, only DFEs would be required to complete the Schedule D to report participating plan information; plans would no longer be required to file Schedule D because they would be reporting detailed information about the collective investment vehicles in which they invest, including DFEs, on the Schedule of Assets Held for Investment and the Schedule of Assets Disposed of During Plan Year. In order to improve the transparency of reporting for plans that participate in a master trust, the proposal would require that master trusts operate either on a calendar year basis or on the same fiscal year as all the plans that participate in the master trust. In general, a master trust is a trust maintained by a bank or similar institution to hold the assets of more than one plan sponsored by a single employer or by a group of employers under common control.

2. Section 2520.103-2

Section 2520.103-2 describes the content of the Form 5500 Annual Return/Report for a group insurance arrangement (GIA) that files an annual report under § 2520.104-43. The amendments proposed in this document include the requirement to file the proposed new Schedule J. Group health plans that are part of a GIA would continue to be exempt from filing a Form 5500 Annual Return/Report under 29 CFR 2520.104-43. For plans to be eligible for this exemption, the GIA would have to file a separate Schedule

¹⁵ The details of the limited reporting that would be required for small fully insured group health plans would be set forth in the instructions.

J for each group health plan participating in the GIA.

3. Section 2520.103-3, 2520.103-4, and 2520.103-1(e)

Section 2520.103-3 provides an exemption for employee benefit plans from certain annual reporting requirements for plan assets held in a common collective trust (CCT) maintained by a bank, trust company, or similar institution. Section 2520.103-4 provides a similar exemption for plan assets held in a pooled separate account (PSA) maintained by an insurance carrier. Section 2520.103-1(e) provides for special reporting rules for plans that participate in a master trust. The Notice of Proposed Forms Revisions would alter the annual reporting requirements for plans investing in CCTs, PSAs and master trusts in significant ways to increase the transparency of plan investments in such pooled investment vehicles. The DOL proposes revising language to 29 CFR 2520.103-3, 29 CFR 2520.103-4, and 29 CFR 103-1(e) to reflect those changes.

4. Section 2520.103-6

Section 2520.103-6 sets forth the contents of the Schedule of Reportable Transactions that is part of the Form 5500 Annual Return/Report. The Schedule of Reportable Transactions is required to be filed by plans and DFEs that file their own Form 5500 Annual Return/Report. This schedule is used to report, subject to conditions and exceptions, individual transactions or series of transactions that involve more than five percent of the current value of the assets of the plan or DFE. The existing rules require the schedule to include the name of each party to a "reportable transaction." The form and instructions changes being published concurrently with this document include certain additions and clarifications of the content of the Schedule of Reportable Transactions designed to improve the information regarding parties involved in these significant plan transactions or series of transactions. 29 CFR 2520.103-6(d)(1) sets forth the content requirements for the Schedule of Reportable Transactions. Rather than list all the schedules' content requirements, the proposed amendment to paragraph (d)(1) would simply reference the schedules' contents in the relevant Form 5500 Annual Return/Report instructions.

5. Section 2520.103-8

Section 2520.103-8 implements the limited-scope audit exemption described in ERISA section 103(a)(3)(c).

Specifically, this exemption allows a plan to exclude from the examination and report of an independent qualified public accountant (IQPA) any statement or information regarding plan assets held by banks, similar institutions, or insurance carriers if the statement or information is prepared and certified by the bank, similar institution, or insurance carrier. The GAO and the DOL's Inspector General (DOL-OIG) have recommended that the Department revise section 2520.103-8 to improve the information being reported by plan administrators electing a limited scope audit. The DOL agrees that better information is needed by plan administrators in connection with limited scope audits. To address concerns it has observed, as well as to respond to the GAO and the DOL-OIG recommendations,¹⁶ the DOL proposes amending section 2520.103-8.

Currently, section 2520.103-8 requires the bank or insurance company to certify the accuracy and completeness of the information being provided by a written declaration which is signed by a person authorized to represent the bank or insurance carrier. The DOL proposes to amend the requirements under section 2520.103-8 to require that the certification:

- (1) Appear on a separate document from the list of plan assets covered by the certification;
- (2) Identify the bank or insurance company holding those plan assets that are the subject of the certification;
- (3) Describe the manner in which the bank or insurance company is holding the assets covered by the certification;
- (4) State whether the bank or insurance company is providing current value information regarding the assets covered by the certification, and if so, state that the assets for which current value is being certified are separately identified in the list of assets covered by the certification;
- (5) If current value is not being certified for all of the assets covered by the certification, include a caution that the certification is not certifying current value information and the asset values provided by the bank or insurance company may not be suitable for use in satisfying the plan's obligation to report current value information on the Form 5500 Annual Return/Report; and
- (6) If the certification is being provided by an agent on behalf of the bank or insurance company, a statement

¹⁶ The Agencies discuss various GAO and DOL-OIG recommendations with respect to the Form 5500 Annual Return/Report and the steps the Agencies are taking that are consistent with the recommendations in the Notice of Proposed Forms Revisions published today in the **Federal Register**.

certifying that the person providing the certification is an authorized agent acting on behalf of the bank or insurance company and affirming that the bank or insurance company is taking responsibility for the accuracy and completeness of the certification and the underlying records used as a basis for the information being certified.

6. Section 2520.103–10

Section 2520.103–10 identifies the financial schedules that are required to be included as part of the Form 5500 Annual Return/Report, which include the “Schedule of Assets Held for Investment” and “Schedule of Assets Acquired and Disposed within the Plan Year.” Paragraph (b)(1)(i) of § 2520.103–10 sets forth the content requirements for the Schedule of Assets Held for Investment. The Notice of Proposed Forms Revisions proposes certain additions and clarifications to the content of the Schedule of Assets Held for Investment that are designed to improve the information regarding parties and assets involved in these significant plan investments. Rather than list all the required contents of this schedule, the proposed amendment to paragraph (b)(1)(i) of § 2520.103–10 would simply reference the contents of the schedule listed in the relevant Form 5500 Annual Return/Report instructions.

Paragraph (b)(2)(i) of § 2520.103–10 sets forth the content requirements for the “Schedule of Assets Acquired and Disposed of During the Plan Year.” This proposed amendment reflects the Agencies’ proposal to revise and rename the current “Schedule of Assets Acquired and Disposed of Within the Plan Year.” Filers would be required to report information on the disposal of certain assets, regardless of when the assets were acquired. The Notice of Proposed Forms Revisions also includes certain proposed additions and clarifications of the content of the Schedule of Assets Disposed of During the Plan Year that are designed to improve the information regarding parties and assets involved in these plan transactions. Rather than list the required contents of the Schedule of Assets Disposed of During the Plan Year, the proposed amendment to paragraph (b)(2)(i) of § 2520.103–10 would reference the contents of the schedule listed in the relevant Form 5500 Annual Return/Report instructions.

7. Section 2520.104–20 and 2520.104–26

Section 2520.104–20 provides an exemption from certain annual

reporting and disclosure provisions of ERISA for certain welfare plans that cover fewer than 100 participants at the beginning of the plan year and for which benefits are paid exclusively from the general assets of the employer or employee organization sponsoring the plan, exclusively through insurance, or a combination of both. An expansion of the annual reporting of information regarding plans that provide group health benefits is described in detail in the Notice of Proposed Forms Revisions. To implement those changes, the DOL proposes eliminating the existing regulatory exemption for welfare plans that provide group health benefits (the exemption will continue to apply to other small welfare plans). Thus, small plans that provide group health benefits that are unfunded, or a combination of unfunded and fully insured, will be required to file an annual return/report, including the new Schedule J, in accordance with the requirements in the proposed instructions. Under the proposal, small fully insured plans will only be required to answer basic identifying and plan characteristic information on the Form 5500 and limited health plan benefit, insurance, and participant information on the Schedule J. Similarly, the limited exception in § 2520.104–26 for certain unfunded dues-financed welfare plans maintained by employee organizations would be amended to further limit the exemption to those unfunded dues-financed welfare plans that do not provide health benefits.

8. 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 materials that fairly summarize the plan’s annual report. Section 2520.104b–10 sets forth the requirements for the Summary Annual Report (SAR) and prescribes formats for such reports. The amendments being proposed do not include any change to the SAR requirements. However, in order to facilitate compliance with the SAR requirement, the DOL is updating its cross-reference guide to correspond to the line items of the Form 5500 Annual Return/Report and Form 5500–SF. The cross-reference guide has also been updated to reflect that defined benefit pension plans that furnish an annual funding notice to participants and beneficiaries, pursuant to 29 CFR 2520.101–4, are not required to furnish a SAR. This update reflects statutory changes enacted as part of the Pension Protection Act of 2006 extending the annual funding notice requirements of

section 101(f) of ERISA. The cross-reference guide, as before, would continue to be an appendix to 29 CFR 2520.104b–10.

9. Technical and Conforming Changes for Forms and Instructions

Various other technical and conforming changes are being proposed as part of the restructuring of the Form 5500 Annual Return/Report.

III. Regulatory Impact Analysis

Executive Order 12866 and 13563 Statement

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, and public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, it must be determined 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 \$100 million or more. Therefore, this action is being treated as “economically significant” and subject to OMB review under section 3(f)(1) of Executive Order 12866. The DOL 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.

TABLE 1—ACCOUNTING STATEMENT: ESTIMATED COSTS FROM CURRENT REPORTING REQUIREMENTS TO 2019 REPORTING REQUIREMENTS
[In millions]

Category	Estimates			Units		
	Primary estimate	Low estimate	High estimate	Year dollar	Discount rate (percent)	Period covered
Benefits:						
Annualized Monetized (\$millions/year)	.....	.....	.....	.....	.....	.....
Annualized Quantified	.....	.....	.....	.....	.....	.....
Qualitative	The proposal pursues five main objectives: (1) Improve reliability of reporting and transparency of financial products and investments acquired by plans, especially alternative investments, hard-to-value assets, and investments through collective investment vehicles; foster ongoing monitoring of retirement plans by employers, plans, participants and beneficiaries, and policymakers; and better leverage the ability of the Agencies to fulfill their statutory oversight role. (2) Establish better compliance awareness and education, provide critical data for Agency oversight, collect information needed for Congressionally mandated reports on group health plans, and satisfy certain reporting requirements under sections 2715A and 2717 of the PHS Act as added by the Affordable Care Act and incorporated into ERISA section 715. (3) Standardize and structure the Form 5500 Annual Return/Report to make key retirement and health and welfare benefit data, including information on assets held for investment, more available and usable in the electronic filing and data environment, which, consistent with the Administration's "Smart Disclosure" effort, to enable private sector data users to develop more individualized tools for employers to evaluate their retirement plans and for employees to manage their retirement savings. (4) By harmonizing reporting on Schedule C of the Form 5500 Annual Return/Report with the now final disclosure requirements in DOL's regulation at 29 CFR 2550.408b-2, provide a powerful tool and economic basis for improved evaluation of investment, recordkeeping, and administrative service arrangements, including potential innovative uses of Form 5500 Annual Return/Report data by private sector companies that have created tools for evaluating and benchmarking employee benefit plans, provide tools to benefit participants where failures to disclose indirect compensation received by a service provider have resulted in corrective monetary recoveries to plans, as well as minimize filer confusion with the harmonization of reporting and disclosure requirements. (5) Enhance reporting on plan compliance to improve plan operations, protect participants and beneficiaries and their retirement benefits, and educate and provide annual discipline for plan fiduciaries.					
Costs:						
Annualized Monetized (\$millions/year)	372.6	.....	.....	2016	7	2019 and later.
Annualized Quantified	366.2	.....	.....	2016	3	2019 and later.
Qualitative	.....	.....	.....	.....	.....	.....

Background and Need for Regulatory Action

The Form 5500 Annual Return/Report is the principal source of information and data available to the Agencies concerning the operations, funding, and investments of pension and welfare benefit plans covered by ERISA and the Code. Accordingly, the Form 5500 Annual Return/Report is essential to each Agency's enforcement, research, and policy formulation programs and is 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 Form 5500 Annual Return/Report also serves as the primary means by which the operations of plans can be

monitored by plan participants and beneficiaries and the general public.

As discussed in the Notice of Proposed Forms Revisions published concurrently with this document and below, the DOL has received several reports from the GAO, the DOL-OIG, and the ERISA Advisory Council indicating the need for substantive changes to annual reporting forms and regulations. TIGTA has also suggested to the IRS that substantive changes are needed. In response to these reports, the continued shift from DB to DC plans, and legislative and regulatory changes that have been issued since the last major revision to the Form 5500 Annual Return/Report, the DOL has determined that the substantial revisions to the reporting scheme discussed earlier in

this preamble and in the Notice of Proposed Forms Revisions, published concurrently, are necessary and appropriate. These changes will ensure that the Agencies, plan participants and beneficiaries and the general public can monitor the operations of employee benefit plans. With their help, the Form 5500 Annual Return/Report will continue to serve its essential functions.

As described earlier in this document, the proposed revisions to the Form 5500 Annual Return/Report reflect priorities of and efforts by the Agencies to improve the quality of the information collected, while limiting wherever possible, especially for small pension plans invested in easy to value assets and plans that provide group health benefits that have fewer than 100

participants that are fully insured, the overall burden of the statutory reporting requirements and the forms. To accomplish this goal, the Agencies have pursued five objectives. The need for regulatory action to achieve these objectives is discussed below.

(1) *Modernizing financial information.*

Modernizing the Schedule H Balance Sheet and Income Statement: The financial statements contained in the current Schedule H (Large Plan Financial Information) and Schedule I (Small Plan Financial Information) are based on data elements that have remained largely unchanged since the Form 5500 Annual Return/Report was established in 1975. Many investments in alternative and hard-to-value assets and those held through collective investment funds that are frequently held by plans and the investment industry today were not as prevalent in 1975. Thus, they do not fit squarely into any of the existing Schedule H reporting categories. Further, some of these investments in alternative and hard-to-value assets, including those held through collective investment funds, are sufficiently complex that plan administrators and plan accountants may not completely understand how they fit into the balance sheet reporting on the Form 5500 Annual Return/Report. This results in inconsistent financial reporting by filers because certain types of investments may arguably fall into one or more categories. For example, a “hedge” fund could potentially be reported as a limited partnership or some other type of collective investment entity, or could be reported in a different reporting category based on the primary assets held through a particular type of collective investment vehicle.

Additionally, many filers simply report investments that do not readily fit into one of the existing categories in “Other.” For example, large retirement plans reported having \$153 billion in assets that they categorized as “Other” on the Schedule H balance sheet for 2013. DFEs reported an additional approximately \$407 billion in assets as “Other” for the 2013 plan year. In order to determine why there is a substantial amount in “Other,” the Agencies now have to rely on the current, unstructured Schedule H Line 4i Schedules of Assets, which might not specifically indicate the necessary details, or the Agencies would need to contact the filer for the information. The types of alternative and hard-to-value assets that might be reported in “Other” include: Options, index futures, state and municipal securities, hedge funds, and private

equity. Some of these asset types can be fairly complex and merit more rather than less transparency in order to determine the overall financial health of the plan. The inability to distinguish these types of assets on the Form 5500 Annual Return/Report reduces the form’s usefulness for policy analysis and research as well for monitoring plans for enforcement purposes.

A recent GAO report stated, for example, that, “while hedge funds and private equity have very different risk, return, and disclosure considerations from state and municipal securities, all of these investments could be included in the “other plan asset” category.”¹⁷ GAO also noted that the plan asset categories on the Schedule H are not representative of current plan investments, and provide little insight into the investments themselves, the level of associated risk, or structures of the investments.¹⁸ The DOL–OIG also recommended that the Agencies revise the Form 5500 Annual Return/Report to improve reporting of hard-to-value assets and alternative investments.¹⁹ Based on their own assessment and experience in research and enforcement and the use of the Form 5500 Annual Return/Report to support these critical agency functions and responsibilities, as well as in response to these recommendations, as discussed in detail earlier in this document, the Agencies are proposing to make changes to the Schedule H balance sheet and income statement.

Modernizing the Schedule H, Line 4i Schedules of Assets: As discussed in detail in the Notice of Proposed Forms Revisions published simultaneously with this document, the Agencies are proposing structural, data element and instruction changes to the current Schedule H, Line 4i(1) Schedule of Assets Held for Investment and Line 4i(2) Schedule of Assets Acquired and Disposed of Within Year. These schedules are filed by plans required to file the Schedule H and by certain DFEs. The Schedules of Assets are a central element of the financial disclosure structure of ERISA. They are the only place on the Form 5500 Annual Return/Report where plans are required to list individual plan investments identified by major characteristics, such as issue, maturity date, interest rate, cost and current value. As such, they are the only part of the Form 5500 Annual Return/

Report that can be used to evaluate the year-to-year performance, liquidity, and risk characteristics of a plan’s individual investments.

The current reported information, however, suffers from several shortcomings. First, this information is not reported in a data-capturable format. Only an image or picture of the attachments that are currently filed as non-standard attachments to filers’ electronic Form 5500 Annual Return/Report filings is available through the EFAST2 public disclosure function. Second, the Line 4i Schedules of Assets are not always found in the same place in each annual return/report. For example, the Line 4i Schedules of Assets are often incorporated in the larger audit report of the plan’s IQPA that itself is filed as a nonstandard attachment to the Form 5500 Annual Return/Report. Third, the schedules do not require a standardized method for identifying and describing assets on the Line 4i Schedules. Therefore, under the current reporting rules, the same stock or mutual fund may be identified with various different names or abbreviations.

