

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

RIN 1210-AB97

Revision of Annual Information Return/ Reports**AGENCY:** Employee Benefits Security Administration, Labor.**ACTION:** Final forms revisions.

SUMMARY: This document contains final revisions to the instructions for the Form 5500 Annual Return/Report of Employee Benefit Plan and Form 5500-SF Short Form Annual Return/Report of Small Employee Benefit Plan effective for plan years beginning on or after January 1, 2021. These final revisions to the instructions were included in a broader proposal of form and instruction changes published on September 15, 2021. The limited number of instruction changes in this document implement annual reporting changes for multiple-employer plans (including pooled employer plans) that result from statutory provisions in section 101 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act). The other changes to the Form 5500 Annual Return/Report included in the September 2021 proposal will be the subject of one or more separate and later final notices.

DATES: The final instruction revisions in this document are effective for plan years beginning on or after January 1, 2021. The Form 5500 Annual Return/Report for the 2021 plan year generally is not required to be filed until seven months after the end of the 2021 plan year, e.g., July 2022 for calendar year plans, and a 2½-month extension is available.

FOR FURTHER INFORMATION CONTACT: Janet Song or Florence Novellino, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693-8500, (this is not a toll-free number).

Customer service information: Individuals interested in obtaining information from the DOL concerning Title I of Employee Retirement Income Security Act of 1974 (ERISA) may call the EBSA Toll-Free Hotline at 1-866-444-EBSA (3272) or visit the DOL's website (www.dol.gov/agencies/ebsa).

SUPPLEMENTARY INFORMATION:**I. Background**

Titles I and IV of Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code), generally require pension and other employee benefit plans to file annual returns/reports concerning, among other things, the financial condition and operations of the plans. Filing a Form 5500 Annual Return/Report of Employee Benefit Plan (Form 5500) or, if eligible, a Form 5500-SF Short Form Annual Return/Report of Small Employee Benefit Plan (Form 5500-SF), together with any required schedules and attachments (together "the Form 5500 Annual Return/Report"),¹ in accordance with their instructions, generally satisfies these annual reporting requirements. ERISA section 103 broadly sets out annual financial reporting requirements for employee benefit plans under Title I of ERISA. The Form 5500 Annual Return/Report for Title I purposes is promulgated pursuant to DOL regulations under the ERISA provisions authorizing limited exemptions and simplified reporting and disclosure for welfare plans under ERISA section 104(a)(3), simplified annual reports under ERISA section 104(a)(2)(A) for pension plans that cover fewer than 100 participants, and alternative methods of compliance for all pension plans under ERISA section 110. The Form 5500 Annual Return/Report, and related instructions and regulations, are also promulgated under the DOL's general regulatory authority in ERISA sections 109 and 505.

The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), included various provisions designed to improve the private employer-based retirement system that either directly changed or necessitated changes to the annual reporting requirements under ERISA and the Code.² On September 15, 2021, the DOL, the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC) (collectively "the Agencies") published a notice of proposed forms revisions (NPRM) to amend the Form 5500 Annual Return/Report to implement the SECURE Act and related reporting changes with a

limited number of proposed forms revisions beginning with the 2021 reporting year; with most of the proposed revisions not applying until the 2022 reporting year. 86 FR 51488 (Sept. 15, 2021). The DOL simultaneously published a proposed rulemaking (NPRM) required to implement the proposed forms revisions. 86 FR 51284 (Sept. 15, 2021). The Agencies received 114 comments on the NPRM and NPRM. The comments, which were all posted on the Department's website, generally focus on the proposed changes for the 2022 plan year forms. This document is limited to the changes for the 2021 plan year forms. Specifically, the reporting changes are revisions to the instructions that: (1) Implement the SECURE Act amendment to ERISA section 103(g) by requiring multiple employer defined contribution pension plans to include aggregate account balance information by employer on their existing Form 5500 attachment on participating employer information; and (2) noting that a pooled employer plan is a multiple employer plan that files a single Form 5500 Annual Return/Report, and requiring such plans to indicate in an attachment to their Form 5500 (i) whether the plan's pooled plan provider complied with the Form PR registration requirements for pooled plan providers; and (ii) if the answer is yes, to provide the AckID number for the pooled plan provider's latest Form PR filing.³ Although not a change to the instructions, in response to comments raising the issue, this document also advises filers that the Department is continuing the current requirement that welfare plans that file a Form 5500 must include participating employer information notwithstanding that the SECURE Act amended ERISA section 103(g) to limit that specific section to retirement plans. No changes to the DOL's implementing regulations are required for these instruction changes. The Agencies intend to address the other changes to the Form 5500 and related regulations proposed in the September 2021 NPRM and NPRM in one or more other separate and later Notices of Adoption of Final Forms Revisions and Notices of Final Rulemaking. The instruction changes

¹ References to the "Form 5500 Annual Return/Report" may include, depending on the context, the Form 5500, the Form 5500-SF, and the Form 5500-EZ, Annual Return of One Participant (Owners and Their Spouses) Retirement Plan. The Form 5500-EZ is a return that is required only to satisfy the Code. Form 5500-EZ filers are not subject to Title I of ERISA.

² The SECURE Act was enacted on December 20, 2019, as Division O of the Further Consolidated Appropriations Act, 2020 (Pub. L. 116-94).

³ These requirements for pooled employer plans are limited to the Form 5500 because the Form 5500-SF instructions provide, consistent with the proposal, that pooled employer plans are not eligible to file the Form-SF. The proposal would also have required that all multiple employer plans file the Form 5500 regardless of whether they would otherwise be eligible to file the Form 5500-SF. The Department is not adopting that change for all MEPs in the 2021 forms but intends to address that proposed change in a separate and later Notice.

being added beginning with the 2021 reporting year are discussed below.

