

conditions of employment, including coverage under Plan A.

(2) In this example, Plan A still meets the criteria for a regulatory finding that it is collectively bargained under section 3(40) of ERISA. Union A's recruitment and representation of a new occupational category of workers unrelated to the construction trade, its promotion of attractive health benefits to achieve organizing success, and the Plan's resultant growth, do not take Plan A outside the regulatory finding.

Example 10. (1) Assume the same facts as in Example 7. The Medical Consortium, a newly formed organization, approaches Plan A with a proposal to make money for Plan A and Union A by enrolling a large group of employers, their employees, and self-employed individuals affiliated with the Medical Consortium. The Medical Consortium obtains employers' signatures on a generic document bearing Union A's name, labeled "collective bargaining agreement," which provides for health coverage under Plan A and compliance with wage and hour statutes, as well as other employment laws. Employees of signatory employers sign enrollment documents for Plan A and are issued membership cards in Union A; their membership dues are regularly checked off along with their monthly payments for health coverage. Self-employed individuals similarly receive union membership cards and make monthly payments, which are divided between Plan A and the Union. Aside from health coverage matters, these new participants have little or no contact with Union A. The new participants enrolled through the Consortium amount to 23% of the population of Plan A during the current Plan Year.

(2) In this example, Plan A now fails to meet the criteria in paragraphs (b)(2) and (b)(3) of this section, because more than 20% of its participants are individuals who are not employed under agreements that are the product of *bona fide* collective bargaining relationship and who do not fall within any of the other nexus categories set forth in paragraph (b)(2). Moreover, even if the number of additional participants enrolled through the Medical Consortium, together with any other participants that did not fall within any of the nexus categories, did not exceed 20% of the total participant population under the plan, the circumstances in this example would trigger the disqualification of paragraph (c)(2) of this section, because Plan A now is being maintained under a substantial number of agreements that are a "scheme, plan, stratagem or artifice of evasion" intended primarily to evade compliance with state laws and regulations pertaining to insurance. In either case, the consequence of adding the participants through the Medical Consortium is that Plan A is now a MEWA for purposes of section 3(40) of ERISA and is not exempt from state regulation by virtue of ERISA.

(f) *Cross-reference.* See part 2570, subpart G of this chapter for procedural rules relating to proceedings seeking an Administrative Law Judge finding by the Secretary under Section 3(40) of ERISA.

(g) *Effect of proceeding seeking Administrative Law Judge Section 3(40) finding.*

(1) An Administrative Law Judge finding issued pursuant to the procedures in part 2570, subpart G of this chapter, will constitute a finding that the employee welfare benefit plan at issue in that proceeding is established or maintained under or pursuant to an agreement that the Secretary finds to be a collective bargaining agreement for purposes of Section 3(40) of ERISA.

(2) Nothing in this section or in part 2570, subpart G of this chapter is intended to have any effect on applicable law relating to stay or delay of a state administrative or court proceeding or enforcement of a subpoena.

(h) *Effective date.* This regulation is effective December 26, 2000.

Signed this 16th day of October 2000.

Leslie B. Kramerich,

Acting Assistant Secretary, Pension and Welfare Benefits Administration.

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Part 2570

RIN 1210-AA48

Procedures for Administrative Hearings Regarding Plans Established or Maintained Pursuant to Collective Bargaining Agreements Under Section 3(40)(A) of ERISA

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Proposed rule.

SUMMARY: This document contains proposed rules under the Employee Retirement Income Security Act of 1974, as amended (ERISA), describing procedures for administrative hearings to obtain a determination by the Secretary of Labor (Secretary) as to whether a particular employee welfare benefit plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of section 3(40) of ERISA. The procedure for administrative hearings would be available only in situations where the jurisdiction or law of a state has been asserted against a plan or other arrangement that contends it meets the exception for plans established or maintained under or pursuant to one or more collective bargaining agreements. Under Section

3(40) of ERISA, the Secretary may make a determination that an employee welfare benefit plan is a collectively bargained plan, and thereby excluded from the definition of "multiple employer welfare arrangements" under section 3(40) of ERISA, which are otherwise subject to state regulation of multiple employer welfare arrangements as provided for by ERISA. A separate document is being published today in the **Federal Register** containing proposed rules setting forth the criteria for determining when an employee welfare benefit plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of section 3(40) of ERISA. If adopted, these proposed rules would affect employee welfare benefit plans, their sponsors, participants, and beneficiaries as well as service providers to plans.

