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# Part IV

# Department of Labor

## Employee Benefits Security Administration

## 29 CFR Part 2520

## Annual Funding Notice for Multiemployer Defined Benefit Pension Plans; Final 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:** Final regulation.

**SUMMARY:** This document contains a final regulation implementing 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).

**DATES:** *Effective Date:* This rule is effective February 10, 2006.

*Applicability Date:* The requirements of this rule shall apply to plan years beginning after December 31, 2004.

**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, Public Law 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 multiemployer defined benefit 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 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.

On February 4, 2005, the Department published in the **Federal Register** (70 FR 6306) a proposed rule (and model notice), designated as § 2520.101–4 of title 29, to implement the new notice requirement. The Department received seven comment letters from representatives of employers, plans, and others. Copies of these comments are posted on the Department's Web site. After careful consideration of the issues raised by the written comments, the Department is publishing in this notice, in final form, regulation § 2520.101–4 of title 29. The final regulation is substantially similar to the proposal. Set forth below is an overview of the final regulation, with a discussion of the comments received on the proposal and changes made in response to the comments.

### B. Overview of Final Regulation

*1. In General*

The final regulation 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)). See § 2520.101–4(a)(1). Like the proposal, the final regulation includes a limited exception to the requirement to furnish the annual funding notice. Under the exception, the 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. See § 2520.104–4(a)(2). One commenter recommended eliminating this exception on the basis that the need for information about the financial condition of a plan actually increases when the plan becomes financially distressed. After consulting with the PBGC on this issue, the Department has decided to retain the exception for the reasons stated in the preamble of the proposal.[1]

Another commenter recommended the development of an exception for plans whose only contributing employers are contractors or subcontractors of the United States Government. The commenter argues that funding notices are not necessary in this context given that, pursuant to the contractual relationship between each contributing employer and the Federal government under Federal acquisition rules, the Federal government is ultimately required to meet the applicable minimum funding requirements under the law. The Department has decided against developing an exception along the lines requested by this commenter. Section 101(f)(2) of ERISA requires all multiemployer defined benefit pension plans to disclose their funding level even in cases where the plan is 100 percent funded (on a funded current liability basis). This provision, in the Department's view, suggests strongly that Congress intends for disclosure without regard to how well a plan is funded or how secure its ultimate source of funding. Because the disclosure requirement in section 101(f) is not conditioned on a plan's funding level or source, the Department did not adopt this suggestion.

This commenter also suggested that the regulation should provide a mechanism by which a plan administrator could incorporate information from the annual funding notice into other documents already being distributed by the plan. More

[1] The Department is of the view that the annual funding notice would be of little, if any, value to recipients in light of the PBGC's authority and responsibility under title IV of ERISA with respect to insolvent multiemployer plans. The provisions of title IV of ERISA that apply in the context of a plan's receipt of financial assistance from the PBGC (§§ 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. See 70 FR 6306.

specifically, under the commenter's approach all of the required information under section 101(f) of ERISA would be put into the plan's summary annual report and summary plan description, thereby eliminating the need to distribute a stand alone annual funding notice. The commenter believes this approach would reduce compliance costs. The Department has decided not to adopt this suggestion. Dispersing the annual funding notice information among a plan's summary annual report and summary plan description, in the Department's view, is not consistent with the requirements of section 101(f) of ERISA, for the following two reasons. First, under section 101(f), the information in the annual funding notice must be furnished on an annual basis, but under section 104(b)(1) of ERISA, some participants and beneficiaries might receive a summary plan description only every 10 years. Second, under section 101(f) of ERISA, the annual funding notice must be furnished 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 PBGC, but section 104(b)(3) requires plan administrators to furnish a summary annual report only to each participant and beneficiary receiving benefits. The Department also notes that the commenter's suggestion may be contrary to the requirements relating to the summary annual report in that some or all annual funding notice information might not be information that, as required by section 104(b)(3) of ERISA, fairly summarizes a plan's latest annual report.[2]

*2. Content of Notice*

Paragraph (b) of the final regulation sets forth the content requirements of the annual funding notice. Like the proposal, paragraph (b) of the final regulation requires that the identification and financial information included in the notice should be consistent with the information included in the plan's Annual Return/Report Form 5500 filed for the plan year to which the notice relates. Paragraph (b)(1)–(4) of the final regulation 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). Because there were no comments on these provisions, they were adopted from the proposal without modification. See § 2520.101–4(b)(1)–(4).