II. 2021 Form 5500 Annual Return/Report Changes for MEPs and Pooled Employer Plans

SECURE Act section 101 amended ERISA section 3(2) and added ERISA sections 3(43) and 3(44) to allow for a new type of ERISA-covered multiple employer pension plan (MEP) for plan years beginning on or after January 1, 2021—a defined contribution pension plan called a “pooled employer plan” operated by a “pooled plan provider.” Pooled employer plans allow multiple unrelated employers to participate without the need for any common interest among the participating employers (other than having adopted the plan). Under section 3(2) of ERISA, as amended by the SECURE Act, a pooled employer plan is treated for purposes of ERISA as a single plan that is a multiple employer plan. New section 3(44) of ERISA establishes requirements for pooled plan providers, including a requirement to register with the DOL before beginning operations as a pooled plan provider. A parallel requirement to file a registration statement with the Secretary of Treasury is in section 413(e)(3)(A)(ii) of the Code. On November 16, 2020, the DOL published a notice of final rulemaking establishing the registration requirement for pooled plan providers. 85 FR 72934 (Nov. 16, 2020). The Treasury Department and the IRS have advised that filing the Form PR with the DOL will satisfy the requirement to register with the Secretary of the Treasury. The instructions to the Form PR (Pooled Plan Provider Registration) (Form PR) advised registrants to use the same identifying information on the Forms 5500 Annual Return/Report filed by the pooled employer plans, particularly name; EIN for the pooled plan provider; any identified affiliates providing services; trustees; and plan name and number for each pooled employer plan.

Section 101 of the SECURE Act also amended ERISA section 103(g), effective for plan years beginning on or after January 1, 2021. Section 103(g) was added to ERISA by the Cooperative and Small Employer Charity Pension Flexibility Act (CSEC Act) in 2014.⁴ Prior to the SECURE Act amendment, section 103(g) required multiple employer plans to include with their annual reports “a list of participating employers” and, with respect to each participating employer, “a good faith estimate of the percentage of total contributions made by such

participating employer during the plan year.” In response to the CSEC Act, the Form 5500 instructions for 2014 and later were amended to provide for all multiple employer plans to include the section 103(g) information as a nonstandard attachment.⁵ SECURE Act section 101(d) amended ERISA section 103(g) by providing that annual reports for “any plan to which [ERISA] section 210(a) applies (including a pooled employer plan)” also must include two additional pieces of information: (1) The aggregate account balances attributable to each employer in the plan (determined as the sum of the account balances of the employees of such employer and the beneficiaries of such employees), and (2) with respect to a pooled employer plan, identifying information for the person designated under the terms of the plan as the pooled plan provider.

As discussed in the NPFR, the statutory establishment of pooled employer plans as a type of multiple employer plan under Title I of ERISA requires some adjustments to the Form 5500 Annual Return/Report to acknowledge the existence of this new type of plan and to confirm that pooled employer plans must file a Form 5500 Annual Return/Report in accordance with the requirements that apply to other MEPs that file the Form 5500. The adjustments to accommodate pooled employer plan reporting on the Form 5500 were presented in the NPFR largely in the form of a new proposed Schedule MEP and its instructions that would be a required part of the Form 5500 Annual Return/Report for various types of MEPs, including pooled employer plans. As proposed, however, the Schedule MEP would not be effective until plan years beginning on or after January 1, 2022, but under the SECURE Act, pooled employer plans could begin operating for plan years beginning on or after January 1, 2021. In order to implement core elements of the SECURE Act section 101(d) reporting requirements on a timely basis, the NPFR included proposed amendments to the instructions for the 2021 Form 5500 and Form 5500-SF, specifically for the multiple-employer plan check box that is currently on Part I, line A of the Form 5500 and Form 5500-SF. Upon review of the public comments, the Department continues to believe that amending those instructions is an efficient and appropriate way to provide for the reporting of ERISA section 103(g) information for the 2021 reporting year.

Specifically, the instructions to the 2021 Form 5500⁶ for Part I, Line A (the multiple-employer plan checkbox) are being amended to note that (1) a pooled employer plan operated by a pooled plan provider that meets the definition under ERISA section 3(43) is a multiple employer plan, and (2) like other ERISA-covered pension MEPs, a single Form 5500 Annual Return/Report is required to be filed for a pooled employer plan.⁷ The 2021 instructions to the Form 5500 and Form 5500-SF for the multiple-employer plan check box are being further amended to require MEPs to include a new data element on the currently required 2021 non-standard attachment, specifically the “Aggregate Account Balances Attributable to Participating Employer” (element 4). The instructions to the multiple-employer plan check box currently provide that the Annual Return/Report filed for a multiple-employer plan (MEPs and multiple employer welfare plans) must include a non-standard attachment that identifies the participating employers in the plan by name and employer identification number (EIN) and include for each participating employer an estimate of

⁶ As noted above, pooled employer plans are not eligible to file the Form 5500-SF so the instructions describing the pooled employer plan’s status as a MEP are not being added to the Form 5500-SF instructions.

⁷ A commenter presenting itself as representing accounting industry interests asked for clarification regarding audit requirements for pooled employer plans. To some extent, however, the comment incorrectly assumed that a pooled employer plan operates as an aggregation of many plans, rather than as a single ERISA-covered plan. For example, the commenter asked “If a pooled employer plan is comprised of hundreds of plans, will each plan be required to be audited annually?” The commenter also asked “If the DOL permits rotation of audit procedures for plans participating in a pooled employer plan, how will that be determined?” The commenter also asked “Will the DOL provide guidance for the auditor if there are one or more plans within the pooled employer plan that are not compliant with the plan document or with ERISA?” A pooled employer plan, like other MEPs, is a single plan covering the employees of multiple employers. It is not comprised of multiple separate plans, as would be true of the proposed new direct filing entity the “DCG.” The Department notes that nothing in the SECURE Act changed the ERISA independent qualified public accountant (IQPA) audit requirements as they apply to pooled employer plans. Rather, under ERISA, pooled employer plans are subject to the Form 5500 Annual Return/Report requirements that apply generally to employee pension benefit plans, including the audit requirements under ERISA that apply to employee pension benefit plans generally. As such, the audit must be performed in accordance with Generally Accepted Auditing Standards (GAAS), which are established by the accounting industry not the Department. How GAAS applies to pooled employer plans, including any differences in audit procedures that may be required under GAAS, are issues that are beyond the scope of these forms revisions.

