



This document is scheduled to be published in the Federal Register on 12/06/2011 and available online at <http://federalregister.gov/a/2011-30919>, and on FDsys.gov

DEPARTMENT OF LABOR

Employee Benefits Security Administration

RIN 1210–AB51

Proposed Revision of Annual Information Return/Reports

AGENCY: Employee Benefits Security Administration, Department of Labor

ACTION: Notice of Proposed Forms Revisions.

SUMMARY: This document contains proposed revisions to the Form 5500 Annual Return/Report filed by administrators of employee benefit plans. The proposed revisions are intended to enhance the Department of Labor’s ability to enforce the reporting requirements for multiple employer welfare arrangements (MEWAs) under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA).

DATE: Written comments on the proposed regulations should be submitted to the Department of Labor on or before **[INSERT DATE THAT IS 90 DAYS AFTER PUBLICATION IN FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Janet K. Song, Office of Regulations and Interpretations, Employee Benefits Security Administration, Department of Labor, at (202) 693-8523. This is not a toll-free number.

ADDRESSES: Written comments may be submitted to the address 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 may be posted on the Internet and can be retrieved by most Internet search engines. Comments may be submitted anonymously.

Comments may be submitted to the Department of Labor, identified by RIN 1210-AB51, by one of the following methods:

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

- **Email:** e-ORI@dol.gov

- **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—AB51.

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.

SUPPLEMENTARY INFORMATION:

I. Background

Under Titles I and IV of ERISA, and the Internal Revenue Code (Code), as amended, and regulations issued thereunder, pension and welfare benefit plans are generally required to file an

annual report concerning, among other things, the financial condition and operation of the plans. Filing the Form 5500 Annual Return/Report of Employee Benefit Plan (Form 5500 Annual Return/Report), including any required attachments and schedules, generally satisfies the annual reporting requirements. The Form 5500 Annual Return/Report is the principal source of information and data concerning the operations, funding and investments of pension and welfare benefit plans. The Form 5500 Annual Return/Report constitutes an integral part of the enforcement, research and policy development programs of the Department of Labor (Department), the Internal Revenue Service, and the Pension Benefit Guaranty Corporation, 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 Return/Report also serves as the primary means by which the operations of plans can be monitored by participants, beneficiaries, and the general public.

In addition to filing the Form 5500 Annual Return/Report, certain employee welfare benefit plans that are multiple employer welfare arrangements (MEWAs), as defined in section 3(40) of ERISA, are also subject to the reporting requirements under § 2520.101-2, which is satisfied by filing a Form M-1 Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Other Entities Claiming Exception (ECEs) (Form M-1).

II. Multiple Employer Welfare Arrangements

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. 104–191, 110 Stat. 1936) amended ERISA to provide for, among other things, improved portability and continuity of health insurance coverage. HIPAA added section 101(g) to ERISA, providing

the Secretary of Labor (Secretary) with the authority to establish, by regulation, annual reporting by MEWAs that are not themselves plans within the meaning of ERISA section 3(3) (non-plan MEWAs). The purpose of the reporting requirement was to determine whether MEWAs were in compliance with the requirements created by HIPAA. The Patient Protection and Affordable Care Act (Affordable Care Act), Pub. L. 111-148, 124 Stat. 119 (2010), amended section 101(g) of ERISA to require non-plan MEWAs to register with the Department prior to operating in a State.

On February 11, 2000, the Department published an interim final rule implementing the Form M-1 regulation under § 2520.101-2. 65 FR 715. On April 9, 2003, the Department published the final rule. 68 FR 17494. ERISA section 101(g) only applies to non-plan MEWAs. In order to effectuate MEWA compliance, however, and based on the authority found in ERISA sections 505 and 734,¹ the 2003 Form M-1 regulation requires the administrators of both plan and non-plan MEWAs, as well as certain other entities that offer or provide health benefits to the employees of two or more employers, to file the Form M-1 with the Secretary.

