

make certain modifications to the proposed regulations. These may be more restrictive than the proposed regulations under certain limited circumstances. Consequently, for plan years beginning after December 31, 1996, but before January 1, 2007, an employer is permitted to determine the excludable employees under a section 401(k) plan or section 401(m) plan using either § 1.410(b)-6(g) in the proposed regulations or these final regulations.

Special Analyses

It has been determined that this is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

Drafting Information

The principal authors of these regulations are Linda L. Conway and Michael P. Brewer of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by removing the entry for §§ 1.410(b)-2 through 1.410(b)-10 and adding entries in numerical order to read, in part, as follows:

Authority: 26 U.S.C. 7805. * * *

§ 1.410(b)-2 also issued under 26 U.S.C. 410(b)(6).

§ 1.410(b)-3 also issued under 26 U.S.C. 410(b)(6).

§ 1.410(b)-4 also issued under 26 U.S.C. 410(b)(6).

§ 1.410(b)-5 also issued under 26 U.S.C. 410(b)(6).

§ 1.410(b)-6 also issued under 26 U.S.C. 410(b)(6) and section 664 of the Economic Growth and Tax Relief Reconciliation Act of 2001 (Public Law 107-16, 115 Stat. 38).

§ 1.410(b)-7 also issued under 26 U.S.C. 410(b)(6).

§ 1.410(b)-8 also issued under 26 U.S.C. 410(b)(6).

§ 1.410(b)-9 also issued under 26 U.S.C. 410(b)(6).

§ 1.410(b)-10 also issued under 26 U.S.C. 410(b)(6). * * *

■ **Par. 2.** Section 1.410(b)-0 is amended by:

■ 1. Revising the entry for 1.410(b)-6(g).

■ 2. Adding entries for 1.410(b)-6(g)(1), (g)(2), and (g)(3).

The revision and additions read as follows:

§ 1.410(b)-0 Table of contents.

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§ 1.410(b)-6 Excludable employees.

* * * * *

(g) Employees of certain governmental or tax-exempt entities.

(1) Plans covered.

(2) Employees of governmental entities.

(3) Employees of tax-exempt entities.

* * * * *

■ **Par. 3.** In § 1.410(b)-6, paragraph (g) is revised to read as follows:

§ 1.410(b)-6 Excludable employees.

* * * * *

(g) *Employees of certain governmental or tax-exempt entities*—(1) *Plans covered.* For purposes of testing either a section 401(k) plan, or a section 401(m) plan that is provided under the same general arrangement as a section 401(k) plan, an employer may treat as excludable those employees described in paragraphs (g)(2) and (3) of this section.

(2) *Employees of governmental entities.* Employees of governmental entities who are precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B)(ii) may be treated as excludable employees if more than 95 percent of the employees of the employer who are not precluded from being eligible employees by reason of section 401(k)(4)(B)(ii) benefit under the plan for the year.

(3) *Employees of tax-exempt entities.* Employees of an organization described in section 403(b)(1)(A)(i) who are eligible to make salary reduction contributions under section 403(b) may be treated as excludable with respect to a section 401(k) plan, or a section 401(m) plan that is provided under the same general arrangement as a section 401(k) plan, if—

(i) No employee of an organization described in section 403(b)(1)(A)(i) is eligible to participate in such section 401(k) plan or section 401(m) plan; and

(ii) At least 95 percent of the employees who are neither employees of an organization described in section 403(b)(1)(A)(i) nor employees of a

governmental entity who are precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B)(ii) are eligible to participate in such section 401(k) plan or section 401(m) plan.

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■ **Par. 4.** In § 1.410(b)-10, paragraph (e) is added to read as follows:

§ 1.410(b)-10 Effective dates and transition rules.

* * * * *

(e) *Effective date for provisions relating to exclusion of employees of certain tax-exempt entities.* The provisions in § 1.410(b)-6(g) apply to plan years beginning after December 31, 1996. For plan years to which § 1.410(b)-6 applies that begin before January 1, 1997, § 1.410(b)-6(g) (as it appeared in the April 1, 2005 edition of 26 CFR part 1) applies.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: June 30, 2006.

Eric Solomon,

Acting Deputy Assistant Secretary of the Treasury (Tax Policy).

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2520

RIN 1210-AB04

Electronic Filing of Annual Reports

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Final rule.

SUMMARY: This document contains a final rule establishing an electronic filing requirement for certain annual reports required to be filed with the Department of Labor by plan administrators and other entities. The Employee Retirement Income Security Act of 1974, as amended (ERISA), the Internal Revenue Code of 1986, as amended (Code), and the regulations issued thereunder impose certain annual reporting obligations on pension and welfare benefit plans, as well as on certain other entities. These annual reporting obligations generally are satisfied by filing the Form 5500 "Annual Return/Report of Employee Benefit Plan," including any required schedules and attachments (Form 5500). Currently, the Department of Labor

(Department), the Pension Benefit Guaranty Corporation, and the Internal Revenue Service (Agencies) use an automated document processing system—the ERISA Filing Acceptance System (EFAST)—to process the Form 5500 filings. As part of the Department's efforts to update and streamline the current processing system, the regulation contained in this document requires electronic filing of all annual reports filed with the Secretary of Labor (Secretary) for plan years beginning on or after January 1, 2008, to satisfy annual reporting obligations under Part 1 of Title I of ERISA. This regulation affects employee pension and welfare benefit plans, plan sponsors, administrators, and service providers to plans subject to Title I of ERISA.

DATES: This rule is effective September 19, 2006.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Goodman or Yolanda R. Wartenberg, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8523. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

Sections 104(a) and 4065 of ERISA, and sections 6058(a) and 6059(a) of the Code, and the regulations issued under those sections impose certain annual reporting and filing obligations on pension and welfare benefit plans, as well as on certain other entities.¹ Plan administrators, employers, and others generally satisfy these annual reporting obligations by filing the Form 5500 Annual Return/Report of Employee Benefit Plan, together with any required attachments and schedules (Form 5500). On August 30, 2005, the Department of Labor (Department) published in the *Federal Register* (70 FR 51541) a proposed rule to implement the Department's announced intention to move to a wholly electronic filing system for receipt of Form 5500 filings (E-Filing Proposal).