The creation of more detailed and structured Schedules of Assets is a specific recommendation of the DOL–OIG and the GAO.²⁰ The proposed changes to the Schedules of Assets are designed to remedy the shortcomings described above. In addition, data capturability of the Line 4i Schedules of Assets will make it much easier and more efficient to monitor plan holdings as computer programs can read and analyze the data much more efficiently. It will allow the Agencies and the interested public to monitor a larger number of pension plans and their asset allocations. The existence of a group of private companies that are transforming the Line 4i Schedule of Assets Held for Investment of the larger pension plans into data-capturable information and using it to compare plan investment menus and investment allocations is a clear indication that plans sponsors and their service providers also are interested in having access to these data. For example, one of these companies sent a letter to DOL stating that they believe that the information on the Form 5500 Annual Return/Report is very useful in “helping the agency understand the performance and design of retirement plans in the market place” and that the data availability fosters “third party data collection and

¹⁷ GAO, *Private Pensions: Targeted Revisions Could Improve Usefulness of Form 5500 Information*, at 12.

¹⁸ *Id.* at 11–12.

¹⁹ EBSA *Needs to Provide Additional Guidance and Oversight to ERISA Plans Holding Hard-To-Value Alternative Investments*, at 4, 18, and 19.

²⁰ See EBSA *Needs to Provide Additional Guidance and Oversight to ERISA Plans Holding Hard-to-Value Alternative Investments*, at 17; *Private Pensions: Targeted Revisions Could Improve Usefulness of Form 5500 Information*, at 37.

evaluation efforts that in turn help protect retirement plan participants.”²¹ Plan sponsors can use this information to see how their investment menus compare to similarly situated plans and service providers often use this information to identify plans with underperforming investments in order to attract new business. This can lead to more competition and improved plan performance, which will ultimately benefit participants.

Changes to DFE Reporting: Under the current reporting rules, DFEs are permitted, or in some cases required, to file their own Form 5500 Annual Return/Report. Generally, pension plans that invest in DFEs only are required to report their interest in the DFE but do not have to report detailed information regarding the underlying investments in the DFE. Such plans are required to file a Schedule D on which the plans identify each DFE in which they invest and the year-end values of the plans' interests. Although DFEs file their own Form 5500 Annual Return/Report, only Master Trust Investment Accounts (MTIAs) and entities meeting the conditions of DOL regulation 29 CFR 103–12 (103–12 IEs) are required to include as part of their own Form 5500 Annual Return/Report, detailed asset holdings on the Schedule H, Line 4i Schedules of Assets. Insurance company pooled separate accounts (PSAs) and bank common/collective trusts (CCTs), which together account for 32 percent of large plans' reported DFE holdings, do not report such information, nor are the investing plans required to report it, although the information is required by regulation to be provided by PSAs and CCTs to investing plans on an annual basis.

The Agencies have encountered, and researchers have reported to the DOL,²² difficulties matching plans' investments in DFEs reported by investing plans and DFEs in which the plans and other DFEs are participating. Some of this stems from incomplete, unreliable, or inconsistent data on Schedule D filings. For example, for 2013, about 57 percent of plans and 17 percent of DFEs that filed a Schedule D and reported non-zero amounts of interest in DFEs on Schedule H have at least one discrepancy in reporting of more than \$1,000 between the value of the

investment in a DFE on their Schedule D and their Schedule H. There might be some legitimate reasons for these discrepancies, e.g. different plan year dates, but these discrepancies make it difficult to verify filing accuracy. Another more troubling issue is that there are more than 7,000 plan filings for 2013 that report investments in DFEs that cannot be directly linked to any applicable DFE filings. This problem primarily involves CCTs and PSAs. Investments in these unlinked DFEs account for more than \$382 billion in assets. A serious consequence of not being able to link these plan filings and assets to DFE filings is that the Agencies and participants do not get information on their plan investments and thus are not able to monitor these investments.

GAO has recommended that the Agencies take steps to address the problem of incomplete or inaccurate matching between plan and DFE filings.²³ Therefore, as discussed in detail earlier in this document, the Agencies are proposing to revise the reporting structure of both Schedule H and the Line 4i Schedules of Assets, with corresponding changes to Schedule D, that are intended to ensure that the Agencies, plan fiduciaries, plan service providers, and other users of data have the tools to create a more complete picture of plans' investment in pooled investment vehicles.

Changes to Financial Information Reporting for Small Plans: Small pension plans that are invested in “eligible” plan assets and otherwise meet certain requirements are eligible to file Form 5500–SF, which was established in part to comply with provisions of the PPA requiring a simplified form of reporting for plans with fewer than 25 participants.²⁴ Currently, the Form 5500–SF does not require filers to breakout assets on the balance sheet into specific categories. Small plans that are not eligible to file the Form 5500–SF because they are invested in hard-to-value and alternative investments currently file Schedule I, but the Schedule I does not require small plan filers to provide detailed plan asset information and does not provide significantly more useful financial information than the Form 5500–SF with respect to alternative and hard-to-value assets.

The lack of specific questions on the investment activity of small pension plans, which comprise over 80 percent

of filers, impairs the usefulness of the Form 5500 Annual Return/Report as a tool to obtain a meaningful picture of small plan investments, especially investments in hard-to-value and alternative investments. As the GAO has noted, the limited financial information provided on the Schedule I creates a challenge for participants, beneficiaries, oversight agencies, researchers, and other users of the Form 5500 Annual Return/Report or Form 5500 Annual Return/Report data.²⁵ Therefore, as discussed in detail in the Notice of Proposed Forms Revisions published today, under the proposal, Form 5500–SF filers would be required to provide a modest additional breakout of plan investments on the balance sheet. The proposal also would eliminate the Schedule I for small plans that are not eligible to file the Form 5500–SF, predominantly because they are invested in hard-to-value and alternative investments, including employer securities. Under the proposal, such plans instead would be required to complete Schedule H and the Line 4i Schedules of Assets. These changes are designed to ensure that the Agencies are able to collect critical information regarding small plan investments in hard-to-value and alternative investments.

Although the proposed elimination of Schedule I and the addition of basic investment category information to the Form 5500–SF balance sheet would result in additional reporting for those small plans invested in hard-to-value and alternative investments, those small plans with simple investment portfolios would not see a significant increase in their annual reporting burden. In light of changes in the financial environment and increasing concern about investments in hard-to-value assets and alternative investments, however, the Agencies believe that requiring the more detailed financial information regarding hard-to-value investments on the Schedule H is important for regulatory, enforcement, and disclosure purposes for those small plans with more complex portfolios that include hard-to-value or alternative investments. The inherent increased risk posed by hard-to-value or alternative investments affects participants in small plans as well as large plans, but without these proposed revisions, the participants in small plans are left without the protection afforded participants in large plans that comes from the reporting that large plans are already required to do. Although such small plans would be

²¹ See August 23, 2010 Comment Letter from Ryan Alfred, President, BrightScope, Inc. Re: Proposed Extension of Information Collection, Form 5500 http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201009-1210-002.

²² See “Invisible Pension Investments,” Peter J. Wiedenbeck, Rachael K. Hinkle & Andrew D. Martin (<http://sites.lsa.umich.edu/admart/wp-content/uploads/sites/127/2014/08/vatr13.pdf>).

²³ See, GAO *Private Pensions: Targeted Revisions Could Improve Usefulness of Form 5500*, at 14–15.

²⁴ See section 1103(b) of the Pension Protection Act of 1996, Public Law 109–280, 120 Stat. 780 (2006).

²⁵ GAO *Targeted Revisions Could Improve Usefulness of Form 5500 Information*, at 18.

required to complete the Schedule H instead of the Schedule I, including the Schedule H Line 4i(1) and 4i(2) Schedules of Assets, eligible small plans, as under the current rules, would still be eligible for a waiver of the annual examination and report of an IQPA under 29 CFR 2520.104–46, and the number count required to determine eligibility would be changed from the number of participants at the beginning of the plan year to the number of participants with account balances at the beginning of the plan year.

(2) *Updating fee and expense information on plan service providers with a focus on harmonizing annual reporting requirements on Schedule C with DOL's final disclosure requirements at 29 CFR 2550.408b–2.*

The current rules for reporting indirect compensation on the Schedule C as part of the Form 5500 Annual Return/Report, including the limited reporting option for “eligible indirect compensation,” were implemented starting with the 2009 forms.²⁶ Those changes were part of a three-pronged regulatory initiative that included the DOL's regulations under 29 CFR 2550.408b–2 and participant-level disclosure regulations under 29 CFR 2550.404a–5. At the time the 2009 Schedule C rules were finalized, neither the ERISA section 408b–2 regulation nor the ERISA section 404a–5 regulation had been promulgated. Some elements of the 2009 Schedule C, for example, the eligible indirect compensation provisions, were adopted in light of the fact that it was not certain at the time what the ERISA section 408b–2 final rule would require. Those provisions were also meant to respond to concerns from the regulated community, especially large plan service providers, about having to create two different record-keeping systems to meet the various requirements of the Form 5500 Annual Return/Report and disclosures required under 408b–2 should the later promulgated provisions differ from the Form 5500 reporting requirements on indirect compensation.

Now that EBSA has promulgated the ERISA sections 408b–2 and 404a–5 final regulations, there is a need to harmonize fee reporting under the Schedule C and ERISA section 408b–2 regulations to: (1) Make it easier to understand the disclosure and reporting rules regarding indirect compensation; (2) improve quality of data by minimizing any filer confusion that might result from differences in the two requirements and having all the compensation required to be disclosed to be reported on the

Schedule C; (3) reduce burden by synchronizing the record-keeping that would be required for ERISA section 408b–2 regulations before-the-fact disclosure with Schedule C's after-the-fact reporting; and (4) make the information easier to understand for end users of the forms by bringing consistency between the service provider fees disclosed to the plan fiduciaries and the service provider fees reported to the Agencies and made public. In this regard, a recent GAO report stated that some filers advised that there was confusion over what Schedule C requires to be reported, including in comparison to what is required under the ERISA section 408b–2 regulations disclosure scheme.²⁷ Therefore, as discussed in detail earlier in this document, the Agencies are proposing various changes to the Schedule C to better harmonize it with the disclosure requirements under the final ERISA section 408b–2 regulation. Among other changes, the Agencies are proposing to eliminate the concept of “eligible indirect compensation” on Schedule C in part because “eligible indirect compensation” was created prior to the finalization of ERISA section 408b–2 rules to address concerns about possible future inconsistencies that are no longer applicable. Instead of being able to rely on the construct of “eligible indirect compensation” to report only the name of the person providing the disclosures to the plan administrator, the proposal would require filers to report all types of compensation for ERISA section 408b–2 “covered” service providers. This change will also help address concerns raised by other data sources on service provider compensation about the completeness of Schedule C compensation data. A recent survey by Deloitte Consulting LLP for the Investment Company Institute reported fees paid by 401(k) plans that greatly exceeded fees reported on the Schedule C at every asset level.²⁸

The proposed forms revisions, and implementing DOL regulations, would also require small pension plans that are not eligible to file the Form 5500–SF and welfare plans that are funded with a trust with fewer than 100 participants to file the Schedule C. Currently, only large pension plans and large welfare plans that are not unfunded or insured (e.g., funded using a trust) must file the

Schedule C, thus excluding almost 90 percent of current pension plan filers and over 80 percent of current welfare plan filers from having to disclose service provider fees. The DOL recognizes the burdens small plans face in complying with reporting obligations, but must weigh them against the market efficiencies that can be gained through improved transparency and fee disclosure. The DOL therefore proposes to require small pension plans to file Schedule C only if they do not meet the eligibility conditions for filing the Form 5500–SF, which predominantly are those pension plans that are invested in alternative or hard-to-value assets. The DOL proposes to require welfare plans that offer group health benefits with fewer than 100 participants to file Schedule C only if they are not unfunded or insured (e.g., funded with a trust), because those plans are most likely to experience financial difficulties. Defined contribution pension plan Form 5500–SF filers, as well as defined contribution pension plan Form 5500 Annual Return/Report filers required to complete the Schedule H, would also have to attach the comparison chart that is required to be furnished to participants under the DOL's regulation at 29 CFR 2550.404a–5. Although the comparison chart would not be attached in a “structured” format, it would provide, with a minimal burden increase, a picture of the investment earnings and fees for defined contribution pension plans, which constitute the majority of small plan filers.

Requiring those small pension plans that are not eligible to file the Form 5500–SF and welfare plans that include group health benefits with fewer than 100 participants that are not unfunded or insured (e.g., funded with a trust) to complete the Schedule C as part of their Form 5500 Annual Return/Report filing, and requiring Form 5500–SF defined contribution pension plan filers to include the 404a–5 comparison chart should address some of the GAO's concerns that service provider fee information is incomplete because plans with fewer than 100 participants are not currently required to file information about indirect compensation received by the plans' service providers.²⁹ Both the proposed Schedule C information for small plans not eligible to file the Form 5500–SF and the 404a–5 information would also enable sponsors of small plans to more easily compare fee information between their plans and increase competition for these services.

²⁷ See GAO *Targeted Revisions Could Improve Usefulness of Form 5500 Information*, at 22.

²⁸ Deloitte Consulting LLP (2014, August). *Inside the Structure of Defined Contribution/401(k) Plan Fees, 2013: A Study Assessing the Mechanics of the 'all-in' Fee*. (Available at https://www.ici.org/pdf/rpt_14_dc_401k_fee_study.pdf).

²⁹ See GAO *Targeted Revisions Could Improve Usefulness of Form 5500 Information*, at 25.

²⁶ See 72 FR 74731 (Nov. 16, 2007).

In addition, financial information reporting could be better aligned with recently adopted disclosure rules to ensure that all fees are reported by the plans.³⁰

(3) *Enhancing usability of data filed on the annual return/report.*

E-filing, as well as advances in information technology, have changed both the regulated community's and government's ability to use the Form 5500 Annual Return/Report data. The government can now provide the data in a much more timely and comprehensive manner. As a result, the Form 5500 Annual Return/Report data sets are posted on the Internet, updated monthly, and the images of the individual filings and attachments are made available at no cost to the requester.³¹ This has allowed the public as well as the Agencies to monitor plan investments and trends more efficiently. Several private companies have started to build data sets and applications using the Form 5500 Annual Return/Report data to compare plans and service providers and make these services available to plan sponsors and service providers. These developments can lead to better review of plan investments and increased competition, ultimately benefiting plans and participants.

The usefulness of the Form 5500 Annual Return/Report data for comprehensive plan monitoring is dependent on comparable data being available for all or most plans and on the data being available in data-capturable formats. The current financial reporting structures and requirements, however, do not allow the data to be utilized to the fullest extent. As stated above, the Schedule H Line 4i, Schedules of Assets, and the Line 4j, Schedule of Reportable Transactions, as well as other attachments to various schedules (including Schedules MB and SB) are not filed in a standardized electronic format and therefore cannot be searched and analyzed electronically. As a result, the Agencies, other governmental users, including policymakers, and the public have difficulty accessing and making most effective use of key information about pension plan investments.

The proposed requirement for filers to complete a standardized Schedule H Line 4i(1), Schedule of Assets Held for Investment and Line 4i(2) Schedule of Assets Disposed of by End of Plan Year,

in a data-capturable format would address some of the critical gaps in available data on pension plan investing, which accounts for over \$7.87 trillion of United States savings. The Agencies' proposal to standardize the Schedule H, Line 4i Schedules of Investments also is responsive to the DOL-OIG's recommendation that the Agencies create a searchable reporting format for the Schedule H, Line 4i Schedules of Assets and otherwise increase the accessibility of Form 5500 Annual Return/Report data, particularly information on hard-to value assets and multiple-employer plans.³²

In addition, this proposal would enhance the usability of data by replacing some of the attachments to the various schedules (including some attachments to Schedules MB and SB)³³ with text fields and having filers report required information in text fields on the face of the forms and on schedules instead of requiring this information to be filed as non-standard attachments. The Agencies took into account the size and complexity of the attachments in determining which should be text fields and which should continue to be attachments, despite the overarching goal of improving data usability for the complete form. In a few cases, especially for detailed actuarial charts, the Agencies determined that requiring standardized attachments or requiring the information to be provided on the face of the forms and schedules could potentially be overly difficult, costly, and complex, and therefore the costs would outweigh the benefits.

Further improvements would be realized from the proposal's requirement that other currently unstructured data or new elements would also be collected as structured data. These include the lists of employers participating in multiple-employer and controlled group plans required to be attached to the Form 5500 Annual Return/Report or Form 5500-SF; the Schedule H, Line 4a Schedule of Delinquent Contributions, and Schedule H, Line 4j Schedule of Reportable Transactions. Having information on delinquent participant contributions and reportable transactions in a "structured" data format would benefit

the Agencies by allowing them to identify common types of violations across plans, more quickly respond to any identified issues, and better determine areas where more enforcement and encouragement of compliance and education is needed. Having this data reported in a structured format would also benefit the Agencies and the general public by identifying the universe of employers that participate in multiple-employer and controlled group plans and allowing them to quickly identify plan sponsors that might be affected by adverse market conditions or financial distress.

