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29 CFR Part 2520

Annual Funding Notice for Multiemployer Defined Benefit Pension Plans; Proposed Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2520

RIN 1210–AB00

Annual Funding Notice for Multiemployer Defined Benefit Pension Plans

AGENCY: Employee Benefits Security Administration, DOL.

ACTION: Proposed rule.

SUMMARY: This document contains a proposed regulation that, upon adoption, would implement the notice requirement in section 101(f) of the Employee Retirement Income Security Act of 1974. Section 103 of the Pension Funding Equity Act of 2004 (PFEA '04) amended section 101 of ERISA by adding a new subsection (f), which requires the administrator of a multiemployer defined benefit plan to provide participants, beneficiaries, and certain other parties, including the Pension Benefit Guaranty Corporation, with an annual funding notice indicating, among other things, whether the plan's funded current liability percentage is at least 100 percent. This document also contains a model notice that may be used by plan administrators in discharging their duties under section 101(f). This proposed regulation, upon adoption, will affect plan administrators, participants, and beneficiaries of multiemployer defined benefit pension plans, as well as labor organizations representing such participants or beneficiaries and employers that have an obligation to contribute under such plans.

DATES: Written comments on the proposed regulation should be received by the Department of Labor on or before March 7, 2005. *See* ''C. Request for Comments,'' in the **SUPPLEMENTARY INFORMATION** section.

ADDRESSES: Comments should be addressed to the Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N–5669, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, Attn: PFEA '04 Project. Comments also may be submitted electronically to *e-ORI@dol.gov*. All comments received will be 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: Stephanie L. Ward, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

Section 103(a) of the Pension Funding Equity Act of 2004, Pub. L. 108–218 (PFEA '04), which was enacted on April 10, 2004, added section 101(f) to the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act). Section 101(f) provides that the administrator of a defined benefit plan which is a multiemployer plan shall for each plan year furnish a plan funding notice to each plan participant and beneficiary, to each labor organization representing such participants or beneficiaries, to each employer that has an obligation to contribute under the plan, and to the Pension Benefit Guaranty Corporation. Section 103(b) of PFEA '04 amended section 502(c)(1) of ERISA to provide that any administrator who fails to meet the requirements of section 101(f) with respect to a participant or beneficiary may, in a court's discretion, be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal and the court may in its discretion order such other relief as it deems proper. Section 103(c) of PFEA '04 provides that the Secretary of Labor shall, not later than 1 year after the date of the enactment of PFEA '04, issue regulations (including a model notice) necessary to implement the amendments made by section 103. Section 103(d) of PFEA '04 provides that the amendments made by section 103 of PFEA '04 shall apply to plan years beginning after December 31, 2004.

B. Overview of Proposed Regulation

Paragraph (a) of the proposed regulation implements the requirements set forth in section 101(f)(1) of the Act. This section in general requires the administrator of a multiemployer defined benefit pension plan to furnish annually a notice of the plan's funded status to the plan's participants and beneficiaries and other specified interested parties (each labor organization representing such participants or beneficiaries, each employer that has an obligation to contribute under the plan, and the Pension Benefit Guaranty Corporation (PBGC)). Those persons entitled to the notice are further clarified in paragraph (f) of the proposed regulation.

Paragraph (a)(2) provides a limited exception to the requirement to furnish the annual funding notice. Under the exception, the plan administrator of a plan receiving financial assistance from the PBGC is not required to furnish the annual funding notice to the parties otherwise entitled to such notice. The Department, after consulting with the PBGC, is of the view that such notice would be of little, if any, value to such parties in light of the PBGC's authority and responsibility under title IV of ERISA with respect to insolvent multiemployer plans.[1]

Paragraph (b) of the proposed regulation sets forth the content requirements of the notice required under section 101(f). Paragraph (b) requires that the identification and financial information included in the notice is consistent with the information included in the plan's Annual Return/Report filed for the plan year to which the notice relates.

Specifically, paragraph (b)(1)–(4) provides that the notice shall include: The name of the plan; the address and phone number of the plan administrator and the plan's principal administrative officer (if different from the plan administrator); the plan sponsor's employer identification number (currently line 2(b) of the Annual Return/Report Form 5500); and the plan number (currently line 1(b) of the Annual Return/Report Form 5500).