DATES: Written comments concerning the proposed regulation must be received by December 26, 2000.

ADDRESSES: Interested persons are invited to submit written comments (preferably three copies) concerning this proposed regulation to: Pension and Welfare Benefits Administration, Room N-5669, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, (Attention: Proposed Regulation Under Section 3(40)). All submissions will be open to public inspection at the Public Documents Room, Pension and Welfare Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Goodman, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, Room N-5669, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, (202) 219-8671. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

This document contains proposed rules describing procedures for administrative hearings to obtain a determination by the Secretary as to whether a particular employee benefit plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of section 3(40) of ERISA. The procedure for administrative hearings would be available only in situations where the jurisdiction or law of a state has been asserted against a plan or other arrangement that contends it meets the exception for plans established or maintained under or pursuant to one or

more collective bargaining agreements. These rules are modeled on the procedures set forth in sections 29 CFR 2570.60 through 2570.71 regarding civil penalties under section 502(c)(2) of ERISA relating to reports required to be filed under ERISA section 104(b)(4).

B. The 1995 Notice of Proposed Rulemaking

The history of section 3(40) of ERISA and the Department's efforts to implement this provision is fully outlined in the proposed rule establishing the regulatory criteria under section 3(40), published separately in this issue of the **Federal Register**. On August 1, 1995, the Department published a Notice of Proposed Rulemaking on Plans Established or Maintained Pursuant to Collective Bargaining Agreements in the **Federal Register**. (60 FR 39209) (1995 NPRM). The Department proposed criteria and a process for determining whether an employee benefit plan is established or maintained under or pursuant to one or more agreements that the Secretary finds to be collective bargaining agreements for purposes of section 3(40) of ERISA. The approach proposed in the 1995 NPRM did not provide for individual findings by the Department. The Department received numerous comments on the NPRM. Commenters objected to having state regulators determine whether a particular agreement was a collective bargaining agreement.

C. Regulatory Negotiation

A discussion of the process the Department followed to establish the ERISA Section 3(40) Negotiated Rulemaking Advisory Committee (the Committee) to recommend a rule implementing section 3(40) is set forth in the proposed rule establishing the regulatory criteria under section 3(40), published separately in this issue of the **Federal Register**.

The goal of the Committee was to develop a substantive rule to help the states, insurers, plans, and organized labor determine which entities are indeed plans established or maintained under or pursuant to one or more collective bargaining agreements, and therefore not subject to state regulation, under Section 3(40) of ERISA. These procedural rules, in addition to the substantive rule published simultaneously in this issue of the **Federal Register**, resulted from the Committee's determination that the availability of an individualized procedure before a Department of Labor Administrative Law Judge (ALJ), and for appeals of an ALJ decision to the

Secretary or the Secretary's delegate, would be appropriate for the resolution of a dispute regarding an entity's legal status in situations where the jurisdiction or law of a state has been asserted against a plan or other arrangement that contends it meets the exception for plans established or maintained under or pursuant to one or more collective bargaining agreements.

With the exception of sections F–L of the preamble, the text of the proposed rule and preamble is the Committee's consensus.

D. Overview of the Proposed Regulations

This document contains proposed regulations that establish procedures for hearings before an ALJ with respect to individualized determinations under Section 3(40) of ERISA. In this regard, the Secretary has established the Pension and Welfare Benefits Administration (PWBA) within the Department for the purpose of carrying out the Secretary's responsibilities under ERISA. See Secretary of Labor's Order 1–87, 52 FR 13139 (April 21, 1987).

The Department has also published rules of practice and procedure for administrative hearings before the Office of the Administrative Law Judges in Subpart A of 29 CFR Part 18, 48 FR 32538 (1983). As explained in 29 CFR 18.1, those provisions generally govern administrative hearings before ALJs assigned to the Department and are intended to provide maximum uniformity in the conduct of administrative hearings. However, in the event of an inconsistency or conflict between the provisions of Subpart A of 29 CFR Part 18 and a rule or procedure required by statute, executive order, or regulation, the latter controls.