In summary, advances and developments in technology allow data users to run increasingly sophisticated analyses using the existing Form 5500 Annual Return/Report data, but this is dependent on the availability of these data in a data-capturable format. In addition to researchers interested in studying trends in the employee benefits industry, some companies have reached out to the DOL to request that Form 5500 Annual Return/Report data be collected in a more standardized and consistent format.³⁴ If these data were available in such a format, researchers, businesses and plan professionals could use the data more efficiently to inform employers and participants on plan structures, operations, and finances. Particularly important in a constrained federal budgetary environment, such data will allow EBSA's enforcement staff to monitor many more employee benefit plans in a systematic and efficient way, producing more fruitful investigations and reducing the inefficiencies and disruptions resulting from unnecessary investigations.

(4) *Requiring reporting by all group health plans covered by Title I of ERISA, including adding a new Schedule J (Group Health Plan Information).*

The enactment of the Affordable Care Act expanded DOL's already growing oversight and regulatory responsibilities with respect to the provision of group health benefits to workers in private sector employer-sponsored group health plans. Generally most welfare plans that include group health benefits that have fewer than 100 participants do not currently file the Form 5500 Annual Return/Report. The current regulation exempts small plans from the requirement to file if they are unfunded, fully insured or combination unfunded/fully insured.³⁵ The current lack of information collected on the Form 5500

³² See *EBSA Needs to Provide Additional Guidance and Oversight to ERISA Plans Holding Hard-to-Value Alternative Investments*, at 17; see also *GAO Private Pensions: Targeted Revisions Could Improve Usefulness of Form 5500 Information*, at 37; *GAO, Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans*, at 30.

³³ The proposed Schedule E, which is based in large part on the Schedule E from 2008 and earlier, would use text fields rather than attachments for some of the previously asked questions.

³⁴ See August 23, 2010 Comment Letter from BrightScope Re: Proposed Extension of Information Collection, Form 5500 (<http://www.dol.gov/EBSA>).

³⁵ 29 CFR 2520.104-20.

³⁰ *Id.* at 50.

³¹ Requests for individual filings and attachments are available at no cost to the requester. Bulk requests are available at a minimal cost to the requester. See Guide to Submitting Requests Under the Freedom of Information Act, Section VIII (<http://www.dol.gov/dol/foia/guide6.htm>).

Annual Return/Report from group health plans diminishes the effectiveness of EBSA's ability to develop health care regulations and complicates the DOL's ability to enforce such regulations and educate plan administrators regarding compliance. Congress, DOL, other governmental users, private researchers, service providers, and other members of the regulated community currently are not able to confidently estimate even the most basic information regarding group health plans, such as the total number of plans that exist or trends that are occurring in the marketplace.

The Affordable Care Act requires the Secretary of Labor to provide Congress with an annual report containing general information on self-insured employee health benefit plans and financial information regarding employers that sponsor such plans. This "Annual Report on Self-Insured Group Health Plans," by the terms of the statute, must use data from the Form 5500 Annual Return/Report. However, as noted above, those small plans that are self-insured and do not use a trust are not required to file the Form 5500 Annual Return/Report with the DOL and the Form 5500 Annual Return/Report only collects limited information from self-insured plans that do file.³⁶ Also, as the 2015 Report states, "health benefits may be reported together with certain other benefits, such as disability or life insurance benefits, on a single Form 5500 Annual Return/Report. This makes it difficult to distinguish how the different benefits are financed."³⁷ To fulfill its responsibility to Congress, the DOL has developed an algorithm to try to infer the funding method for plans that file. This methodology, however, may not accurately identify self-insured plans and can only draw information from the Form 5500 Annual Returns/Reports filed, which are a limited sample, and the methodology may compromise the validity of any conclusions drawn from the report and any resulting policy prescriptions.

In addition, sections 2715A and 2717 of the PHS Act, as added by the Affordable Care Act and incorporated into ERISA section 715, include important new reporting requirements for group health plans subject to ERISA. Specifically, section 2715A of the PHS Act incorporates the transparency

provisions of section 1311(e)(3) of the Affordable Care Act to require non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage to make available to the public, and the government a host of information on health plan enrollment and claims, including: (1) Claims payment policies and procedures; (2) periodic financial disclosures; (3) data on enrollment and disenrollment; (4) data on the number of denied claims; (5) data on rating practices; (6) information on cost-sharing and payments with respect to any out-of-network coverage; (7) information on enrollee and participant rights; and (8) other information as determined by the Secretary. Moreover, section 2717 of the PHS Act generally requires non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage to report annually whether the benefits under the plan: (A) Improve health outcomes through the implementation of activities such as quality reporting, effective case management, care coordination, chronic disease management, and medication and care compliance initiatives, including through the use of the medical homes model as defined for purposes of section 3602 of the Affordable Care Act, for treatment or services under the plan or coverage; (B) implement activities to prevent hospital readmissions through a comprehensive program for hospital discharge that includes patient-centered education and counseling, comprehensive discharge planning, and post discharge reinforcement by an appropriate health care professional; (C) implement activities to improve patient safety and reduce medical errors through the appropriate use of best clinical practices, evidence based medicine, and health information technology under the plan or coverage; and (D) implement wellness and health promotion activities.

These regulations propose conforming amendments in 29 CFR 2590.715–2715A and 29 CFR 2590.715–2717 to clarify that compliance with the reporting requirements in 29 CFR 2520.103–1 (including filing any required schedules to the annual report) by plans subject to ERISA would satisfy the reporting requirements of PHS Act section 2715A and 2717,³⁸ incorporated

in ERISA through ERISA section 715(a)(1).³⁹ As explained in FAQs issued August 11, 2015,⁴⁰ HHS proposed an information collection for public comment in connection with the transparency provisions of section 1311(e)(3) of the Affordable Care Act. The proposed data collection would collect certain information from Qualified Health Plan (QHP) issuers in Federally-facilitated Exchanges and State-based Exchanges using the federal eligibility and enrollment platform. The HHS proposal explained that other reporting requirements would be proposed at a later time, through a separate rulemaking with respect to non-Exchange coverage, including those that extend to health insurance issuers offering non-grandfathered group and individual health insurance coverage outside of Exchanges and non-grandfathered group health plans (including large group and self-insured health plans).

This rulemaking proposes transparency and quality reporting for non-grandfathered group health plans under PHS Act sections 2715A and 2717, as incorporated in ERISA. It takes into account differences in markets and other relevant factors and reduces unnecessary duplication. The DOL is proposing to collect and provide high-value data to participants, beneficiaries, and regulators, such as information about benefits and plan design characteristics, funding, grandfathered plan status, rebates received by the plan (such as medical loss ratio rebates), service provider information (including information regarding any third party administrators, pharmacy benefit managers, mental health benefit

(including filing any required schedules to the annual report) would satisfy the reporting requirements of sections 2715A and 2717 of the PHS Act, as incorporated in the Code. Group health plans that are not required to file an annual report pursuant to section 104 of ERISA but that are subject to sections 2715A and 2717 of the PHS Act as incorporated in the Code, will not be required to do any reporting to comply with sections 2715A and 2717 of the PHS Act, as incorporated in the Code, unless and until the Treasury Department and the IRS issue subsequent further guidance or rulemaking regarding any such reporting by such plans.

³⁹ Nonfederal governmental plans (as defined in PHS Act section 2791(d)(8)(C)) and health insurance issuers (as defined in PHS Act section 2791(b)(2) and ERISA section 733(b)(2)) are not required to file annual reports pursuant to ERISA section 103. Accordingly, any reporting required of such plans and issuers to satisfy PHS Act sections 2715A and 2717 will be addressed separately by HHS in future rulemakings and/or guidance.

⁴⁰ See FAQs about Affordable Care Act Implementation (Part XXVIII), available at www.dol.gov/ebsa/faqs/faq-aca28.html and www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQ-Part-XXVIII-transparency-reporting-final-8-11-15.pdf.

³⁶ Only a little over 20,000 self-insured and approximately 4,000 mixed self-insured health plans file annually with the DOL under the current reporting scheme. See "Report to Congress: Annual Report on Self-Insured Group Health Plans," March 2015, page iii (available at <http://www.dol.gov/ebsa/pdf/ACAReportToCongress2015.pdf>).

³⁷ Id. at v.

³⁸ The Treasury Department and the IRS intend to publish proposed regulations in 26 CFR 54.9815–2715A and 54.9815–2717 clarifying that group health plans required to file an annual report pursuant to section 104 of ERISA that comply with the reporting requirements in 29 CFR 2520.103–1

managers, and independent review organizations), information on any stop loss insurance, claims processing and payment information (including number of claims filed, paid, appealed and denied), wellness program information, and other compliance information. The collection of high-value data will lead to greater transparency for consumers and assist in their decision-making process.

As discussed in detail in the Notice of Proposed Form Revision, the proposal would make significant changes to group health plan reporting. First, the proposal would add a new Schedule J (Group Health Plan Information). Plans that provide group health benefits that have 100 or more participants, all of which are currently required to file a Form 5500 Annual Return/Report, would have to include the new Schedule J in their annual report, with the remaining reporting requirements generally unchanged, except as proposed to be changed for all filers. Plans that provide group health benefits with fewer than 100 participants that are funded using a trust would generally be required to report the same information as plans that provide group health benefits with 100 or more participants that are funded using a trust; they would no longer be permitted to file the Form 5500-SF. Although this would require such plans to complete the Schedule C and the Schedule H, for plans with simple investments, there should only be a modest burden increase over completing the Form 5500-SF. Small welfare plans funded with a trust that are invested in assets that are not “eligible plan assets” for purposes of Form 5500-SF filing, are already required to file the Form 5500 Annual Return/Report, along with the Schedule I, and if applicable, Schedule A.

Group health plans that have fewer than 100 participants currently exempt from filing an annual report under 29 CFR 2520.104-20 because they are completely unfunded or combination unfunded/fully insured now would be required to file a Form 5500, a Schedule J, and, if applicable, a Schedule A. Plans that are unfunded pay some or all of their benefits out of the plan sponsors’ general assets, which exempts them from state insurance regulation, making the DOL their sole regulatory agency. Because such small plans are not currently required to file the Form 5500 Annual Return/Report, there is no comprehensive and direct source of data about the number and characteristics of these plans. Further, because these plans are small, they are more susceptible to financial difficulties. Because of these concerns, the DOL

believes that it is important to have more detailed benefit, financial, and compliance information for “unfunded” plans that are self-insured or partially self-insured than for those small plans that are fully insured. These plans would be required under the proposal to file the complete Form 5500 and Schedule J and, if applicable, Schedule A.

Plans that provide group health benefits that have fewer than 100 participants that are fully insured would be required to answer only limited questions on both the Form 5500 and Schedule J, and would not be required to file any other schedules or attachments. Collecting this limited data on fully insured plans providing group health benefits that have fewer than 100 participants would give the DOL basic information to identify health insurance plans they regulate and allow them to better monitor plan trends and activities, but minimize the reporting burden from more detailed reporting that is more generally required on the Form 5500, Schedule A, Schedule J, and any other applicable schedules that comprise the Form 5500 Annual Return/Report.

(5) *Improving compliance under ERISA and the Code through selected new questions regarding plan operations, service provider relationships, and financial management of the plan.*

In an era of limited financial resources, the Agencies must pursue new and creative ways to maximize the efficacy of their enforcement budgets. Improving compliance under ERISA and the Code reduces the need for costly enforcement actions. Focusing filer compliance through selected new questions regarding plan operations, service provider relationships, and financial management of the plan under ERISA and the Code can also have the effect of allowing the Agencies’ enforcement staff to work more efficiently, and therefore better protect plan participants and beneficiaries.

Analysis of Benefits and Costs

The DOL believes that the benefits to be derived from this proposal, including the amendments to the reporting regulations and the forms revisions, would justify their costs. The DOL further believes that these revisions to the existing reporting requirements will enhance protection of ERISA rights by improving the effectiveness of enforcement actions and by improving the quality of data used for research and policymaking purposes. The DOL conducted a detailed assessment of the costs and benefits of these changes.

Benefits

As stated previously, the proposal pursues five main objectives. The various changes to the forms, schedules, instructions, and DOL regulatory exemptions and requirements are together intended to integrate these various objectives, and all of the other goals together are proposed with the intention of supporting the move towards fuller transparency and data mineability overall. Fuller transparency could increase participant trust levels, which could encourage pension plan participants to increase their retirement savings and welfare plan participants to use benefits when needed, resulting in strengthened retirement security and improved public health. The benefits of each of the five main objectives are discussed below.

(1) *Modernizing financial information.*

As stated previously, the financial information, particularly the asset/liability statement, contained in the current Schedule H (Large Plan Financial Information), Schedule I (Small Plan Financial Information), as well as the more recently established Form 5500-SF, is based on data elements that have remained largely unchanged since the Form 5500 Annual Return/Report was established in 1975. Many investments in alternative and hard-to-value assets and held in collective investment funds do not fit squarely into any of the existing reporting categories on Schedule H. As discussed previously, the GAO has expressed concerns that many investments with widely varying risk, return, and disclosure considerations are often reported in the catch-all “other plan asset” category.⁴¹ GAO also noted that the plan asset categories on the Schedule H are not representative of current plan investments, and provide little insight into the investments themselves, the level of associated risk, or structures of the investments.⁴² The DOL-OIG also recommended that the Agencies revise the Form 5500 Annual Return/Report to improve reporting of hard-to-value assets and alternative investments.⁴³

As part of their overall evaluation of how best to restructure financial reporting to maximize usable data while limiting burden increases, the Agencies also concluded that research and

⁴¹ GAO *Targeted Revisions Could Improve Usefulness of Form 5500 Information*, at 12.

⁴² *Id.* at 11-12.

⁴³ *EBSA Needs to Provide Additional Guidance and Oversight to ERISA Plans Holding Hard-To-Value Alternative Investments*, Department of Labor Office of Inspector General Report Number: 09-13-001-12-121 at 4, 18, and 19.

enforcement efforts could be enhanced by updating the asset reporting categories and by standardizing Schedule H Line 4i attachments. Accordingly, the changes the Agencies are proposing to make to the asset breakouts on the balance sheet and income statement components of Schedule H would make the asset reporting more consistent with the current financial marketplace and enable the Agencies, plan sponsors, and participants and beneficiaries to develop a more accurate and detailed picture of the types of assets held by plans, including hard-to-value assets and alternative investments and investment held through collective investment vehicles. The proposed changes take into account many of the sophisticated and complex investments that do not fit neatly into any of the existing program categories, which would lead to consistent reporting by filers and more transparency by limiting the consolidation of many diverse investments into the catch-all “Other” category on the balance sheet on the Schedule H.

The Agencies also opted to revise the Schedule H Line 4i Schedules of Assets attachment into two, distinct structured data attachments. Doing so will produce more consistent data, reduce confusion over the proper format to provide required data, and enable data mineability. Moreover, as discussed in detail earlier in this document and the Notice of Proposed Forms Revisions published simultaneously, the structural, data element and instruction changes to the Schedule H, Line 4i Schedule of Assets Held for Investment the Agencies are proposing will allow the Form 5500 Annual Return/Report to be better used as a tool to evaluate the year-to-year performance of a plan’s individual investments. The creation of more detailed and structured Schedule H, Line 4i Schedules of Assets is a specific recommendation of the DOL–OIG and the GAO.⁴⁴ The proposed changes to the Schedule H Line 4i Schedules of Assets, in addition to better meeting the needs of the Agencies, other government users, and other end users of the data, should also serve to address the shortcomings identified in these reports.

The proposed changes made to DFE reporting would ensure that the Agencies, plan fiduciaries, plan service providers, and other users of data have the tools to create a more complete

picture of plans’ investments in pooled investment vehicles. Similarly, the proposed changes to the financial information reported by small plans would improve the utility of the Form 5500 Annual Return/Report as a tool to obtain a meaningful picture of small plan investments in hard-to-value and alternative investments as suggested by GAO and other government oversight and advisory bodies.⁴⁵

Although these changes would result in additional reporting for certain small plans, the Agencies do not expect that small plans with simple investment portfolios would experience a significant increase in their annual reporting burden. Small plans with complex portfolios that include hard-to-value or alternative investments should have more transparent financial statements which may require somewhat more complex financial reporting obligations. In light of changes in the financial environment and increasing concern about investments in hard-to-value assets and alternative investments, the Agencies believe that requiring separate financial information regarding hard-to-value investments is important for regulatory, enforcement, and disclosure purposes.⁴⁶

A major overriding objective of these proposed forms revisions is to modernize the Form 5500 Annual Return/Report information collection so that the presentation of plan trust financial and balance sheet information is a more transparent and detailed reflection of the investment portfolios and asset management practices of employee benefit plans. The basic objective of general financial reporting is to provide information about the reporting entity for the Agencies’ enforcement, research, and policy formulation programs, for other federal agencies, Congress, and the private sector in assessing employee benefit, tax, and economic trends and policies; and for plan participants and beneficiaries and the general public in monitoring employee benefit plans. Modernizing the financial reporting instruments will bring greater transparency to plan transactions, which will enhance the efficiency of the Agencies’ enforcement efforts. Specifically, the Agencies will be better able to target their enforcement efforts, which will reduce the number of

investigations involving plans that are not engaging in problematic activities.

Additionally, ERISA Section 513(a) authorizes and directs the Secretary of Labor and EBSA to conduct a robust research program on employee benefits. The Form 5500 Annual Return/Report is one of the leading sources of data used in this research program. Modernizing the financial information reported on the Form 5500 Annual Return/Report will improve the quality of the research conducted by internal and external researchers. This improved research will, in turn, improve the quality of policy decisions made by DOL and other governmental policymakers that rely on the Form 5500 Annual Return/Report data.