Paragraph (b)(5)–(8) further provides that the notice shall include information relevant to the plan's funding, including: a statement as to whether the plan's funded current liability percentage (calculated by dividing the actuarial value of the plan's assets (currently line 1b(2) of the Schedule B of the Annual Return/Report Form 5500) by the current liability (currently line 2b(4), column (3), of the Schedule B of the Annual Return/Report Form 5500) for the plan year to which the notice relates is at least 100 percent (and, if not, the actual percentage); a statement of the market value of the plan's assets (currently line 1b(1) of the Schedule B of the Annual Return/Report Form 5500) and the valuation date, the

[1] The provisions of title IV of ERISA that apply in the context of a plan's receipt of financial assistance from the PBGC (sections 4245(e) and 4281(d)) ensure that participants and beneficiaries of insolvent plans are adequately informed of, among other things, their plan's funding status (including for participants in pay status, their individual benefit levels), and PBGC's benefit guarantees. In addition, PBGC receives plan financial information before providing financial assistance. Inasmuch as the foregoing title IV provisions are largely duplicative of the requirements in section 101(f) of ERISA, an exception from the requirements of section 101(f) for plans receiving financial assistance necessarily would reduce administrative costs to these plans, thereby increasing the plan's available resources for benefit payments.

amount of benefit payments for the plan year to which the notice relates (currently line 2e(4) of the Schedule H of the Annual Return/Report Form 5500), and the ratio of the assets to the benefit payments for the plan year to which the notice relates; a summary of the rules governing insolvent multiemployer plans, including the limitations on benefit payments and any potential benefit reductions and suspensions (and the potential effects of such limitations, reductions, and suspensions on the plan); and a general description of the benefits under the plan that are eligible to be guaranteed by the PBGC, along with an explanation of the limitations on the guarantee and the circumstances under which such limitations apply.

Paragraph (b)(9) of the proposed regulation permits inclusion in the notice of any additional information that the administrator determines would be helpful to understanding the information required to be contained in the notice.

Paragraphs (c) and (e) of the proposed regulation, respectively, set forth the form and manner requirements relating to the notice. Paragraph (c) of the proposed regulation provides that notices shall be written in a manner calculated to be understood by the average plan participant. *See* 29 CFR 2520.102–2. Paragraph (e) of the proposed regulation provides that notices (except for notices to the PBGC) shall be furnished in a manner consistent with the requirements of 29 CFR 2520.104b–1. Collectively, these requirements are intended to ensure that notices are written so that the average plan participant can understand them, and that they are provided in a form reasonably accessible to those individuals eligible to receive the notice. In addition, the Department believes that plan administrators already are familiar with the rules in §§ 2520.102–2 and 2520.104b–1, thereby easing the burden of compliance with this regulation.

The Department worked with the PBGC to develop model language for use in connection with funding notices. Such language is set forth in a model notice in the appendix to the regulation. Use of the model notice is not mandatory. However, paragraph (g) of the proposed regulation provides that, by using the model notice, the plan administrator will be deemed to satisfy its duties with respect to the requirements of paragraphs (b) and (c) of the proposed regulation, except with respect to information referenced in paragraph (b)(9) of the regulation.

Paragraph (d) provides that notices shall be furnished within 9 months after the close of the plan year, unless the Internal Revenue Service has granted an extension of time to file the annual report, in which case the notice shall be furnished within 2 months after the close of the extension period. This paragraph implements the requirements of section 101(f)(3) of the Act, which provides that annual funding notices shall be provided to recipients no later than two months after the deadline (including extensions) for filing the annual report for the plan year to which the notice relates.

Paragraph (f) of the proposed regulation delineates the persons to whom funding notices required by this section must be furnished. In an effort to limit administrative burdens and costs attendant to compliance with this notice requirement, paragraph (f) of the proposal limits an administrator's disclosure obligation to only individuals who are participants on the last day of the plan year to which the notice relates, beneficiaries receiving benefits under the plan on the last day of the plan year to which the notice relates, labor organizations representing participants under the plan on the last day of the plan year to which the notice relates, and each employer that, as of the last day of the plan year to which the notice relates, is a party to the collective bargaining agreement(s) pursuant to which the plan is maintained or who otherwise may be subject to withdrawal liability. By focusing on a person's status on the last day of the previous plan year, the plan administrator is thereby relieved of additional costs of tracking and providing notice to individuals, labor organizations and employers who may no longer have an interest in the plan's funding condition.