Although ERISA sections 505 and 734 provided the Secretary with the authority to require plan MEWAs to comply with the Form M-1 reporting requirements of § 2520.101-2,

¹ In the preamble to the 2000 interim final rule, the Department explained “[a]n important reason for requiring these groups to file is that the administrator of a MEWA may incorrectly determine that it is a group health plan or that it is established or maintained pursuant to a collective bargaining agreement. A reporting requirement limited only to MEWAs that are not group health plans may not result in reporting by many such MEWAs, thus greatly reducing the value of the data collected.” *See* 65 FR 7152, 7153, (Feb. 11, 2000).

only non-plan MEWAs are subject to civil penalties under ERISA section 502(c)(5) for failure to comply with the Form M-1 requirements.²

III. Discussion of the Proposed Revisions

1. Proposed Regulatory Amendments.

The Department is simultaneously publishing a Notice of Proposed Rulemaking in today's **Federal Register** that, upon adoption, would amend the existing Form M-1 requirements under § 2520.101-2, propose implementation of new registration requirements enacted by the Affordable Care Act, and propose amendments to the Department's annual reporting regulations to strengthen the Form M-1 requirements for MEWAs. To reflect the proposed regulatory amendments to the Form 5500 reporting requirements, the Department is proposing to revise the Form 5500 Annual Return/Report and instructions as follows.

2. Plan MEWA Filing Requirement.

Section 2520.104-20 and the instructions for the Form 5500 and Form 5500-SF provide for exemption from certain reporting and disclosure requirements under Title I of ERISA, including the requirement to file Form 5500 Annual Return/Report, for unfunded, fully insured, or combination unfunded/fully insured welfare plans that cover fewer than 100 participants. Under the proposed amendments to §2520.103-1(c)(2) and §2520.104-20, and revisions to the instructions for Form 5500 and Form 5500-SF, all plan MEWAs subject to the Form M-1 requirements would be required to file Form 5500 Annual Return/Report, regardless of the plan size. The limited exemption under § 2520.104-20 would be removed for plan MEWAs subject

² Pursuant to ERISA section 502(c)(5), a civil penalty of up to \$1,100 (or higher amount if adjusted pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended) a day may be assessed for each day a non-plan MEWA fails to file a complete Form M-1.

to the Form M-1 requirements. In addition, such plan MEWAs would not be eligible to file the Form 5500-SF.³

As discussed in the Paperwork Reduction Act statement, below, the Department believes that the number of plan MEWAs affected by the proposed removal of the exemption under § 2520.104-20 would be small. Nevertheless, the Department believes that the proposed change is necessary because all MEWAs are subject to the existing (and proposed) Form M-1 requirements under § 2520.101-2, regardless of the size of the entity. Unless all plan MEWAs are required to file the Form 5500 Annual Return/Report (with the proposed questions regarding Form M-1 compliance), the Department would have no way to enforce the Form M-1 requirements against MEWAs that might mischaracterize themselves as being eligible for the exemption under § 2520.104-20.

Moreover, the burden of preparing and filing the Form 5500 Annual Return/Report for the few small unfunded/fully insured plan MEWAs affected by the proposal would be minimized because, in addition to being eligible for the simplified annual reporting requirements for small welfare plans provided under § 2520.104-41, these plan MEWAs would be exempt under § 2520.104-44 from completing Schedule I (Financial Information). Thus, these plan MEWAs would only need to file a Form 5500 and, if applicable, Schedule A (Insurance Information) and Schedule G, Part III (to report any nonexempt transactions).

³ The Form 5500-SF does not include specific Schedule A insurance information, and the Department believes that plan MEWAs subject to this proposal that claim to provide insured benefits should be required to complete the Schedule A so that enforcement officials and the public have information about the insurance policy and insurance company through which the MEWA is providing insurance coverage.

3. Form 5500 - New MEWA Information.

Under the Notice of Proposed Rulemaking, content of the annual report under § 2520.103-1 would be amended to require a plan MEWA subject to the Form M-1 requirements to include a proof of compliance with § 2520.101-2 (filing the Form M-1) as part of the Form 5500 Annual Return/Report. Accordingly, the Department is proposing to add a new Part III to the Form 5500, which would ask for information regarding whether an employee welfare benefit plan is a MEWA subject to the Form M-1 requirements, and if so, whether the plan is currently in compliance with the Form M-1 requirements under § 2520.101-2. Plan administrators that indicate the plan is a MEWA subject to the Form M-1 requirements will also be required to enter a Receipt Confirmation Code for the most recent Form M-1 filed with the Department. Failure to answer the Form M-1 compliance questions will result in rejection of the Form 5500 Annual Return/Report as incomplete and civil penalties may be assessed pursuant to ERISA section 502(c)(2).