(2) *Updating fee and expense information on plan service providers with a focus on harmonizing annual reporting requirements on Schedule C with DOL’s final disclosure requirements at 29 CFR 2550.408b–2.*

As previously discussed, the proposal would harmonize the Schedule C rules with the DOL’s regulations at 29 CFR 2550.408b–2. The Agencies believe that requiring reporting of all indirect compensation (rather than continuing the exemption from reporting for “eligible indirect compensation”), but limiting indirect compensation reporting to the service providers and types of compensation that are required to be disclosed under the ERISA section 408b–2 regulation will provide a particular benefit to plan record keepers. The information required to be reported would be an after the fact reporting of fees that should have been disclosed in advance under the ERISA section 408b–2 regulation. Because the ERISA section 408b–2 regulation requires covered service providers to provide plan administrators the information they need to satisfy their Form 5500 Annual Return/Report obligations with respect to compensation information, the additional burden should be limited to entering the data on the Form 5500 Annual Return/Report.⁴⁷

Currently, given that some significant component of indirect compensation is not reported because it is permitted to be treated as “eligible indirect compensation,” and the fact that some filers report formulas instead of dollar amounts, the Agencies and public only have limited information regarding the total compensation that service providers receive and that affects plans’ finances and potentially involves conflicts of interests among service providers. Almost 90 percent of 2013

⁴⁵ Id.

⁴⁶ Although such small plans would be required to complete the Schedule H instead of the Schedule I, including the Schedule H Line 4i(1) and 4i(2) Schedules of Assets, eligible small plans, as they can under the current rules, would still be eligible for a waiver of the annual examination and report of an IQPA under 29 CFR 2520.104–46.

⁴⁷ See 29 CFR 2550.408b–2(c)(iv).

⁴⁴ See *EBSA Needs to Provide Additional Guidance and Oversight to ERISA Plans Holding Hard-to-Value Alternative Investments*, at 17; *Private Pensions: Targeted Revisions Could Improve Usefulness of Form 5500 Information*, at 37.

Schedule C filers reported at least one service provider receiving some amount of eligible indirect compensation, and nearly 70 percent of 2013 Schedule C filers reported at least one provider receiving *only* eligible indirect compensation. Filers identifying at least one service provider as receiving some amount of eligible indirect compensation on their Schedules C, according to the overall Form 5500 data, report holding roughly two-thirds of all pension assets. Thus, the limited “eligible indirect compensation” reporting impacts the data relating to service provider fees in connection with the servicing and management of a significant amount of assets. In addition, analysis of these data also indicates that almost 50 percent of Schedule C filers report at least one service provider who provides a formula instead of an explicit or estimated amount of compensation. These filers report holding almost 40 percent of all pension assets. Providing only a formula without an actual or estimated dollar amount of the compensation makes it very hard for plan sponsors or participants to identify the exact amount of compensation.

The proposed rules and the subsequent reported information would make it possible to get a much better understanding on the fees that were transferred between service providers in the form of indirect compensation, therefore allowing plan sponsors and participants to assess the fees that they are incurring. The Agencies anticipate that the increased transparency under the proposal would likely lead to increased competition in the service provider market.

Aligning the Schedule C with ERISA section 408b–2 disclosure should benefit the regulated community by clarifying and streamlining the information reported on the Schedule C, which should reduce filer confusion, and in turn reduce any filer burden caused by the confusion. The updated service provider information will also improve targeting in the Agencies’ enforcement efforts, be a resource for independent researchers to identify fee trends, and help policymakers identify opportunities to make regulatory adjustments.

The proposed rule would also require small pension plans that are not eligible to file the Form 5500–SF and welfare plans that provide group health benefits that are not unfunded or insured (*e.g.*, funded using a trust) and have fewer than 100 participants to file Schedule C. Currently, only large plans (for welfare plans, only large plans that are not unfunded or insured) must file a Schedule C, thus a large portion of plans

do not disclose service provider compensation, except total administrative expenses, which includes direct compensation to service providers.⁴⁸ The Agencies believe that the ideal solution for enforcement, research, policymaking, and participant monitoring purposes would be for all indirect compensation to be required to be reported, but recognize the burdens small plans face in complying with disclosure obligations. The Agencies therefore propose to require small pension plans to file Schedule C only if they do not meet the eligibility conditions for filing the Form 5500–SF, which generally would be those pension plans that are invested in alternative or hard-to-value assets. The Agencies propose to require welfare plans that offer group health benefits with fewer than 100 participants to file Schedule C only if they are funded using a trust. This makes the reporting requirements consistent with those for other welfare plans that are funded using a trust that are required to file the Form 5500. Self-insured plans are more susceptible to experience financial difficulties than fully insured plans. Requiring these small plans to file a Schedule C would address some of the GAO’s concerns that not all critical information on indirect compensation is being reported to the Agencies.⁴⁹

(3) Enhancing mineability of the data filed on the Form 5500 Annual Return/Report.

As stated previously, a key component of the proposal is to make it easier and more efficient to use the data from the Form 5500 Annual Return/Report for research, policy analysis, and enforcement purposes. The primary way the Agencies propose to enhance the mineability of Form 5500 Annual Return/Report data is by structuring and standardizing the questions on the forms and schedules and structuring certain information currently required to be reported in the form of a nonstandard attachment to the filing. This will improve the integrity of the collected data and allow the Agencies and others to compare, aggregate, and analyze these data.

⁴⁸ “Direct” compensation is included as an administrative expense item on both the Form 5500–SF and on Schedule H, but it is a total and is not linked to payments to specific service provider. Because it is not a “balance sheet” item, indirect compensation is not reported as part of the financial statements.

⁴⁹ See GAO *Targeted Revisions Could Improve Usefulness of Form 5500 Information* at 25–26 (“Given these various exceptions to fee reporting requirements, Schedule C may not provide participants, the government, or the public with information about a significant portion of plan expenses and limits the ability to identify fees that may be questionable.”)

The Agencies have identified a number of areas where the current method of reporting information impedes data usability and are proposing several changes to facilitate the efficient use of Form 5500 Annual Return/Report data. Data from Schedule H Line 4i (Schedule of Assets), for example, is currently not available in a standardized electronic format and would be very useful for monitoring the performance of plan investments. The proposed rules would require the Schedule H Line 4i, Schedules of Assets, to be filed in a standardized electronic format, which will allow them to be searched and matched to performance data through common software programs. As a result, the Agencies and the public would have much less difficulty accessing key information about the plan’s investments. Additional improvements in data mineability and plan monitoring also would be realized from the proposal’s requirement that other currently unstructured data or new elements also be collected as structured data under the proposal, including the lists of employers participating in multiple-employer and controlled group plans required to be attached to the Form 5500 Annual Return/Report or Form 5500–SF, the Schedule H, Line 4a Schedule of Delinquent Contributions, and Schedule H Line 4j Schedule of Reportable Transactions.

Data mineability also would be improved by the proposal’s requirement that some data would be reported as text fields instead of as attachments. This would increase the accessibility of data. Similar to the proposed specific data elements for the Schedule H Line 4i Schedules, which replace a suggested format for an unstructured attachment, the Agencies believe, based on their own use of the data to support the research, policy, and oversight efforts of the Agencies, and input from other end users, that data mineability will be enhanced by requiring the use of text fields on the face of the schedules instead of having information filed as non-standard attachments.

Another limitation on data mineability and usability of the current Form 5500 Annual Return/Report is that actuarial information is reported in the form of PDF attachments to the Schedules MB and SB, rather than on the face of the actuarial schedules. Therefore, as discussed above, the proposal would expand data elements on actuarial schedules including information previously reported on unstructured attachments. If questions are directly answered on structured forms and schedules, like the Form 5500

Annual Return/Report and the listed schedules (as opposed to non-standard attachments) the data are “machine-readable” in the 5500 data base, and computer programs can be written to read the data sets created by DOL. This would make more readily searchable and usable actuarial information essential to the Agencies’ enforcement efforts and in their ability to target plans with likely compliance issues. Furthermore, the availability of the data would enhance the ability of private-sector auditors using the information to validate a plan actuary’s calculations. The data would also provide new opportunities for research. There is no source of system-wide data on defined benefit pension plan participants with age, service, and average benefit levels. The availability of such data would allow for more refined projections of future coverage and benefits adequacy for plan participants and beneficiaries. As more of these data are collected over the years, trends in plan coverages and benefits could more easily be analyzed and identified.

The proposed rules make an additional change to reporting requirements that is expected to make filing some of the plan characteristics easier and more reliable. Instead of having to report all applicable plan characteristic codes under one line item, the proposal would ask for this information grouped by topic. Currently, some filers report an incomplete picture of their plan characteristics. For example, some filers have characteristics that should warrant supplying five or more codes, but instead they only supply two or three. It is expected that the new questions will be easier for filers to respond to and that the data reported will be more accurate.

In summary, these improvements in data mineability will make it more efficient to conduct Form 5500 Annual Return/Report data analysis and to use the data to monitor plans, and identify trends.

(4) *Requiring reporting by all group health plans covered by Title I of ERISA, including adding a new Schedule J (Group Health Plan Information).*

As discussed above, the proposal would eliminate the current exemption from reporting for certain group health plans covered by Title I of ERISA so that all group health plans covered by Title

I of ERISA will be required to file a Form 5500 Annual Return/Report. Currently, generally most plans that provide group health benefits with fewer than 100 participants that meet the conditions of existing regulations are exempt from filing the Form 5500 Annual Return/Report, because they are unfunded, fully insured, or a combination of unfunded/fully insured. Requiring such plans to file would fill an information gap, which would allow the DOL to effectively meet its statutory obligation to enforce the ERISA requirements that apply to group health plans. Currently, the DOL must rely on complaints from plan participants as its primary source to uncover ERISA violations in small plans that are exempt from annual reporting. Eliminating this exemption would provide the DOL with the information necessary to be more proactive and systematic in identifying violations and in providing compliance assistance. The DOL would be able to track total health plan counts and coordinate its enforcement efforts relating to plans providing benefits through common issuers. For example, fully-insured plans using the same insurance provider often contain provisions that are similar. By requiring plans providing group health benefits, that are unfunded, fully insured, or combination unfunded/fully insured and have fewer than 100 participants to identify themselves and the insurance carrier through which they are insured, the DOL should be able to better determine which plans might be affected by noncompliant plan provisions. The DOL also could better coordinate its enforcement efforts with affected service providers and other Federal and State agencies.

This information also would enhance the DOL’s ability to develop health care regulations, conduct policy analysis and research with respect to participant trends, and comply with the Affordable Care Act requirement to report to Congress annually regarding self-insured plans.

(5) *Improving compliance under ERISA and the Code through selected new questions regarding plan operations, service provider relationships, and financial management of the plan.*

Improving compliance under ERISA and the Code through selected new questions will bring two main benefits.

First, these compliance questions will serve as a form of education for plan administrators and a self-compliance check. The Agencies believe that the new compliance questions under the proposal, as is true of the existing compliance questions, would help plan administrators better understand and monitor required plan behavior and would remind plan administrators to comply with requirements under ERISA and the Code, and thus will improve protections for participants and beneficiaries.

Second, these compliance questions will allow the Agencies, with their limited enforcement budgets, to engage in more sophisticated targeting and compliance assistance. Improvements in data management technology now enable the Agencies to create plan risk profiles to improve the effectiveness of investigations. These compliance questions, including questions on audit and oversight requirements, nondiscrimination, administrative expenses, participant contributions, and automatic enrollment, will improve the risk profiles, which will further enable the Agencies to use their enforcement resources in the most efficient way possible.

Costs

The costs for plans to satisfy their annual reporting obligations would increase under these proposed regulations relative to the current regime.⁵⁰ As shown in Table 2 below, the aggregate annual cost of such reporting under the current regulations and forms is estimated to be \$488.1 million annually, shared across the 816,000 filers subject to the filing requirement. The DOL estimates that the regulations and forms revisions proposed today will impose an annual burden of \$817.0 million on 2.97 million filers, for a total increase of \$328.8 million annually.

⁵⁰ The DOL believes that the annual cost burden on filers would be higher still in the absence of the proposed regulations enabling use of the Form 5500 Annual Return/Report in lieu of the statutory requirements. Without the Form 5500 Annual Return/Report, filers would not have the benefits of any regulatory exceptions, simplified reporting, or alternative methods of compliance, and standardized and electronic filing methods.

TABLE 2—SUMMARY OF ANNUAL COSTS: CURRENT REQUIREMENTS VS. PROPOSED REQUIREMENTS

	Total annual costs (millions)	Total annual burden hours (thousands)
Current reporting requirements	\$488.1	4,378.5
Change due to Revisions	328.8	2,949.0
Proposed Reporting Requirements	817.0	7,327.5

Because this proposal makes substantial changes to the requirements currently in effect, filers also will experience some one-time transition costs. The DOL estimates that plans will require twice as long to supply the new data elements during the first year, relative to subsequent years, and will therefore encounter one-time transition costs of \$328.8 million.

The DOL has analyzed the cost impact of the individual revisions. In doing so, the DOL 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, nearly all pension plans that are required to file the Form 5500 and related schedules, including ESOPs, would be affected by the changes to the Schedule H. ESOPs, however, would be affected not only by the proposed Schedule H changes, but also by the proposed restoration of Schedule E. The DOL quantified the individual revisions as described below and shown in Table 3.

(1) *Revised financial reporting on the Schedule H and elimination of the Schedule I.*

Revising the Schedule H, including the revisions to the Schedule H Line 4i Schedules of Assets, and eliminating the Schedule I will increase net costs. The DOL estimates that the net effect of these changes will be to increase the total burden by 535,400 hours. These changes, in conjunction with revisions to the reporting requirements for DFEs, discussed below, will decrease the number of filers reporting on Schedule H and/or Schedule I from 115,100 to 114,600. Applying an hourly labor rate of \$114.95 for service providers and \$98.25 for plan sponsors, the DOL estimates that this revision will increase the aggregate annual reporting cost by an estimated \$57.6 million.⁵¹

(2) *Required reporting by all group health plans covered by Title I of ERISA, including addition of a new Schedule J (Group Health Plan Information).*

⁵¹ The appropriateness of the labor rates used in the calculations and assumptions are discussed in the Technical Appendix, which can be accessed at the DOL's Web site at www.dol.gov/ebsa.

Currently, about 54,000 welfare plans that provide group health benefits file the Form 5500 Annual Return/Report and applicable schedules. Of these 54,000 filers, approximately 48,000 are welfare plans that provide group health benefits with 100 or more participants and the rest are welfare plans that provide group health benefits with fewer than 100 participants. We estimate that this proposed change will increase the number of welfare plan with group health benefit filers to approximately 2.2 million. Of these 2.2 million welfare plans with group health benefits, 1.9 million welfare plans with group health benefits are expected to be fully insured plans with fewer than 100 participants, while 289,000 welfare plans with group health benefits are expected to be unfunded, combination unfunded/fully insured, or funded with a trust with fewer than 100 participants, and approximately 48,000 welfare plans with group health benefits are expected to have 100 or more participants.

The 1.9 million plans that provide group health benefits, have fewer than 100 participants, and are fully insured would be required to complete lines 1–5 on Form 5500 and lines 1–8 on Schedule J. The 289,000 plans that provide group health benefits, have fewer than 100 participants, and are unfunded, combination unfunded/fully insured, or funded with a trust would be required to file a Form 5500, Schedule J, and Schedule A, if applicable, and if they were already required to file a Form 5500 Annual Return/Report (*i.e.*, funded with a trust), they would be required to attach any other applicable schedules. The 48,000 plans that provide group health benefits and have 100 or more participants that already are required to file a Form 5500 Annual Return/Report would be required to attach a Schedule J in addition to any other forms and schedules that they are currently required to submit.

The DOL estimates that requiring plans that provide group health benefits, have fewer than 100 participants, and are fully insured to complete only lines 1–5 of the Form 5500 and lines 1–8 of the Schedule J will increase total burden by 623,000 hours and increase the aggregate annual reporting cost by \$69.6

million. Requiring all other plans that provide group health benefits and have fewer than 100 participants (unfunded, combination unfunded/fully insured, or funded with a trust) and all plans that provide group health benefits and have 100 or more participants to file a Form 5500 Annual Return/Report, Schedule J, and any other required schedules and attachments will increase the total burden by 349,100 hours for the Form 5500 Annual Return/Report and 1.2 million hours for the Schedule J. The aggregate annual reporting cost associated with requiring all other group health plans with fewer than 100 participants (unfunded, combination unfunded/fully insured, or funded with a trust) and all group health plans with 100 or more participants to file a Form 5500 Annual Return/Report, Schedule J, and any other required schedules and attachments is \$39.0 million for the Form 5500 Annual Return/Report and \$133.0 million for the Schedule J.

Based on the foregoing, the DOL estimates that, in total, group health plan annual reporting burden will increase by approximately 2.2 million hours and the aggregate annual reporting cost will increase by \$241.6 million.

(3) *Restored Schedule E.*

Approximately 6,700 employee stock ownership plans (ESOPs) will be subject to increased reporting on the restored Schedule E. As discussed above, the Schedule E is intended to provide increased reporting related to areas of concern specific to ESOPs. The DOL estimates that the restored Schedule E will add approximately 22,000 hours of burden and an additional \$2.5 million of aggregate annual reporting cost.

