



This document is scheduled to be published in the Federal Register on 11/10/2014 and available online at <http://federalregister.gov/a/2014-26498>, and on FDsys.gov

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2520

RIN 1210-AB66

Revisions to Annual Return/Report -- Multiple-Employer Plans

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule describes revisions to the Form 5500 Annual Return/Report of Employee Benefit Plan and Form 5500-SF Annual Return/Report of Small Employee Benefit Plan (together “Form 5500 Annual Return/Report”) to implement annual reporting changes for multiple-employer plans required by The Cooperative and Small Employer Charity Pension Flexibility Act (CSEC Act), enacted on April 7, 2014. The Form 5500 annual return/report is filed by employee benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA) and sections 6047(e), 6057(b), 6058(a), and 6059 of the Internal Revenue Code (Code). The CSEC Act established additional annual reporting requirements for multiple-employer plans for plan years beginning after December 31, 2013, by adding new section 103(g) to Title I of ERISA. Specifically, the annual return/report of a multiple-employer plan must include a list of participating employers and a good faith estimate of the percentage of total contributions made by each participating employer during the plan year. This interim final rule also includes findings by the Department of Labor (Department) under the Administrative Procedure Act that good cause exists to adopt these revisions on an interim final basis without prior notice and public comments.

DATES: Effective date. This interim final rule is effective on **[INSERT DATE OF PUBLICATION IN FEDERAL REGISTER]**.

Comment date. Comments are due on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. We will consider public comments in connection with publishing a final rule that would apply no earlier than the 2015 Form 5500.

Applicability dates. The multiple-employer plan reporting requirements under the CSEC Act apply to plan years beginning after December 31, 2013, which created an immediate need for changes to the Form 5500 and Form 5500-SF. Accordingly, the CSEC Act form changes in this document will be applicable beginning with the 2014 Form 5500 Annual Returns/Reports filed for plan years beginning after December 31, 2013.

ADDRESSES: Written comments may be submitted to any of the addresses specified below. All comments will be made available to the public. **Warning:** Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments are posted on the Internet exactly as received, and can be retrieved by most Internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.

Comments to the Department of Labor, identified by RIN 1210-AB66 , by one of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

E-mail: E-ORI@dol.gov with Subject Line: RIN 1210-AB66 – CSEC Act Form 5500 Interim Final Rule.

Mail or Hand Delivery: Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210, Attention: RIN 1210-AB66 – CSEC Act Form 5500 Interim Final Rule.

Comments received by the Department of Labor will be posted without change to <http://www.regulations.gov> and <http://www.dol.gov/ebsa> and made available for public inspection at the Public Disclosure Room, N-1513, Employee Benefits Security Administration, 200 Constitution Avenue, NW, Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Mara S. Blumenthal, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693–8523, for questions relating to this document. Note that this is not a toll-free number.

Customer service information: Individuals interested in obtaining information from the Department of Labor concerning the Employee Retirement Income Security Act may call the

EBSA Toll-Free Hotline at 1-866-444-EBSA (3272) or visit the Department of Labor's Web site (www.dol.gov/ebsa).

SUPPLEMENTARY INFORMATION:

I. Background

A. Form 5500 Annual Return/Report

Section 103 of ERISA, 29 U.S.C. 1023, and the regulations issued under that section, impose annual reporting and filing obligations on pension and welfare benefit plans, including multiple-employer plans. Plan administrators, employers, and others generally satisfy these annual reporting obligations by the filing of the Form 5500 Annual Return/Report of Employee Benefit Plan or Form 5500-SF Annual Return/Report of Small Employee Benefit Plan, including any required schedules and attachments, (together “Form 5500 Annual Return/Report”), in accordance with the instructions and related regulations.

The Form 5500 Annual Return/Report is the principal source of information and data available to the Department, the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC) concerning the operations, funding, and investments of pension and welfare benefit plans. The Form 5500 Annual Return/Report constitutes an integral part of each Agency’s enforcement, research, and policy formulation programs, and is a source of information and data for use by other federal agencies, Congress, and the private sector in

assessing employee benefit, tax, and economic trends and policies. The Form 5500 Annual Return/Report also serves as a primary means by which plan operations can be monitored by participants and beneficiaries and by the general public.