The E-Filing Proposal described the current automated document processing system—the ERISA Filing Acceptance System (EFAST)—maintained by the Department to process annual reports.

¹ Other filing requirements beyond the scope of this rule may apply to employee benefit plans and to multiple employer welfare arrangements under ERISA or to other benefit arrangements under the Code. For example, Code sec. 6033(a) imposes an additional reporting and filing obligation on organizations exempt from tax under Code sec. 501(a), which may be related to retirement trusts that are qualified under sec. 401(a) of the Code. Code sec. 6047(e) also imposes an additional reporting and filing obligation on pension benefit plans that are employee stock ownership plans (ESOPs).

Using the EFAST system, the Department annually receives and processes approximately 1.4 million filings. For the 2002 plan year, these filings translated into approximately 25 million paper pages. The EFAST system, which was developed in 1998 and 1999, relies on a mixture of paper and electronic filing options and computerized processing methods to accept, compile, and monitor the Form 5500 filings. A private contractor performs the EFAST processing under a contract with the Department's Employee Benefits Security Administration (EBSA). The end of the time-limited contracting cycle and the beginning of another contracting cycle present a significant opportunity for EBSA to evaluate the system and to make changes to take advantage of technological advances. In connection with that process, the Department posted, in March 2004, a request for public comments (Request for Comment) on its Web site relating to updating the current EFAST processing system.²

The Department explained in the E-Filing Proposal that it believed that a wholly electronic system will result in, among other things, reduced filer errors and, therefore, reduced correspondence and potential for filer penalties; more timely data for public disclosure and enforcement, thereby enhancing the protections for participants and beneficiaries; and lower annual report processing costs, benefiting taxpayers generally. In order to ensure an orderly and cost-effective migration to an electronic filing system by both the Department and Form 5500 filers, the requirement to file electronically was proposed to be implemented for plan years beginning on or after January 1, 2007.

The Department received eighteen comment letters on the E-Filing Proposal from representatives of employers, plans, and plan service providers. The Department also received a comment letter from the Small Business Administration's Office of Advocacy (SBA). Copies of all the comments are posted on the Department's Web site at http://www.dol.gov/ebsa/regs/cmt_mefr.html.

Set forth below is a discussion of the comments received on the proposal, including changes made in response to the comments, and an overview of the final regulation.

² A more detailed description of the EFAST processing system is included in the Request for Comment which may be reviewed at: <http://www.efast.dol.gov/efastfrc.html>.

B. Discussion of Public Comments

Virtually all of the comments received in response to the E-Filing Proposal recognized the value of electronic filing over paper filing, expressed support for increasing the use of electronic filing, and recognized that the Department's move to a wholly electronic system for receipt and processing of Form 5500 filings reflects a trend also seen in the business community to move toward paperless systems. The majority of comments endorsed the concept of a transition to 100 percent electronic filing and favored the development of a secure Internet Web site on which a filer could file the Form 5500 through direct input of data as an option to hiring a third party preparer or purchasing privately developed software to file the Form 5500. Several commenters, including the SBA, questioned the ability of employers, especially small employers, to make the necessary adjustments to comply with an electronic filing mandate for the 2007 plan year, especially in the absence of information about the technical specifications that will have to be met to use the new e-filing system. Most commenters suggested that the Department postpone the implementation to give filers and service providers enough time to prepare their own systems and staff to use the system. Some suggested that the Department grant a transition year exemption from annual reporting civil penalties for unintentional filing violations caused by lack of familiarity with the new filing process. One commenter asked whether electronic filing would apply for administrators of one-participant plans required to file the Form 5500-EZ to satisfy annual reporting requirements under the Code.³

The E-Filing Proposal specifically invited comments on the need for an exception to accommodate any unanticipated and potentially significant impediments to some filers' transition to electronic filing. Commenters were encouraged to provide specific examples of such impediments, as well as to address the specific conditions for, and necessary scope of, relief under a hardship exception. In response, several commenters suggested as alternatives that the Department phase in the e-file

³ For purposes of the annual reporting requirements under the Code, certain pension benefit arrangements that cover only sole proprietors or partners (and their spouses), which are not employee benefit plans under Title I of ERISA, are permitted to file the Form 5500-EZ to satisfy filing requirements under the Code. See instructions to the Form 5500-EZ to determine who may currently file the Form 5500-EZ.

mandate over time and allow filers to test the system on a voluntary basis or through a pilot program. One commenter suggested the Department continue to offer paper filing along with electronic filing and, instead of mandating electronic filing, take steps to encourage electronic filing by making it easier and cheaper to use than paper.

1. Electronic Filing Mandate

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

After having carefully considered the public comments, the Department continues to believe, consistent with the goals of E-government, as recognized by the Government Paperwork Elimination Act⁴ and the E-Government Act of 2002,⁵ that the new processing system designed to replace EFAST must have as its core component a requirement that Form 5500 filings be submitted through electronic means. A mandate of electronic filing of benefit plan information, among other program strategies, will facilitate EBSA's achievement of its Strategic Goal of "enhancing pension and health benefits of American workers." EBSA's strategic goal directly supports the Secretary of Labor's (Secretary) Strategic Goals of "protecting workers benefits" and of fostering "a competitive workforce," as well as promoting job flexibility and

minimizing regulatory burden.⁶ A cornerstone of EBSA's enforcement program is the collection, analysis, and disclosure of benefit plan information.

A comparison of the relative costs and benefits of the available alternatives supports the move to a wholly electronic filing system. The Department believes that a wholly electronic system will result in, among other things, a reduction in filer errors and a correlative reduction in correspondence and potential for filer penalties; more timely data for public disclosure and enforcement, thereby enhancing the protections for participants and beneficiaries; and lower annual report processing costs, benefiting taxpayers generally. The resulting improvement in the timeliness and accuracy of the information from electronic filing would assist EBSA in its enforcement, oversight, and disclosure roles and ultimately enhance the security of plan benefits.⁷ Having a phase-in period, pilot program, and providing filers with a voluntary choice whether to file electronically, as suggested by some commenters, would require the Department to continue to maintain a paper filing system. The Department still believes that maintaining any paper filing system, even on a reduced scale and/or for a limited period of time, would be inherently inefficient and unduly costly. It is the Department's view that any economic benefit that might accrue to some limited class of filers under the alternatives considered would be outweighed by the benefits to participants and beneficiaries at large and to the Department and taxpayers generally of implementing a single, wholly electronic system. The Department accordingly is not prepared to adopt any alternative that would involve continuation of paper filing alternatives to electronic filing.