IV. Findings on the Revised Form 5500 Annual Return/Report as a Limited Exemption and Simplified Reporting

Section 104(a)(2)(A) of ERISA authorizes the Secretary to prescribe by regulation simplified reporting for pension plans that cover fewer than 100 participants. Section 104(a)(3) of ERISA authorizes the Secretary to exempt any welfare plan from all or part of the reporting and disclosure requirements of Title I of ERISA or to provide simplified reporting and disclosure if the Secretary finds that such requirements are inappropriate as applied to such plans. Section 110 of ERISA permits the Secretary to prescribe for pension plans alternative methods of complying with any of the reporting and disclosure requirements if the Secretary finds that: (1) the use of the alternative method is consistent with the purposes of Title I of ERISA, provides

adequate disclosure to plan participants and beneficiaries, and provides adequate reporting to the Secretary; (2) the application of the statutory reporting and disclosure requirements would increase costs to the plan or impose unreasonable administrative burdens with respect to the operation of the plan; and (3) the application of the statutory reporting and disclosure requirements would be adverse to the interests of plan participants in the aggregate. For purposes of Title I of ERISA, the filing of a completed Form 5500 Annual Return/Report, including the filing by eligible plans of the Form 5500-SF, in accordance with the instructions and related regulations, generally would constitute compliance with the simplified report, limited exemption and/or alternative method of compliance in § 2520.103-1. In addition, section 505 of ERISA authorizes the Secretary to prescribe such regulations as the Secretary finds necessary or appropriate to carry out the provisions of Title I of ERISA.

In revising the Form 5500 Annual Return/Report and making the amendments to the Department's annual reporting regulations, the Department has attempted to balance the needs of participants and beneficiaries and the Department to obtain information necessary to protect ERISA rights and interests with the costs attendant with the reporting of information to the federal government. The Department finds under sections 104(a)(2)(A) and 104(a)(3) of ERISA that the use of the Form 5500 Annual Return/Report, with the proposed new Form M-1 compliance questions, is consistent with the purposes of Title I of ERISA and provides adequate disclosure to participants and beneficiaries and adequate reporting to the Secretary.

The use of the Form 5500 Annual Return/Report, including the proposed new Form M-1 compliance questions, will relieve plan MEWAs from increased costs and unreasonable

administrative burdens by providing a standardized format that facilitates reporting, eliminates duplicative reporting requirements, and simplifies the content of the annual report in general. Taking into account the above, the Department has determined that the proposed revisions to the Form 5500 Annual Return/Report are necessary and appropriate to carry out the provisions of Title I of ERISA. The proposed revised Form 5500 Annual Return/Report provides for the reporting and disclosure of financial and other plan information described in section 103 of ERISA in a uniform, efficient, and understandable manner, thereby facilitating the disclosure of such information to plan participants and beneficiaries.

V. Paperwork Reduction Act Statement

According to the Paperwork Reduction Act of 1995 (Pub. L. 104-13) (PRA), no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The Department notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by the Office of Management and Budget (OMB) under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. *See* 44 U.S.C. 3507. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. *See* 44 U.S.C. 3512.

The Department has filed a revision with OMB regarding the impact this notice would have on the information collection request titled “Form 5500, Annual Return/Report of

Employee Benefit Plan,” which is approved by OMB under OMB Control Number 1210-0110 and currently scheduled to expire on March 31, 2014. The proposed regulation titled “Filings Required of Multiple Employer Welfare Arrangements and Certain Other Entities that Offer or Provide Coverage for Medical Care to the Employees of Two or More Employers,” published elsewhere in today’s issue of the **Federal Register**, would revise the content of the Form 5500 Annual Return/Report to require an ERISA-covered plan MEWA that is subject to Form M-1 requirements to include a proof of filing the Form M-1 as part of the Form 5500 Annual Return/Report. Accordingly, the Department is proposing to add a new Part III to the Form 5500, which would ask for information regarding whether the employee welfare benefit plan is a MEWA subject to the Form M-1 requirements, and if so, whether the plan is currently in compliance with the Form M-1 requirements under § 2520.101-2. Plan administrators that indicate the plan is a MEWA subject to the Form M-1 requirements also would be required to enter a Receipt Confirmation Code for the most recent Form M-1 filed with the Department. Failure to answer the Form M-1 compliance questions will result in rejection of the Form 5500 Annual Return/Report as incomplete and civil penalties may be assessed pursuant to ERISA section 502(c)(2). The Department believes that the burden associated with this revision would be de minimis, because plan administrators would know whether the plan MEWA is subject to and in compliance with the Form M-1 requirements, and they would have the Receipt Confirmation Code for the most recent Form M-1 filing readily available.

