

**FIELD ASSISTANCE BULLETIN NO. 2019-01**

DATE: JULY 24, 2019

MEMORANDUM FOR: MABEL CAPOLONGO, DIRECTOR OF ENFORCEMENT
MICHAEL AUERBACH, CHIEF ACCOUNTANT
REGIONAL DIRECTORS

FROM: JOHN J. CANARY
DIRECTOR OF REGULATIONS AND INTERPRETATIONS

SUBJECT: ANNUAL REPORTING REQUIREMENTS FOR MULTIPLE
EMPLOYER PLANS SUBJECT TO ERISA SECTION 103(g)

This Field Assistance Bulletin provides guidance and temporary penalty relief related to certain Form 5500 Annual Return/Report requirements for multiple employer plans (MEPs) subject to Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). In particular, MEPs have a statutory obligation under section 103(g) of ERISA to file complete and accurate lists of participating employers with their Forms 5500, as part of a public reporting system. The Employee Benefits Security Administration (EBSA), in the course of its ongoing annual reporting compliance efforts, found that a substantial number of MEP filers were not in full compliance with this reporting obligation. While EBSA expects full compliance with these reporting obligations on a prospective basis, this Bulletin gives transition relief for MEPs that have failed to file a complete and accurate list of participating employers with their Form 5500 for the 2017 plan year and before, as set forth below. The guidance in this Bulletin relates solely to civil penalties for Form 5500 reporting obligations under Title I of ERISA; it does not address any other issue under ERISA or any obligations under the Internal Revenue Code.

BACKGROUND

In 2014, Congress as part of the Cooperative and Small Employer Charity Pension Flexibility Act (Pub. L. No. 113-97, § 104(c) (CSEC Act)), added section 103(g) to ERISA as a specific Form 5500 annual report requirement for multiple employer plans. Section 103(g) provides:

With respect to any multiple employer plan, an annual report under this section for a plan year shall include a list of participating employers and a good faith estimate of the percentage of total contributions made by such participating employers during the plan year.

The CSEC Act, which was enacted in April 2014, made the new reporting requirement effective for plan years beginning after December 31, 2013. The Department issued an interim final rule in November 2014 that implemented ERISA section 103(g). *See* 79 Fed. Reg. 66617 (Nov. 10, 2014). The interim final rule added the new requirements to the first question on the face of the

Form 5500 at Part I, Line A, Annual Report Identification Information, where filers indicate the general type of plan. Specifically, the rule added text next to the check box for multiple employer plans: “(Filers checking this box must attach a list of participating employer information in accordance with the form instructions).” The interim final rule also added the following accompanying instructions for the Form 5500:

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.

See, e.g., 2018 Form 5500 instructions at 14; *see also* 2018 Form 5500-SF instructions at 8-9. The “[e]xcept as provided below” caveat refers to a following sentence in the instructions that says unfunded or insured welfare plans that are exempt under 29 CFR 2520.104-44 from filing financial information with their Form 5500 must file a list of participating employers, but do not have to include an estimated amount of contributions from each employer.

The Department, in reviewing Form 5500 data in 2018, found that some MEPs, including MEPs sponsored by professional employer organizations (PEOs), had failed to include a complete and accurate list of participating employers with their Form 5500/5500-SF. The Department initiated an enforcement effort and corresponded with filers in 2019. As part of that effort, the Department identified 185 MEP filings for the 2016 plan year as compliant (plans reported total participants of approximately 425,000) and 101 MEP filings as non-compliant (plans reported total participants of approximately 480,000). Examples of non-compliant filings included Forms in which: (1) the filer replaced employer names with either abbreviated names or initials, client numbers, or other labels such as “Client 1;” (2) the filing reported only the last 4 digits of EINs; (3) the filing included an attachment with no information and a note “Details available upon request;” and (4) the filing incorrectly listed the PEO as the only participating employer.

The Department’s enforcement effort resulted in a dialog with individual PEOs and organizations representing PEO interests. The National Association of Professional Employer Organizations (NAPEO), in a letter dated March 26, 2019, told the Department that while “a few” PEOs listed the employers that participate in their MEPs, “most” filed their Form 5500 with the participating employer redacted, coded, or under a separate cover. The PEOs and their representatives also raised a number of objections to the ERISA section 103(g) filing requirement. They contended that filing the participating employer list imposes material costs

and burdens on PEO-sponsored plans and they argued that making the employer list public was not in the best interests of plan participants and beneficiaries.