Paragraph (b)(5)–(8) of the final regulation provides that the notice shall include information relevant to the plan's funding. Paragraph (b)(5) requires a statement as to whether the plan's funded current liability percentage for the plan year to which the notice relates is at least 100 percent (and, if not, the actual percentage). A plan's funded current liability percentage is 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 1d(2)(a) of the Schedule B of the Annual Return/Report Form 5500).[3]

Paragraph (b)(6) of the final regulation requires a statement of the market value (same as current value) of the plan's assets (currently line 2a of the Schedule B of the Annual Return/Report Form 5500) and the valuation date (first day of the plan year), the 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.

Paragraph (b)(7) of the final regulation requires 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). Lastly, paragraph (b)(8) requires 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. See § 2520.101–4(b)(5)–(8).

With respect to calculating a plan's funded current liability percentage under paragraph (b)(5) of the regulation, one commenter suggested that the final regulation might allow plans to use generally applicable actuarial assumptions to establish the plan's current liability, rather than the assumptions specifically required under the definition of ''current liability'' in section 412(l)(7) of the Internal Revenue Code. The Department was unable to accommodate this suggestion, taking into account the clear and specific directive in section 101(f) of ERISA. Section 101(f) states that a plan's funded current liability percentage is ''as defined in section 302(d)(8)(B)'' of ERISA. The Internal Revenue Service advised the Department that it interprets section 302(d)(8)(B) of ERISA to include the requirements of section 412(l)(7) of the Code.[4] Accordingly, the final regulation does not permit plan administrators to depart from mandatory assumptions under section 412(l)(7) of the Code when calculating the funded current liability percentage for purposes of section 101(f) of ERISA.

One commenter took issue with the requirement in paragraph (b)(6) of the proposal that each annual funding notice must include a statement of the market value of the plan's assets. The commenter argued that plans should have a choice whether to state the value of their assets on an actuarial or market basis. In the Department's view, however, a market value approach is more appropriate for this particular statement. A market value approach is more likely to increase the transparency of a plan's financial condition for all parties interested in the financial viability of the plan. Actuarially derived figures, on the other hand, may be contrary to increased transparency, thereby diminishing the likelihood that participants and others will be able to engage in a meaningful monitoring process. Accordingly, the Department rejected this comment, and paragraph (b)(6) the final regulation continues to require that each annual funding notice include a statement of the market value of the plan's assets.

In connection with the statement of the market value of the plan's assets, as required in paragraph (b)(6) of the final regulation, one commenter suggested

[2] Regarding the commenter's cost argument, any cost savings that might be realized as a result of not having to distribute a stand alone annual funding notice to each participant and beneficiary would seem to be reduced, if not entirely negated, by having to distribute the summary annual report and summary plan description to the wider set of recipients set forth in section 101(f) of ERISA.

[3] The preamble to the proposal explained that a plan's funded current liability percentage is to be 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). The second Schedule B reference was changed from ''line 2b(4), column (3)'' to ''line 1d(2)(a).'' This change was to ensure that the same valuation date would be used for the plan's assets and current liability.

[4] Under Reorganization Plan No. 4 of 1978 (43 FR 47713; October 17, 1978), the Department's authority to issue interpretations and opinions under part 2 (relating to minimum participation, vesting and benefit accrual standards for pension plans) and part 3 (relating to minimum funding standards for pension plans) of title I of ERISA, including section 302(d)(8)(B), has been transferred to the Department of the Treasury.

that plan administrators might also be required to include a description of the plan's contribution stream, defined by this commenter as new money coming into the plan, so that interested individuals could better assess the financial strength of the plan. The Department decided against this suggestion on the basis that such a requirement is beyond the scope of this regulatory project. However, the Department notes that ERISA already requires pension plans, as part of their summary annual report, to disclose similar information to participants and beneficiaries. See 29 CFR 2520.104b–10(d)(3).

Paragraph (b)(8) of the proposed regulation mandated a general description of the benefits eligible to be guaranteed by the PBGC. One commenter suggested that plans with a funded current liability percentage of 75 percent or greater should be exempt from the requirements of paragraph (b)(8). As indicated above, the Department is of the view that the structure and requirements of section 101(f)(2)(B) of ERISA suggest that Congress intended for plans to disclose all of the information set forth in section 101(f)(2), including a general description of the benefits under the plan that are eligible to be guaranteed by the PBGC, without regard to the plan's actual funding percentage. Accordingly, this commenter's recommendation was not accepted, and paragraph (b)(8) of the final regulation requires that each annual funding notice include a general description of the benefits under the plan that are eligible to be guaranteed by the PBGC.

