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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2520

RIN 1210-AB62

Electronic Filing of Notices for Apprenticeship and Training Plans and Statements for Pension Plans for Certain Select Employees

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Proposed rule.

SUMMARY: This document contains proposed regulations that would revise filing procedures for apprenticeship and training plan notices and “top hat” plan statements with the Secretary of Labor to require electronic submission of these notices and statements.

DATES: Comments are due on or before [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 1210–AB62, by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Email: e-ORI@dol.gov. Include RIN 1210-AB62 in the subject line of the message.
- Mail or personal 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.

Instructions: All submissions received must include the agency name and Regulation Identifier Number (RIN) for this rulemaking. Comments received, including any personal

information provided, 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. Persons submitting comments electronically are encouraged not to submit paper copies.

FOR FURTHER INFORMATION CONTACT: Marjorie M. Kress or Eric A. Raps, Office of Regulations and Interpretations, Employee Benefits Security Administration (EBSA), Department of Labor, at (202) 693-8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

Background

Part 1 of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), contains reporting and disclosure requirements applicable to plans covered by ERISA. For instance, sections 103 and 104 of ERISA establish requirements for the publication and filing of annual reports, while sections 102 and 104 of ERISA require plan administrators to furnish summary plan descriptions and summaries of material modifications or changes to participants and beneficiaries.

Section 104(a)(3) of ERISA, however, authorizes the Secretary to exempt any welfare benefit plan from all or part of the reporting and disclosure obligations, or to provide simplified reporting and disclosure, if the Secretary finds that the requirements are inappropriate for these plans. Under this authority, the Secretary, in 1980, issued 29 CFR 2520.104-22, which provides an exemption from the reporting and disclosure provisions of Part 1 of Title I of ERISA for employee welfare benefit plans that provide only apprenticeship or training benefits, or both,

if certain conditions are met.¹ Under the regulation, a welfare plan that provides only these benefits is not required to meet the requirements of Part 1 of Title I if the administrator files with the Secretary a notice as described in § 2520.104-22 by mail or personal delivery, takes steps reasonably designed to ensure that the information required to be contained in the notice is disclosed to employees of employers contributing to the plan who may be eligible to enroll, and makes the notice available to these employees upon request.

Similarly, section 110(a) of ERISA permits the Secretary to specify an alternative form of compliance with the reporting and disclosure obligations of Part 1 of Title I for any pension plan or class of pension plans subject to ERISA if certain findings are made. Under the authority of section 110(a), the Department, in 1975, issued regulation 29 CFR 2520.104-23 to provide an alternative method of compliance with the reporting and disclosure requirements of Part 1 of Title I for unfunded or insured pension plans established for a select group of management or highly compensated employees (“top hat” plans).² Under the alternative method of compliance, the administrator of a top hat plan will satisfy the requirements for the reporting and disclosure provisions of Part 1 of Title I by filing a statement with the Secretary by mail or personal delivery to the address specified in the regulation, and by providing plan documents, if any, to the Secretary upon request. The statement must include the information listed in the regulation.

Recently, the Department instituted a wholly electronic system (EFAST2) for filing and processing the Form 5500 Annual Return/Report, which is used to report information to the government on certain employee benefit plans and direct filing entities. Form 5500 Annual Return/Reports filed through EFAST2 on or after the 2009 plan years are also available to the general public through the Department’s website at <http://www.efast.dol.gov>. The EFAST2

¹ See 40 FR 24647 (June 9, 1975); 40 FR 34529, 34530 (August 15, 1975); and 45 FR 34528, 34529 FN 10 (March 11, 1980).

² See 40 FR 24647, 24648 (June 9, 1975) and 40 FR 34530 (August 15, 1975).

system, however, does not include apprenticeship and training plan notices and top hat statements.³ Thus, all such notices and statements are filed with the Department on paper though regular mail or personal delivery.