The Department's conclusions concerning the public comments and alternatives are grounded in the

Regulatory Impact Analysis presented in the E-Filing Proposal and below.

2. Postponed Implementation of Electronic Filing Requirement

As noted above, commenters generally expressed concern about the time line in the proposal calling for the new electronic requirement to be implemented for plan years (or reporting years for non-plan filers) commencing on or after January 1, 2007. Several commenters, including the SBA, questioned the ability of employers, especially small employers, to make the necessary adjustments to comply with an electronic filing mandate for the 2007 plan year and urged that a delay of the implementation of the e-file mandate was needed to give all filers and service providers enough time to train staff, adopt new procedures, and install new software.

In light of the concerns raised regarding the timing of the implementation of the system, and in order to ensure an orderly and cost-effective migration to an electronic filing system by both the Department and Form 5500 filers, the Department has decided to delay the electronic filing requirement. Under the final regulation, the electronic filing requirement is to become effective for all annual report filings made under Part 1 of Title I of ERISA for plan years (or reporting years for non-plan filings) beginning on or after January 1, 2008. Accordingly, the vast majority of filers will have until at least July 2009 to make any necessary adjustments to accommodate the electronic filing of their annual report.⁸ This delay also affords service providers, software developers, and the Department adequate time to work through electronic processing issues.⁹

In addition, the Department, in coordination with the Internal Revenue Service (IRS) and Pension Benefit Guaranty Corporation (PBGC), is taking

⁸ Annual reports generally are not required to be filed until the end of the 7th month following the end of the plan year.

⁹ One comment noted that to create a wholly electronic filing environment, the filing system will have to be capable of accepting amended filings for prior years where paper filings were permitted as well as delinquent filings that currently can be filed under the Department's Delinquent Filer Voluntary Compliance Program by using either the form issued for the prior year or the most current form available at the time the administrator files the late report. As noted above, the Department believes that the new e-file system must be the exclusive means for filing all Form 5500s. Accordingly, delinquent or amended filings for prior plan years for which paper filing options were available will be subject to the electronic filing requirement. The Department will provide instructions prior to the inauguration of the system on how those filings are to be made under the electronic filing system.

⁴ Title XVII, Pub. L. 105-277, 112 Stat. 2681 (Oct. 21, 1998).

⁵ Pub. L. 107-347, 116 Stat. 2899 (Dec. 17, 2002).

⁶ For further information on the Department of Labor's Strategic Plan and EBSA's relationship to it, see <http://www.dol.gov/sec/stratplan/main.htm>.

⁷ The Government Accountability Office (GAO) noted in a June, 2005 report on the Form 5500 that the current necessity for handling paper filings under EFAST creates a long processing related delay between receipt of a filing and the availability of its information for any enforcement and oversight purposes even in cases where no filing errors are detected. Private Pensions: Government Actions Could Improve the Timeliness and Content of Form 5500 Pension Information (GAO-05-491) ("GAO Report") at 28 and fig. 9 at 32. GAO also noted that, where errors in a filing are detected, additional processing delays of up to 120 more days occur. Electronic filing would eliminate virtually all of that processing delay, improving outcomes for all of the users of the Form 5500 information.

steps to revise the Form 5500 that should further mitigate any burdens associated with transitioning to a new wholly electronic processing system. Concurrently with the publication of this final rule, the Agencies are separately publishing in today's **Federal Register** proposed revisions to the annual reporting forms and proposed amendments to the Department's implementing regulations that are to be applicable for the 2008 plan year, the reporting year for which the new e-filing system will be implemented. As discussed more fully in the separate **Federal Register** notices, the Agencies believe the proposed form changes in conjunction with the electronic filing system will substantially reduce plan administrators' reporting compliance burdens and also greatly enhance the utility and accessibility of reported information to the government, participants and beneficiaries, and others. For example, the Agencies are developing a simplified, two-page form (titled the Form 5500-SF with the "SF" standing for "Short Form") for plans that have fewer than 100 participants and that invest in secure, easily valued assets. The Department estimates that approximately 90 percent of all small plan filers would be able to use the new short form. Also, because of limits on what the IRS can require to be filed electronically,¹⁰ the IRS is removing from the Form 5500 the schedules, attachments, and information currently required solely to comply with an IRS reporting obligation (e.g., Schedule E (ESOP Annual Information) and Schedule SSA (Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits)). The IRS has advised the Department that, although there are no mandatory electronic filing requirements for the Form 5500 under the Code or the regulations issued thereunder, to ease the burdens on plans that cover only sole proprietors or partners (and their spouses) that are not subject to Title I of ERISA but file the Form 5500-EZ to satisfy the annual reporting and filing obligations imposed by the Code, the IRS intends to permit certain Form 5500-EZ filers to satisfy the requirement to file the Form 5500-EZ with the IRS by filing the Form 5500-SF electronically through the EFAST processing system. Therefore, under the proposal certain Form 5500-EZ filers will be provided both electronic and paper filing options. The

¹⁰ See, e.g., 26 CFR 301.6033-4T (mandating electronic filing of certain corporate income tax returns and returns of organizations required to be filed under Code sec. 6033).

electronic option would allow 5500-EZ filers to complete and electronically file with EFAST selected information on the Short Form 5500. Form 5500-EZ filers would also be able to choose instead to file a Form 5500-EZ on paper with the IRS.

3. Waiver of Filing Penalties

Two commenters, including the SBA, suggested that the Department consider providing filers, especially small plan filers, with a one time exemption from annual reporting civil penalties for unintentional filing violations due to lack of familiarity with the new filing process. Commenters also expressed concern that design and operational issues may arise during the initial stages of implementing the new electronic filing system that may require filers to refile, revise software, or otherwise incur expenses and delay in adjusting their systems to address glitches in the electronic filing system. The comments expressed the view that a one time exemption from civil penalties would help plan sponsors transitioning to an unfamiliar filing process.