In drafting proposed regulatory language, the Committee reviewed the applicability of the provisions of Subpart A of 29 CFR Part 18 to the ALJ determination whether an employee benefit plan is a collectively bargained plan under section 3(40) of ERISA, and the Department, following the recommendations of the Committee, has decided to adopt many, though not all, of the provisions of Subpart A of 29 CFR Part 18 for these proceedings. These proposed rules relate specifically to procedures for ALJ determinations under section 3(40) of ERISA and are controlling to the extent that they are inconsistent with any portion of Subpart A of 29 CFR Part 18. Accordingly, where not otherwise specified in these proposed regulations, adjudications relating to determinations under ERISA section 3(40) will be governed by the

following sections of Subpart A of 29 CFR Part 18:

- § 18.4 Time Computations.
- § 18.5 (c) through (e) Responsive pleadings—Answer and Request for Hearing.
- § 18.6 Motions and Requests.
- § 18.7 Prehearing Statements.
- § 18.8 Prehearing Conferences.
- § 18.9 Consent Order or Settlement; Settlement Judge Procedure.
- § 18.11 Consolidation of Hearings.
- § 18.12 Amicus Curiae.
- § 18.13 Discovery Methods.
- § 18.14 Scope of Discovery.
- § 18.15 Protective Orders.
- § 18.16 Supplementation of Responses.
- § 18.17 Stipulations Regarding Discovery.
- § 18.18 Written Interrogatories to Parties.
- § 18.19 Production of Documents and Other Evidence; Entry Upon Land for Inspection and Other Purposes; and Physical and Mental Examination.
- § 18.20 Admissions.
- § 18.21 Motion to Compel Discovery.
- § 18.22 Depositions.
- § 18.23 Use of Depositions at Hearings.
- § 18.24 Subpoenas.
- § 18.25 Designation of Administrative Law Judge.
- § 18.26 Conduct of Hearings.
- § 18.27 Notice of Hearing.
- § 18.28 Continuances.
- § 18.29 Authority of Administrative Law Judge.
- § 18.30 Unavailability of Administrative Law Judge.
- § 18.31 Disqualification.
- § 18.32 Separation of Functions.
- § 18.33 Expedition.
- § 18.34 Representation.
- § 18.35 Legal assistance.
- § 18.36 Standards of Conduct.
- § 18.37 Hearing Room Conduct.
- § 18.38 Ex Parte Communications.
- § 18.39 Waiver of Right to Appear and Failure to Participate or to Appear.
- § 18.40 Motion for Summary Decision.

- § 18.43 Formal Hearings.
- § 18.44 [Reserved].
- § 18.45 Official Notice.
- § 18.46 In Camera and Protective Orders.
- § 18.47 Exhibits.
- § 18.48 Records in Other Proceedings.
- § 18.49 Designation of Parts of Documents.
- § 18.50 Authenticity.
- § 18.51 Stipulations.
- § 18.52 Record of Hearings.
- § 18.53 Closing of Hearings.
- § 18.54 Closing the Record.
- § 18.55 Receipt of Documents After Hearing.
- § 18.56 Restricted Access.
- § 18.58 Appeals.
- § 18.59 Certification of Official Record.

This proposed rule is designed to maintain the maximum degree of uniformity with the rules set forth in Subpart A of 29 CFR Part 18, consistent with the need for an expedited procedure, but also recognizing the special characteristics of proceedings under ERISA section 3(40). For purposes of clarity, where a particular section of the existing procedural rules would be affected by these proposed rules, the entire section of the existing procedural rules (with the appropriate modifications) has been set out in this document. Thus, only a portion of the provisions of the procedural rules set forth below contain changes from, or additions to, the rules in Subpart A of 29 CFR Part 18. The Department seeks suggestions on ways to facilitate and expedite the process by electronic means or otherwise. The specific modifications to the rules in Subpart A of 29 CFR Part 18, and their relationship to the conduct of these proceedings generally, are outlined below.