The Department has determined that regular mail or personal delivery are no longer the most efficient or cost-effective ways to file and process these notices and statements. The Department annually receives approximately 120 apprenticeship and training plan notices and approximately 2,000 top hat plan statement filings. To make the information on these notices and statements accessible, the Department converts each paper filing to electronic format. The proposal will eliminate the need for this time-consuming task. Because the internet is widely accessible to persons who file these notices and statements, the Department expects that the regulated community will find electronic filing to be easier and more cost-effective than paper filing. Electronic filing should also facilitate the disclosure of the information to participants and beneficiaries, and other interested members of the public since electronically filed documents can be promptly posted on the Department's website. Thus, the Department, filers, and users all stand to benefit from this proposal in ways that are consistent with the goals of the E-Government Act of 2002.⁴

Explanation of Provisions

The proposal would revise the current procedures for filing apprenticeship and training plan notices and "top hat" plan statements with the Secretary of Labor to require electronic submission of these notices and statements. The proposal is not intended to express any view on, and would not change, the current content requirements in the exemption under § 2520.104-22

³ The Department also requires that the administrator of a multiple employer welfare arrangement (MEWA) and the administrator of any entity claiming exception (ECE) satisfy Form M-1 reporting obligations by filing electronically. Apprenticeship and training plan notices and top hat statements also are not part of the MEWA and ECE electronic filing process.

⁴ Pub. L. No. 107-347, sec. 2 (Dec. 17, 2002).

for apprenticeship and training plans or the alternative method of compliance under § 2520.104-23 for top hat plans.⁵

The proposal would revise § 2520.104-22(c) and § 2520.104-23(c) to require internet-based electronic filing of apprenticeship and training plan notices and top hat plan statements with the Secretary through EBSA's website. Once they are filed, these notices and statements would be posted on the Department's website at <http://www.dol.gov/ebsa> and be available to the public. The submission process would be easy to use because the web portal would include instructions for using the electronic filing system and also would assist administrators by ensuring that all of the information required by the regulations would be included in the notice or statement before the filing could be completed through the website. In addition, as previously mentioned, the process would provide an electronic confirmation to the administrator that the filing had been received by EBSA. This assurance would provide a benefit to apprenticeship and training plan administrators and top hat plan administrators that is not available through the existing paper-based filing system. Finally, the design of the electronic filing system will facilitate the requirement that plan administrators of apprenticeship and training plans make notices available to participants upon request.

Dates & Interim Availability of New Electronic Filing System

The Department today is launching its new web-based filing system for the notices described above. See <http://www.dol.gov/ebsa>. Use of this system in lieu of paper-based filing is voluntary pending the adoption of a final rule. The Department encourages administrators of apprenticeship and training plans and administrators of top hat plans to file their plan notices and

⁵ We note that the proposed filing system would require the filer to input an email address. Although neither regulation explicitly mentions such an address, we are not viewing this item as a content requirement of the regulations. Rather, the address is needed for system functionality because without it the filer would not receive instantaneous confirmation of the filing.

statements using this new system. Pending issuance of final regulations, the Department will treat administrators who use the new system as having satisfied the requirement to mail the notice or statement to the address listed in §§ 2520.104-22(c) and 2520.104-23(c). The Department is interested in receiving comments on the design and operation of the system and proposes that the final rules would become effective on their date of publication in the Federal Register and applicable to all filings made on or after 120 days after that date.⁶ After the applicability date, the website filing system would be the exclusive method of filing these notices and statements. Filings with the Secretary by mail and personal delivery would no longer be acceptable.

Regulatory Impact Analysis

1. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility.

Under Executive Order 12866, “significant” regulatory actions are subject to the requirements of the executive order and review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 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

⁶ As noted above, once they are filed, the notices and statements would be posted on the Department’s website and available online to the public. One issue we wish to flag for public comment is whether there are any concerns with making any of this information, in particular the email address of the plan administrator, publicly accessible online. Should this address be suppressed for privacy or logistical reasons?

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.

Pursuant to the terms of the Executive Order, OMB has determined that this action is “significant” within the meaning of section 3(f) of the Executive Order. Therefore, the proposed rule was reviewed by OMB. However, because the rule merely would replace the paper-based filing of apprenticeship and training plan notices and top hat plan statements with an electronic filing system, and no substantive change would be made to the notices and statements, the Department does not expect this rulemaking to result in significant costs or benefits. For a further discussion, see the Paperwork Reduction Act section, below.