⁴ Public Law 113–97 (Apr. 7, 2014).

⁵ 79 FR 66617 (Nov. 10, 2014).

the percentage of total contributions for the plan year made by each employer.⁸

Some commenters asked that the Department interpret the SECURE Act's requirement to report employer-level aggregate account balances as applying only to defined contribution MEPs. The commenters noted that neither the operative language of the SECURE ACT nor its legislative history support applying this requirement to defined benefit pension plans that do not maintain "account balances" for each employee. Two of these commenters noted that this requirement is particularly inappropriate for defined benefit MEPs established before 1989 that determine their minimum funding requirements as if all participants were employed by a single employer and, therefore, did not elect "employer-by-employer" treatment under the Technical and Miscellaneous Revenue Act of 1988 (TAMRA). One of the commenters also noted that participants already receive annual funding notices on their defined benefit pension plan, so reporting of an artificial "account balance" could give the false impression that, in these MEPs, specific assets are set aside to provide benefits for employees of each employer when, in fact, all of the assets of a defined benefit MEP (like any other defined benefit pension plan) are available to pay all of the benefits of all of the participants in that MEP, regardless of where the participants are employed.

The Department agrees that the SECURE Act's requirement to report employer-level aggregate account balances should not apply to defined benefit pension MEPs. The SECURE Act expressly states that the aggregate account balances attributable to each employer in the plan is to be determined "as the sum of the account balances of the employees of such employer (and the beneficiaries of such employees)." Although the SECURE Act amended ERISA section 103(g) to provide that it applies to plans subject to ERISA section 210(a), and there may be a relatively small number of defined benefit MEPs that are subject to ERISA section 210(a), in the Department's view, it would not be a reasonable reading of the statutory text to conclude that Congress intended by the reference to ERISA section 210(a) to mandate that aggregate account balance information

⁸ The instruction further provides that unfunded, fully insured, or combination unfunded/insured multiple employer welfare plans that are exempt under 29 CFR 2520.104-44 from filing financial statements with their annual report must attach a list of participating employers, but do not have to include an estimated amount of contributions from each employer.

be reported by defined benefit plans that do not maintain account balances for covered participants. Accordingly, the final instructions for the 2021 reporting year provide that only defined contribution MEPs must report the new SECURE Act required employer-level aggregate account balances.

One commenter requested clarification of the requirement to report the "Percentage of Total Contributions for the Plan Year" (element 3 for the 2021 non-standard attachment). Specifically, the commenter asked whether the total of all participating employers must equal 100 percent, and whether it will cause red flags with the DOL/IRS if it does not. They also asked whether filers should round the percentage entry for each employer to decimal places, and if so, how many. The Department read these commenter's questions as primarily directed at issues that may arise when in the context of a standardized Schedule MEP structure for reporting this information. The Agencies will take into account such questions in designing the form and developing appropriate instructions and edit tests. For the 2021 reporting year, as noted above, the instructions will continue to allow filers to use a non-standard attachment to report the required information. The Department also notes that this is not a new reporting requirement. It has been part of the Form 5500 since it was added in 2014 in response to the CSEC Act addition of section 103(g) to Title I of ERISA. Nonetheless, for the 2021 reporting year, it would be acceptable for filers to round to the nearest whole number similar to rounding conventions that apply to the Form 5500 financial statements and schedules. To the extent the filer's concern is whether rounding could result in the total reported percentage either slightly above or slightly below 100 percent, the filer can indicate that on the non-standard attachment as part of its filing.

A commenter asked for guidance on the asset values that should be used for the "Aggregate Account Balances Attributable to Participating Employer" (element 4 for the 2021 non-standard attachment) and, in particular, whether the end of year net value may be used based on the values reported on the Schedules H and I. The SECURE Act expressly states that the aggregate account balances information should be determined as the sum of the account balances of the employees of such employer and the beneficiaries of such employees. In the Department's view, an end of year valuation is an appropriate reporting requirement as it will provide the most up to date value for the plan

year covered by the Form 5500 report. The final instructions include directions to that effect. Further, rounding to the nearest dollar, as with the financial reporting on other parts of the Form 5500 and schedules, would be appropriate. The final instructions have been revised to provide this clarification as well.⁹

With respect to the additional ERISA section 103(g) information regarding pooled employer plans that must be included for the 2021 reporting year, the Department had proposed that the substance of the proposed Schedule MEP changes would apply to the 2021 reporting year requirements except that the information could be filed as a non-standard attachment. The Department received comments opposing or expressing concern about some elements of the proposed Schedule MEP. Since the Department intends to address those comments and resolve the Schedule MEP content requirement in a later final rule, the Department agrees that it would be premature to impose the requirements wholesale to the 2021 Form 5500 Annual Return/Reports. Rather, for the 2021 reporting year, in addition to the participating employer information required for all MEPs, pooled employer plans only will be required to indicate, on a non-standard attachment, whether they are in compliance with the Form PR registration requirements and provide the AckID number for their latest Form PR filing.¹⁰

Some commenters complained that pooled employer plans should not be required to provide the AckID number, claiming that this requirement was unnecessary because the Department already has the Form PR and issued the AckID number. Some commenters suggested that asking any questions about the pooled plan provider was duplicative of the Form PR and that the "AckID" could be found by a separate

⁹ The Department understands from some comments on the proposal that, depending on the treatment of receivables and forfeitures by the plan, the sum of the account balances of the employees of each employer and the beneficiaries of such employees may not match the net asset value reported on Schedule H or I. The Department believes that the aggregate account balance information should be calculated and reported in accordance with the statutory direction in the SECURE Act. Filers can add an explanatory statement to the extent they wish to explain any difference between that sum and other total asset values reported on the Form 5500.