Paragraph (f)(4) provides a more detailed clarification of which employers are entitled to an annual funding notice. Specifically, the language ''is a party to the collective bargaining agreement(s) pursuant to which the plan is maintained'' therein is intended to cover not only employers that have a present obligation to contribute under the plan, but also those whose obligation may be temporarily suspended due to a funding holiday granted by the plan's board of trustees. In addition, the Department, through its use of the phrase ''or who otherwise may be subject to withdrawal liability,'' intends to make it clear that, in the case of plans that cover employees in the building and construction industry, entertainment industry, or trucking, household goods moving and public warehousing industries, notice is required for any employer that, as of the last day of the plan year to which the notice relates, has ceased to have an obligation to contribute under the plan, but has continued exposure to withdrawal liability pursuant to section 4203(b), (c), or (d) of ERISA. The clarification in paragraph (f)(4) is intended to ensure that all employers that have a direct financial interest in the plan's funding status will receive a notice.

C. Request for Comments

The Department invites comments from interested persons on all aspects of the proposed regulation. Comments should be addressed to the Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N–5669, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, Attn: PFEA '04 Project. Comments also may be submitted electronically to *e-ORI@dol.gov.* All comments received will be available for public inspection at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, 200 Constitution Avenue NW., Washington, DC 20210.

The Department has limited the comment period to 30 days in order to issue a final regulation on the earliest possible date, taking into account Congress' expectation that regulations would be issued not later than one year from enactment of the PFEA '04, which was April 10, 2004. The Department believes that, in light of the limited number of issues presented for consideration by the proposal, the provided 30-day comment period affords interested persons an adequate amount of time to analyze the proposal and submit comments.

D. Regulatory Impact Analysis

Summary

This proposed regulation contains a model notice and other guidance necessary to implement the amendments made by new section 101(f) of ERISA, as enacted by section 103(a) of PFEA '04. The regulation, if adopted as proposed, will offer a model notice to administrators of multiemployer defined benefit plans, which is expected to mitigate burden and contribute to the efficiency of compliance.

The multiemployer defined benefit plan funding notice provision of PFEA '04 was enacted amid concerns about persisting low interest rates and declines in equity values, each of which has an increasing effect on contribution

requirements and a decreasing effect on the funding levels of defined benefit plans. More complete and timelier disclosures were considered an important element of measures enacted in PFEA '04 to strengthen the long-term health of the defined benefit pension system. Increasing the transparency of information about the funding status of multiemployer plans for participants and beneficiaries, the labor organizations representing them, contributing employers, and PBGC will afford all parties interested in the financial viability of these plans greater opportunity to monitor their funding status.

According to a March 2004 Report by the General Accounting Office [2] the regulatory framework within which multiemployer plans operate shifts certain financial risks away from the government and by implication the taxpayer. Contributing employers to multiemployer plans share the risk of funding benefits for all participants, not just those in their employment, and face specific liabilities if they withdraw from the plans. Participants in multiemployer plans face lower benefit guaranties than those in single-employer plans. According to the GAO report, these factors create incentives for participants and employers to work together constructively to find solutions to plans' financial difficulties. These notices will provide timely disclosure of information concerning the funding status of these plans to support the effort of all interested parties to monitor their financial condition and take action where necessary.

The regulation would further afford plan administrators greater certainty that they have discharged their notice obligation under section 101(f). The proposed regulation is also intended to clarify certain terms used in section 101(f) for the general purpose of delineating those persons entitled to receive the notice. The benefits of greater efficiency, certainty, and clarity are expected to be substantial, but cannot be specifically quantified.