Section 502(c)(2) of ERISA provides that the Secretary may assess a civil penalty of up to \$1,100 a day from the date of a plan administrator's failure or refusal to file the annual report required to be filed under ERISA.¹¹ Penalties under section 502(c)(2) are assessed only in those instances where there is a failure or refusal to file any annual report within the prescribed time frames or where, subsequent to notification that a filed report has been rejected and the reasons for which the filing has been rejected, the filer fails or refuses to file a corrected report within the 45-day period prescribed in section 104(a)(5) of ERISA. Section 104(a)(5) specifically contemplates that, where a filing is rejected under section 104(a)(4), the filer will be afforded 45 days from the date of the rejection to submit a revised filing satisfactory to the Secretary. Accordingly, in the case of a report rejected under section 104(a)(4), the administrator can avoid the assessment of any penalty under section 502(c)(2) by making the necessary corrections to the filing within the prescribed time frame. In addition, as reflected in the regulation at § 2560.502c-2, penalties may be waived, in whole or in part, upon the administrator's showing of mitigating circumstances regarding the

¹¹ In accordance with the requirements of the Federal Civil Penalties Inflation Act of 1990, as amended, the Department's regulation at 29 CFR 2575.502c-2 increased the maximum civil penalty from \$1,000 a day as stated in section 502(c)(2) of ERISA to \$1,100 a day for violations occurring after July 29, 1997.

degree or willfulness of the noncompliance.

The Department recognizes that some plan administrators, plan sponsors, and service providers may encounter technical and logistical problems in taking the steps necessary to transition to a wholly electronic filing system for annually submitting Form 5500 reports. As noted above, the Department believes that further delay of the electronic mandate being adopted in this final rule will provide plans and service providers with adequate time to make necessary adjustments in advance of the implementation of the new filing system. The Agencies also will be conducting outreach activities to help filers successfully make the transition to the wholly electronic filing system. Nonetheless, in assessing civil penalties under section 502(c)(2) of ERISA, the Department will take into account technical and logistical obstacles experienced by plan administrators who acted prudently and in good faith in attempting to timely file a complete annual report during the first year of the wholly electronic filing system. In the Department's view it would be premature at this point to announce a general exemption from annual reporting civil penalties, but the Department will remain open to reconsidering the issue to the extent developments suggest that an exemption for unintentional filing violations caused by lack of familiarity with the new filing process would facilitate a smoother transition to the new electronic filing system.

Although not specifically raised by the commenters, annual reporting penalties assessed under section 502(c)(2) of ERISA are independent from those penalties that may be imposed by the IRS for noncompliance with the annual reporting requirements of the Code. Therefore, penalties under one or both statutes could be assessed or waived in a given situation. In this regard, the Department will be coordinating its annual reporting compliance efforts with those of the IRS.

4. Technical Comments on the E-Filing System

In connection with the proposal, the Department reviewed the Request for Comments on the technical design of the new electronic filing system and provided further information regarding the project to assist the public in evaluating the electronic filing proposal; however, the Department noted that the proposed regulation concerned only the mandate of electronic filing. A number of commenters included in their comments recommendations regarding

various technical and operational specifications that the commenters thought should be part of the new e-filing system.

The majority of commenters favored the development of a secure Internet Web site on which a filer could file the Form 5500 through direct input of data as an additional option to hiring a third party preparer or purchasing privately developed software to file the Form 5500. Four commenters requested that the system be structured to allow direct filing by plan administrators so that small plans would not have to hire a paid preparer to file nor have to use privately developed software at plan expense. Several commenters emphasized the need for an automated way to receive an electronic signature in the form of a Personal Identification Number (PIN) or other signer identification. Other commenters suggested that the Department establish both a transmitter-based and a Web-based filing process. Several commenters suggested that multiple parties be able to submit information electronically for single filing, that plan sponsors be allowed to authorize third party filers as well as accommodate multiple signers, and that the plan's auditor and actuary be able to access the forms and provide approval as needed, including use of a separate electronic signature. Other commenters suggested that the system allow for the ability to download and import into the electronic Form 5500 filing materials from multiple sites or entities and allow for the use of multiple, privately-developed software formats in a filing. One commenter wanted the system to include adequate safeguards against security vulnerabilities resulting from multiple-party access to information saved to a secured Internet Web site. Another commenter recommended developing a standard encryption method for the report of the independent qualified public accountant. One commenter recommended that the e-filing system be capable of processing extensions, and amended and late filings, as well as filings for different years.

The Department reiterates its intention to ensure that the new e-filing system will remedy the existing technical difficulties that underlie the perceived limitations of EFAST's current electronic filing design and will provide an electronic filing process that will be simpler, easier, and more attractive to filers. For example, as explained in the E-Filing Proposal, the Department anticipates that the new electronic filing system will incorporate the Internet as the sole medium for

transmission of all filings, with this Internet-based transmission process superseding all of the other currently available methods of transmitting Form 5500 filings, including use of computer diskette, CD-ROM and magnetic tape. The system is to incorporate immediate validity and accuracy checks that will reduce both the error and rejection rate of filings and will eliminate much of the costly post-filing paper correspondence and related potential penalties. It is intended that the new electronic filing system will provide more than one vehicle for the electronic submission of annual return/reports. It is intended that the new filing system will offer users of approved, privately developed Form 5500 computer software (service providers to plans as well as plan administrators) a secure Internet-based method for transmission of Form 5500 filings created through the use of the software. In making a transition to 100 percent electronic filing, it is contemplated that the new system will continue to provide support to private sector software developers. Indeed, it is expected that third-party software will remain the primary means of producing Form 5500s. It is intended that service providers and software developers that provide value-added services for plan sponsors will be able to incorporate the new system's method of transmission into their services effectively and efficiently. Software file specifications will be based on improved data exchange technology based on widely-accepted standards, such as XML. It is also intended that software file specifications will be non-proprietary so that users of different software may freely share information across different platforms. The Department also intends to include in the new system, as a separate filing method, a dedicated, secure Internet Web site through which plan administrators (or other return/report preparers) will be able to input data and to complete and submit Form 5500 filings on an individual plan-by-plan basis. It is anticipated that the Internet Web site will provide the filer with the capability of entering and saving data for an individual filing through multiple sessions, uploading attachments, saving return/reports to a repository, and retrieving, updating, and editing stored filings, as well as creating and submitting amended filing data to EBSA.