¹⁰ AckID is the acknowledgement code generated by the system in response to a completed filing for the most recent Form PR submitted. The instructions to the Form PR advise the pooled plan provider that it must keep, under ERISA section 107, the electronic receipt for the Form PR filing as part of the records of the pooled employer plans operated by the pooled plan provider.

internet search. A few commenters also argued that pooled employer plans should not be subject to special reporting standard and that subjecting pooled employer plans to heightened scrutiny, when other plans treated as single plans are not, is arbitrary and unsupported by statute. A commenter further argued that the question regarding whether the pooled plan provider is currently in compliance with the Form PR (Pooled Plan Provider Registration Statement) requirements is ambiguous and unclear, given the lack of guidance and pending agency rulemakings (*e.g.*, IRS' one bad apple guidance).

The Department disagrees with the commenters opposing the collection of information regarding the Form PR. In the preamble to the final regulation establishing the Form PR, the DOL specifically noted that it would add new questions on the Form 5500 that would ask whether a pooled plan provider filed its registration statement with the Secretary, including any required updates, and to report the electronic confirmation number provided to the pooled plan provider at the time that the registration was received. Further, as explained in the preamble to the proposal to add this information collection item for pooled employer plans, the questions related to the Form PR are intended to provide the Department, the Treasury Department, the IRS, participating employers, and other stakeholders with information that would allow them to connect the Form PR registration with the Form 5500 for all pooled employer plans operated by the registrant. 85 FR 72934, 72946 (Nov. 16, 2020). In fact, one commenter representing retirees and plan participants specifically indicated its support for requesting the "AckID" to help workers and retirees keep track of their assets and the plan, especially with the anticipated limited involvement of their employer in the design of pooled employer plans. Also, as discussed above, SECURE Act section 101(d) specifically requires the annual report of pooled employer plans to include identifying information for the person designated under the terms of the plan as the pooled plan provider. Thus, the requirement is neither arbitrary nor unsupported by the statute. The AckID requirement is also similar to the questions currently on the Form 5500 that require multiple employer group health plans to report about their compliance with registration and reporting requirements on the Form M-1 (Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain

Entities Claiming Exception (ECEs)). The Department also does not agree that the filing requirements are ambiguous, that there is a lack of guidance regarding the filing requirement, or that it is unfair to require pooled employer plans to report on the registration status of their pooled plan providers. Unlike other ERISA-covered multiple employer plans, the SECURE Act expressly sets forth roles and responsibilities for pooled plan providers. One of those clear requirements is that the pooled plan provider must register with the Department and with the IRS. The Form PR was adopted after public notice and comment to implement a specific registration requirement added to ERISA by the SECURE Act. The Form PR also includes instructions for completing the form, which also were developed as part of the notice and comment rulemaking process. The Form 5500 is signed by the plan administrator stating that the administrator has reviewed the filing and that "to the best of my knowledge and belief, it is true, correct, and complete." In the case of a pooled employer plan, the pooled plan provider is the administrator. Pooled plan providers should be able to say whether they believe the Form PR filing requirements have been met. In the Department's view, it does not impose any meaningful burden on the pooled plan provider acting as the plan administrator to acknowledge on the plan's Form 5500 annual report that it believes to the best of the pooled plan provider's knowledge and belief that it has fulfilled its statutory registration obligation. Further, the DOL continues to believe that linking the Form PR filed by a pooled plan provider to the Forms 5500 is a reasonable method to help make sure that workers, retirees, and the agencies charged with oversight have the information they need to be sure that the Form PR information is consistent and up to date. For example, having the AckID number on the plan's Form 5500 will assist plan participants and participating employers in finding the relevant Form PR on the Department's website. The requirement to report Form PR compliance information on the Form 5500 will also help the Department ensure compliance with those registration requirements. While there is no explicit civil penalty for failing to file a Form PR, there is a civil penalty for failing to file a complete and accurate Form 5500. See ERISA section 502(c)(2); 29 CFR 2560.502(c)(2) and the Federal Civil Penalties Inflation Adjustment Act of 1990.

Finally, with respect to the requirement that multiple employer welfare plans file the participating employer information as a non-standard attachment to the 2021 Form 5500 Annual Return/Report, one commenter representing retirees and plan participants specifically indicated its support for continuing to require multiple employer welfare plans to provide participating employer information. Two commenters argued to the contrary that the DOL could no longer ask multiple employer welfare plans to report any participating employer information because Congress, by amending ERISA section 103(g) to add a reference to plans subject to ERISA section 210(a), was explicitly saying that welfare plans should no longer report such information. One of the commenters noted that DOL had cited ERISA section 103(c)(2) as separate authority for DOL to require welfare plans to report such information, but argued that section 103(c)(2) was not applicable because the DOL is not establishing this reporting requirement to obtain "the name and address of each fiduciary" but rather to reinstate a reporting requirement that was repealed by the SECURE Act.

Although the DOL agrees that ERISA section 103(g) technically is not applicable to welfare plans as a result of the SECURE Act amendment, the DOL does not agree the SECURE Act amendment precludes its continued collection of participating employer information on the Form 5500 from multiple employer welfare plans.¹¹ Rather, DOL continues to believe that the addition of the reference to ERISA section 210(a) was meant to emphasize that defined contribution MEPs, including association retirement plans, professional employer organization plans (PEOs), and the newly created pooled employer plan, are required to comply with the participating employer reporting requirements. The DOL does not believe that the amendment was intended to preclude the Department from relying on other annual reporting authorities to collect participating employer information about multiple employer welfare arrangements (MEWAs). In the DOL's view, receiving participating employer information from MEWAs, including multiple employer welfare plans, is important for oversight

¹¹ This final rule does not address comments on the proposal in the NPFR to move the participating employer questions to the Form M-1 for MEWA plans and arrangements that provide medical benefits. As noted above, the proposals relating to changes for the 2022 reporting year will be addressed in a later, separate **Federal Register** notice.

of such arrangements by the Department and monitoring such arrangements by employers and plan participants and beneficiaries. This transparency about participating employers is supported by congressional findings in ERISA section 2 (Congressional Findings and Declaration of Policy), which provides, in relevant part, that “[i]t is hereby declared to be in the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto. . . .” In addition, the Committee Report on ERISA provided that “[t]he Subcommittee intended that Congress provide for greater legislative protection for beneficiaries of pension plans through detailed public disclosure of the administration and operation of private pension plans.” S. Rep. 93–127 (Apr. 18, 1973).