The cost of the multiemployer defined benefit plan notices is expected to amount to $777,000 in the year of implementation, and $644,000 in each subsequent year. The total estimated cost includes the one-time development of a notice by each plan, and the annual preparation and mailing by the administrators of all multiemployer defined benefit plans of the required notices to plan participants and beneficiaries, specified labor organizations, employers that have an obligation to contribute to these plans, and to the Pension Benefit Guaranty Corporation. The first year estimate is higher to account for the time required for plan administrators to adapt and review the model notice.

In this proposed regulation, the Department has attempted to provide guidance to assist administrators to meet this objective the most economically efficient way possible. Because the costs of this proposal arise from notice provisions in PFEA '04, the data and methodology used in developing these estimates are more fully described in the Paperwork Reduction Act section of this analysis of regulatory impact.

Executive Order 12866

Under Executive Order 12866 (58 FR 51735), the Department must determine whether a regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. It has been determined that this proposed regulation is significant within the meaning of section 3(f)(4) of the Executive Order. OMB has, therefore, reviewed this proposed regulation pursuant to the Executive Order.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, EBSA is soliciting comments concerning the proposed information collection request (ICR) included in the proposed regulation regarding the Annual Funding Notice for Defined Benefit Multiemployer Pension Plans. A copy of the ICR may be obtained by contacting the PRA addressee shown below.

The Department has submitted a copy of the proposed information collection to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

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

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. Although comments may be submitted through April 5, 2005, OMB requests that comments be received within 30 days of publication of the Notice of Proposed Rulemaking to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to Gerald B. Lindrew, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N–5647, Washington, DC 20210.

[2] See GAO–04–423 Private Pensions. Multiemployer Plans Face Short and Long-Term Challenges. U.S. General Accounting Office, March 2004. General Accounting Office name changed to Government Accountability Office effective July 7, 2004.

Telephone (202) 693–8410; Fax: (202) 219–5333. These are not toll-free numbers.

The information collection provisions of this proposed regulation are found in § 2520.101–4. A model notice is provided in the Appendix to §2520.101–4 to facilitate compliance and moderate the burden attendant to supplying notices to participants and beneficiaries, labor organizations, contributing employers, and PBGC as required by PFEA '04 and the proposed regulation. Use of the model notice is not mandatory; however, use of the model will be deemed to satisfy the requirements for content, style, and format of the notice, except with respect to any other information the plan administrator elects to include. This proposed regulation is also intended to clarify certain of the PFEA '04 requirements as to content, style and format, manner of furnishing, and persons entitled to receive notice.

In order to estimate the potential costs of the notice provisions of section 101(f) of ERISA and this proposed regulation, the Department estimated the number of multiemployer defined benefit plans, and the numbers of participants, beneficiaries receiving benefits, labor organizations representing participants, and employers that have an obligation to contribute to these plans. The PBGC Pension Insurance Data Book 2003 indicates that as of September 30, 2003, there were 1,623 multiemployer defined benefit plans with 9.7 million participants and beneficiaries receiving benefits. These estimates are based on premium filings with PBGC for 2002, projected by PBGC to 2003, generally the most recent information currently available. This total has been adjusted to 1,595 to reflect the exception from the requirement to furnish a funding notice for years in which a plan is receiving financial assistance from PBGC.

The Department is not aware of a direct source of information as to the number of labor organizations that represent participants of multiemployer defined benefit plans and that would be entitled to receive notice under section 101(f). As a proxy for this number, the Department has relied on information supplied by the Department's Employment Standards Administration, Office of Labor Management Standards, as to the number of labor organizations that filed required annual reports for their most recent fiscal year, generally 2002, at this time. The Department adjusted the number provided by excluding labor organizations that appeared to represent only state, local, and federal governmental employees to account for the fact that such employees are generally unlikely to be participants in plans covered under Title I of ERISA. The resulting estimate of labor organizations entitled to receive notice is 21,000. Although this number has been used for purposes of this analysis, it is believed that this number is an upper bound for the actual number of labor organizations that will receive notice because it is likely that some labor organizations do not represent participants in defined benefit plans, or that some labor organizations represent only participants in single employer plans not subject to section 101(f).