Paragraph (b)(9) of the proposal contained a provision allowing a plan administrator to add to the notice information in addition to the information mandated by the regulation, provided that the additional information is ''necessary or helpful'' to explaining the mandatory information. One commenter representing plans objected to this standard on the basis that it might be too restrictive. This commenter was concerned that the proposed standard might hamper an administrator's ability to add desirable explanatory or contextual information to notices, such as why the plan has a funding shortfall. This commenter requested that the Department replace the proposed standard with a standard that permits the inclusion of any additional information so long as the information is not designed to mislead or confuse recipients of the notice. While the Department believes that plan administrators have substantial discretion to determine whether additional information might be appropriate to add to a plan's notice, taking into account the unique circumstances of that plan, the Department, nevertheless, is of the view that such additional information must be relevant to the information Congress requires in these notices. Because this commenter's suggestion, in the view of the Department, lacks an acceptable standard of relevance, the suggestion was not adopted in the final regulation.

A different commenter objected to the ''necessary or helpful'' standard on the basis that it might be too permissive. This commenter was concerned that additional information might have the unintended effect, either due to placement or quantity, of obscuring the prescribed information. This commenter recommended that information in addition to prescribed information should be allowed only on a separate page and after the prescribed information. The Department shares the concern raised by this commenter. Accordingly, under paragraph (b)(9) of the final regulation, plan administrators are free to add to their notices any additional information they elect, provided that such information is necessary or helpful to understanding the mandatory information in the notice, and that such additional information is added at the end of the notice under the heading ''Additional Explanation.'' See § 2520.101–4(b)(9).

*3. When To Furnish Notice*

Paragraph (d) of the proposal provided that notices shall be furnished within nine 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 two months after the close of the extension period. Since there were no negative comments regarding this aspect of the proposal, this provision was adopted in the final regulation without modification. See § 2520.101–4(d). The Department notes that the deadline established under paragraph (d) is the same deadline for furnishing the summary annual report, see § 2520.104b–10(c), and that nothing in this regulation precludes a plan administrator from furnishing simultaneously both notices in the same mailing.

*4. Persons Entitled to Notice*

Paragraph (f) of the proposal delineated the persons to whom funding notices would have to be furnished. While there were no comments on the other provisions in paragraph (f), one commenter made several comments regarding the breadth of paragraph (f)(4) of the proposal. Paragraph (f)(4) of the proposed regulation, in relevant part, provided that notification must be furnished to 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 ERISA.

In the preamble to the proposed regulation, the Department explained that the phrase ''or who otherwise may be subject to withdrawal liability'' is intended 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 who has continued exposure to withdrawal liability pursuant to section 4203(b), (c), or (d) of ERISA. This ''special industry rule'' is intended to ensure that all employers who have a direct financial interest in a plan's funding status will receive a notice.

The commenter opposed the special industry rule for two reasons. First, the commenter argued that a requirement to provide notification to employers based solely on continued exposure to withdrawal liability is beyond the Department's regulatory authority under section 101(f) of the Act. Second, the commenter argued that the information provided by this notice is irrelevant to these employers given that the amount of their withdrawal liability is fixed as of the last day of the plan year preceding the cessation of the contribution obligation. On the first argument, the Department disagrees with the commenter's assessment of the Department's scope of regulatory authority under section 101(f) of the Act. Section 103(c) of PFEA '04 expressly grants the Department authority to establish regulations necessary to implement the notice requirement in section 101(f) of the Act. On the second argument, after consulting with the PBGC on the special industry rule, the Department disagrees with the commenter that the information in the notice would be irrelevant to special-industry employers who are exposed to withdrawal liability after the cessation of their obligation to contribute. The Department is of the view that the information provided by this notice might be relevant to an employer's decision, particularly in the

construction and entertainment industries, whether to renew its obligation and resume covered operations prior to the expiration of the 5-year or 3-year period, as applicable, set forth in section 4203(b) of ERISA. Accordingly, the Department has adopted paragraph (f)(4) of the proposal without modification.

This commenter also requested clarification regarding whether plans would have to furnish notification to each entity within the same controlled group as the participating employer, as well as to employers that have withdrawn but are in the process of making annual withdrawal liability payments to the plan. The Department agrees clarification would be helpful on these two issues. With respect to whether a plan administrator is required to provide notification to controlled group members, it is the Department's view that, for purposes of section 101(f) of the Act, a plan administrator is not required to provide annual notices to entities in the same controlled group as an employer otherwise eligible to receive a notice under paragraph (f)(4) of the regulation. With respect to withdrawn employers, notification under section 101(f) of the Act, and this implementing regulation, is not required in the case of any employer that has withdrawn under any provision in section 4203 of the Act.