(4) *Revised Schedule C.*

As discussed above, Schedule C revisions are intended to harmonize the Schedule C reporting of indirect compensation with the disclosures required under the DOL's final rules on service provider compensation at 29 CFR 2550.408b–2, expand the Schedule C reporting requirement to all pension plans required to file the Form 5500 regardless of size, expand the Schedule C reporting requirement to welfare plans that offer group health benefits with fewer than 100 participants if they are

funded with a trust, clarify the indirect compensation reporting requirements, and improve the information plan officials receive regarding amounts received by plan service providers. The expanded reporting requirements are expected to increase the number of Schedule C filers from approximately 82,400 to approximately 100,200. Reporting burden for Schedule C filers is expected to increase by 116,600 hours, *i.e.* roughly an hour per filer, which will produce an additional \$12.9 million of annual aggregate reporting cost. Of this \$12.9 million increase, \$5.3 million is borne by existing filers and is attributable to eliminating the “eligible indirect compensation” reporting relief;⁵² \$7.2 million is borne by filers newly required to attach a Schedule C;⁵³ and \$0.4 million is borne by existing filers and is attributable to all other changes to the Schedule C.⁵⁴

As indicated in the regulatory impact analysis in the final publication of the regulation at 29 CFR 2550.408b–2, the DOL believes that more transparency of service provider compensation serves to discourage harmful conflicts, reduce information gaps, improve fiduciary decision-making about plan services, enhance value for plan participants, and increase the DOL’s ability to redress abuses committed by service providers. 77 FR 5632, 5650 (Feb. 3, 2012). As is true with the improved disclosure required under the DOL’s regulation at 29 CFR 2550.404a–5, increased transparency and ability to compare fees

(and, on the improved balance sheet and schedules of assets) are expected to reduce participants’ time otherwise used for searching for fee and other investment information and to produce substantial additional benefits, in the form of improved investment decisions, although the DOL has not been able to quantify this effect. 75 FR 64910, 64928 (Oct. 20, 2010).

(5) *Changes to reporting requirements and methods for direct filing entities (DFEs), added compliance questions, and all other changes.*

As discussed earlier in the preamble, the rule proposes to make several changes to the DFE filing requirements. For example, the Agencies propose eliminating the concept of Master Trust Investment Accounts (MTIA) reporting and require reporting by a master trust instead. The proposal also would change the filing requirements for a CCT or PSA in which the plan invests by requiring the plan to report the interests in the CCT or PSA on the Schedule H balance sheet (Part I, Line 1b) regardless of whether the PSA or CCT in which the plan invests files a Form 5500 Annual Return/Report as a DFE, changing how assets held through DFEs are reported on the proposed Schedule H Line 4i(1) Schedule of Assets Held for Investment, and eliminate the requirement for plans to file the Schedule D, since the DFE information that had been on Schedule D would now be on plans’ Schedule H Line 4i(1) Schedule of Assets Held for Investment. The net effect of these

changes to DFE reporting is to reduce the number of Schedule D filers from 61,100 to 8,900, with smaller reductions in the filing of other schedules discussed elsewhere. Reporting burden associated with DFEs is expected to fall by 94,200 hours, which will produce a \$10.1 million reduction in aggregate reporting cost.

Additionally, the DOL proposes a series of compliance questions primarily on the Form 5500, Form 5500–SF, and Schedule R. Other miscellaneous changes throughout the forms and schedules include requiring new information on employer matching contributions, employee participation rates and plan design for defined contribution plans, and changes to the reporting on Schedule G.

Some of these compliance questions and other miscellaneous changes add burden, while others reduce burden. Together, the DOL estimates that the net effect of these various changes would add approximately 219,300 hours of aggregate reporting burden, which will produce an additional \$21.5 million in aggregate reporting cost. In combination with the changes to DFE reporting discussed above, these changes will reduce the aggregate number of forms and schedules filed by 52,500.

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 affected filings.

TABLE 3—SUMMARY OF CHANGES TO THE REPORTING REQUIREMENTS

Revisions	Change in costs (millions)	Change in burden hours (thousands)	Number of filers under current requirements (thousands)	Number of filers under proposed requirements (thousands) ⁵⁵	Δ Cost per affected filer by proposed requirements
Elimination of Schedule I & Change in Schedule H	\$57.6	535.4	115.1	114.6	\$502
Schedule C	12.9	116.6	82.4	100.2	128
DFE Reporting Changes (Including changes to Schedule D)	– 10.1	– 94.2	61.1	8.9	– 1,137
Schedule E	2.5	22.0	0.0	6.7	374
Completion of lines 1–5 on Form 5500 and lines 1–8 on Schedule J by fully insured GHPs with fewer than 100 participants	69.6	623.0	0.0	1,869	37
Completion of Form 5500 by GHPs with fewer than 100 participants that are unfunded, combination unfunded/fully insured, or funded with a trust and GHPs with 100 or more participants	39.0	349.1	54.1	336.9	116
Completion of Schedule J by GHPs with fewer than 100 participants that are unfunded, combination unfunded/fully insured, or funded with a trust and GHPs with 100 or more participants	133.0	1,179.2	0.0	336.9	395

⁵² As discussed previously, the DOL is eliminating the limited reporting option for “eligible indirect compensation.” The DOL believes that many of the costs associated with gathering and organizing data necessary for expanded service provider reporting, to the extent that the information was not already required to be provided to and kept by the plan administrator for

“eligible indirect compensation” that did not have to be reported, have already been accounted for as part of the RIA for the ERISA section 408b–2 rule. Therefore, these costs reflect only the incremental increase of reporting service provider compensation to the Agencies. Under the proposal, indirect compensation reporting would be limited to the types of service providers and compensation under

ERISA section 408b–2, in contrast to all service providers currently having to report on the Schedule C receipt of indirect compensation.

⁵³ For new filers, this includes the costs of all other changes to the Schedule C.

⁵⁴ Costs may not add up to the total due to rounding.

TABLE 3—SUMMARY OF CHANGES TO THE REPORTING REQUIREMENTS—Continued

Revisions	Change in costs (millions)	Change in burden hours (thousands)	Number of filers under current requirements (thousands)	Number of filers under proposed requirements (thousands) ⁵⁵	Δ Cost per affected filer by proposed requirements
All Other Revisions ⁵⁶	24.4	217.9	1,076.7	1,024.2	24
Total (Unique Filers)	328.8	2,949.0	816.3	2,967.5	111

The proposal does not otherwise alter reporting costs. With the exception of most welfare plans that provide group health benefits, plans currently exempt from annual reporting requirements (such as certain simplified employee pensions (SEPs) and small unfunded, fully insured, or combination unfunded/fully insured welfare plans that do not provide group health benefits) would remain exempt. Also, plans eligible for limited reporting options (such as certain IRA-based pension plans) would continue to be eligible. The revised Form 5500 Annual Return/Report would retain the structure that is familiar to individual and corporate taxpayers—the form would continue to contain basic identifying information, participant counts, and plan characteristics, along with a checklist of the schedules being filed.

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 eligible to file the Form 5500–SF should incur far lower costs than a large, multiemployer defined benefit pension plan that holds multiple insurance contracts, engages in reportable transactions, and has many service providers that each received over \$5,000 in compensation. The DOL separately considered the cost to different types of plans in arriving at its aggregate cost estimates. The DOL’s

basis for these estimates is described below.

Assumptions Underlying this Analysis: The DOL’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 will be required to file the Form 5500 Annual Return/Report. The DOL has used a “status quo” baseline for this analysis, assuming that the world absent the proposed regulations will resemble the present.⁵⁷

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 since 1999. 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 DOL May 25, 1999.⁵⁸ 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. The DOL has adjusted these unit costs since 1999 to account for changes to the forms and schedules and increases in the cost of labor and service providers since MPR developed the initial data.

For this forms revision, the DOL used the adjusted MPR unit cost data for pension and non-health welfare plans. The DOL developed the unit cost data for group health plans using the best available data. To develop unit costs for DFEs, the DOL created weighted averages of the unit costs for plans.

To obtain filer counts for pension plans, non-health welfare plans, and DFEs, the DOL used historical counts of Form 5500 Annual Return/Report filers

tabulated by type and reported characteristics. For counts of group health plan filers, the DOL used data from the Medical Expenditure Panel Survey, Insurance Component (MEPS–IC) and Census of Business data.

The MEPS–IC is an annual survey of establishments collected by the Agency for Healthcare Research and Quality (AHRQ) about employer sponsored health insurance. AHRQ uses two sources to draw their data: (1) A random sample, from the Census Bureau, of private-sector business establishments with annual payroll greater than zero; and (2) a list of employers or other insurance providers identified by the Medical Expenditure Panel Survey, Household Component respondents who report having private health insurance. In 2013, approximately 39,000 private-sector establishments were surveyed.

In 2003, DOL began using the MEPS–IC as a basis for estimating the number of health plans. The number of plans was based on the share of the total number of establishments that offer health insurance by size. DOL then attempted to correct for establishments that offer multiple health plans by making a reasonable assumption that the share of establishments that reported that they “offer 2 or more plans” offered two distinct plans. Finally, DOL attempted to control for multiple establishments covered by the same plan sponsor by using the Census of Business ratio of establishment-to-firms and dividing the total number of establishment plans by this ratio to produce an estimate of the number of health “plans” which has been consistently around 2.5 million over the years.

The DOL modeled its approach to calculating burden on the approach used during the 2009 forms revision. Aggregate burden estimates were produced in both revisions by multiplying the unit cost measures by the filer count estimates. The methodology is described in broad terms below.⁵⁹

⁵⁹ Further details about the approach are explained in the Technical Appendix, which can be

⁵⁵ The proposed change eliminating the concept of MTIA reporting and requiring reporting by a master trust instead, whose burden change is taken into account in the DFE Reporting Changes row, produces a reduction in the number of schedules included in filings. The change in the number of schedules filed is taken into account in the row specific to the schedule affected.

⁵⁶ The number of filers in this row exceeds the total number of filers because an individual filer counts more than once when it is affected by more than one revision included in the “All Other Revisions” category.

⁵⁷ Further detail can be found in the Technical Appendix, which can be accessed at www.dol.gov/ebsa.

⁵⁸ The MPR report can be accessed at the DOL’s Web site at 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 below, calculations of aggregate cost were prepared for each of 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 universe of filers was divided into four basic types: Defined benefit pension plans, defined contribution pension plans, welfare plans, and DFEs. For the plans, each of these major plan types was further subdivided into multiemployer and single-employer plans.⁶⁰ 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 (less than 100 participants) were divided similarly, except that they were divided into Form 5500-SF eligible and Form 5500-SF ineligible plans, as applicable. Welfare plans were divided into group health plans and plans that do not provide any group health benefits, while plans that provide group health benefits and have fewer than 100 participants were divided into fully insured group health plans and unfunded, combination unfunded/fully insured plans, or funded with a trust group health plans. DFEs were divided into Master Trusts/MTIAs, CCTs, PSAs, 103-12 IEs, and GIAs. For each of these sets of respondents, burden hours per

respondent were estimated for the Form 5500 Annual Return/Report itself and up to seven schedules or the Form 5500-SF (and the Schedule SB, for Form 5500-SF eligible defined benefit pension plans).

We also separately estimated the costs for each of the forms and for each schedule that is part of the Form 5500 Annual Return/Report. When items on a 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 how many items are required by each 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, under the proposal, a small, fully insured group health plan would be required to file only basic questions on the Form 5500 and the proposed Schedule J. By contrast, a large single-employer defined benefit pension plan that is intended to be tax-qualified that has insurance products among its investments and whose service providers received compensation above the Schedule C reporting thresholds would be required to submit an annual report completing almost all the line items of the Form 5500, plus Schedule A (Insurance Information), Schedule SB (Single-Employer Defined Benefit Plan Actuarial Information), Schedule C

(Service Provider 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 report. 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 DOL 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 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.⁶¹ The DOL estimated the burden impact of changes in the numbers of filings and of changes made to the form and the various schedules. The burden estimates use data from the Form 5500 Annual Return/Report for plan year 2013, which is the most recent year for which complete data is available. The Overall Total line in Table 4 shows that the aggregate cost under the current and proposed requirements, respectively, add up to \$488.1 million and \$817.0 million.

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

Type of filer	Number of filers under current requirements (thousands)	Number of filers under proposed requirements (thousands)	Aggregate annual cost under current requirements (millions)	Aggregate annual cost under proposed requirements (millions)
Overall Total	816.3	2,967.5	\$488.1	\$817.0
Large Plans	148.5	148.5	252.4	309.3
DB/ME/100–1,000 LARGE (Non-ESOP)	0.5	0.5	1.6	1.9
DB/ME/1,000+ LARGE (Non-ESOP)	0.8	0.8	2.8	3.1
DB/SE/100–1,000 LARGE (Non-ESOP)	4.8	4.8	13.0	15.2
DB/SE/1,000+ LARGE (Non-ESOP)	2.8	2.8	8.5	9.6
DC/ME/LARGE (100+ Participants) (Non-ESOP)	1.1	1.1	2.1	2.5
DC/SE/LARGE (100+ Partic.) (ESOP)	2.9	2.9	4.0	6.4
DC/SE/LARGE (100+ Partic.) (Non-ESOP)	62.2	62.2	109.2	135.9
Welfare/LARGE (Health)	47.9	47.9	91.7	114.2

accessed at the DOL's Web site at www.dol.gov/ebsa.

⁶⁰ For purposes of this analysis, multiple employer plans were treated as single employer plans.

⁶¹ Some filers are eligible to file the Form 5500-SF, but choose to file a Form 5500 and attach Schedule I and/or other schedules because they find it less burdensome to do so in their particular situation. In an effort to be conservative in

estimating burden, counts of these filings are adjusted to reflect what they would have filed if they had chosen to file the Form 5500-SF.

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

Type of filer	Number of filers under current requirements (thousands)	Number of filers under proposed requirements (thousands)	Aggregate annual cost under current requirements (millions)	Aggregate annual cost under proposed requirements (millions)
Welfare/ME/LARGE (Non-Health)	0.8	0.8	1.1	1.4
Welfare/SE/LARGE (Non-Health)	24.8	24.8	18.5	19.1
Small Plans Eligible for 5500–SF	622.4	622.4	205.8	227.3
DB/Eligible for 5500–SF/SMALL (Non-ESOP)	41.1	41.1	37.6	39.0
DC/Eligible for 5500–SF/SMALL (Non-ESOP)	580.7	580.7	168.0	188.0
Welfare/Eligible for 5500–SF/SMALL (Non-Health)	0.7	0.7	0.2	0.2
Small Plans Not Eligible for 5500–SF	35.9	2,187.7	18.4	266.1
DB/ME/Not Eligible for 5500–SF/SMALL (Non-ESOP)	0.05	0.05	0.06	0.1
DB/SE/Not Eligible for 5500–SF/SMALL (Non-ESOP)	0.9	0.9	1.0	1.8
DC/ME/Not Eligible for 5500–SF/SMALL (ESOP)	0.001	0.001	0.0004	0.002
DC/ME/Not Eligible for 5500–SF/SMALL (Non-ESOP)	0.1	0.1	0.1	0.2
DC/SE/Not Eligible for 5500–SF/SMALL (ESOP)	3.8	3.8	1.8	5.8
DC/SE/Not Eligible for 5500–SF/SMALL (Non-ESOP)	21.5	21.5	10.0	27.9
Welfare/Not Eligible for 5500–SF/SMALL (Fully Insured Health)	0.0	1,869.0	0.0	69.6
Welfare/Not Eligible for 5500–SF/SMALL (Unfunded, Combination Unfunded/Fully Insured, or Funded with a Trust Health)	6.2	289.0	4.1	158.2
Welfare/ME/Not Eligible for 5500–SF/SMALL (Non-Health)	0.1	0.1	0.1	0.2
Welfare/SE/Not Eligible for 5500–SF/SMALL (Non-Health)	3.2	3.2	1.5	2.4
DFEs	9.4	8.9	11.4	14.2
Master Trust Investment Accounts and Master Trusts	1.6	1.0	2.7	2.2
Common Collective Trusts	4.0	4.0	4.3	6.0
Pooled Separate Accounts	3.2	3.2	3.3	4.7
103–12 Investment Entities	0.5	0.5	0.7	0.9
Group Insurance Arrangements	0.1	0.1	0.4	0.4

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—generally fewer than 100 participants.

Uncertainty Within Estimates:

Because the DOL has access to the historical Form 5500 Annual Return/Report filing information, the DOL has good data for the number of pension plans, large welfare plans, including group health plan filers that file the various schedules, and DFEs, and the types of plans those filers represent. However, there is some uncertainty regarding the number of welfare plans that provide group health benefits and have fewer than 100 participants filing. There is also some uncertainty in the unit cost estimates.

There are two main issues with the methodology for counting welfare plans that provide group health benefits. First, MEPS does not differentiate between establishments offering single or multiemployer plans, which implies EBSA over-counts health plans (*i.e.*, a firm offering health insurance is counted as providing benefits to their employees when in fact one multiemployer plan may cover several firms). Second, MEPS–IC respondents that “offer 2 or more plans” are generally referencing plan types (*i.e.* HMO vs PPO) or types of employees (part-time plan vs executive plan) which

would likely be included on a single Form 5500 Annual Return/Report with a single plan number on the form, which again would over-count the EBSA estimate.

With regard to the unit cost estimates, the DOL has no direct measure for the unit costs and uses a proxy adapted from the MPR model, which was developed in the late 1990s. In addition, some uncertainty is inherent in any proposed revision to the existing form, and the level of uncertainty increases where the proposal adds a new requirement, such as the proposed new group health plan filing requirements, rather than revising, deleting, or moving existing items from one schedule to another.