The Department is also unaware of a source of information for the current number of employers obligated to contribute to multiemployer defined benefit plans. PBGC assisted with development of an estimate of this number by providing the Department with a tabulation on their 1987 premium filings of the number of employers contributing to multiemployer defined benefit plans at that time. This was the last year this data element was required to be reported. The Department has attempted to validate that 1987 figure by dividing the number of participants in multiemployer defined benefit plans in the industries in which these plans are most concentrated, such as construction, trucking, and retail food sales,[3] by the average number of employees per firm in those industries based on data published by the Office of Advocacy, U.S. Small Business Administration for 2001. This computation resulted in a figure that was similar in magnitude, but somewhat higher than the 277,600 employers reported in the PBGC premium filing data. As a result, the Department has used 300,000 for its estimate of the number of contributing employers to whom the required notice will be sent.

For purposes of its estimates of regulatory impact, then, the Department has assumed that each plan will develop a notice, and that each year the multiemployer defined benefit plan notices will be prepared and sent by the administrators of 1,595 plans to 9.7 million participants and beneficiaries, 21,000 labor organizations, and 300,000 contributing employers, and to PBGC, for a total of about 10 million notices.

It is assumed that the availability of a model notice as provided in paragraph (f) will lessen the time otherwise required by a plan administrator to draft a required notice. In developing burden estimates, the Department has included one hour for reviewing and adapting the model notice, and 30 minutes for completing the notice for each plan. Reviewing and adapting the notice is expected to be performed by service providers, specifically by legal counsel at an hourly rate of $83. This accounts for the estimated burden of developing the notice, which amounts to about $133,000 for the 1,595 plans. Completing the notice by adding information relevant to each year is expected to take 30 minutes in the first year of implementation, as well as in subsequent years, and it is expected to be performed by the same professionals who are accounted for as preparing the Summary Annual Report (SAR) for plans, namely financial professionals at the rate of $68 per hour. The assumed preparation cost to plans to complete the notice is therefore about $55,000 per year. The total cost to plans to develop and complete the notice in the year of implementation is about $187,000.

The estimated distribution costs for the notices are based on separate assumptions for participant and beneficiary notices versus the labor organization, contributing employer, and PBGC notices. The distribution cost for the notices to participants and beneficiaries is relatively modest compared to the number of notices because it is assumed that these notices will be provided at the same time and as part of the same mailing as the Summary Annual Report. The mailing costs for the SAR are already accounted for in the ICR for the SAR, currently approved under OMB Control Number 1210–0040. Therefore, only an additional materials cost is accounted for in the estimate of distribution costs for participant and beneficiary notices, which totals $292,000.

Distribution cost estimates for the notices to labor organizations, employers, and PBGC include $0.40 for materials and postage, and two minutes at a clerical wage rate of about $17 for each notice. Total distribution costs to labor organizations, contributing employers, and PBGC, therefore, are expected to total about $316,000. Distribution costs for all notices are estimated at $608,000.

In order to estimate the hour burden of preparation and distribution of the notices, the Department has generally relied on the same assumptions used for estimates of the burden of SAR preparation and distribution. Specifically, it is assumed that 100% of notices are developed by service providers, and that 90% of notices are prepared and distributed by service providers. Those activities are

[3] Multiemployer Plans Face Short and Long-Term Challenges. U.S. General Accounting Office, March 2004. General Accounting Office name changed to Government Accountability Office effective July 7, 2004. See GAO–04–423 Private Pensions.

appropriately accounted for as cost burden, for which plans pay service providers. The remaining 10% of notices prepared and distributed in house by plan administrators are appropriately accounted for as hour burden. Materials and mailing costs are considered direct cost burden, as well. The Department has not accounted here for reductions in mailing and material costs that might arise from the electronic distribution of some notices. Although such distribution may be deemed to satisfy the requirements of section 2520.104b–1(b)(1) with respect to fulfilling the disclosure obligation if conditions of section 2520.104b–1(c) are satisfied, it is assumed for purposes of these estimates that these funding notices are less likely to be provided electronically due to the nature of the industries involved and the relationships of the parties affected by this requirement since the active workers affected often do not have access to e-mail at their workplaces. The resulting hour and cost burden estimates are shown below. The Department requests comments on the data, assumptions, and methodology used in arriving at these estimates of economic impact and PRA 95 burden.