The proposed rule also would require all plan MEWAs subject to the Form M-1 requirements to file the Form 5500 Annual Return/Report, regardless of the plan size. The limited exemption for certain small welfare plans under § 2520.104-20 would be removed for

plan MEWAs subject to the Form M-1 requirements. In addition, such plan MEWAs would not be eligible to file the Form 5500-SF. Although the Department does not have sufficient data to estimate the number of plan MEWAs that would be affected by this revision, it expects the number to be small, because 90% of MEWAs that file the Form M-1 with the Department cover more than 100 participants. Moreover, as discussed earlier in this notice, the burden of preparing and filing the Form 5500 Annual Return/Report for the few small unfunded/fully insured plan MEWAs affected by the proposal would be minimal, because, in addition to being eligible for the simplified annual reporting requirements for small welfare plans provided under § 2520.104-41, these plan MEWAs would be exempt under § 2520.104-44 from completing Schedule I (Financial Information). Thus, the affected plan MEWAs would only need to file a Form 5500 and, if applicable, Schedule A and Schedule G, Part III (to report any nonexempt transactions). The Department estimates that affected MEWAs would incur a cost of \$450 to engage a third-party service provider to prepare the form and schedules for submission.

Appendix A – Proposed Changes to Existing Form 5500 – New Part III added

Part III	Multiple Employer Welfare Arrangement (MEWA) Information
11a. If the plan provides welfare benefits, is the plan a multiple employer welfare arrangement (MEWA) that is subject to the Form M-1 filing requirements? (See instructions and 29 CFR 2520.101-2.) <input type="checkbox"/> Yes <input type="checkbox"/> No	
If “Yes” is checked, complete lines 11b and 11c.	
11b. Is the plan currently in compliance with the Form M-1 filing requirements? (See instructions and 29 CFR 2520.101-2.) <input type="checkbox"/> Yes <input type="checkbox"/> No	
11c. Enter the Receipt Confirmation Code for the most recent 20XX Form M-1 that was filed in accordance with the Form M-1 filing requirements. (Failure to enter a valid Receipt Confirmation Code will result in rejection of the filing as incomplete.) _____	

Appendix B – Proposed Changes to Form 5500 Instructions

The proposed changes to the instructions to the Form 5500 are as follows:

Section 1: Who Must File

- The following instructions will be added to the instructions for Welfare Benefit Plan:

Plans that are also multiple employer welfare arrangements (MEWAs) required to file a Form M-1, Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs), are not eligible for the filing exemption for small unfunded, fully insured or combination of unfunded/fully insured welfare plans as described below. Such plan MEWAs are required to file the Form 5500 regardless of the plan size or whether the plan is unfunded, fully insured, or a combination of insured and unfunded.

Section 4: What To File

- The following instructions will be added to the instructions for General Schedules,

Schedule I:

Note. A plan that would have been eligible for the filing exemption for small unfunded, fully insured or combination of unfunded/fully insured welfare plans under 29 CFR 2550.104-20 but for the fact that it is a MEWA required to file a Form M-1 is exempt under 29 CFR 2520.104-44(b)(1) from completing a Schedule I.

- The following tip will be added to the instructions for Small Welfare Plan filing

requirements:



An unfunded, fully insured or combination of unfunded/fully insured welfare plan that covered fewer than 100 participants as of the beginning of the plan year and is a multiple employer welfare arrangement (MEWA) required to file a Form M-1, Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs), is exempt from attaching Schedule I if the plan meets the requirements of 29 CFR 2520.104-44. However, Schedule G, Part III, must be attached to the Form 5500 to report any nonexempt transactions.

Quick Reference Chart of Form 5500, Schedules, and Attachments (Not Applicable for Form 5500-SF Filers)

- The following sentence will be added at the end of footnote 3:

Plans that are also multiple employer welfare arrangement (MEWA) required to file Form M-1, Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs), must file an annual report regardless of plan size or whether the plan is unfunded, fully insured, or a combination of unfunded/fully insured.

Section 5: Line-by-Line Instructions for the Form 5500 and Schedules

- The following instruction will be added to the instructions for Part I, Line A- Box for

Multiple-Employer Plan.

A plan that is a multiple employer welfare arrangement (MEWA) is a multiple-employer plan for purposes of filing the Form 5500.