B. Cooperative and Small Employer Charity Pension Flexibility Act and Additional Reporting Requirements for Multiple-Employer Plans

The Cooperative and Small Employer Charity Pension Flexibility Act (CSEC Act), Pub. L. 113-97, 128 Stat. 1101, enacted on April 7, 2014, amended the funding rules for pension plans that are maintained by certain cooperatives or charities. In addition, the CSEC Act created additional annual reporting requirements for multiple-employer plans covered by Title I of ERISA. Specifically, section 104(c) of the CSEC Act amended section 103 of ERISA to require in section 103(g) that annual reports of multiple-employer plans include “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 employers during the plan year.”¹ These additional reporting requirements apply generally to a multiple-employer plan regardless of whether the plan is affected by the modifications to the minimum funding requirements made by the CSEC Act.² The effective date provisions in section 3 of the CSEC Act make these new annual reporting requirements applicable for plan years beginning after December 31, 2013.

¹ The Government Accountability Office also recommended that the Form 5500 be used to collect information about participating employers in multiple employer plans. See GAO Report to the Chairman, United States Senate Committee on Health, Education, Labor, and Pensions, entitled “PRIVATE SECTOR PENSIONS: Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans,” GAO 12-665 (Sept. 2012).

² This document is limited to the annual reporting changes required by section 104(c) of the CSEC Act and does not address possible guidance on completing the Schedule SB to reflect modifications to the minimum funding requirements made by the CSEC Act for multiple-employer plans affected by those modifications.

The CSEC Act did not define the terms included in the new annual reporting requirement or otherwise explain the purpose or objectives of the requirement. In light of the fact that the CSEC Act directed changes to Form 5500 reporting, the Department believes that it is appropriate to use existing Form 5500 definitions and requirements to implement the CSEC Act changes. This approach will also allow the Department to establish a uniform way for plan administrators and employers to comply with reporting requirements and ensure that consistent information about participating employers in multiple-employer plans is available to the public as part of the Form 5500 information collection.

In order to implement the CSEC Act requirements in a timely fashion, this interim final rule changes the Form 5500 and Form 5500-SF generally for plan years beginning after December 31, 2013. First, certain conforming revisions to Part I (Annual Report Identification Information) of the Form 5500 Annual Return/Report are being made to enable multiple-employer plans to comply with the new requirements imposed by section 104(c) of the CSEC Act. Specifically, Part I, line A—Multiple-Employer Plan, of the Form 5500 and Form 5500-SF currently provides a box to check if the Form 5500 or Form 5500-SF is being filed for a multiple-employer plan. A parenthetical is being added next to the box that tells filers checking the box that they must attach a list of participating employers and related information and directs them to the form instructions for further information and directions on the filing requirements for the attachment.

The instructions to the Form 5500 and Form 5500-SF for that box are also being amended to include information and specific directions on completing and filing the required

attachment. The instructions to the Form 5500 and Form 5500-SF will now provide that the Annual Return/Report filed for a multiple-employer plan must include an attachment that identifies the participating employers in the plan by name and employer identification number (EIN) and includes for each participating employer an estimate of the percentage of the contributions made by each employer (including employer and participant contributions) relative to the total contributions made by all participating employers during the plan year. This attachment, entitled “Multiple-Employer Plan Participating Employer Information,” supplements and does not replace other Form 5500 filing requirements that apply to multiple-employer plans.

For purposes of defining the employee benefit plans subject to the CSEC Act reporting requirement, the interim final rule uses the existing definition of “multiple-employer plan” in the instructions for the Form 5500 Annual Return/Report. Specifically, a multiple-employer plan in this context is a plan that is maintained by more than one employer and is not a “single employer plan” or a “multiemployer plan” for Form 5500 filing purposes.³ Multiple-employer plans can be collectively bargained and collectively funded, but if covered by PBGC termination insurance, they 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 plan is treated as a single-employer plan for Form 5500 purposes 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). See

³ Unlike the Form 5500, which excludes multiple employer plans from the definition of single-employer plans, ERISA section 3(41) defines all plans, with the sole exception of multiemployer plans, as single-employer plans. The Form 5500 multiple-employer plan definition is the relevant definition for purposes of this interim final rule.