*5. Model Notice*

A number of commenters offered suggestions on improving the language in the proposed model notice. Most, if not all, of the suggestions were elaborations on concepts significant to the particular commenter in light of the uniqueness of the commenter's own plan. Given that the final regulation permits plan administrators to augment plan notices with any additional information they elect, provided that such information is necessary or helpful to understanding the mandatory information in the notice, see § 2520.101–4(b)(9), the Department decided against most of the suggestions for improving the language in the model notice. The Department, however, changed the model notice in two noteworthy respects. First, language was added to the section entitled *Plan's Funding Level* to provide a more helpful context for understanding the significance of a plan's funded current liability percentage. Second, the section entitled *Rules Governing Insolvent Plans* was expanded to provide for a fuller explanation of the rules relating to insolvent plans. These and other changes to the language in the model notice are intended to clarify the proposal and should not be viewed as substantive changes to the content requirements in the proposed regulation.

Although not specifically the subject of any particular comment letter, the Department believes it might be helpful to clarify whether there would be any impact on the relief otherwise accorded by paragraph (g) of the regulation to a plan administrator that elects to include in the notice, pursuant to paragraph (b)(9) of the final regulation, information in addition to prescribed information. Paragraph (g) of the final regulation, in relevant part, provides that, although use of the model notice is not mandatory under the regulation, its use will be deemed to satisfy the requirements of paragraphs (b) (content requirements) and (c) (style and format requirements) of the regulation, with respect to the prescribed information in paragraph (b)(1)–(8). The Department is of the view that the forgoing relief is not affected by an administrator's decision to add supplementary information to a model notice, provided that the administrator complies with requirements of paragraph (b)(9) of the regulation with respect to the additional information.

**C. Regulatory Impact Analysis**

*Summary*

This final 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 offers 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 a deleterious effect on contribution requirements and funding levels of defined benefit plans, increasing the former and decreasing the latter. 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 (GAO) [5] 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 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 $1,301,000 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, 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, and the planning of a one-time informational meeting which plan administrators may hold for labor and employer representatives, to help them better understand the information contained in the notices. The first year estimate is higher to account for the time required for plan administrators to adapt and review the model notice, and

[5] 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.

the time required to plan the informational meeting.

In this regulation, the Department has attempted to provide guidance to assist administrators to meet this objective in the most economically efficient way possible. Because the costs of this regulation 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 action is significant under section 3(f)(4) of the Executive Order. OMB has, therefore, reviewed this regulatory action 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.

On February 4, 2005, the Department published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (70 FR 6306) concerning the Annual Funding Notice for Multiemployer Defined Benefit Pension Plans, which included a request for comments on its information collection provisions. The Office of Management and Budget (OMB) approved the information collection requirements included in the NPRM (OMB Control Number 1210–0126) in an OMB Notice of Action dated March 17, 2005. No program changes have been made to the regulation that would affect these information collection requirements. In response to two comments on the burden analysis published in the NPRM, the Department has, however, adjusted the hourly rate for attorneys preparing the notice from $83 per hour in the NPRM to $275 in the notice of final rulemaking and included two hours for preparation in order to account for plan administrators who may hold briefing meetings to educate employers and union representatives about the notice in the first year of implementation, as further described below. The Department will submit these minor adjustments to the paperwork burden under Control Number 1210–0126 to OMB for review.

The information collection provisions of this regulation are found in section 2520.101–4. A model notice is provided in the Appendix to section 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 final 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 final 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.

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.

In order to estimate the potential costs of the notice provisions of section 101(f) of ERISA and this final 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,[6] 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, 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, 30 minutes for completing the notice, and two hours to prepare for and hold briefing meetings 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 $275. This accounts for the estimated burden of developing the notice, which amounts to about $438,625 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. Preparing for, and holding, briefing sessions that explain the purpose and content of the notice for union and employer representatives, is expected to take 2 hours, on average, in the first year of implementation. Preparing for, and holding, a briefing session, is expected to be carried out by the same professionals who are accounted for as completing the notice 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 $54,525 per year. The total cost to plans to develop, complete, and explain the notice in the year of implementation is about $711,000. This estimate has been adjusted upwards from the $187,000 outlined in the NPRM. The increase of $523,830 is the result of an adjustment in the hourly rate for the attorney developing the notice in the year of implementation from $83 per hour to $275 per hour, and the addition of time to prepare for, and hold, a briefing meeting explaining the notice to union and employer representatives. These adjustments are the result of comments received in response to the NPRM.