DOL is also continuing to rely on ERISA section 103(c)(2) and its general regulatory authority under ERISA section 505 as authority for requiring multiple employer welfare plans to continue reporting the participating employer information for the 2021 plan year filing.¹² As discussed in the NPPF, in the DOL’s view, each participating employer is acting as a fiduciary with respect to its decision to join the MEWA and provide ERISA-covered benefits through a MEWA, and has ongoing fiduciary obligations to monitor the plan and confirm that continued participation in the plan is prudent and in the best interests of its employees who are covered participants in the plan.¹³ Nothing in ERISA section

103(c)(2) precludes the Department from relying on that authority to collect information about a particular class or group of fiduciaries as opposed to requiring the identification of all plan fiduciaries in general. *See also* ERISA section 104(a)(3) (authority to exempt welfare benefit plans from all or part of Title I reporting and disclosure requirements). With respect to its general regulatory authority under ERISA section 505, the Department explained in the preamble to the proposal that the participating employer information has proven useful to the DOL for its oversight functions for both MEPs and those MEWAs that file the Form 5500, regardless of the types of benefits provided by the MEWA. 86 FR at 51498. This reporting requirement is also relevant to the Department’s enforcement of the criminal penalties added by the Affordable Care Act under ERISA section 519 for any person who knowingly submits false statements or false representations of fact in connection with a MEWA’s financial condition (including a plan MEWA), the benefits it provides, or its regulatory status as a MEWA. In light of the fact that participating employers in a MEWA would likely be the recipients of such false statements or representations, having data regarding the participating employers in a MEWA plan would be useful in policing whether such false statements or representations are being made to participating employers.

Two commenters argued that reporting of employer names and EINs (and the health plan to which they are linked) on a publicly available document exposes plan participants and beneficiaries and their employers to potential cybersecurity fraud. They also argued that the list of participating employers and contribution percentage information is proprietary information and contended that making the information publicly available would negatively impact businesses and their employees. The commenters did not offer empirical evidence or other data to support their assertions about consequences to plan participants and beneficiaries or the participating employers’ businesses. This reporting requirement has been in place since the 2014 plan year and the Department is not aware of any such consequences resulting from the disclosure requirement. In fact, the more powerful argument here is likely that employers have the freedom to choose to change

plans or plan service providers, are undoubtedly receiving marketing solicitations about these matters now, and that transparency about which employers participate in a plan MEWA may well generate competitive pressures to offer better services at lower fees.

The DOL also has addressed similar arguments on several prior occasions in the context of the ERISA section 103(g) requirement for multiple employer plans to include participating employer information as part of the Form 5500 Annual Return/Report. For example, in a 2019 Field Assistance Bulletin, the DOL noted that it had received and considered similar objections in connection with the Paperwork Reduction Act (PRA) notice associated with the publication of the interim final rule on ERISA section 103(g) that implemented the CSEC Act requirement. *See* Proposed Extension of Information Collection Request Submitted for Public Comment; Revisions to Annual Return/Report—Multiple-Employer Plans, 79 FR 66741 (Nov. 10, 2014) (available at www.govinfo.gov/content/pkg/FR-2014-11-10/pdf/2014-26499.pdf). The DOL also pointed out, in its 2016 **Federal Register** notice regarding proposed modernization of the Form 5500, that DOL addressed this issue when it explained its decision at that time not to propose changes to the ERISA section 103(g) reporting requirements. *See* Form 5500 Improvement and Modernization Proposal—Proposed Revision of Annual Information Return/Reports, 81 FR 47534, 47564–47565 (July 21, 2016) (available at www.govinfo.gov/content/pkg/FR-2016-07-21/pdf/2016-14893.pdf). In the SECURE Act itself Congress reaffirmed and in fact expanded the requirements for reporting participating employer information on the Form 5500. The Department does not believe that a different conclusion regarding these arguments is warranted just because they are now being presented separately for welfare plans. Although, as noted above, after the SECURE Act amendment the specific reporting requirement in ERISA section 103(g) technically is not applicable to welfare plans, the Department does not view the SECURE Act amendment as an acknowledgement that the cybersecurity and confidential information arguments being pressed by these commenters somehow now has merit with respect to just welfare plans notwithstanding the fact that multiple employer welfare plans have been required to file the participating employer information since the 2014 reporting year. The Department also continues to be of the

¹² ERISA section 103(c)(2) states that the administrator shall furnish as a part of a plan’s annual report “(2) The name and address of each fiduciary.” ERISA section 505 provides the Department with general authority, subject to certain limits not relevant here, to “prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter.”