Form 5500 and Form 5500-SF Instructions for Line A – Box (available at www.dol.gov/ebsa/5500main.html#2013).

Although the CSEC Act was focused on amendments to the funding rules for certain defined benefit pension plans, the annual reporting amendment to section 103 of ERISA did not limit the new reporting requirement to defined benefit pension plans. Rather, the new requirement applies generally to “any multiple-employer plan.” Accordingly, the interim final rule adds instructions for the Form 5500 and Form 5500-SF requiring all multiple-employer plans (defined benefit pension plans, defined contribution plans, and welfare plans) required to file the Form 5500 or Form 5500-SF to include with their annual report the new “Multiple-Employer Plan Participating Employer Information” attachment. The form instructions further provide that welfare plans that are exempt under 29 CFR 2520.104-44 from the obligation to file financial statements with their annual report are required to include a “Multiple-Employer Plan Participating Employer Information” attachment, but are permitted to report only a list of participating employers in the attachment filed with their Form 5500 Annual Return/Report.

The CSEC Act required information to be reported on “participating employers.” That term, however, was not defined in the CSEC Act, and it is not otherwise defined in Title I of ERISA or used elsewhere in ERISA section 103 or the Department’s regulations implementing the ERISA annual reporting requirements. However, the Department has used the term “participating employer” in other contexts generally to describe employers that are obligated to make contributions to a plan, made contributions to the plan, or whose employees are covered under the plan. See, e.g., DOL Advisory Opinion 81-44A. The Department uses a similar

concept in its regulation on content requirements for summary plan descriptions (SPD), 29 CFR 2520.102-3. Specifically, 29 CFR 2520.102-3(b)(4) requires that the SPD of a plan established or maintained by two or more employers must contain a statement that a complete list of the employers sponsoring the plan may be obtained by participants and beneficiaries on request and a statement that the list is available for examination by participants and beneficiaries at the plan administrator's office. The term "sponsoring employer" includes employers that are obligated to make contributions to a plan or whose employees are covered under the plan. Accordingly, because employee benefit plans must maintain a list of employers that are obligated to make contributions to the plan or whose employees are covered under the plan, the Department believes that interpreting the term "participating employer" to include all employers that are obligated to make contributions to the plan, that make contributions to the plan, or whose employees are covered under the plan would be consistent with the CSEC Act annual reporting changes and the least burdensome alternative for filers.

In addition to requiring disclosure of a list of participating employers, the CSEC Act requires "a good faith estimate of the percentage of total contributions made by such participating employers during the plan year." In the case of many employee benefit plans, in addition to employer contributions, participants (and in some cases beneficiaries) may pay amounts to the employer for contribution to the plan and the employer may withhold amounts from wages or other compensation for contribution to the plan. Under Title I of ERISA, the Department generally classifies such contributions as "employee contributions" or "participant contributions," while under the Internal Revenue Code such contributions may be classified for some purposes as "employer contributions." The Form 5500 Annual Return/Report generally

follows the Title I classification system and includes several distinct reporting requirements that call for employer and participant contributions to be accounted for and reported separately. The Department believes that the CSEC Act should be interpreted consistently with existing Form 5500 Annual Return/Report requirements regarding contributions and require that multiple-employer plans include both employer and participant contributions in calculating the percentage of each employer's contributions relative to those made by all participating employers. Particularly in the case of defined contribution and welfare plans, requiring reporting of both employer and participant contributions will help the Department better understand the role of each participating employer in the overall funding of the plan.

The Department similarly believes the “during the plan year” concept should be interpreted consistent with other financial reporting requirements on the Form 5500 Annual Return/Report. The instructions for the Form 5500 Annual Return/Report allow filers to report financial information using “the cash, modified cash, or accrual basis for recognition of transactions, as long as you use one method consistently.” A literal interpretation of the phrase “during the plan year” might suggest that Congress intended that the CSEC percentage calculation be done using a cash basis. There is nothing in the CSEC Act, however, that indicates that Congress intended to impose such a burden on plans that currently use an accrual approach to measuring contributions for the plan year. In fact, elsewhere in the Form 5500 the Department has used the terms “during the plan year” and “for the plan year” interchangeably in a way that allows plans to use cash or accrual approaches to recognizing contribution amounts. Specifically, the Schedule R requires that multiemployer plans report the dollar amount contributed by each employer that contributed more than five percent (5%) of total contributions