Type of Review: New.

Agency: Department of Labor, Employee Benefits Security Association.

Title: Multiemployer Defined Benefit Plan Funding Notice.

OMB Number: 1210-NEW.

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

Respondents: 1,595.

Frequency of Response: Annual.

Responses: 10,048,000.

Estimated Total Burden Hours: 1,155.

Total Annualized Capital/Startup Costs: $133,000.

Total Annual Cost (Operating and Maintenance): $644,000.

Total Annualized Cost: $777,000.

OMB will consider comments submitted in response to this request in its review of the request for approval of the ICR; these comments will also become a matter of public record.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a proposed rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations and governmental jurisdictions.

For purposes of analysis under the RFA, the Employee Benefits Security Administration (EBSA) proposes to continue to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Under section 104(a)(3), the Secretary may also provide for exemptions or simplified annual reporting and disclosure for welfare benefit plans. Pursuant to the authority of section 104(a)(3), the Department has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46 and 2520.104b–10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans covering fewer than 100 participants and which satisfy certain other requirements.

Further, while some large employers may have small plans, in general small employers maintain most small plans. Thus, EBSA believes that assessing the impact of this proposed rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 *et seq.*). EBSA therefore requests comments on the appropriateness of the size standard used in evaluating the impact of this proposed rule on small entities. The Department does not expect that the plans potentially impacted by this proposal will be small entities. However, the Department requests comments on the potential impact of proposal on small entities, and on ways in which any burdens on small entities might be minimized.

EBSA has preliminarily determined that this rule will not have a significant economic impact on a substantial number of small entities. In support of this determination, EBSA has prepared the following initial regulatory flexibility analysis.

Section 103(c) of PFEA '04 provides that the Secretary of Labor shall issue regulations (including a model notice) necessary to implement the amendments made by new section 101(f) of ERISA, as enacted by section 103(a) of PFEA '04. Section 101(f) of ERISA requires the administrator of a multiemployer defined benefit pension plan to furnish annually a notice of the plan's funded status to the plan's participants and beneficiaries and other specified interested parties (each labor organization representing such participants and beneficiaries, each employer that has an obligation to contribute under the plan, and the PBGC).

The conditions set forth in this proposed regulation are intended to satisfy the PFEA '04 requirement that the Secretary prescribe regulations (including a model notice) necessary to implement the amendments made by section 103.

The proposed rule would impact small plans that are multiemployer defined benefit pension plans. It is expected that the proposal will affect approximately 10 small plans, and 800 participants in small plans.

The initial cost of the funding notice for small plans is expected to be about $82 per plan. Preparation of this information is in most cases accomplished by professionals that provide services to employee benefit plans.

The benefits of greater certainty afforded fiduciaries by the model notice are substantial but cannot be specifically quantified.

To the Department's knowledge, there are no federal regulations that might duplicate, overlap, or conflict with the proposed regulation for multiemployer defined benefit pension plan funding notices under section 101(f) of ERISA.

Congressional Review Act

The rules being issued here are subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and if finalized will be sent to Congress and the Comptroller General for review. The rule is not a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects

on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, this proposed regulation does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, and does not impose an annual burden exceeding $100 million on the private sector.

Federalism Statement

Executive Order 13132 (August 4, 1999) 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, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This final rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated that are not pertinent here, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in this final rule do not alter the fundamental reporting and disclosure requirements of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects in 29 CFR Part 2520

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

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

PART 2520—RULES AND REGULATIONS FOR REPORTING AND DISCLOSURE

1. The authority citation for part 2520 is revised to read as follows:

Authority: 29 U.S.C. 1021–1025, 1027, 1029–31, 1059, 1134 and 1135; and Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2520.101–2 also issued under 29 U.S.C. 1132, 1181–1183, 1181 note, 1185, 1185a–b, 1191, and 1191a–c. Secs. 2520.102–3, 2520.104b–1 and 2520.104b–3 also issued under 29 U.S.C. 1003,1181–1183, 1181 note, 1185, 1185a–b, 1191, and 1191a–c. Secs. 2520.104b–1 and 2520.107 also issued under 26 U.S.C. 401 note, 111 Stat. 788. Section 2520.101–4 also issued under sec. 103 of Pub. L. 108–218.