The Department is aware that some filers may be concerned that the new electronic filing system could require changes in their current practices or their purchase of new software. The Department does not believe that filers

are at significant risk of not having electronic access or that filers will be required to purchase new software or make significant changes to their current practices. As an initial matter, this filing is made on behalf of employee benefit plans, not individuals. Moreover, the Department's confidence that these filers should be able to have electronic access, with relatively little difficulty or additional cost, is based on the following considerations. First, the new system will have two options for electronic filing: (1) By entering data directly on screen (through a Web-based system) and (2) by entering data through third-party software that many preparers may choose to use with an XML data feed. Second, the new system will be platform neutral; in this regard, the Department's Chief Information Officer will confirm and ensure that the new system will support all major platforms (Windows, Mac, UNIX, Linux, etc.) and browsers (Mozilla, Firefox, Opera, IE, Netscape, etc.).

Although it is still not possible at this time to provide full technical details regarding the new electronic filing system as many of the technological aspects of the redesign are still in development, the Department has been and will continue to consider the filing community's concerns and recommendations regarding various technical and operational specifications in the development of the new electronic filing system. In that regard, the Department notes that many of the commenters' suggestions were previously submitted in response to the Request for Comment that the Department posted on its Web site relating to updating the current EFAST processing system.

C. Overview of the Final Rule

The rule adds a new § 2520.104a-2, Electronic Filing of Annual Reports, to subpart E of 29 CFR part 2520 and establishes a requirement for the electronic filing of the Form 5500 for purposes of the annual reporting provisions of Title I of ERISA. The final rule provides that any annual report (including any accompanying schedules or attachments) filed with the Secretary under Part 1 of Title I of ERISA for any plan year beginning on or after January 1, 2008, shall be filed electronically in accordance with the instructions applicable to the report and such other guidance as the Secretary may provide. Because the Form 5500 is also filed by certain non-plan entities, such as common or collective trusts, pooled separate accounts, and entities described in 29 CFR 2520.103-12, which file for the fiscal year ending

with or within the plan year for which a plan's annual report is filed, the final rule makes further reference to the first "reporting year" beginning on or after January 1, 2008, for such entities.

The rule is designed to ensure that all annual reports filed under Part 1 of Title I of ERISA, as well as any statements or schedules required to be attached to the report, including those filed by administrators (29 CFR 2520.103-1), group insurance arrangements (29 CFR 2520.103-2), common or collective trusts and pooled separate accounts (29 CFR 2520.103-3, 2520.103-4, and 2520.103-9), and entities described in 29 CFR 2520.103-12, are required to be filed electronically.

Following the development of a new electronic filing system, the Department intends to provide specific instructions and guidance concerning methods of electronic filing in the instructions for the Form 5500 and via its Web site. The requirement in the final rule to file the annual report electronically applies only to annual reports filed under Part 1 of Title I of ERISA.

For purposes of the annual reporting requirements under section 4065 of Title IV of ERISA, the PBGC has advised the Department that all administrators of plans required to file reports under ERISA section 4065 also are required to file reports for purposes of section 104(a) of ERISA and a plan administrator's electronic filing of the Form 5500 for purposes of ERISA section 104(a), together with the required attachments and schedules and otherwise in accordance with the instructions to the form, will be treated as satisfying the administrator's annual reporting obligation under section 4065 of Title IV of ERISA.

For purposes of the annual filing and reporting requirements of the Code, the IRS has advised the Department that, although there are no mandatory electronic filing requirements for a Form 5500 under the Code or the regulations issued thereunder, the electronic filing of a Form 5500 by plan administrators, employers, and certain other entities for purposes of ERISA section 104(a), together with the required attachments and schedules and otherwise in accordance with the instructions to the Form, will be treated as satisfying the annual filing and reporting requirements under Code sections 6058(a) and 6059(a). Furthermore, as noted above, the IRS has determined that administrators of certain one-participant plans may file the Short Form 5500 electronically through the EFAST processing system to satisfy the requirement to file the Form 5500-EZ with the IRS. Administrators of one-

participant plans will continue to have the option of filing the Form 5500-EZ, but if they file the Form 5500-EZ, they must file with the IRS, rather than with EFAST.¹² The IRS intends that plan administrators, employers, and certain other entities that are subject to other filing and reporting requirements under Code sections 6033(a), 6047(e), and 6057(b) must continue to satisfy these requirements in accordance with IRS revenue procedures, publications, forms, and instructions. With respect to other annual reporting and filing obligations imposed by the Code but not required under section 104(a) of ERISA, such as are currently satisfied by the filing of the Schedule SSA, the IRS has advised the Department that it is currently exploring how best to make a transition from paper filing to electronic filing in a manner that minimizes the burdens on taxpayers and practitioners. For example, the IRS notes that it has promulgated regulations mandating or permitting electronic filing of certain returns filed by pension and welfare benefit plans. *See, e.g.*, 26 CFR 301.6033-4T (mandating electronic filing of certain corporate income tax returns and returns of organizations required to be filed under Code section 6033); 26 CFR 1.6033-4T (returns required to be filed on magnetic media under 26 CFR 301.6033-4T must be filed in accordance with IRS revenue procedures, publications, forms, or instructions).

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

Conforming changes are being made in order to reflect the electronic filing requirement in 29 CFR 2520.103-1(f) (contents of the annual report), 2520.103-2(c) (contents of the annual

report for a group insurance arrangement), 2520.103-9(d) (direct filing for bank or insurance carrier trusts and accounts), and 2520.103-12(f) (limited exception and alternative method of compliance for annual reporting of investments in certain entities).