¹³ *See also* Advisory Opinion 2007–06A (Aug. 16, 2007) (“decisions regarding the method through which benefits are to be paid under an employee welfare benefit plan, including the selection of an insurer and the negotiation of the terms of any contractual arrangement obligating the plan, are matters that generally are subject to the fiduciary responsibility provisions of Title I of ERISA.”); Information Letter to Diana Ceresi (Feb. 2, 1998) (“when the selection of a health care provider involves the disposition of employee benefit plan assets, such selection is an exercise of authority or control with respect to the management and disposition of the plan’s assets within the meaning of section 3(21) of ERISA, and thus constitutes a fiduciary act . . .”); Advisory Opinion 2018–01A (Nov. 5, 2018) (In the context of a pension plan rollover service provider, not covered by Title I of ERISA, “When plan sponsors or other responsible fiduciaries choose to have a plan participate in the RCH Program, they are acting in a fiduciary

capacity, and would be subject to the general fiduciary standards and prohibited transaction provisions of ERISA in selecting and monitoring the RCH Program.”)

view that an employer's sponsorship or participation in an ERISA-covered plan is not confidential information.¹⁴ Employers that sponsor single employer plans are identified on the plan's Form 5500, and we do not see the identity of a sponsoring employer in a multiple employer plan as somehow different for annual reporting and disclosure purposes. Similarly, the purported cybersecurity issues noted by the comments (e.g., "spoofing" of either the MEWA itself, or the MEWA's health insurer, in order to generate a phishing attack) are not different for an employer (including small employers) identified on a single-employer Form 5500 compared to a participating employer identified on a multiple employer Form 5500. In the Department's view, Form 5500 reporting of participating employer information is just as important for multiple employer welfare plans as retirement plans because it provides important information for oversight of such arrangements by the Department and monitoring such arrangements by employers and plan participants and beneficiaries. Accordingly, multiple employer welfare plans will continue to be required to file the participating employer information as a non-standard attachment to the 2021 Form 5500 Annual Return/Report, as they have been required to do since the 2014 plan year filing.

III. Regulatory Impact Analysis

1. Executive Order 12866

This Final Rule does not constitute a "significant regulatory action" for purposes of Executive Order 12866. The changes are minor additions to existing reporting requirements that in large part

¹⁴ Prior guidance issued by the Department has generally rejected allegations of possible harm due to disclosure of reporting information in favor of the policy reasons in favor of public disclosure. See, e.g., Aug. 14, 1994, letter to David Mintz (noting ERISA policy of public disclosure and rejecting concerns raised that the Form 5500 series is available to organizations that compile and sell to the public a directory of employee benefit plan information); April 7, 1978, letter to Congressman Harley O. Staggers (concluding nothing in section 110 supported changing the requirement, in response to claims that because personal financial information possibly could be calculated from 103(b)(3)(B) requirement for plans to include in their annual report a statement of receipts and disbursements during the preceding twelve-month period aggregated by general sources and applications, and thus should be treated as confidential information); July 23, 1981, letter to Mr. T.C. Heyward, Jr. (contested information did not fit within 106(b) exception from public disclosure and nothing in section 110 warranted omission from the annual report required information on distribution of benefits and payments directly to participants or their beneficiaries and total annual contribution of the sponsoring organization on the grounds that the information constitutes an invasion of privacy).

merely adopt requirements set forth in statutory amendments to the annual reporting requirements that apply under ERISA and the Code. Therefore, this action has not been reviewed by OMB pursuant to the Executive Order. Pursuant to the Congressional Review Act, OMB has determined that this final rule is not a "major rule," as defined by 5 U.S.C. 804(2).

2. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments concerning the information collection request (ICR) included in the revision of the Form 5500 Annual Return/Report. At the same time, the Department also submitted an information collection request (ICR) to the Office of Management and Budget (OMB), in accordance with 44 U.S.C. 3507(d).

The Department did not receive comments that specifically addressed the paperwork burden analysis of the information collection requirement contained in the proposed rule.

In connection with publication of this final rule, the Department is submitting an ICR to OMB requesting a revision of the collection of information under OMB Control Number 1210-0110 reflecting the instruction changes being finalized in this document. The Department will notify the public when OMB approves the ICR.

A copy of the ICR may be obtained by contacting the PRA addressee shown below or at www.RegInfo.gov. PRA ADDRESSEE: Address requests for copies of the ICRs to James Butikofer, Office of Research and Analysis, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N-5655, Washington, DC 20210. Telephone: (202) 693-8410; Fax: (202) 219-4745; Email: ebssa.opr@dol.gov. These are not toll-free numbers. ICRs submitted to OMB also are available at <http://www.RegInfo.gov>.

The burden analysis is based on data from the 2019 Form 5500 filings (the latest year for which complete data are available). The burden analysis includes the burden of the current information collection and adjusts it for changes made by the final rule.

Burden estimates take into account the changes in plan counts due to the creation of pooled employer plans, with an increase in multiple-employer plans and a small decrease in single employer plans, reflecting some single employer plans moving to pooled employer plans. The agencies estimated that there are 4,538 defined contribution multiple-

employer pension plans and that 75 pooled employer plans will be formed.

Reporting the information about participating employers required by the changes being finalized in this document should not be burdensome for defined contribution multiple-employer plan administrators as current requirements under ERISA already require them to maintain a list of participating employers and records of the contributions made by each employer. Although likely an overestimate of the actual time required, to ensure that we are not underestimating the potential burden, the Department is using an estimate of on average 30 minutes to comply with the new question for defined contribution MEPs regarding aggregate account balances on the currently required attachment to the Form 5500 Annual Return/Report containing the list of participating employers, their EINs, and their percentage of total plan contributions. The Department estimates that the anticipated 75 pooled employer plans would take an additional five minutes to indicate whether they are in compliance with the Form PR registration requirements and provide the AckID number for their latest Form PR filing.

The Agencies' burden estimation methodology excludes certain activities from the calculation of "burden." If the activity is performed for any reason other than compliance with the applicable federal tax administration system or the Title I annual reporting requirements, it was not counted as part of the paperwork burden. For example, most businesses or financial entities maintain, in the ordinary course of business, detailed accounts of assets and liabilities, and income and expenses for the purposes of operating the business or entity. These recordkeeping activities were not included in the calculation of burden because prudent business or financial entities normally have that information available for reasons other than federal tax or Title I annual reporting. Only time for gathering and processing information associated with the tax return/annual reporting systems, and learning about the law, was included. In addition, an activity is counted as a burden only once if performed for both tax and Title I purposes. The Agencies also have designed the instruction package for the Form 5500 Annual Return/Report so that filers generally will be able to complete the Form 5500 Annual Return/Report by reading the instructions without needing to refer to the statutes or regulations. The Agencies, therefore, have considered in their PRA

calculations the burden of reading the instructions and find there is no recordkeeping burden attributable to the Form 5500 Annual Return/Report.