Two commentators indicated that the hourly rate the Department estimated in the NPRM for attorneys who work with multiemployer retirement plans was too low. The revised hourly rate is derived from the Altman Weil 2004 Survey of Law Firm Economics,[7] and represents the average hourly rate for ERISA attorneys, the type of attorney assumed most likely to develop the notice.

In the NPRM, the Department did not include a cost burden for planning or holding briefing meetings for union and employer representatives. However, one commentator indicated that the notice might provoke inquiries, particularly from employers who are not accustomed to receiving such notices. The Department has taken this comment into consideration, and has concluded that it supports an adjustment of the hour and cost burdens originally estimated for the first year after implementation. The Department has included two hours for preparation in order to allow plan administrators to hold briefing meetings in the first year of implementation.

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 SAR. 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 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 because the active workers affected often do not have access to e-mail at their workplaces.

The Department received one comment suggesting that multiemployer plans do not necessarily send regular mail to contributing employers and many may need additional data collection and systems work to do so. The Department believes that plan administrators should currently have the ability to mail correspondence to all contributing employers, and therefore no adjustments have been made to address the commenter's concern.

[6] 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.

[7] Altman Weil 2004 Survey of Law Firm Economics, pages 83 & 114. The Department made further tabulations of data.

*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 are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a final 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 a final regulatory flexibility analysis at the time of the publication of the notice of final 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 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 requested comments on the appropriateness of the size standard used in evaluating the impact of the proposal on small entities, but received none.

EBSA has 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 final 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 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 regulation will affect only small plans that are multiemployer defined benefit pension plans. It is expected that the regulation 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 $275 per plan. Preparation of this information is in most cases accomplished by professionals that provide services to employee benefit plans. Administrators of some small plans may choose to hold briefing meetings to educate employers and union representatives about the notice. The Department estimates that, on average, small plans will spend two hours preparing for, and holding briefing meetings at an estimated cost of $138 per plan, or $1,380 for all plans the Department estimates to be impacted by the notice requirement.

*Congressional Review Act*

The Notice of Final Rulemaking being issued here is subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801, *et seq.*) (SBREFA) and has been transmitted 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 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, the relationship between the national government and 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 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 amends 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. Sec. 2520.101–4 also issued under sec. 103 of Pub. L. 108–218.

■ 2. Add § 2520.101–4 to subpart A to read as follows:

### § 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) of ERISA) 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:

(i) Is necessary or helpful to understanding the mandatory information in the notice, and

(ii) Is set forth following the information prescribed by paragraphs (b)(1) through (b)(8) of this section and shall be headed, ''Additional Explanation.''

(c) *Style and format of notice.* Funding notices shall be written in a manner that is consistent with the style and format requirements of 29 CFR 2520.102–2.

(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), except with respect to information referenced in paragraph (b)(9) of this section.

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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. Whether this percentage will increase or decrease over time depends on a number of factors, including how the plan's investments perform, what assumptions the plan makes about rates of return, whether employer contributions to the fund increase or decline, and whether benefits payments from the fund increase or decline.

*(Instructions: For purposes of computing the "funded current liability percentage," insert ratio of actuarial value of assets to current liability, as of the valuation date, 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

Federal law has a number of special rules that apply to financially troubled multiemployer plans. Under so-called "plan reorganization rules," a plan with adverse financial experience may need to increase required contributions and may, under certain circumstances, reduce benefits that are not eligible for the PBGC's guarantee (generally, benefits that have been in effect for less than 60 months). If a plan is in reorganization status, it must provide notification that the plan is in reorganization status and that, if contributions are not increased, accrued benefits under the plan may be reduced or an excise tax may be imposed (or both). The law requires the plan to furnish this notification to each contributing employer and the labor organization.

Despite the special plan reorganization rules, a plan in reorganization nevertheless could become insolvent. 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 maximum benefit that the PBGC guarantees is set by law. Only vested benefits are guaranteed. Specifically, the PBGC 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 PBGC's maximum guarantee, therefore, is $35.75 per month times a participant's years 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 x $33), or $35.75. Thus, the participant's guaranteed monthly benefit is $357.50 ($35.75 x 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 x $9), or $17.75. Thus, the participant's guaranteed monthly benefit would be $177.50 ($17.75 x 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 the earlier of the plan's termination or insolvency. Similarly, the PBGC does not guarantee pre-retirement death benefits to a spouse or beneficiary (e.g., a qualified pre-retirement survivor annuity) if the participant dies after the plan terminates, 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 website, 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 3rd day of January, 2006.

**Ann L. Combs,**

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

[FR Doc. 06–194 Filed 1–10–06; 8:45 am]

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