to the plan “during the plan year (measured in dollars).” The instructions state that the plan should enter information for any employer that contributed more than five percent (5%) of the plan’s total contributions “for the plan year.” Accordingly, in the Department’s view, it is an appropriate reading of the CSEC Act requirements to allow filers to use the same method (cash, modified cash, or accrual) for calculating the good faith estimate that they use for recognizing other financial transactions on the Form 5500 Annual Return/Report.

II. Good Cause for Exemption From Public Notice and Comment and Immediate Effective Date

To issue an interim final rule without prior public notice and comment, an agency must find good cause that notice and comment are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b). To issue a rule that is immediately effective, an agency similarly must find good cause for dispensing with the 30-day delay required by the Administrative Procedure Act (APA). The multiple-employer plan reporting requirements under the CSEC Act apply to plan years beginning after December 31, 2013, thus creating an immediate need for changes to the Form 5500 and Form 5500-SF. Without these changes to the Form 5500 and related instructions, multiple-employer plans would have no uniform way to comply with the CSEC Act requirements and nor would there be any assurance that uniform information about participating employers in multiple-employer plans would be available to the public. In addition, the Department would be hampered in its ability to comply with the Congressional directive in the CSEC Act to collect the reported information. Moreover, only multiple-employer plans, which are a relatively small percentage of Form 5500 Annual

Return/Report filers, are affected by this change,⁴ and the requirements are limited in scope to the information specifically required under the CSEC Act.

Further, reporting the basic information about participating employers required by the CSEC Act should not be burdensome for multiple-employer plans because they are already required to maintain a list of participating employers and records of the contributions made by each employer. As noted above, the Department's regulation on content requirements for summary plan descriptions, 29 CFR 2520.102-3, requires in the case of a plan established or maintained by two or more employers that the SPD contain a statement that a complete list of the employers sponsoring the plan may be obtained by participants and beneficiaries on request and a statement that the list is available for examination by participants and beneficiaries at the plan administrator's office. In addition, the Form 5500 Annual Return/Report currently requires that plans report information on employer and participant contributions as part of the financial information required to be filed. Section 107 of ERISA requires the plan administrator to keep records in sufficient detail to allow the information on the Form 5500 Annual Return/Report to be "verified, explained, or clarified, and checked for accuracy and completeness." In the Department's view, this would require the plan to keep records sufficient to identify the participating employers and the amount of the contributions attributable to each individual employer, participant or beneficiary.

The Department thus finds for good cause that it would be impracticable and contrary to the public interest to delay putting the above described revisions to the Form 5500 and Form

⁴ The Department estimates that 5,527 multiple employer plans are subject to the requirements of the CSEC Act Amendment (280 defined benefit plans, 4,739 defined contribution plans, and 508 welfare plans).

5500-SF required by the CSEC Act into place until completion of a full notice and public comment process. For the same reasons, the Department also finds good cause to adopt an effective date that would be less than 30 days after the publication in the Federal Register pursuant to the APA. 5 U.S.C. 553(d). The adoption of the changes affecting the 2014 Form 5500 Annual Return/Report will be effective as of the date of publication of this document in the Federal Register. The same or related information for multiple-employer plans will continue to be required to be provided on the 2015 and later Form 5500 Annual Returns/Reports, but for 2015 and later, the format for providing this information may be different.

Although the revisions in this document will be effective beginning with the 2014 Form 5500 and 2014 Form 5500-SF, and related instructions, the Department seeks comments on this interim final rule. The comments will be considered in connection with final revisions that will be adopted in connection with the 2015 or later year forms.

III. Executive Order 12866

This Interim Final Regulation does not constitute a “significant regulatory action” for purposes of Executive Order 12866. Therefore, this action has not been reviewed by OMB pursuant to the Executive Order.

IV. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 et seq.), the Form 5500 information collection request (ICR) has been approved by OMB under control number 1210-0110, which currently is scheduled to expire on April 30, 2015. On September 8, 2014, the Department submitted an ICR revision reflecting the CSEC Act revision to OMB utilizing the emergency PRA clearance procedures in accordance with 5 CFR 1320.13. OMB approved the emergency submission on October 7, 2014.