Regulatory Alternatives

Executive Order 12866 directs federal agencies promulgating regulations to evaluate regulatory alternatives. The DOL and the other Agencies have done so in the process of developing this proposal. The following summarizes major alternatives considered, but not proposed.

(1) *Alternative approaches for modernizing financial information*

besides revising the Schedule H and eliminating the Schedule I.

Most of the changes that are being proposed to modernize the financial information that is reported on the form respond to recommendations from GAO, DOL–OIG, TIGTA, ERISA Advisory Council and other advisory groups. Early in the regulatory process, the Agencies considered revising the Schedule I instead of eliminating it, but the Agencies determined that reporting on alternative and hard-to-value assets, which is not required on the current Schedule I, is just as vital for enforcement purposes for small plans as for large plans. Adding reporting on alternative and hard-to-value assets to the financial statement on Schedule I in a meaningful way would have made Schedule H and Schedule I substantially similar. Therefore, to best effectuate the goal of providing more transparency on plan investments in alternative and hard-to-value assets, which is important for understanding the risks to participants in small plans as well as large, the Agencies concluded that eliminating the Schedule I and requiring small plans with alternative and hard-

to-value assets to file the Schedule H was the most appropriate alternative.

(2) *Alternative approaches for group health plan reporting.*

In addition to the proposed annual reporting regime described in detail earlier in this preamble, the DOL considered a variety of other reporting options for group health plans. Among the options considered were (a) using existing IRS data or entering into a data sharing agreement with HHS; (b) requiring all group health plans, including small, fully insured plans to file a complete Form 5500 and Schedule J, along with the other schedules required to be filed currently by group health plans that are not exempt from filing under the existing regulations; and (c) requiring small, fully insured plans to file a Form 5500 and Schedule J every second or third year and requiring those plans to file a registration form in all other years, similar to the Form 5500-C/R structure used prior to 1999.

In an effort to minimize burden and reporting duplication, the DOL reviewed existing IRS health plan data to determine if any of these data would be usable. The DOL concluded that all data collected by the IRS about health plans, such as premium information, minimum essential coverage information, and information on the number of employees covered, is collected specifically to assess Affordable Care Act-related excise taxes and penalties and is subject to a higher threshold for information sharing than most other data collected by federal agencies. Therefore, the DOL concluded that its enforcement, policymaking, and research needs would not rise to the threshold to enable the IRS to share data. The DOL also consulted with HHS to determine whether any of their data might be appropriate; however, HHS does not collect any data on the “plan” level, which is the level of detail needed by the DOL to inform oversight, Congressional reporting, and policy obligations under Title I of ERISA.

The DOL considered requiring welfare plans that offer group health benefits with fewer than 100 participants that are fully insured to file the complete Form 5500 and Schedule J, as would now be required of welfare plans that offer group health benefits with fewer than 100 participants that are unfunded, combination unfunded/fully insured, or funded with a trust. The DOL also considered requiring welfare plans that offer group health benefits with fewer than 100 participants that are fully insured to attach a Schedule A (in addition to the Form 5500 and Schedule J). The DOL decided against both of

these options after weighing the benefits of getting additional data and the likely burdens. DOL also took into account that that the data of most benefit is the proposed new reporting to provide identity, number, and basic funding and benefit structures and types for these plans, which is currently unavailable due to the Form 5500 filing exemption from filing for these plans. More information than that would provide the DOL with somewhat more robust data, but it would not merit the burden of requiring the estimated nearly 2 million small, fully insured plans to report such information, particularly since much of the information is directed towards pension plans and welfare plans that are funded with a trust. For comparison, the DOL estimates that a plan that provides group health benefits with fewer than 100 participants filing a complete Form 5500 Annual Return/Report and a complete Schedule J will incur 5 hours and 14 minutes of burden, while one with fewer than 100 participants answering only limited questions on the Form 5500 and Schedule J will incur only 30 minutes of burden. If the DOL were to require these plans to file a complete Form 5500 and a complete Schedule J, then each of the estimated 2 million welfare plans that offer group health benefits with fewer than 100 participants that are fully insured would incur an additional 4 hours and 44 minutes of burden, at an additional aggregate annual reporting cost of \$927.6 million. Attaching a Schedule A requires 2 hours and 45 minutes of burden for welfare plans that offer group health benefits with fewer than 100 participants. If the DOL were to require welfare plans that offer group health benefits with fewer than 100 participants that are fully insured to attach Schedule A, the additional aggregate annual reporting cost would be \$583.4 million. The DOL concluded that requiring these fully insured plans to file a complete Form 5500 and Schedule J, as well as potentially Schedule A would grant the DOL slightly more robust data in a significantly more burdensome fashion compared with the chosen option.

The DOL decided, however, that plans that provide group health benefits and have fewer than 100 participants that are not fully insured, *i.e.*, some or all of the funding comes from the general assets of the employer or funded through a trust, would have to complete the full Form 5500 Annual Return/Report and the full Schedule J, as well as the Schedule A, if applicable. The filings for plans that provide group health benefits and have fewer than 100

participants that are unfunded, combination unfunded/fully insured, or funded with a trust would generally be similar to those for plans that provide group health benefits and have 100 or more participants that are funded in the same way. Group health plans that are unfunded, combination unfunded/fully insured, or funded with a trust, by definition, are fully or partially self-insured, and the DOL believes that the additional Schedule J information, in particular, is important for the DOL's role with regard to oversight and to development of the self-insured report.

Relatedly, the DOL also considered not requiring plans that provide group health benefits and have fewer than 100 participants that are funded with a trust to file the more detailed financial and service provider information required of large plans that are funded with a trust, in particular the Schedule C and Schedule H. Small welfare plans that provide group health benefits that are funded with a trust are already filing either the Form 5500-SF or the Form 5500 Annual Return/Report and the Schedule I. If a small welfare plan funded with a trust is required to file a Form M-1 or is invested in alternative or hard-to-value assets, it currently would have to file the Form 5500 with a Schedule I, and, if applicable, Schedule A. As with small pension plans required to file the Form 5500 Annual Return/Report, in general, the proposal would have plans that provide group health benefits and have fewer than 100 participants that are funded using a trust file in the same manner as plans that provide group health benefits that have 100 or more participants that are funded using a trust.

With respect to requiring filing of the Schedule C by plans that provide group health benefits and have fewer than 100 participants that are currently not subject to any filing requirement (*i.e.*, unfunded, fully insured, or combination unfunded/fully insured), the Agencies took into account that the existing 408b-2 regulation only applies to pension plans. Large welfare plans that are funded with a trust are already required to file a Schedule C with service provider compensation information, and the difference in information reporting should not be significant. Moreover, small plans that are funded with a trust would already be required to keep as part of their records information on direct compensation, because direct expenses are reported as administrative expenses of the plan. With respect to indirect compensation, given that the class of service providers for whom indirect compensation must be reported is

limited to those identified in 408b-2, a small plan should not have many service providers that would be required to be reported, and so the burden should be minimal. Just as the Agencies believe that it is important to have improved information on small pension plans that invest in alternative and hard-to-value assets, so too, they believe that it is important to have the information for small welfare plans that are funded with a trust that invest in such assets. To the extent that small plans funded with a trust are the plans most likely to experience financial difficulties, having this information should help the Agencies and participants and beneficiaries better monitor the financial stability. Additionally, the Form 5500 Annual Return/Report together with the proposed Schedule J would give basic contribution, claims, benefit structure, and group health compliance information. For these reasons, the DOL concluded that the burden of requiring plans that provide group health benefits and have fewer than 100 participants, other than those funded with a trust, to also file the Schedule C and Schedule H would outweigh the benefits of requiring that these schedules be filed; therefore, those plans are not required to do so.

Finally, the DOL considered requiring small, fully insured plans to file a Form 5500 Annual Return/Report and Schedule J every second or third year and requiring those same plans to file a registration form in alternate years. This option was ruled out due to public comments made during the 1999 Form 5500 Annual Return/Report revisions. Prior to the 1999 revisions, some filers were eligible to file the Form 5500-C/R, which included robust reporting during one year and more limited reporting during the second and third years of a three year cycle. Commenters responding to the proposed 1999 revisions were supportive of the DOL's plan to eliminate Form 5500-C/R, and accordingly eliminate the multi-year cycle of reporting, because they felt that it was difficult to keep track of the schedule.⁶² In an effort to take those comments into account, the DOL decided not to propose a reporting scheme for small, fully insured group health plans that required filing a registration statement in certain years and more expansive information in other years because DOL thought it would likely be confusing, lead to filer error, and inconsistent reporting. The proposal to have the currently exempt plans that provide group health benefits with fewer than 100 participants

complete some or all of the Form 5500 Annual Return/Report and Schedule J was designed to get the minimal amount of information needed for research, policy, and oversight purposes, with the simplest and least amount of reporting.

(3) *Alternative approaches for ESOP-specific reporting.*

In addition to the proposed restoration of the Schedule E, the Agencies also considered whether to add only certain additional ESOP questions to existing schedules, such as the Schedule R, which currently has ESOP questions that were moved to the Schedule R from the Schedule E when the Schedule E was eliminated for 2009 and later filings. As discussed above, before 2009, the Schedule E (ESOP Annual Information) was an IRS-only component of the Form 5500 Annual Return/Report used to collect data on ESOPs. As with other "IRS-only" schedules that were part of the Form 5500 Annual Return/Report, when the DOL mandated electronic filing of the Form 5500 Annual Return/Report as part of EFAST2, the Schedule E was removed from the Form 5500 Annual Return/Report in 2009 due to the statutory limits on the IRS's authority to mandate electronic filing of such information.

The DOL believes that many of the ESOP questions that were eliminated in 2009 because they were "IRS-only" are useful for DOL's enforcement and research programs of DOL, as well as for participants and beneficiaries in ESOPs. In addition, several new questions have been included to provide a more comprehensive view of ESOPs. With the increase in ESOP-specific questions, the use of a single schedule for all ESOP questions would be a more effective and efficient information collection tool for the Agencies than having some questions on the Schedule R and some questions on the Schedule E.

(4) *Alternative approaches for service provider reporting.*

Most of the changes that are being proposed to revise the service provider information that is reported on the form respond to recommendations from GAO, DOL-OIG, TIGTA, and other advisory groups. As discussed previously, the Agencies evaluated whether to require welfare plans that offer group health benefits with fewer than 100 participants to complete the Schedule C. The Agencies also evaluated whether or not to require small pension plans that are required to file the Form 5500 Annual Return/Report to complete the Schedule C, but decided that due to the importance of the information for participants and beneficiaries, plan officials responsible for understanding

compensation arrangements, and the Agencies, the benefit outweighed the burden. Because the majority of pension plan filers are small plans that are eligible to file the Form 5500-SF, the Agencies considered whether to add questions to the Form 5500-SF requiring filers to provide indirect compensation information. The Agencies determined that to minimize burden, rather than adding new questions that were a subset or total of those on the Schedule C, they would simply require defined contribution pension plan Form 5500-SF filers to file the comparison chart under the DOL's regulation at 29 CFR 404a-5. This would provide some information (though not in the form of structured data) regarding service provider compensation with only minimal burden.

(5) *Alternative approaches for DFE reporting.*

Most of the changes that are being proposed to revise DFE reporting respond to recommendations from GAO, DOL-OIG, TIGTA, and others. The Agencies considered a variety of alternative ways to improve DFE reporting. Included in those alternatives was expanding Schedule D reporting to require plans to provide the date of the most recent Form 5500 Annual Return/Report filing of the DFEs in which a plan or investing DFE was invested. The Agencies also considered having both plans and CCTs, PSAs, and 103-12 IEs identify on the Schedule H, Line 4i Schedules of Assets the underlying assets of those DFEs. To minimize burden and duplicative reporting, the Agencies instead chose to eliminate the requirement for plans to complete the Schedule D, and have plans and filing DFE's identify on the plan or filing DFEs Line 4i Schedule of Assets underlying assets by category where the DFE has filed a Form 5500 Annual Return/Report. The assets would be broken out by the plan only if a CCT or PSA did not file a Form 5500 Annual Return/Report. The Agencies also considered whether to require plans that file the Form 5500-SF that participate in DFEs to provide more detailed information on those DFEs to help provide a more complete crosswalk between DFE and plan filings. The Agencies determined that the burden would outweigh the benefit in that regard. In addition, the Agencies considered, but decided against, requiring CCTs and PSAs that file the Form 5500 Annual Return/Report and 103-12 IEs to complete both Schedule H, Line 4i Schedules of Assets. The Agencies determined that having such entities complete just the Line 4i(1) Schedule of Assets Held for

⁶² See 65 FR 5026.

Investment, and not the Line 4i(2) Schedule of Assets Disposed During Plan Year, would adequately address concerns with quality and usefulness of data, while minimizing burden.

Regulatory Flexibility Act—Initial Regulatory Flexibility Analysis

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 following reflects EBSA's Initial Regulatory Flexibility Analysis (IRFA) describing the impact of the rule on small entities and seeking public comment on such impact.

For purposes of this IRFA, the DOL continues to consider a small entity to be an employee benefit plan with fewer than 100 participants, as it has in many previous IRFAs measuring the impact of proposed regulatory actions on small employee benefit plans. 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.*). The basis of EBSA's definition of a small entity for this IRFA 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. While some large employers may have small plans, in general small employers maintain most small plans. The Form 5500 Annual Return/Report impacts any employer in any private sector industry who chooses to sponsor a plan. The DOL is unable to locate any data linking employer revenue to plans to determine the relationship between small plans and small employers in industries whose SBA size standard is revenue-based. For a separate project, the DOL purchased data on ESOPs that file the Form 5500 and on defined contribution pension plans that file the Form 5500-SF from Experian Information Solutions, Inc. The Experian dataset provides the number of employees for the plan sponsor. By merging these data with internal DOL data sources, the DOL determined the relationship between small plans and small employers in industries whose SBA size standard is based on a threshold number of

employees that varies from 100 to 1,500 employees. Based on these data, the DOL estimates that over 97 percent of small retirement plans and over 80 percent of small health plans are sponsored by employers with less than 100 employees. The DOL estimates that over 99 percent of small retirement plans and over 97 percent of small health plans are sponsored by employers with less than 1,500 employees. Thus, the DOL believes that assessing the impact of these proposed rules on small plans is an appropriate substitute for evaluating the effect on small entities. In previous regulations, the DOL has 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 the DOL received no comments suggesting use of a different size standard. The Department solicits public comments on the appropriateness of continuing to use this size standard.

The following subsections address specific components of an IRFA, as required by the RFA.

Need for the rule and its objectives: The DOL is publishing this proposal to amend the regulations relating to the annual reporting and disclosure requirements of section 103 of ERISA simultaneously with the publication of the Notice of Proposed Forms Revisions. The DOL 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 of reporting requirements in order to satisfy these objectives changes over time. As discussed in the Need for Regulatory Action section above, the Form 5500 and the financial statements contained in the current Schedule H (Large Plan Financial Information) and Schedule I (Small Plan Financial Information) are based on data elements that have remained largely unchanged since the Form 5500 Annual Return/Report was established in 1975. Meanwhile, benefit plan designs and practices have evolved over time in response to market trends in labor, financial, health care, and insurance markets, and markets for various services used by plans. In addition, the technologies available to manage and transmit information continually advance. Therefore, it is incumbent on the Agencies to revise their reporting requirements from time to time to keep pace with such changes. The proposed forms revisions, and associated DOL regulatory amendments in the proposal, are intended to calibrate reporting requirements to take into

account certain recent changes in markets, the law (including the Affordable Care Act), and technology, many of which are referred to above in this document.

Description and estimate of number of small entities to which rule will apply:

This proposal increases the number of small plans required to comply with annual reporting requirements by requiring approximately 1.9 million welfare plans that provide group health benefits with fewer than 100 participants that previously were exempt from annual reporting to file a Form 5500 Annual Return/Report, completing lines 1–5 on Form 5500 and lines 1–8 on Schedule J. This proposal also requires approximately 289,000 plans that provide group health benefits and have fewer than 100 participants that are unfunded, combination unfunded/fully insured, or funded with a trust to file a Form 5500 Annual Return/Report, where previously roughly 6,000 were required to do so. In total, approximately 2.81 million small pension plans and plans that provide group health benefits covering fewer than 100 participants would be required to comply with annual reporting requirements, where previously approximately 658,000 were required to do so. As described previously, estimates of the number of small pension plans and small welfare plans that do not offer group health benefits are based on 2013 Form 5500 filing data. Estimates of the number of plans that provide group health benefits and have fewer than 100 participants are based on MEPS-IC and Census of Business data.

Description of projected reporting, recordkeeping, and other compliance requirements of the rule: The reporting requirements applicable to small plans are detailed above and in the associated Notice of Proposed Forms Revision. Almost 89 percent of the 2.81 million small plans subject to the proposed annual reporting requirements can satisfy the requirements through streamlined options.

The 1.9 million welfare plans that provide group health benefits with fewer than 100 participants can fulfill the proposed reporting requirements answering lines 1–5 of the Form 5500 and line 1–8 of the Schedule J. For these plans, annual reporting will require the use of a mix of clerical and professional administrative skills.