D. Regulatory Impact Analysis

Summary

The Department has considered the costs and benefits of this final regulation, taking into account the public comments submitted in response to the proposed regulation, the changes to the proposal incorporated into this final regulation, and the Department's process to transition from EFAST to a new electronic filing system. The Department believes that the benefits that will arise from mandatory electronic filing beginning with the 2008 plan year will justify its costs. Those costs, which will fall principally on plans, will consist mainly of a one-time, transition or start-up cost to make the change to electronic filing, generally to be incurred in 2009, which on aggregate is estimated to be \$22 million. Benefits to plans, which will include ongoing savings on material and postage and efficiency gains from the early detection and elimination of potential filing errors in the course of electronic filing, are estimated to total \$10 million annually beginning in 2009. Over time the ongoing savings attributable to this regulation are expected to outweigh its one-time transition cost. Aggregate savings are estimated to exceed aggregate costs by \$24 million over the first five years (discounting future savings at a real rate of 3 percent).

As previously stated, additional, substantial, although not quantifiable, benefits are expected to accrue to the government and the public in the forms of substantially reduced processing costs and more timely availability of accurate filing data for use in enforcement and for other purposes of benefit to plans and participants.

Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a "significant regulatory action" is an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the

¹² Under the voluntary electronic filing option, one participant plan filers filing an amended return for a plan year must file the amended return electronically using the Form 5500-SF if they initially filed the Form 5500-SF electronically for the plan year and must file the amendment with the IRS using the paper Form 5500-EZ if they initially filed for plan year with the IRS on a paper Form 5500-EZ.

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

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and are likely to have a significant economic impact on a substantial number of small entities. For purposes of analysis under the RFA, EBSA continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Under section 104(a)(3) of ERISA, the Secretary may also provide for exemptions or simplified annual reporting and disclosure for welfare benefit plans. Pursuant to the authority of section 104(a)(3), the Department has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46, and 2520.104b–10, certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans that cover fewer than 100 participants and satisfy certain other requirements. Further, while some large employers may have small plans, in general small employers maintain most small plans. Thus, EBSA believes that assessing the impact of these rules on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of

small business that is based on size standards promulgated by the Small Business Administration (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 *et seq.*).

The Department presented an initial regulatory flexibility analysis at the time this regulation was proposed because the Department believed that the proposed regulation might have a significant economic impact on a substantial number of small entities, as defined under section 603 of the RFA. After reviewing and considering the public comments submitted in response to the proposal and the changes that are incorporated into the final regulation, the Department has prepared a final regulatory flexibility analysis, which is presented in this document as part of a broader economic analysis.

Costs and Benefits

Under this final regulation, costs to plans will include a one-time transition or start-up cost to make the change to electronic filing, estimated at \$22 million. Benefits will include ongoing savings on material and postage and efficiency gains from the early detection and elimination of potential filing errors in the course of electronic filing, estimated to total \$10 million annually. Over time the ongoing savings attributable to this regulation are expected to outweigh its one-time transition cost. Aggregate savings are estimated to exceed aggregate costs by \$24 million over the first five years (discounting future savings at a real rate of 3 percent). Additional benefits are expected to accrue to the government and the public in the forms of reduced processing costs and more timely availability of accurate filing data.

The costs and benefits of this regulation will accrue primarily to 815,000¹³ plans that file Form 5500s.¹⁴ Non-plan entities that file Form 5500s generally do so in their capacity as service providers to plans and therefore are expected to pass their own costs and benefits from the regulation on to the plans they serve.¹⁵

¹³ The numbers used in this analysis for aggregate plans and for plan subcategories (such as large and small plans; hand-print, machine-print, and electronic filers; and correction correspondence) are derived from Form 5500 data for the 2002 plan year.

¹⁴ The economic analysis of the regulation pertains only to those plans that file a Form 5500 to satisfy filing requirements under Title I of ERISA. Because the Form 5500–EZ is filed only to satisfy filing requirements under the Code, data related to Form 5500–EZ filers is not included in this analysis.

¹⁵ Economic theory predicts that producers in competitive markets pass costs and savings on to buyers.

Transition Costs

This regulation will entail some one-time costs, incurred in making the transition to electronic filing. The magnitude of the transition costs will vary across filer groups. As described in the economic analysis for the proposed regulation, the Department believes that filers that previously relied on the hand-print method of filing will generally face higher transition costs than other filers. The Department has refined its analysis of filers’ transition costs to take into account commenters’ concerns about the increased risk of initial filing difficulties when the new electronic filing system first begins operations, which is associated with potential higher filing costs. For purposes of this analysis, therefore, the Department has assumed that filers who submit an electronic filing within the first six months of operations of the new processing system, from January 1, 2009, through June 30, 2009 (the early filing period), may experience a higher cost.¹⁶

Hand-print Filers. Hand-print filers as a group are likely to face larger transition costs than others.¹⁷ These filers by and large currently file government printed forms, filled out by hand or by using a typewriter.¹⁸ Like all other filers, they will have the option of preparing and submitting their filings via a government provided Web site. It is likely that many (but not all) of these hand-print filers already have an electronic infrastructure (mainly a personal computer and Internet service) sufficient to support electronic filing. Nonetheless, hand-print filers are likely to incur some expense to learn about the new requirement, and some will incur

¹⁶ In order to estimate how many filers within each relevant category would be likely to file within the first six months of the new filing system’s operation, the Department analyzed filing patterns of the relevant types of plans for each calendar year from 2000 to 2002 and averaged the resulting data to produce an estimate for each category.

¹⁷ The comments focused on small plans in discussing the potential difficulties that hand-print filers may experience. The Department believes that all hand-print filers, regardless of plan size, may experience larger transition costs than machine-print filers, since the size and complexity of the reports filed by larger hand-print filers may create a burden equivalent to that of the small hand-print filers. Accordingly, these estimates treat all hand-print filers the same with regard to transition costs.

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

additional costs, such as in locating and becoming familiar with Internet access, as well as in establishing a secured filing account.