Based on data from the 2012 Form 5500 filings (the latest year for which complete data are available), the Department estimates that 5,527 multiple-employer plans are subject to the requirements of the CSEC Act amendment (280 defined benefit plan, 4,739 defined contribution plans, and 508 welfare plans). The Department assumes that plan administrators will comply with the new requirements; therefore, the entire burden is hour burden.

Reporting the basic information about participating employers required by the CSEC Act should not be burdensome for multiple-employer plan administrators, because as discussed in detail above, current requirements under ERISA already require them to maintain a list of participating employers and records of the contributions made by each employer. Therefore, the Department assumes that on average, it will take a financial professional thirty (30) minutes to comply the CSEC Act amendments by creating an attachment containing the list of participating employers, their EINs, and their percentage of total plan contributions. Based on the foregoing, the Department estimates that 5,527 multiemployer plan administrators will spend approximately

2,764 hours complying with the CSEC Act requirements at an equivalent cost of approximately \$173,000 (2,764 hours times \$69 for the services of an in-house financial professional).⁵

The OMB emergency approval expires on April 30, 2015. Therefore, contemporaneously with the publication of the interim final rule, the Department has published a notice elsewhere in this issue of the Federal Register informing the public of its intention to extend the OMB approval for three years. The notice solicits comments on the revisions to the ICR and provides the public with 60 days to comment as required by 5 CFR 1320.8(d).

V. Changes to the Form 5500 and Form 5500-SF and Instructions

On the Form 5500 and Form 5500-SF, in “Part I Annual Report Identification Information”—Box for Multiple-Employer Plan add the following parenthetical:

(Filers checking this box must attach a list of participating employer information in accordance with the form instructions).

In the Form 5500 Instructions for Part I Annual Report Identification Information—Box for Multiple-Employer Plan add the following instructions as a new second paragraph:

⁵ The Department calculated the hourly labor rate using published survey data from the Bureau of Labor Statistics, Occupational Employment Statistics Survey (May 2013), and Employment Cost Index (March 2014) to estimate the cost of benefits in total compensation. A calculation of the 2014 hourly labor cost for financial professionals was estimated at \$69 an hour including wage, benefits, and overhead.

Except as provided below, multiple-employer pension plans and multiple-employer welfare plans required to file a Form 5500 must include an attachment using the format below that (1) lists each participating employer in the plan during the plan year, identified by name and employer identification number (EIN), and (2) includes 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. 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 (c).

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 Form 5500.

Multiple-employer welfare plans that are exempt under 29 CFR § 2520.104-44 from the obligation to file financial statements with their annual report are required to include only a list of participating employers with the corresponding EIN/PN numbers in elements (a) and (b) of the "Multiple-Employer Plan Participating Employer Information" attachment included with their Form 5500.

Complete as many entries as needed to report the required information for all participating employers.

Multiple-Employer Plan Participating Employer Information (Insert Name of Plan and EIN/PN as shown on the Form 5500)		
(a) Name of participating employer	(b) EIN	(c) Percent of Total Contributions
(a) Name of participating employer	(b) EIN	(c) Percent of Total Contributions

In the Form 5500-SF Instructions for Part I Annual Report Identification Information—
 Box for Multiple-Employer Plan add the following instructions as a new second paragraph:

Multiple-employer pension plans required to file a Form 5500-SF must include an attachment using the format below that (1) lists each participating employer in the plan during the plan year, identified by name and employer identification number (EIN), and (2) includes 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. 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 (c).

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 Form 5500-SF.

Complete as many entries as needed to report the required information for all participating employers.

Multiple-Employer Plan Participating Employer Information (Insert Name of Plan and EIN/PN as shown on the Form 5500-SF)		
(a) Name of participating employer	(b) EIN	(c) Percent of Total Contributions
(a) Name of participating employer	(b) EIN	(c) Percent of Total Contributions

Signed at Washington, DC, this 30th day of October, 2014.

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

[FR Doc. 2014-26498 Filed 11/07/2014 at 8:45 am; Publication Date: 11/10/2014]