- The following instructions for new Part III will be added as follows:

Part III – Multiple Employer Welfare Arrangement (MEWA) Information

Line 11a. All plans providing welfare benefits must complete Part III, line 11a by answering either “Yes” or “No.” Do not leave the answer blank. If “yes” is checked, you must complete line 11, elements 11b and 11c.

Generally, a plan is a “multiple employer welfare arrangement” (MEWA) subject to the filing requirements of **Form M-1, Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs)**, if the plan offers or provides medical benefits to employees of two or more employers, unless it meets any of the exceptions described in the instructions to Form M-1. See the instructions for the Form M-1 on the EBSA website at www.dol.gov/ebsa.

Line 11b. All plans that answered “Yes” in line 11a must complete line 11b by answering either “Yes” or “No.” Do not leave the answer blank.

In order for a plan MEWA to be deemed compliant with the Form M-1 filing requirements, a Form M-1 must be filed each year by March 1st following the calendar year in which the plan MEWA operates. Additional Form M-1 filings are necessary when the plan MEWA experiences any of the following registration filing events:

1. The plan MEWA first begins operating with regard to the employees of two or more employers (including one or more self-employed individuals);
2. The plan MEWA begins operating in any additional state;
3. The plan MEWA begins operating following a merger with another MEWA;
4. The number of employees receiving coverage for medical care under the plan MEWA is at least 50 percent greater than the number of such employees on the last day of the previous calendar year; or
5. The plan MEWA experiences a material change as defined by the Form M-1 instructions.

Events 1 and 2 require a Form M-1 filing 30 days prior to the event, while events 3-5 require a Form M-1 filing within 30 days of the event occurring. A plan MEWA may be required to file a Form M-1 more than once during the plan year.

See the instructions for Form M-1 and 29 CFR 2520.101-2 for more information regarding the Form M-1 filing requirements for plan MEWAs.

Line 11c. All plans that answered “Yes” in line 11a must enter a Receipt Confirmation Code for the most recent 20XX Form M-1 filed with the Department in accordance with the Form M-1 filing requirements. If a subsequent Form M-1 has been filed with the Department, enter the Receipt Confirmation Code for the subsequent Form M-1. The Receipt Confirmation Code is a unique code generated by the Form M-1 electronic filing system.



A welfare benefit plan's failure to answer line 11a, line 11b or enter a valid Receipt Confirmation Code in line 11c will result in rejection of the filings as incomplete and civil penalties may be assessed pursuant to ERISA Section 502(c)(2) and 29 CFR 2560.502c-2.

Instructions for Schedule G (Form 5500) *Financial Transaction Schedules*

- The following instructions will be added to the “Caution” paragraph in Part III – Nonexempt

Transactions:

An unfunded, fully insured, or combination unfunded/fully insured welfare plan with fewer than 100 participants that is a multiple employer welfare arrangement (MEWA) exempt under 29 CFR 2520.104-44 from completing Schedule I, must complete Schedule G, Part III, to report nonexempt transactions.

Instructions for Schedule I (Form 5500) *Financial Information – Small Plan*

- The following instructions will be added to the “Exception” paragraph under General

Instructions for Who Must File:

An unfunded, fully insured or combination unfunded/fully insured welfare plan that would have been exempt from filing the Form 5500 but for the fact that it is a multiple employer welfare arrangement (MEWA) required to file a Form M-1, is exempt under 29 CFR 2520.104-44 from completing Schedule I.

Appendix C - Proposed Changes to Existing Form 5500-SF Instructions

General Changes

The instructions to the Form 5500-SF will be updated to clarify that plan MEWAs subject to Form M-1 filing requirements are not eligible to file the Form 5500-SF and must file the Form 5500, with all required schedules and attachments. The proposed changes are as follows:

Who May File

- The following paragraph 6 will be added to the instructions:

6. The plan is not a multiple employer welfare arrangement (MEWA) required to file a Form M-1, Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs).

Specific Line-by-Line Instructions (Form 5500-SF)

- The following paragraph 6 will be added to the instructions for Part II, Line 6:

6. The plan is not a multiple employer welfare arrangement (MEWA) required to file a Form M-1, Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs).

Signed at Washington, DC this 28th day of November, 2011.

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

BILLING CODE: 4510-29-P

[FR Doc. 2011-30919 Filed 12/05/2011 at 8:45 am; Publication Date: 12/06/2011]