This PRA calculation does not include any burden related to Form M-1 changes related to reporting of participating employer information by plans and non-plan MEWAs that are required to file the Form M-1 because those changes are not included in this document. Rather, for the 2021 Form 5500 reporting year, plan MEWAs, including those that offer or provide coverage for medical care, will continue to be required to provide participating employer information as a nonstandard attachment to the 2021 Form 5500 Annual Return/Report in substantially the same manner as has been required since the 2014 forms.

Note that to reflect OMB's preference that burden incurred by service

providers be reported as hour burden instead of cost burden, burden that has historically been included as cost burden has been included here as hour burden. This change led to an increase in reported hour burden and an offsetting decrease in cost burden.

A summary of paperwork burden estimates follows. As noted above, these estimates include the burden of the overall Form 5500 information collection and makes adjustments for the final instructions revisions included in this document.

Type of Review: Revision of existing collection.

Title: Annual Information Return/Report of Employee Benefit Plan.

Affected Public: Individuals or households; Private Sector—Business or other for-profit; Not-for-profit institutions.

Forms: Form 5500 and Schedules.

Total Respondents: 840,923.

Total Responses: 840,923.

Frequency of Response: Annually.

Estimated Total Burden Hours: 3,031,649.

Estimated Total Annualized Costs: \$0.

The aggregate hour burden for the Form 5500 Annual Return/Report (including schedules and short form) is estimated to be 4.5 million hours annually shared between the DOL, IRS, and the PBGC. The hour burden reflects filing activities carried out directly by filers.

Presented below is a chart showing the total hour and cost burden of the revised Form 5500 Annual Return/Report allocated to the DOL, including the changes to the DOL burden by these 2021 SECURE Act revisions.

| | | DOL hours |
|--------------------------------|-------------------|-----------|
| Pension | Large Plans | 895,570 |
| | Small Plans | 931,031 |
| Welfare | Large Plans | 1,064,998 |
| | Small Plans | 64,616 |
| Total | Large Plans | 1,960,568 |
| | Small Plans | 995,647 |
| DFEs | | 70,103 |
| January 2013 Revision | | 646 |
| 2014 CSEC Revision | | 2,371 |
| 2021 SECURE Act Revision | | 2,313 |
| Total | | 3,031,649 |

3. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) ¹⁵ 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 ¹⁶ and are likely to have a significant economic impact on a substantial number of small entities. Unless the head of an agency certifies that a final rule is not likely to have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present a final regulatory flexibility analysis of the final rule.¹⁷

The Department prepared an Initial Regulatory Flexibility Analysis at the proposed rule stage. However, this final rule is focused only on a subset of the requirements proposed. The Department certifies that this final rule will not have a significant impact on a substantial number of small entities. Therefore, the

Department has not prepared a Final Regulatory Flexibility Analysis.

4. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 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.¹⁸ For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875,¹⁹ this final rule does not include any federal mandate that the DOL expects would result in such expenditures by State, local, or tribal governments, or the private sector.

5. Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism, and requires the 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 States, or on the distribution of power and responsibilities among the various levels of government.²⁰ Federal agencies promulgating regulations that have federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final rule.

In the DOL's view, this final rule would not have federalism implications because they would not have direct effects on the States, on the relationship between the national government and the States, or on the distribution of

¹⁵ 5 U.S.C. 601 *et seq.* (1980).

¹⁶ 5 U.S.C. 551 *et seq.* (1946).

¹⁷ 5 U.S.C. 604 (1980).

¹⁸ 2 U.S.C. 1501 *et seq.* (1995).

¹⁹ Enhancing the Intergovernmental Partnership, 58 FR 58093 (Oct. 28, 1993).

²⁰ Federalism, *supra* note 6.

power and responsibilities among various levels of government. This final rule does 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.

IV. Final Revisions to the Form 5500 and Form 5500-SF Instructions for the 2021 Reporting Year

To implement the SECURE Act section 101 changes, the current instructions including the graphic, in the Form 5500 and Form 5500-SF instructions, as applicable, for Part I, Line A “Box for Multiple Employer Plan” and graphic entitled “Multiple-Employer Plan Participating Employer Information,” are replaced with instructions below and two separate graphics. The second graphic, which will appear only in the Form 5500 instructions shows information pooled employer plans must provide in addition to the participating employer information. It may be attached as part of the “Multiple-Employer Plan Participating Employer Information” attachment or as a separate attachment entitled “Pooled Employer Plan Information.”

Line A—Box for Multiple-Employer Plan. Check this box if the [Form 5500 or Form 5500-SF] is being filed for a multiple-employer plan. A multiple-employer plan is a plan that is maintained by more than one employer and is not one of the plans already described. A multiple-employer plan can be collectively bargained and collectively funded, but if covered by PBGC termination insurance, must have properly elected before September 27,

1981, not to be treated as a multiemployer plan under Code section 414(f)(5) or ERISA sections 3(37)(E) and 4001(a)(3), and have not revoked that election or made an election to be treated as a multiemployer plan under Code section 414(f)(6) or ERISA section 3(37)(G). A single [Insert either Form 5500 or Form 5500-SF] Annual Return/Report is filed for the multiple-employer plan; participating employers do not file individually for this type of plan. [Following sentence is for Form 5500 Instructions only] A pooled employer plan as defined in ERISA section 3(44) operated by a “pooled plan provider” that meets the definition under ERISA section 3(43) is a multiple-employer plan.²¹

Note. Do not check this box if all of the employers maintaining the plan are members of the same controlled group or affiliated service group under Code sections 414(b), (c), or (m).