2. Add the following new section and related appendix to subpart A:

§ 2520.101–4 Annual funding notice for multiemployer defined benefit pension plans.

(a) *In general.* (1) Except as provided in paragraph (a)(2) of this section, pursuant to section 101(f) of the Act, the administrator of a defined benefit, multiemployer pension plan shall furnish annually to each person specified in paragraph (f) of this section a funding notice that conforms to the requirements of this section.

(2) A plan administrator shall not be required to furnish a funding notice for any plan year for which the plan is receiving financial assistance from the Pension Benefit Guaranty Corporation pursuant to section 4261 of ERISA.

(b) *Content of notice.* A funding notice shall, consistent with the information included in the plan's Annual Return/Report Form 5500 filed for the plan year to which the funding notice relates, include the following information:

(1) The name of the plan;

(2) The address and phone number of the plan administrator and the plan's principal administrative officer (if different from the plan administrator);

(3) The plan sponsor's employer identification number;

(4) The plan number;

(5) A statement as to whether the plan's funded current liability percentage (as defined in section 302(d)(8)(B)) for the plan year to which the notice relates is at least 100 percent (and, if not, the actual percentage);

(6) A statement of the market value of the plan's assets (and valuation date), the amount of benefit payments, and the ratio of the assets to the payments for the plan year to which the notice relates;

(7) A summary of the rules governing insolvent multiemployer plans, including the limitations on benefit payments and any potential benefit reductions and suspensions (and the potential effects of such limitations, reductions, and suspensions on the plan);

(8) A general description of the benefits under the plan which are eligible to be guaranteed by the Pension Benefit Guaranty Corporation, along with an explanation of the limitations on the guarantee and the circumstances under which such limitations apply; and

(9) Any additional information that the plan administrator elects to include, provided that such information is necessary or helpful to understanding the mandatory information in the notice.

(c) *Style and format of notice.* Funding notices shall be written in a manner calculated to be understood by the average plan participant.

(d) *When to furnish notice.* A funding notice shall be furnished within 9 months after the close of the plan year, unless the Internal Revenue Service has granted an extension of time to file the annual report, in which case such furnishing shall take place within 2 months after the close of the extension period.

(e) *Manner of furnishing notice.* (1) Except as provided in paragraph (e)(2) of this section, funding notices shall be furnished in any manner consistent with the requirements of § 2520.104b–1 of this chapter, including paragraph (c) of that section relating to the use of electronic media.

(2) Notice shall be furnished to the Pension Benefit Guaranty Corporation in a manner consistent with the requirements of part 4000 of this title.

(f) *Persons entitled to notice.* Persons entitled to notice under this section include:

(1) Each participant covered under the plan on the last day of the plan year to which the notice relates;

(2) Each beneficiary receiving benefits under the plan on the last day of the plan year to which the notice relates;

(3) Each labor organization representing participants under the plan on the last day of the plan year to which the notice relates;

(4) Each employer that, as of the last day of the plan year to which the notice relates, is a party to the collective bargaining agreement(s) pursuant to which the plan is maintained or who otherwise may be subject to withdrawal liability pursuant to section 4203 of the Act; and

(5) The Pension Benefit Guaranty Corporation.

(g) *Model notice.* The appendix to this section contains a model notice that is intended to assist plan administrators in

discharging their notice obligations under this section. Use of the model notice is not mandatory. However, use of the model notice will be deemed to satisfy the requirements of paragraphs (b) and (c) of this section, except with respect to information referenced in paragraph (b)(9) of this section.

Appendix to § 2520.101–4—Annual Funding Notice for [Insert name of pension plan]

Introduction

This notice, which federal law requires all multiemployer plans to send annually, includes important information about the funding level of [insert name, number, and EIN of plan] (Plan). This notice also includes information about rules governing insolvent plans and benefit payments guaranteed by the Pension Benefit Guaranty Corporation (PBGC), a federal agency. This notice is for the plan year beginning [insert beginning date] and ending [insert ending date] (Plan Year).