Over 581,000 small defined contribution pension plans and small welfare plans that do not provide group health benefits can fulfill the proposed reporting requirements with the Form 5500-SF with no schedules required to be attached. All of these plans are

eligible for the waiver of audit requirements. For such plans, therefore, satisfaction of the applicable proposed annual reporting requirements is not expected to require the services of an IQPA or auditor, but, like the small, fully insured group health plans, will require the use of a mix of clerical and professional administrative skills. Another 41,000 small defined benefit pension plans and money purchase plans will continue to be eligible to use the streamlined 5500-SF; satisfaction of the proposed reporting requirements will require additional services of an actuary and submission of the Schedule SB or Schedule MB, as applicable, and no other schedules.

The remaining 319,000 small pension and welfare plans will not be eligible to use the Form 5500-SF or any other streamlined reporting option. These plans will be required to file the Form 5500 Annual Return/Report, along with any other schedules required for pension plans or welfare plans that are not fully insured group health plans.⁶³ Of these plans, approximately 289,000 are welfare plans that provide group health benefits and are unfunded,

combination unfunded/fully insured, or funded with a trust, 25,000 are defined contribution pension plans, and over 3,000 are welfare plans that do not provide group health benefits. All will require a mix of clerical and professional administrative skills to satisfy the proposed reporting requirements. Fewer than 1,000 small pension plans that are not eligible to use the Form 5500-SF are defined benefit pension plans that will be required to use an actuary and file Schedule MB or Schedule SB in addition to needing a mix of clerical and professional administrative skills to satisfy the proposed reporting requirements.

Satisfaction of the proposed 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 DOL'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 slightly

higher for small pension plans and small welfare plans that are eligible to file the Form 5500-SF and significantly higher for small pension and welfare plans that are not eligible to file the Form 5500-SF (including group health plans). As discussed above, the significant increase for group health plans reflects the elimination of prior reporting exemptions for most plans that provide group health benefits and have fewer than 100 participants. The significant increase for small pension plans and small welfare plans that do not offer group health benefits that are not eligible to file the Form 5500-SF results primarily from the changes to financial and service provider reporting. The DOL notes that for the over 90 percent of plans that are eligible for annual reporting under streamlined options, the per-filer cost under the proposed requirements increases by \$35-37 annually relative to the current requirements.⁶⁴ 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 of filers under current requirements (thousands)	Number of filers under proposed requirements (thousands)	Aggregate annual cost under current requirements (millions)	Aggregate annual cost under proposed requirements (millions)	Annual per filer cost under current requirements	Annual per filer cost under proposed requirements
Defined Benefit Pension—Eligible for 5500-SF	41.1	41.1	\$37.6	\$39.0	\$916	\$951
Defined Benefit Pension—Not Eligible for 5500-SF	1.0	1.0	1.1	1.9	1,150	1,970
Defined Contribution Pension—Eligible for 5500-SF	580.7	580.7	168.0	188.0	289	324
Defined Contribution Pension—Not Eligible for 5500-SF	25.4	25.4	11.8	33.9	484	1,335
Welfare—Non-Health—Eligible for 5500-SF	0.7	0.7	0.2	0.2	289	324
Welfare—Non-Health—Not Eligible for 5500-SF	3.3	3.3	1.5	2.5	455	758
Welfare—Fully Insured Health	0.0	1,869.0	0.0	69.6	0	37
Welfare—Unfunded, Combination Unfunded/Insured, or Funded with a Trust Health	6.2	289.0	4.1	158.2	654	547
Total for All Small Plans	658.3	2,810.1	224.3	493.4	341	176

In comparison to the costs per filer described in Table 5, the 75,000 large pension plans will incur an average cost of \$2,326 under the proposed requirements and the almost 74,000 large welfare plans subject to annual

reporting requirements will incur an average cost of \$1,833 each year.⁶⁵

Table 6 below compares the DOL's estimates of small plans' reporting costs under the requirements in effect prior to this action with those under the new requirements as a percentage of plan

assets for pension plans and welfare plans that do not offer group health benefits and as a percentage of annual health insurance premiums for welfare plans that offer group health benefits to show the impact of the reporting requirement on small plans of differing

⁶³The exact schedules that these plans are required to attach vary based on the plans' specific facts and circumstances.

⁶⁴In the case of the 2.0 million small, fully insured group health plans, the increase in per filer cost is from no cost to \$37 per year.

⁶⁵Average costs for large plans do not include the costs of obtaining the report of an IQPA or an actuarial report, if such a report is required for the plan's specific situation.

sizes.⁶⁶ As shown, group health plans with five or fewer participants that are unfunded, combination unfunded/fully insured, or funded with a trust incur the highest costs as a result of the proposed reporting requirements, incurring an annual reporting cost of 0.998 percent of their annual health insurance premiums. Non-health welfare plans that are eligible to file Form 5500-SF and have between 6 and 10 participants incur the second highest costs under the proposed reporting requirements. These plans' annual reporting cost is 0.561 percent of their plan assets.

TABLE 6—SMALL PLAN REPORTING COSTS UNDER PRIOR AND NEW REQUIREMENTS AS A PERCENTAGE OF PLAN ASSETS OR AGGREGATE ANNUAL HEALTH INSURANCE PREMIUMS

Class of small plan (participants)	Annual per filer cost under current requirements as a percentage of plan assets or aggregate annual health insurance premiums	Annual per filer cost under proposed requirements as a percentage of plan assets or aggregate annual health insurance premiums	Number of plans subject to proposed filing requirements
Defined Benefit Pension—Eligible for 5500-SF:			
5 or Fewer	0.088	0.091	178,694
6–10	0.084	0.087	105,458
11–25	0.067	0.070	139,971
26–50	0.040	0.041	86,936
51–75	0.022	0.023	38,822
76–90	0.018	0.018	14,491
90–99	0.016	0.016	6,341
Defined Benefit Pension—Not Eligible for 5500-SF:			
5 or Fewer	0.002	0.003	566
6–10	0.050	0.086	82
11–25	0.041	0.069	60
26–50	0.016	0.027	40
51–75	0.017	0.028	46
76–90	0.016	0.027	66
90–99	0.020	0.034	90
Defined Contribution Pension—Eligible for 5500-SF:			
5 or Fewer	0.045	0.050	178,694
6–10	0.036	0.040	105,458
11–25	0.024	0.027	139,971
26–50	0.014	0.016	86,936
51–75	0.010	0.011	38,822
76–90	0.008	0.009	14,491
90–99	0.007	0.008	6,341
Defined Contribution Pension—Not Eligible for 5500-SF:			
5 or Fewer	0.011	0.033	15,650
6–10	0.040	0.115	1,856
11–25	0.021	0.062	1,989
26–50	0.012	0.033	1,888
51–75	0.009	0.026	1,362
76–90	0.009	0.026	990
90–99	0.008	0.024	1,086
Welfare—Non-Health—Eligible for 5500-SF:			
5 or Fewer	0.135	0.151	263
6–10	0.501	0.561	61
11–25	0.269	0.301	124
26–50	0.124	0.139	91
51–75	0.036	0.041	58
76–90	0.057	0.064	32
90–99	0.134	0.150	23
Welfare—Non-Health—Not Eligible for 5500-SF:			
5 or Fewer	0.019	0.032	1,917
6–10	0.197	0.328	51
11–25	0.172	0.287	117
26–50	0.038	0.064	218
51–75	0.073	0.123	310
76–90	0.028	0.047	323
90–99	0.150	0.250	404
Welfare—Fully Insured Health			
5 or Fewer	0.000	0.068	1,869,000
6–10	0.000	0.034	
11–25	0.000	0.014	
26–50	0.000	0.007	

⁶⁶ Plan asset data reflects data reported on 2013 Form 5500 filings. Because so few plans that provide group health benefits and have fewer than 100 participants are currently subject to annual

reporting requirements and many group health plans do not hold assets in trusts, the DOL concluded that annual health insurance premium data reported by the Kaiser Family Foundation was

a more appropriate metric for comparison of group health plans.

TABLE 6—SMALL PLAN REPORTING COSTS UNDER PRIOR AND NEW REQUIREMENTS AS A PERCENTAGE OF PLAN ASSETS OR AGGREGATE ANNUAL HEALTH INSURANCE PREMIUMS—Continued

Class of small plan (participants)	Annual per filer cost under current requirements as a percentage of plan assets or aggregate annual health insurance premiums	Annual per filer cost under proposed requirements as a percentage of plan assets or aggregate annual health insurance premiums	Number of plans subject to proposed filing requirements
51–75	0.000	0.005	.....
76–90	0.000	0.004	.....
90–99	0.000	0.003	.....
Welfare—Unfunded, Combination Unfunded/Fully Insured, or Funded with a Trust Health			289,000
5 or Fewer	1.192	0.988	.....
6–10	0.596	0.496	.....
11–25	0.238	0.199	.....
26–50	0.119	0.100	.....
51–75	0.079	0.066	.....
76–90	0.066	0.055	.....
90–99	0.060	0.050	.....

Note: Due to data constraints, the DOL is unable to break out smaller subgroup plan counts for welfare plans that provide group health benefits with fewer than 100 participants. Instead, the DOL has provided the total number of welfare plans that provide group health benefits with fewer than 100 participants.

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

Description of steps the DOL has taken to minimize impact on small entities: In developing these regulations and the associated forms revisions, the Agencies considered a number of alternative provisions directed at small plans, many of which are discussed elsewhere in this preamble and in the Notice of Proposed Forms Revision. The DOL believes that the proposed changes to the reporting requirements impose the least amount of burden on small plans, while allowing the DOL to collect sufficient information for it to fulfill its statutory responsibilities. Any efforts to further reduce reporting burden would have had a detrimental impact on the DOL’s ability to protect plan participants and beneficiaries.

The new reporting requirements for welfare plans that offer group health benefits with fewer than 100 participants comprise over 83 percent of the increased burden on small plans. The subset of these welfare plans that are fully insured comprises almost 87 percent of welfare plans that offer group health benefits with fewer than 100 participants. As discussed previously, the DOL considered requiring welfare plans that offer fully insured group health benefits with fewer than 100 participants to file a Form 5500 Annual Return/Report and Schedule J annually, or alternatively, on a two or three year cycle. The DOL opted instead to have those plans file only limited information

on the Form 5500 Annual Return/Report and Schedule J. Requiring those plans to file a complete Form 5500 Annual Return/Report and Schedule J annually would have added \$927.6 million in annual reporting costs relative to the chosen alternative. The DOL also considered requiring welfare plans that offer group health benefits with fewer than 100 participants that are fully insured to attach a Schedule A (in addition to the Form 5500 and Schedule J). If the DOL were to require welfare plans that offer group health benefits with fewer than 100 participants that are fully insured to attach Schedule A, the additional aggregate annual reporting cost would be \$583.4 million relative to the option chosen. The DOL rejected both of these options because they added significant cost (\$1.5 billion total) with limited additional benefit.

As discussed above, the Schedule I is being eliminated for small plans that are not eligible to file Form 5500–SF because the Schedule I does not require small plans to provide detailed plan asset information. This shortcoming impairs the utility of the Form 5500 Annual Return/Report as a tool to obtain a meaningful picture of small plan investments in hard-to-value and other assets. As the GAO has noted, the limited financial information provided on the Schedule I creates a challenge for participants, beneficiaries, oversight agencies, researchers, and other users of the Form 5500 Annual Return/Report or its data.⁶⁷ Accordingly, under the

proposed change, approximately 27,000 small plans that are not eligible to file the Form 5500–SF and currently are required to file the Schedule I would be required to complete the Schedule H and the applicable schedules of assets. Although this would result in additional reporting details for certain small plans, the Agencies do not expect that small plans with simple investment portfolios would see a significant increase in their annual reporting burden. Small plans with complex portfolios that include hard-to-value or alternative investments should have more transparent financial statements which may require somewhat more complex financial reporting obligations. In light of changes in the financial environment and increasing concerns about investments in hard-to-value assets and alternative investments, the Agencies continue to believe that requiring separate financial information regarding hard-to-value investments is important for regulatory, enforcement, and disclosure purposes. The DOL notes that although the proposal would require such small plans to complete the Schedule H instead of the Schedule I, including the Schedule H Line 4i(1) and 4i(2) Schedules of Assets, small plans that are eligible for a waiver of the annual examination and report of an IQPA under current rules would still be eligible for this waiver under the proposal.⁶⁸

The proposed rule would also require approximately 18,200 small plans that

⁶⁷ GAO Targeted Revisions Could Improve Usefulness of Form 5500 Information, at 18.

⁶⁸ 29 CFR 2520.104–46.

are not eligible to file the Form 5500–SF to file Schedule C. Currently, only large plans must file a Schedule C, thus excluding a large portion of plans from having to disclose service provider fees. The Agencies recognize the burdens small plans face in complying with disclosure obligations. The Agencies therefore propose to require small pension plans to file Schedule C only if they do not meet the eligibility conditions for filing the Form 5500–SF, which generally would be those pension plans that are invested in alternative or hard-to-value assets. Small welfare plans that provide group health benefits (which are not eligible to file the Form 5500–SF) would also be required to file the Schedule C if they are not unfunded or insured (*e.g.*, funded using a trust). This would continue to emphasize sensitivity to reporting burden for small plans with simple investment portfolios, while addressing some of the GAO’s concerns that not all critical information on indirect compensations is being reported to the Agencies. See GAO *Targeted Revisions Could Improve Usefulness of Form 5500 Information* at 25–26 (“Given these various exceptions to fee reporting requirements, Schedule C may not provide participants, the government, or the public with information about a significant portion of plan expenses and limits the ability to identify fees that may be questionable.”) In addition, the rule would align financial information reporting with recently adopted disclosure rules to ensure that all fees are reported by the plans.⁶⁹

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 DOL requests comments on the information collections included in the proposed amendments to the DOL’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 Code. The DOL has submitted an information collection request (ICR) to OMB in accordance with 44 U.S.C. 3507(d), for OMB’s review of the DOL’s information collections previously approved under OMB Control No. 1210–0110.

A copy of the ICR can be obtained by contacting the U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue

NW., Room N–5718, Washington, DC 20210, Telephone: (202) 693–8410; Fax: (202) 219–4745 or at www.RegInfo.gov. These are not toll-free numbers.

OMB asks that comments about information collections in this NPRM be submitted by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–EBSA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–6881 (this is not a toll-free number); or by email: OIRASubmission@omb.eop.gov. Commenters are encouraged, but not required, to send a courtesy copy of any comments to the party identified in the **ADDRESSES** section of this NPRM. OMB requests that comments be received within 75 days of publication of the proposed rule to ensure their consideration. Comments submitted in response to this request become a matter of public record. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the DOL’s estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Congressional Review Act

The proposed 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, if finalized, will be transmitted to the Congress and the Comptroller General for review. The proposed rule is a “major rule” as that term is defined in 5 U.S.C. 804, because it is likely to result in an annual effect on the economy of \$100 million or more.

Unfunded Mandates Reform Act Statement and Summary

Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538 requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or

final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. Such a mandate is deemed to be a “significant regulatory action.” The current proposal is expected to have such an impact on the private sector, and the DOL therefore hereby provides such an assessment. The DOL’s written statement as required by this act follows:

The DOL is issuing the current proposed regulations and forms revisions under Sections 103, 104, 110 and 505 of ERISA (29 U.S.C. 1023, 1024, 1030, and 1135). Under Titles I and IV of ERISA and the Code, pension and other employee benefit plans are generally required to file annual returns/reports concerning, among other things, the financial condition and operations of the plan. Filing a Form 5500 Annual Return/Report of Employee Benefit Plan or Form 5500–SF Short Form Annual Return/Report of Small Employee Benefit Plan, together with any required schedules and attachments, generally satisfies these annual reporting requirements. The current proposal would amend current reporting regulations and update the existing forms and schedules as explained in the summary information provided above in this document.

The DOL assessed the anticipated benefits and costs of the current proposal pursuant to Executive Order 12866 in the Regulatory Impact Analysis for the current proposal, above, and concluded that its benefits would justify its costs. The current proposal’s material benefits and costs generally would be largely confined to the private sector, where plans would incur increased costs from expanded reporting requirements, while participants and beneficiaries and other end-users of the Form 5500 Annual Return/Report data would benefit from improved reporting. The DOL itself, as well as IRS, PBGC, and other governmental users would benefit from increased efficiency in enforcement activity and improved quality in research and policy decisions resulting from reporting data that more accurately reflect the current plan marketplace.

Some employee benefit plans sponsored by tribal governments that are subject to ERISA because they cover employees who are involved in performing commercial activities (whether or not such activities are essential government functions) may be affected by the Federal mandate contained in this rule, if it is adopted as

⁶⁹Id. at 50.

proposed. The DOL does not have sufficient data to estimate the amount of the increase in future compliance costs that would be imposed on tribal governments that sponsor these plans, but it believes such costs would be similar to those imposed on private sector employers that are discussed in the regulatory impact analysis. Such increased costs would not be paid with Federal financial assistance (or otherwise paid for by the government). The DOL is not aware of any available Federal resources to carry out this mandate on tribal governments. The budgetary impact of the mandate will fall on tribal governments that maintain certain employee benefit plans. Apart from this, the DOL does not believe that the mandate will cause any disproportionate budgetary effects on any particular regions of the nation or particular tribal governments, urban, rural or other types of communities, or particular segments of the private sector.

The DOL has not consulted with elected representatives of tribal governments, but will do so after the proposed regulations and forms revisions are published.