The Department received and considered similar objections in connection with the Paperwork Reduction Act (PRA) notice associated with the publication of the interim final rule implementing the CSEC Act requirement. *See* Proposed Extension of Information Collection Request Submitted for Public Comment; Revisions to Annual Return/Report—Multiple-Employer Plans, 79 Fed. Reg. 66741 (Nov. 10, 2014) (available at www.govinfo.gov/content/pkg/FR-2014-11-10/pdf/2014-26499.pdf). In its 2016 Federal Register notice regarding proposed modernization of the Form 5500, the Department explained its decision at that time not to propose changes to the ERISA section 103(g) reporting requirements. *See* Form 5500 Improvement and Modernization Proposal -- Proposed Revision of Annual Information Return/Reports, 81 Fed. Reg. 47534, 47564-47565 (July 21, 2016) (available at www.govinfo.gov/content/pkg/FR-2016-07-21/pdf/2016-14893.pdf).

The Department continues to believe that the reporting requirements made effective for MEPs by the 2014 interim final rule implementing ERISA section 103(g) are a reasonable and appropriate way to implement Congress' directive in the CSEC Act. The Department does not believe it has the authority under ERISA section 110 or ERISA section 104, when read together with ERISA section 106, to treat information otherwise required to be filed with or as part of a plan's annual report as confidential or nonpublic information. Section 106 of ERISA provides generally, with an exception for individual benefit statements not relevant here, that the contents of the annual report "shall be public information" that must be open for public inspection.

TRANSITION RELIEF FOR ANNUAL REPORTING CIVIL PENALTIES

In light of the possibility that some plan fiduciaries may have misunderstood the annual reporting requirement, before the Department proceeds with further civil penalty enforcement actions in this area, the Department is prepared to provide transition relief to plan administrators of MEPs who voluntarily comply with the annual reporting requirements in ERISA section 103(g) and commence filing complete and accurate participating employer information. Specifically, the Department will not reject a Form 5500 or Form 5500-SF filed on behalf of a MEP for the 2017 plan year, or any prior plan year, or seek to assess civil penalties against the plan administrator under ERISA section 502(c)(2) with respect to such filings, solely on the basis that the plan administrator failed to include complete and accurate participating employer information in accordance with ERISA section 103(g), provided that the annual reports filed for the plan for the 2018 and following plan years comply with the requirement in ERISA section 103(g), the Form 5500 or Form 5500-SF, as applicable, and the accompanying instructions.¹ Specifically, as set forth in the instructions for the Form 5500 and Form 5500-SF, the annual report is to include in the required format: (1) a complete and accurate listing of each participating employer in the

¹ The Department has the authority under section 502(c)(2) of ERISA to assess civil penalties against plan administrators who fail or refuse to file complete and timely annual reports as required under ERISA and the Department's annual reporting regulations. Pursuant to 29 CFR 2560.502c-2 and 29 CFR 2570.60 *et seq.*, EBSA maintains an enforcement program for the assessment of civil penalties under section 502(c)(2) of ERISA for noncompliance with ERISA's annual reporting requirements.

plan during the plan year, identified by name and employer identification number (EIN); and (2) 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.²

In light of the July 31, 2019, due date for calendar year plans to file their 2018 Form 5500 or Form 5500-SF, the Department is granting MEPs a special filing extension of up to 2½ months to file their 2018 annual report in compliance with ERISA section 103(g). MEPs should check the "special extension" box under Part I, Line D on the 2018 Form 5500/5500-SF and enter "FAB 2019-01" as the description to use this extension. MEPs using this special extension do not need to file a Form 5558 with the IRS.

Filers may still choose to file the Form 5558 instead to obtain a generally available 2½ month extension for annual reports, but Form 5558 must be filed with the Internal Revenue Service on or before the normal due date (not including any extensions), e.g., by July 31, 2019, for calendar year plans. For more information on filing the Form 5558, see the general instructions to the Form 5500 or 5500-SF under the heading "Extension of Time to File," and visit the IRS's website at www.irs.gov/pub/irs-pdf/f5558.pdf.

With respect to MEPs that have already filed their 2018 Form 5500 or Form 5500-SF, provided that such MEPs file an amended annual report for the 2018 plan year that complies with the section 103(g) reporting requirement by October 15, 2019, the relief in this FAB will be available.

In providing this transition relief, the Department reserves the right in individual cases to request that MEPs furnish the employer information for previous years in which the plan administrator failed to include complete and accurate participating employer information. In such instances, the availability of this transitional relief is contingent on compliance with the Department's request.

Questions concerning this Bulletin may be directed to the Division of Coverage, Reporting and Disclosure at 202.693.8523. Questions concerning individual plans facing specific transition issues should be directed to the Office of the Chief Accountant at 202.693.8360.

² As noted above, 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.