Plan's Funding Level

The Plan's ''funded current liability percentage'' for the Plan Year was [insert percentage—see instructions below]. In general, the higher the percentage, the better funded the plan. The funded current liability percentage, however, is not indicative of how well a plan will be funded in the future or if it terminates.

(Instructions: For purposes of computing the ''funded current liability percentage,'' insert ratio of actuarial value of assets to current liability, expressed as a percentage. If the percentage is equal to or greater than 100 percent, you may insert ''at least 100 percent.'')

Plan's Financial Information

The market value of the Plan's assets as of [insert valuation date] was [insert amount]. The total amount of benefit payments for the Plan Year was [enter amount]. The ratio of assets to benefit payments is [enter amount calculated by dividing the value of plan assets by the total benefit payments]. This ratio suggests that the Plan's assets could provide for approximately [enter amount calculated above] years of benefit payments in annual amounts equal to what was paid out in the Plan Year. However, the ratio does not take into account future changes in total benefit payments or plan assets.

Rules Governing Insolvent Plans

The law has special rules governing insolvent multiemployer pension plans. A plan is insolvent for a plan year if its available financial resources are not sufficient to pay benefits when due for the plan year.

An insolvent plan must reduce benefit payments to the highest level that can be paid from the plan's available financial resources. If such resources are not enough to pay benefits at a level specified by law (see Benefit Payments Guaranteed by the PBGC, below), the plan must apply to the PBGC for financial assistance. The PBGC, by law, will loan the plan the amount necessary to pay benefits at the guaranteed level. Reduced benefits may be restored if the plan's financial condition improves.

A plan that becomes insolvent must provide prompt notification of the insolvency to participants and beneficiaries, contributing employers, labor unions representing participants, and PBGC. In addition, participants and beneficiaries also must receive information regarding whether, and how, their benefits will be reduced or affected as a result of the insolvency, including loss of a lump sum option. This information will be provided for each year the plan is insolvent.

Benefit Payments Guaranteed by the PBGC

The PBGC guarantees only vested benefits. Specifically, it guarantees a monthly benefit payment equal to 100 percent of the first $11 of the Plan's monthly benefit accrual rate, plus 75 percent of the next $33 of the accrual rate, times each year of credited service. The maximum guaranteed payment for a vested retiree, therefore, is $35.75 per month times each year of credited service.

Example 1: If a participant with 10 years of credited service has an accrued monthly benefit of $500, the accrual rate for purposes of determining the PBGC guarantee would be determined by dividing the monthly benefit by the participant's years of service ($500/10), which equals $50. The guaranteed amount for a $50 monthly accrual rate is equal to the sum of $11 plus $24.75 (.75 × $33), or $35.75. Thus, the participant's guaranteed monthly benefit is $357.50 ($35.75 × 10).

Example 2: If the participant in Example 1 has an accrued monthly benefit of $200, the accrual rate for purposes of determining the guarantee would be $20 (or $200/10). The guaranteed amount for a $20 monthly accrual rate is equal to the sum of $11 plus $6.75 (.75 × $9), or $17.75. Thus, the participant's guaranteed monthly benefit would be $177.50 ($17.75 × 10).

In calculating a person's monthly payment, the PBGC will disregard any benefit increases that were made under the plan within 60 months before insolvency. Similarly, the PBGC does not guarantee pre-retirement death benefits to a spouse or beneficiary (*e.g.*, a qualified pre-retirement survivor annuity), benefits above the normal retirement benefit, disability benefits not in pay status, or non-pension benefits, such as health insurance, life insurance, death benefits, vacation pay, or severance pay.

Where To Get More Information

For more information about this notice, you may contact [enter name of plan administrator and, if applicable, principal administrative officer], at [enter phone number and address]. For more information about the PBGC and multiemployer benefit guarantees, go to PBGC's Web site, *http://www.pbgc.gov*, or call PBGC toll-free at 1–800–400–7242 (TTY/TDD users may call the Federal relay service toll free at 1–800–877–8339 and ask to be connected to 1–800–400–7242).

Signed at Washington, DC, this 31st day of January, 2005.

Ann L. Combs,

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

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