2. Regulatory Flexibility Analysis

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 APA (5 U.S.C. 551 et seq.) and that are likely to have a significant economic impact on a substantial number of small entities.

The Department carefully considered the likely impact of this proposed rule on small entities. The proposed rule will implement an electronic submission procedure for administrators of apprenticeship and training plans and top hat plans to file notices and statements described in sections 2520.104-22 and 2520.104-23. The electronic filing system will

provide instructions, ensure that plan administrators include all of the required information in their notices and statements, and provide an electronic confirmation that they have been received. The Department expects that an electronic filing system to file apprenticeship notices and top hat statements would be more efficient and cost-effective for small plan administrators than a paper-based filing system, because they no longer will incur material and postage costs associated with delivery by regular mail or personal delivery service. Based on the foregoing, the Department hereby certifies that the proposed rule is not likely to have a significant economic impact on a substantial number of small entities. The Department welcomes public comments regarding its certification.

Section 610 of the RFA requires that an agency review each rule that has or will have a significant economic impact on a substantial number of small entities within ten years of publication of the final rule. EBSA initiates a Section 610 review to determine if the provisions of a rule should be continued without change, rescinded, or amended to minimize adverse economic impact on small entities. In addition to the changes in this proposal, EBSA, under section 610 of RFA, is taking comments on other possible changes or amendments to the two regulations (§§ 2520.104-22(c) and 2520.104-23(c)) that are the subject of the proposed amendments.

3. Paperwork Reduction Act

This Notice of Proposed Rulemaking (NPRM) contains an information collection that is subject to OMB approval under the Paperwork Reduction Act of 1995 (PRA) 44 U.S.C. 3501 et seq. As part of a continuing effort to reduce paperwork and respondent burden, the Department of Labor and OMB conduct a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collection of

information. 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.

More specifically and as stated earlier in this preamble, section 2520.104-22 provides an exemption to the reporting and disclosure provisions of Part 1 of Title I of ERISA for employee welfare benefit plans that provide only apprenticeship or training benefits, or both, if the plan administrator: (1) Files a notice with the Secretary that provides the name of the plan, the plan sponsor's Employer Identification Number (EIN), the plan administrator's name, and the name and location of an office or person from whom interested individuals can obtain certain information about courses offered by the plan; (2) takes steps reasonably designed to ensure that the information required to be contained in the notice is disclosed to employees of employers contributing to the plan who may be eligible to enroll in any course of study sponsored or established by the plan; and (3) makes the notice available to these employees upon request. The plan administrator must file the notice with the Secretary of Labor by mailing or delivering it to the Department at the address set forth in the regulation.

Section 2520.104-23 provides an alternative method of compliance with the reporting and disclosure provisions of Title I of ERISA for unfunded or insured plans established for a select group of management or highly compensated employees (i.e., top hat plans). In order to satisfy the alternative method of compliance, the plan administrator must: (1) File a statement with the Secretary of Labor that includes the name and address of the employer, the employer EIN, a declaration that the employer maintains a plan or plans primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees, and a statement of the number of such plans and the employees covered by each; and (2) make plan

documents available to the Secretary upon request. Only one statement needs to be filed for each employer maintaining one or more of the plans. The statements may be filed with the Secretary by mail or personal delivery.

The proposed rule would replace the paper-based filing of apprenticeship and training plan notices and top hat plan statements with an electronic filing system. No substantive change would be made to the notices and statements. The Department annually receives approximately 120 apprenticeship and training plan notices and approximately 2,000 top hat plan statement filings. The Department estimates in-house human resource professionals on average will spend 15 minutes preparing each filing at an equivalent cost of \$97.69 per hour,⁷ and that in-house clerical staff will spend three minutes filing the notices and statements on the Department's electronic filing system, at an equivalent cost of \$29.14 per hour, for a total of 36 hours for apprenticeship and training plan notice filings and 600 hours of top hat plan statement filings and an overall total of 636 burden hours. The total equivalent cost for the hour burden is \$55,000 (\$3,000 for apprenticeship and training plan notices and \$52,000 for top hat plan statements). The Department assumes that no other cost burden is associated with this information collection request (ICR), because in-house staff will prepare and file the notices on behalf of each plan.