For the 96,000 current hand-print filers, the Department estimates that 11,000 will file their 2008 Form 5500 filing during the early filing period (from January 1, 2009, through June 30, 2009). The filers in that group, whether large or small, are assumed to require on average three hours to transition to electronic filing. The hand-print filers who file their 2008 reports after June 30, 2009, are assumed to require on average one and one-half hours each. The resulting transition cost to electronic filing for all hand-print filers is estimated at a one-time, aggregate of \$9 million. This assumes that a professional-level employee, who costs the plans on average \$58.80 per hour in wages, benefits, and overhead,¹⁹ would perform the work required to make the transition to electronic filing. As discussed in the preamble to the proposed regulation, the Department recognizes that transition costs may vary greatly among hand-print filers and may be larger or smaller than these estimates. For example, some hand-filers may decide to switch to use of a service provider for completing the Form 5500 filing, which might entail greater initial expense; others may experience lower costs because they are highly experienced Internet users already engaged in electronic business activities.

Machine-Print Filers. The Department has also revised its estimates for machine-print filers to take into account a potentially higher cost of making the transition during the early filing period. The Department believes that a large proportion of machine-print filers hire service providers to complete their filings. For purposes of these estimates, that proportion is conservatively assumed to be 50 percent.

With respect to filings on behalf of machine-print filers by service providers during the early filing period, it is likely that service providers will quickly encounter and resolve any early period filing difficulties, reducing the transition cost per plan. Accordingly, the Department has assumed that, for that class of filings, the transition to electronic will require an average of five minutes per filing; later filings are assumed to require no transition costs. These assumptions, applied to an

estimated 58,000 of service-provider filings that are expected to be made during early filing period, add \$300,000 to the aggregate transition costs.

For machine-print filers who prepare their own filings and file them during the early filing period, the Department has assumed that the transition to the electronic filing system will require on average one hour; for later filers, the Department has assumed a transition time averaging 30 minutes. The Department estimates that 355,000 machine-print filers will transition to electronic filing using their own resources, with 58,000 filing during the early filing period, incurring an estimated aggregate transition cost of \$12 million.

Based on the above-described calculations, the Department estimates that the total aggregate transition costs for all machine-print filers will be \$12 million.

Electronic Filers

The Department has also revised its estimates to include costs attributable to filers who have previously used the electronic methods of filing available under EFAST in order to account for the possibility that electronic filers who file during the early filing period might have larger transition costs than those who make that transition later. The Department estimates that 500 previous electronic filers will file during the early filing period and that their transition to the new electronic processing system will require five minutes per plan. The Department assumes that later filers in this category will have only negligible transition costs. This results in an estimate of \$2,000 in aggregate transition costs attributable to electronic filers.

In summary, the total aggregate start-up, transition cost to electronic filing under this regulation is estimated at \$22 million, incurred primarily in 2009.

Ongoing Costs and Benefits

Preparation Costs. This regulation pertains to the filing, and not to the preparation, of the Form 5500. It is possible, however, that for some filers mandatory electronic filing will prompt changes in preparation methods. For example, hand-print filers may currently prepare their filings using a government-printed form and a typewriter. Such filers may prepare future filings by entering information into a government Web site. The Department considered the cost of making such transitions in preparation methods to be part of the overall transition cost of the regulation,

included in the estimates presented above.

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

Filing Cost Savings. Filing costs generally are expected to be reduced by the implementation of this regulation. Savings are foreseen from the elimination of materials and mailing costs and from a reduction in filing errors and subsequent corrections. Electronic transmission will eliminate certain costs otherwise attendant to paper filing, including materials and postage. The Department estimates that by changing to electronic filing, 815,000 plans will benefit from approximately \$900,000 in such cost-savings annually, assuming savings of \$0.0167 per sheet of paper and \$0.57 for postage per filing.

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

Historically, filers that use a software-based system generally have fewer filing errors. In 2002, 6 percent and 16 percent of electronic and machine-print filings, respectively, had filing errors compared to 38 percent of hand-print filings. The filing errors include items such as missing signatures, attestations, schedules, or back-up documents that resulted in an incomplete filing. As a result of filer errors and the need for

¹⁹The total labor cost is derived from wage and compensation data from the Bureau of Labor Statistics' (BLS) 2004 National Occupational Employment and Wage Estimates from the Occupational Employment Survey and BLS 2004 Employment Cost for Compensation.

additional information or clarifications about Form 5500 filings for the 2002 plan year, the Department mailed 150,000 letters to filers requesting corrections or additions. This correction process ultimately delays the final submission and requires plans to incur additional costs to address deficiencies. The electronic filing system's intended error detection capability may largely eliminate the Department's need to forward correspondence to plans with deficient filings. This enhancement is likely to save time for filers. If the need for correspondence can be eliminated, the aggregate annual cost savings to affected filers could be as high as \$9 million, assuming elimination of correspondence with the Department saves an average of one hour of a professional's time, at an average of \$58.80 per hour, plus the value of associated postage and materials. A disproportionate share of this savings, estimated at \$2.2 million, would accrue to current hand-print filers (reflecting their historically higher filing error rates), while \$6.6 million would accrue to machine-print filers. The Department (and by extension taxpayers) would realize additional savings from this reduced need to correct filing errors.

Societal Benefits of E-Filing and E-Government

The Department believes, as previously stated in the preamble to the proposed regulation, that the implementation of a fully electronic processing system for Form 5500 filings will produce substantial additional benefits for both the government and the public through reduced processing costs and more timely availability of accurate filing data. The decrease in erroneous filings and corrective correspondence will produce immediate savings to the Federal Government and therefore to taxpayers, and improvements in the data accuracy and accelerated processing will improve the timeliness and reliability of national statistics on private employee benefit plans.

In addition, the Department continues to believe that this regulation will contribute to the Federal Government's progress in implementing E-government initiatives, taking advantage of the electronic information technologies that are becoming increasingly central to business success in the United States. The proliferation of such technologies, and of expertise and familiarity with using them, is expected to moderate the cost of compliance with this regulation and to increase the importance of its implementation. The Department reviewed current literature on this topic in depth in the preamble to the E-Filing

Proposal and continues to rely on those studies and their conclusions in adopting this final regulation.