Participating Employer Information. [Insert for Form 5500 “Except as provided below, multiple-employer pension plans and multiple-employer welfare plans required to file a Form 5500” or Insert for Form 5500-SF “Eligible multiple-employer pension plans that file a Form 5500-SF”] must include an attachment using the format below. The attachment must be properly identified at the top with the label “Multiple-Employer Plan Participating Employer Information,” and the name of the plan, EIN, and plan number (PN) as found on the plan’s [Insert Form 5500 or Form 5500-SF]. Complete as many entries as needed to report the required information for all participating employers in the plan.

- All multiple-employer pension plans must complete elements 1–3 of the “Multiple-Employer Plan Participating Employer Information” attachment. For element 3, enter a good faith estimate of each employer’s percentage of the total contributions (including employer and participant contributions) made by all participating employers during the year. The percentage may be rounded to be nearest whole percentage. To the extent the rounding results in the total reported percentage being either slightly above or slightly below 100 percent, the filer can indicate that on the attachment. Any employer who was obligated to make contributions to the plan for the

plan year, made contributions to the plan for the plan year, or whose employees were covered under the plan is a “participating employer” for this purpose. If a participating employer made no contributions, enter “–0–” in element 3.

- Multiple-employer pension plans that are defined contribution plans must also complete element 4 of the “Multiple-Employer Plan Participating Employer Information” attachment to report the aggregate account balances for each participating employer determined as the sum of the account balances of the employees of such employer (and the beneficiaries of such employees). For element 4, the aggregate account balance attributable to each employer is the sum of the account balances of the employees of such employer and their beneficiaries at the end of the year. Consistent with the information on the schedules of assets for the plan as a whole, use the end of year valuation to calculate the amount of assets by employer. The amounts can be rounded to the nearest dollar, consistent with other asset reporting on the forms and schedules.

- [For Form 5500 Instructions Only] Multiple-employer welfare plans that are unfunded, fully insured, or a combination of unfunded/insured and exempt under 29 CFR 2520.104–44 from the obligation to file financial statements with their annual report are required to complete elements 1 and 2 only of the “Multiple-Employer Plan Participating Employer Information” attachment.²²

- [For Form 5500 Instructions Only] Multiple-employer pension plans that are pooled employer plans must also complete the “Pooled Employer Plan Information” attachment. The attachment may be attached as part of the “Multiple-Employer Plan Participating Employer Information” attachment or as a separate attachment entitled “Pooled Employer Plan Information.” For element 1b, AckID is the acknowledgement code generated by the system in response to a completed Form PR submitted. The instructions to the Form PR advise the pooled plan provider that it must keep, under ERISA section 107, the electronic receipt for the Form PR filing as part of the records of the pooled employer plans operated by the pooled plan provider.²³

²¹ Pooled employer plans are not eligible to file the Form 5500-SF so the instructions describing the pooled employer plan’s status as a MEP are not being added to the Form 5500-SF instructions.

²² This paragraph only applies to multiple employer welfare plans that file the Form 5500, and thus is not needed in the Form 5500-SF instructions.

²³ As noted above, because pooled employer plans are not eligible to file the Form 5500-SF, this language describing the pooled employer plan attachment is only being added to the Form 5500 instructions.

| Multiple-Employer Plan Participating Employer Information (Insert Name of Plan and EIN/PN as shown on the [Insert Form 5500 or Form 5500-SF as applicable]) | | | |
|---|--------|---|---|
| 1. Name of participating employer | 2. EIN | 3. Percent of Total Contributions for Plan Year | 4. Aggregate Account Balances at End of Year Attributable to Participating Employer |
| 1. Name of participating employer | 2. EIN | 3. Percent of Total Contributions for Plan Year | 4. Aggregate Account Balances at End of Year Attributable to Participating Employer |
| 1. Name of participating employer | 2. EIN | 3. Percent of Total Contributions for Plan Year | 4. Aggregate Account Balances at End of Year Attributable to Participating Employer |
| 1. Name of participating employer | 2. EIN | 3. Percent of Total Contributions for the Plan Year | 4. Aggregate Account Balances at End of Year Attributable to Participating Employer |
| 1. Name of participating employer | 2. EIN | 3. Percent of Total Contributions for the Plan Year | 4. Aggregate Account Balances at End of Year Attributable to Participating Employer |

Complete as many rows as needed to report the required information for all participating employers in the plan.

| [For Form 5500 Instructions only] Pooled Employer Plan/Pooled Plan Provider Information (Insert Name of Plan and EIN/PN as shown on the Form 5500) |
|---|
| Only pooled employer plans complete. |
| <p>1a. Is the pooled plan provider currently in compliance with the requirements for filing the Form PR (Pooled Plan Provider Registration Statement)? (See Form PR Instructions and 29 CFR 2510.3-44.) <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>1b. If “Yes” is checked in line 1a, enter the AckID for the most recent Form PR that was required to be filed under the Form PR filing requirements. (Failure to enter a valid AckID will subject the Form 5500 filing subject to rejection as incomplete.)</p> <p style="margin-left: 40px;">AckID _____</p> |

The following revisions are being made to the Form 5500–SF instructions:

- In the first paragraph of the “General Instruction” section, add a seventh bulleted paragraph that reads “Not be a pooled employer plan. See ERISA section 3(43).”
- In the “General Instruction” section, under the heading “Who May File Form 5500–SF,” add a new paragraph number 7 before the Note that reads: “7. The plan is not a pooled

employer plan. See ERISA section 3(43).”

- In the “Specific Line-By-Line Instructions (Form 5500–SF)” in instructions for Part II, Line 6, add a new paragraph number 7 that reads: “7. The plan is not a pooled employer plan. See ERISA section 3(43).”

Statutory Authority

Accordingly, pursuant to the authority in sections 101, 103, 104, 109,

110, the Form 5500 Annual Return/ Report and the Form 5500–SF Short Form Annual Return/Report are amended as set forth herein.

Signed at Washington, DC, this 17th day of December, 2021.

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

[FR Doc. 2021–27764 Filed 12–28–21; 8:45 am]

BILLING CODE 4510–29–C