The Department has submitted an ICR seeking OMB approval for the information collection contained in the proposed rule to OMB. A copy of this ICR with applicable supporting documentation, including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201407-1210-003 (this

⁷ The Department estimates 2013 hourly labor rates include wages, other benefits, and overhead based on data from the National Occupational Employment Survey (June 2012, Bureau of Labor Statistics) and the Employment Cost Index (September 2012, Bureau of Labor Statistics); the 2011 estimated labor rates are then inflated to 2013 labor rates.

link will only become active on the day following publication of this notice); by sending a request by mail or courier to: PRA Clearance Officer, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N-5718, Washington, DC 20210; or send an email to ebesa.opr@dol.gov.

OMB asks that comments about information collections in this NPRM be submitted by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-EBSA, Office of Management and Budget, Room 10235, 725 17th Street, N.W., Washington, DC 20503; by Fax: 202-395-6881 (this is not a toll-free number); or by email: OIRA_submission@omb.eop.gov. Commenters are encouraged, but not required, to send a courtesy copy of any comments to the party identified in the ADDRESSES section of this NPRM. OMB requests that comments be received within 30 days of publication of the proposed rule to ensure their consideration. Comments submitted in response to this request become a matter of public record.

The Department and OMB are particularly interested in comments that:

- Evaluate whether the 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.

These paperwork burden estimates are summarized as follows:

Title: Apprenticeship and Training Plan Notices and Top Hat Plan Statements.

OMB ICR Reference Number: 201407-1210-003.

Affected Public: Private Sector--business or other for-profit and not-for-profit institutions.

Respondents: 2,120 (120 apprenticeship and training plans and 2,000 top hat plans)

Responses: 2,120.

Frequency of Response: Annually.

Estimated Total Annual Burden Hours: 636 (36 for apprenticeship and training plan notices and 600 for top hat plan statements)

Estimated Total Annual Burden Cost: \$0.

4. Congressional Review Act

The proposed rule is 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 transmitted to Congress and the Comptroller General for review. The proposed 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.

5. 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 rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments in the aggregate of more than \$100 million, adjusted for inflation, or increase expenditures by the private sector of more than \$100 million, adjusted for inflation.

6. 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, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. This proposed 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 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 electronic filing requirements in this proposed 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

Employee benefit plans, Employee Retirement Income Security Act, Pension plans, Pension and welfare plans, Reporting and recordkeeping requirements, Welfare benefit plans.

For the reasons set forth in the preamble, the Department 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 continues to read as follows:

Authority: 29 U.S.C. 1021-1024, 1027, 1029-31, 1059, 1134 and 1135; Secretary of Labor's Order 1-2011, 77 FR 1088 (January 9, 2012). Sec. 2520.101-2 also issued under 29 U.S.C. 1181-1183, 1181 note, 1185, 1185a-d, and 1191-1191c. Sec. 2520.103-1 also issued under 26 U.S.C. 6058 note. Sec. 2520.101-6 also issued under 29 U.S.C. 1021(k); 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-d, 1191, and 1191a-c. Secs. 2520.104b-1 and 2520.107 also issued under 26 U.S.C. 401 note, 111 Stat. 788.

2. Section 2520.104-22 is amended by revising paragraph (c) to read as follows:

§2520.104-22 Exemption from reporting and disclosure requirements for apprenticeship and training plans.

* * * * *

(c) Electronic filing of notice. The notice referred to in paragraph (a) of this section shall be filed with the Secretary electronically in accordance with the instructions published by the Department.

3. Section 2520.104-23 is amended by revising paragraph (c) to read as follows:

§2520.104-23 Alternative method of compliance for pension plans for certain selected employees.

* * * * *

(c) Electronic filing of statement. Statements referred to in paragraph (b) of this section shall be filed with the Secretary electronically in accordance with the instructions published by the Department.

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Signed this 16th day of September, 2014.

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

Billing Code: 4510-29-P

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