Alternatives Considered

As discussed in the preamble to the E-Filing Proposal, before electing to pursue a wholly electronic filing system, the Department considered alternative options for reconfiguring the filing methods for the Form 5500, focusing in particular on the gradual approach advocated generally in the public comments on the Request for Comment, which described technical aspects of the development of the new processing system. The preamble to the proposed regulation described these alternatives and the Department's reasons for rejecting them in favor of mandated electronic filing. The Department continues to believe that allowing filers to choose whether to file electronically or on paper is undesirable because it would perpetuate the inefficiencies inherent in paper filing, such as avoidable filing errors and associated correspondence and civil penalties, delays in processing filings, and inferior data quality, as well as higher costs for the Federal government (and by extension taxpayers).

The Department received several comments on the E-Filing Proposal requesting that the Department reconsider some of the rejected alternatives. Commenters also asked the Department to consider providing small plans a one-year deferral of the electronic filing mandate, a one-year period of relief for filing violations, or a voluntary pilot program during the new system's first year of operations. These commenters suggested that providing this sort of transition relief would ameliorate public concerns about the burden of transitioning to electronic filing. In response to these comments the Department considered delaying the applicability date of the electronic filing mandate an additional year, until the 2009 year. To evaluate this alternative, the Department assessed the relative costs and benefits of mandating electronic filing beginning with the 2008 or 2009 plan year. In each scenario, the Department assumed that the new processing system would be operational as of January 1, 2009.

The Department's economic analysis supports its decision to require electronic filing beginning with the 2008 plan year. As noted earlier, some commenters anticipate that filers who file during the new electronic filing system's initial months of operation may incur higher transition costs than those who file later. Delaying the applicability date until plan year 2009

would reduce the proportion of filers exposed to such potential higher costs from a substantial minority to a tiny one. The Department estimates that adopting this alternative might reduce aggregate transition costs by \$3 million. However, delaying the applicability date would also prolong for an additional year the estimated \$10 million combined annual cost arising from paper filing and associated error correction under EFAST, which electronic filing is expected to eliminate, and so on net would increase aggregate, long-term filer costs by \$7 million. It would also delay for a year the anticipated societal benefits of electronic filing.

Small Plans

This regulation will have an impact on small plans. As for all other plans, costs and benefits for small plans are expected to vary with the plans' circumstances. Most will likely incur moderate transition costs and subsequently realize moderate ongoing savings. Some, however, may experience larger impacts, including greater transition costs and at least some period of ongoing net cost increases rather than ongoing net savings. For example, some small plans may lack experience with or easy access to the Internet. Such plans may incur larger than typical transition costs to gain access to the Internet (or to enlist a service provider with access) and may find it more time consuming, and therefore more costly, to prepare their filing on a government Web site (or to interact with a service provider) than to prepare their filing using a government printed form that is completed "by hand" and filed on paper through the mails.

The Department estimates that 667,000 small plans will incur one-time transition costs of \$18 million; this includes \$7 million for 72,000 current hand-print filers, \$11 million for 587,000 current machine-print filers, and \$2,000 for 9,000 current electronic filers. It is further estimated that small plans will realize on-going annual savings from the elimination of materials and postage costs (approximately \$715,000) and from the elimination of the need to correct deficient filings (\$1.8 million accruing to hand-print filers, \$5.6 million to machine-print filers, and \$36,000 to electronic filers) for a total of approximately \$8 million in annual savings. As with all other plans, over time the aggregate ongoing savings realized by small plans are expected to outweigh their aggregate one-time transition costs. Over five years, savings

are estimated to exceed costs by \$17 million (discounting future savings at a real rate of 3 percent). The Department believes that impacts may vary among small plans, depending for example on their (or their service providers') access to and familiarity with associated technologies, and possibly on their size. The Department, however, lacks a basis on which to estimate such variations.

Paperwork Reduction Act

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

Congressional Review Act

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

Unfunded Mandates Reform Act

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

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism, and requires Federal agencies to adhere to specific criteria 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 States, or on the distribution of power and responsibilities among the various levels of government. This final rule does not have federalism implications because it has 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 this final rule do not alter the fundamental reporting and disclosure requirements of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects in 29 CFR Part 2520

Employee benefit plans, Pensions, Reporting and recordkeeping requirements.

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

PART 2520—RULES AND REGULATIONS FOR REPORTING AND DISCLOSURE

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

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

2. Add § 2520.104a-2 after § 2520.104a-1 to read as follows:

§ 2520.104a-2 Electronic filing of annual reports.

(a) Any annual report (including any accompanying statements or schedules) filed with the Secretary under part 1 of title I of the Act for any plan year (or reporting year, in the case of common or collective trusts, pooled separate accounts, and similar non-plan entities) beginning on or after January 1, 2008, shall be filed electronically in accordance with the instructions applicable to such report, and such other guidance as the Secretary may provide.

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

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

§ 2520.103-1 Contents of the annual report.

* * * * *

(f) Electronic filing. See § 2520.104a-2 and the instructions for the Form 5500 "Annual Return/Report of Employee Benefit Plan" for electronic filing requirements. The plan administrator

must maintain an original copy, with all required signatures, as part of the plan's records.

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

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

* * * * *

(c) Electronic filing. See § 2520.104a-2 and the instructions for the Form 5500 "Annual Return/Report of Employee Benefit Plan" for electronic filing requirements. The trust or other entity described in § 2520.104-43(b) filing under this section must maintain an original copy, with all required signatures, as part of its records.

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

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

* * * * *

(d) Electronic filing. See § 2520.104a-2 and the instructions for the Form 5500 "Annual Return/Report of Employee Benefit Plan" for electronic filing requirements. The bank or insurance company which maintains the common or collective trust or pooled separate account must maintain an original copy, with all required signatures, as part of its records.

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

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

* * * * *

(f) Electronic filing. See § 2520.104a-2 and the instructions for the Form 5500 "Annual Return/Report of Employee Benefit Plan" for electronic filing requirements. The entity described in paragraph (c) of this section must maintain an original copy, with all required signatures, as part of its records.

Signed at Washington, DC, this 13th day of July 2006.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration.

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BILLING CODE 4510-29-P