In summary, the DOL believes the benefits of this proposed rule are significant, and will result in a modernized annual return/report that has substantially more utility for the agencies, the regulated community, and the public. The proposed rule would also impose increased costs on employee benefit plan sponsors. Tribal governments that sponsor ERISA-covered plans will incur increased costs as will all other sponsors of ERISA-covered plans. The DOL lacks sufficient information to quantify the number of tribal governments impacted by this proposed rule, but believes that the costs imposed on tribal governments will be consistent with the costs imposed on all other sponsors of ERISA-covered plans. Finally, the DOL does not believe that the costs imposed by this proposed rule will have any disproportionate budgetary effects based on any particular regions of the nation or particular tribal governments, urban, rural or other types of communities, or particular segments of the private sector.

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 proposed 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

29 CFR Part 2520

Accounting, Employee benefit plans, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 2590

Continuation coverage, Disclosure, Employee benefit plans, Group health plans, Health care, Health insurance, Medical child support, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Department proposes to amend Subchapter C, parts 2520 and 2590 of Title 29 of the Code of Federal Regulations as follows:

PART 2520—RULES AND REGULATIONS FOR REPORTING AND DISCLOSURE

■ 1. The authority section for part 2520 continues to read as follows:

Authority: 29 U.S.C. 1021–1025, 1027, 1029–31, 1059, 1134, and 1135; and Secretary of Labor’s Order 1–2011, 77 FR 1088 (Jan. 9, 2012). 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 (b)(1), (c)(1), (c)(2)(i), (c)(2)(ii)(D), (E), and (e), and add paragraphs (c)(2)(ii)(F) and (c)(2)(iii) to read as follows:

§ 2520.103–1 Contents of the annual report.

* * * * *

(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 C (Service Provider Information), Schedule E (ESOP Annual Information), Schedule G (Financial Transaction Schedules), Schedule H (Financial Information), Schedule J (Group Health Plan Information), Schedule MB (Multiemployer Defined Benefit Plan and Certain Money Purchase Plan Actuarial Information), Schedule R (Retirement Plan Information), Schedule SB (Single-Employer Defined Benefit Plan Actuarial Information), and other financial schedules described in Sec. 2520.103–10. See the instructions for this form.

* * * * *

(c) * * *
(1) Except as provided in paragraphs (c)(2), (d), (e), and (f) of this section, and in §§ 2520.104–43, 2520.104a-6 and 2520.104–44, 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 C (Service Provider Information), Schedule E (ESOP Annual Information), Schedule G (Financial Transactions), Schedule H (Financial Information), Schedule J (Group Health Plan Information), Schedule MB (Multiemployer Defined Benefit Plan and Certain Money Purchase Plan Actuarial Information), Schedule R (Retirement Plan Information), and Schedule SB (Single Employer Defined Benefit Plan Actuarial Information), completed in accordance with the instructions for the form. See the instructions for this form.

(2)(i) The annual report of an employee pension benefit plan or employee welfare benefit plan that does not provide group health benefits and 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 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) * * *

(D) Is not a multiemployer plan;

(E) Is not a plan subject to the Form M-1 requirements under § 2520.101-2 (Filing by Multiple-employer Welfare Arrangements and Certain Other Related Entities); and

(F) Is not a group health plan as defined in section 733(a) of the Act.

(iii) The annual report of an employee benefit plan that meets the definition of a group health plan as defined in section 733(a) of the Act 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 C (Service Provider Information), Schedule H (Financial Information), and Schedule J (Group Health Plan Information). See the instructions for this form.

* * * * *

(e) *Plans that participate in a master trust.* The plan administrator of a plan which participates in a master trust shall file a Form 5500 Annual Return/Report in accordance with the instructions for the form relating to master trusts. For purposes of annual reporting, a master trust is a trust for which a regulated financial institution serves as trustee or custodian (regardless of whether such institution exercises discretionary authority or control respecting the management of assets held in the trust) and in which assets of more than one plan sponsored by a single employer or by a group of employers under common control are held. A master trust must operate either on a calendar year basis or on the same fiscal year as all of the plans that are participating in the master trust. For purpose of this paragraph, a regulated financial institution is a bank, trust company, or similar financial institution regulated, supervised, and subject to periodic examination by a State or Federal agency. Common control is determined on the basis of all relevant facts and circumstances (whether or not such employers are incorporated).

■ 3. In § 2520.103-2, revise paragraph (b)(1) to read as follows:

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

* * * * *

(b) *Contents.* (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 C (Service Provider Information), Schedule D (DFE/Participating Plan Information), Schedule G (Financial Transaction Schedules), Schedule H (Financial Information), a separate Schedule J (Group Health Plan Information) for each participating plan, and the other financial schedules described in § 2520.103-10. See the instructions for this form.

* * * * *

■ 4. In § 2520.103-3, revise paragraph (c) to read as follows:

§ 2520.103-3 Exemption from certain annual reporting requirements for assets held in a common or collective trust.

* * * * *

(c) *Contents.* (1) A plan that meets the requirements of paragraph (b) of this section, and that invests in a common or collective trust that files a Form 5500 report in accordance with § 2520.103-9, shall include in its annual report: information required by the instructions to Schedule H (Financial Information) about the current value of and net investment gain or loss relating to the units of participation in the common or collective trust held by the plan; identifying information in the common or collective trust including its name, employer identification number, and any other information required by the instructions to the Schedule of Assets Held for Investment Purposes and Schedule of Assets Disposed of During Plan Year; and such other information as is required in the separate statements and schedules of the annual report about the value of the plan’s units of participation in the common or collective trust and transactions involving the acquisition and disposition by the plan of units of participation in the common or collective trust.

(2) A plan that meets the requirements of paragraph (b) of this section and that invests in a common or collective trust that does not file a Form 5500 report in accordance with § 2520.103-9, shall include in its annual report: Information required by the instructions to Schedule H (Financial Information) about the current value of and the net investment gain or loss relating to the units of participation in the common or

collective trust held by the plan; information required by the accompanying instructions to the “Schedule of Assets Held for Investment” about the current value of the plan’s allocable portion of the underlying assets and liabilities of the common or collective trust; identifying information about the common or collective trust including its name, employer identification number, and any other information required by the instructions to the Schedule of Assets Held for Investment Purposes and Schedule of Assets Disposed of During Plan Year; and such other information as is required in the separate statements and schedules of the annual report about the value of the plan’s units of participation in the common or collective trust and transactions involving the acquisition and disposition by the plan of units of participation in the common or collective trust.

■ 5. In § 2520.103-4, revise paragraph (c) as follows:

§ 2520.103-4 Exemption from certain annual reporting requirements for assets held in an insurance company pooled separate account.

* * * * *

(c) *Contents.* (1) A plan that meets the requirements of paragraph (b) of this section, and which invests in a pooled separate account that files a Form 5500 report in accordance with § 2520.103-9, shall include in its annual report: Information required by the instructions to Schedule H (Financial Information) about the current value of and net investment gain or loss relating to the units of participation in the pooled separate account held by the plan; identifying information about the pooled separate account including its name, employer identification number, and any other information required by the instructions to the Schedule of Assets Held for Investment Purposes and Schedule of Assets Disposed of During Plan Year; and such other information as is required in the separate statements and schedules of the annual report about the value of the plan’s units of participation in the pooled separate account and transactions involving the acquisition and disposition by the plan of units of participation in the pooled separate account.

(2) A plan that meets the requirements of paragraph (b) of this section and which invests in a pooled separate account that does not file a Form 5500 report in accordance with § 2520.103-9, shall include in its annual report: Information required by the instructions

to Schedule H (Financial Information) about the current value of and the net investment gain or loss relating to the units of participation in the pooled separate account held by the plan; information required by the accompanying instructions to the "Schedule of Assets Held for Investment" about the current value of the plan's allocable portion of the underlying assets and liabilities of the pooled separate account; identifying information about the pooled separate account including its name, employer identification number, and any other information required by the instructions to the Schedule of Assets Held for Investment Purposes and Schedule of Assets Disposed of During Plan Year; and such other information as is required in the separate statements and schedules of the annual report about the value of the plan's units of participation in the pooled separate account and transactions involving the acquisition and disposition by the plan of units of participation in the pooled separate account.

■ 6. In § 2520.103-6, revise paragraph (d) to read as follows:

§ 2520.103-6 Definition of reportable transaction for annual return/report.

* * * * *

(d) *Contents.* (1) The schedule of reportable transactions shall be filed in the format and include information as described in the instructions to the Form 5500 Annual Return/Report of Employee Benefit Plan.

(2) [Removed]

■ 7. In § 2520.103-8, revise paragraphs (a) and (c) and add new paragraphs (d) and (e) to read as follows:

§ 2520.103-8 Limitation on scope of accountant's examination.

(a) *General.* Under the authority of section 103(a)(3)(C) of the Act, the examination and report of an independent qualified public accountant need not extend to any statement or information prepared and certified by a bank or similar institution or insurance carrier provided the certification meets the requirements of paragraph (d) of this section.

* * * * *

(c) *Excluded information.* Any statements or information certified to by a bank or similar institution or insurance carrier described in paragraph (b) of this section, provided that the statements or information regarding assets so held are prepared and certified to by the bank or insurance carrier in accordance with the requirements of (d) of this section and § 2520.103-5.

(d) *Contents and manner.* The certification described in paragraph (a) of this section shall:

(1) Appear on a separate document from the list of plan assets covered by the certification;

(2) Identify the bank or insurance company holding the plan's assets;

(3) Describe the manner in which the bank or insurance company is holding the assets covered by the certification;

(4) State whether the bank or insurance company is providing current value information regarding the assets covered by the certification in accordance with 2520.103-5, and if so, state that the assets for which current value is being certified are separately identified in the list of assets covered by the certification;

(5) If current value is not being certified for all of the assets covered by the certification, include a caution that the certification is not certifying current value information and the asset values provided by the bank or insurance company may not be suitable for use in satisfying the plan's obligation to report current value information on the Form 5500 Annual Return/Report; and

(6) If the certification is being provided by an agent on behalf of the bank or insurance company, a statement certifying that the person providing the certification is an authorized agent acting on behalf of the bank or insurance company and affirming that the bank or insurance company is taking responsibility for the accuracy and completeness of the certification and the underlying records used as a basis for the information being certified.

(e) The administrator of a plan which meets the requirements of paragraph (b) of this section, and which is not required to have covered by the accountant's examination or report any of the information described in paragraph (c) of this section shall attach to the Form 5500 Annual Return/Report of Employee Benefit Plan the certification of investment information created by certain banks or insurance companies in accordance with the requirements of paragraph (d) of this section to comply with the limited scope audit requirements.

■ 8. In § 2520.103-10, revise paragraphs (b)(1)(i) and (2)(i) to read as follows:

§ 2520.103-10 Annual report financial schedules.

* * * * *

(b) * * *

(1) * * *

(i) A schedule of all assets held for investment purposes at the end of the plan year (see § 2520.103-11) with assets aggregated and identified as

described in the instructions to the Form 5500 Annual Return/Report of Employee Benefit Plan.

* * * * *

(2) *Assets disposed of during the plan year.* (i) A schedule of all assets disposed of during the plan year (see § 2520.103-11) with assets aggregated and identified as described in the instructions to the Form 5500 Annual Return/Report of Employee Benefit Plan.

* * * * *

■ 9. In § 2520.104-20, revise paragraph (b)(1) to read as follows:

§ 2520.104-20 Limited exemption for certain small welfare plans.

* * * * *

(b) * * *

(1) Which have fewer than 100 participants at the beginning of the plan year, and do not provide benefits consisting of medical care as defined in section 733(a)(2) of the Act;

* * * * *

■ 10. In § 2520.104-26, revise paragraph (b) to read as follows:

§ 2520.104-26 Limited exemption for certain unfunded dues financed welfare plans maintained by employee organizations.

* * * * *

(b) *Application.* This exemption applies only to welfare benefit plans that do not provide benefits consisting of medical care as defined in section 733(a)(2) of the Act that are maintained by an employee organization, as that term is defined in section 3(4) of the Act, paid out of the employee organization's general assets, which are derived wholly or partly from membership dues, and which cover employee organization members and their families.

* * * * *

■ 11. Revise § 2520.104-42 to read as follows:

§ 2520.104-42 Waiver of certain actuarial information in the annual report.

Under the authority of section 104(a)(2)(A) of ERISA, the requirement of section 103(d)(6) of ERISA that the annual report include as part of the actuarial statement (Schedule SB) the present value of all of the plan's liabilities for nonforfeitable pension benefits allocated by termination priority categories, as set forth in section 4044 of title IV of ERISA, and the actuarial assumptions used in these computations, is waived.

■ 12. In § 2520.104b-10, 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 line items	Form 5500-SF line items
A. Pension Plan (defined contribution pension benefit plans and defined benefit pension plans that do not furnish the annual funding notice under 29 CFR 2520.101-4)		
1. Funding arrangement	Form 5500-10a	Line 13a.
2. Total plan expenses	Sch. H-2j	Line 10h.
3. Administrative expenses	Sch. H-2i(12)(C)	Line 10f.
4. Benefits paid	Sch. H-2e(4)	Line 10d.
5. Other Expenses	Sch. H-Subtract the sum of 2e(4) & 2i(12)(C) from 2j.	Line 10g.
6. Total Participants at end of plan year	Form 5500-7f	Line 7f.
7. Value of plan assets (net):		
a. end of plan year	Sch. H-11 [Col. (b)]	Line 9c [Col. (b)].
b. beginning of plan year	Sch. H-11 [Col. (a)]	Line 9c [Col. (a)].
8. Changes in Net Assets	Sch. H-Subtract 1l [Col. a] from 11 [Col. b] ..	Line 9c-Subtract [Col. a] from [Col. b].
9. Total Income	Sch. H-2d	Line 10c.
a. Employer contributions	Sch. H-2a(1)(A, & 2a(2) if applicable	Line 10a(1)(A).
b. Employee contributions	Sch. H-2a(1)(B), & 2a(2) if applicable	Line 10a(1)(B).
c. Gains (losses) from sale of assets	Sch. H-2c(4)(C)	Not applicable.
d. Earnings from investments	Sch. H-Subtract the sum of 2a(3) and 2c(4)(C) from 2d.	Line 10b.
10. Name of insurance carriers	Schs. A-1a	Not applicable.
11. Total insurance premiums	Sch. A-5b (total of all contracts)	Not applicable.
12. Unpaid minimum required contribution (S-E plans or Defined contribution plans) or Funding deficiency (ME plans):		
a. S-E Defined benefit plans	Sch. SB-43	Same.
b. ME Defined benefit plans	Sch. MB-10	Not applicable.
c. Defined contribution plans	Sch. R-7c, if not zero	Line 16b.

B. Welfare Plan

1. Name of insurance carriers	Schs. A-1a	Not applicable.
2. Total (experience rated and non-experienced rated) insurance premiums.	Schs. A-Sum of 9a(1) and 10a (total of all contracts).	Not applicable.
3. Experience rated premiums	Schs. A-9a(1) (total of all contracts)	Not applicable.
4. Experience rated claims	Schs. A-9b(4) (total of all contracts)	Not applicable.
5. Value of plan assets (net)		
a. end of plan year	Sch. H-11 [Col. (b)]	Line 9c [Col. (b)].
b. beginning of plan year	Sch. H-11 [Col. (a)]	Line 9c [Col. (a)].
6. Changes in Net Assets	Sch. H-Subtract 1l [Col. a] from [Col. b]	Line 9c-Subtract [Col. a] from [Col. b].
7. Total Income	Sch. H-2d	Line 10c.
a. Employer contributions	Sch. H-2a(1)(A) & 2a(2) if applicable	Line 10a(1)(A) if applicable.
b. Employee contributions	Sch. H-2a(1)(B) & 2a(2) if applicable	Line 10a(1)(B) if applicable.
c. Gains (losses) from sale of assets	Sch. H-2c(4)(C)	Not applicable.
d. Earnings from investments	Sch. H-Subtract the sum of 2a(3) and 2c(4)(C) from 2d.	Line 10b.
8. Total plan expenses	Sch. H-2j	Line 10h.
9. Administrative expenses	Sch. H-2i(12)(C)	Line 10f.
10. Benefits paid	Sch. H-2e(4)	Line 10d.
11. Other Expenses	Sch. H-Subtract the sum of 2e(4) & 2i(12)(C) from 2j.	Line 10g.

PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS

■ 13. The authority citation for Part 2590 continues to read as follows:

Authority: 29 U.S.C. 1027, 1059, 1135, 1161-1168, 1169, 1181-1183, 1181 note, 1185, 1185a, 1185b, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L. 104-191, 110 Stat. 1936; sec. 401(b), Pub. L. 105-200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110-343, 122 Stat. 3881; sec. 1001, 1201, and

1562(e), Pub. L. 111-148, 124 Stat. 119, as amended by Pub. L. 111-152, 124 Stat. 1029; Secretary of Labor's Order 1-2011, 77 FR 1088 (Jan. 9, 2012).

Subpart C—Other Requirements

■ 14. Add §§ 2590.715-2715A and 2590.715-2717 to Subpart C to read as follows:

§ 2590.715-2715A Provision of additional information.

A group health plan that complies with the requirements of § 2520.103-1 of this Chapter and any implementing guidance (including filing any required schedules to the annual report required by § 2520.103-1) satisfies the requirements of PHS Act section 2715A, as incorporated in ERISA.

§ 2590.715–2717 Ensuring the quality of care.

A group health plan that complies with the requirements of § 2520.103–1 of this Chapter and any implementing guidance (including filing any required

schedules to the annual report required by § 2520.103–1) satisfies the requirements of PHS Act section 2717, as incorporated in ERISA.

Signed at Washington, DC, this 20th day of June 2016.

Phyllis C. Borzi,

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

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