E. Discussion of the Proposed Rules

1. In General

Generally, the proposed rule in section 2510.3-40, also being published today, sets forth the finding by the Secretary as to what constitutes an employee welfare benefit plan established or maintained under or pursuant to one or more collective bargaining agreements under section 3(40) of ERISA. The availability of the procedures in these proposed rules is limited. The applicability of these procedural rules under section 3(40) of

ERISA is set forth in section 2570.130. In this regard, it should be noted that these procedural rules apply only to adjudicatory proceedings before ALJs of the United States Department of Labor. Pursuant to proposed rule section 2570.131, contained in this notice, an adjudicatory proceeding before an ALJ may be commenced only when the jurisdiction or law of a state has been asserted against a plan or other arrangement that contends it meets the exception for plans established or maintained under or pursuant to collective bargaining. Only an entity against whom the jurisdiction or law of a state has been asserted may initiate adjudicatory proceedings before an ALJ under these rules.

The definitions section (2570.132) of these rules incorporates the basic adjudicatory principles set forth in Subpart A of 29 CFR Part 18, but includes terms and concepts of specific relevance to proceedings under section 3(40) of ERISA. In this respect, it differs from its more general counterpart at section 18.2 of this title. In particular, section 2570.132(f) states that the term "Secretary" means the Secretary of Labor and includes various persons to whom the Secretary may delegate authority. This definition is not intended to suggest any limitation on the authority that the Secretary has delegated to the Assistant Secretary for Pension and Welfare Benefits. As noted above, the Secretary of Labor has delegated most of her authority under ERISA to the Assistant Secretary for Pension and Welfare Benefits. Thus, the Department contemplates that the duties assigned to the Secretary under these proposed procedural regulations will in fact be discharged by the Assistant Secretary for Pension and Welfare Benefits or a properly authorized delegate.

2. Proceedings Before Administrative Law Judges

Section 2570.133 (relating to parties to the proceedings) and section 2570.94 (relating to filing and contents of a petition) contemplate that adjudicatory proceedings will be initiated with the filing by an entity of a petition for a determination under section 3(40) of ERISA. The service of documents by the parties to an adjudicatory proceeding, as well as by the ALJ, will be governed by section 2570.135 of these rules.

In general, the rules in Subpart A of 29 CFR Part 18 concerning the computation of time, pleadings and motions, and prehearing conferences and statements, are adopted in these procedures for adjudications under section 3(40) of ERISA. The proposed

rule on the designation of parties (2570.133) differs from its counterpart under section 18.10 of this title in that it specifies that the parties in these proceedings will be limited to (i) the entity filing a petition under section 2750.134 (the plan or other arrangement against whom state law or jurisdiction has been asserted); (ii) the state or states whose law or jurisdiction has been asserted to apply to the entity; (iii) any individual party other than a state who has asserted that a particular state has jurisdiction over the entity, or whose law applies; and (iv) the Secretary of Labor.

Within 30 days after the service of the petition, any other party may file a response to the petition. Before that date, any state not named in the petition may intervene as of right, simply by giving written notice to the other parties and the ALJ. After that date, intervention by other states is permissive with consent of all parties or by order of the ALJ.

Section 2570.136, relating to expedited proceedings, permits any of the parties to move to shorten the time for the scheduling of a proceeding, including the time for conducting discovery. Paragraph (b) of section 2570.136 describes the information which must be set forth in support of a party's motion to expedite proceedings. Paragraph (c) of section 2570.136 prescribes the manner of service for purposes of this section, while paragraph (d) generally sets a time limit of ten days from the date of service of the motion for all other parties to file an opposition in response to the motion. Paragraph (e) permits an ALJ to advance the schedule for pleadings, discovery, prehearing conferences and the adjudicatory hearing after receiving the parties' statements in response to the initial motion, but requires that the ALJ give notice of at least five business days in advance of a hearing on the merits, unless all parties consent otherwise to an earlier hearing. Paragraph (f) of section 2570.136 provides that when an expedited hearing is held, the ALJ must issue a decision within 20 working days after receipt of the transcript of an oral hearing, or within 20 working days after the filing of all documentary evidence, if no oral hearing is conducted.

The proposed rule on the allocation of the burden of proof (2570.137) provides that for purposes of a final decision under section 2570.138 (decision of administrative law judge) and section 2570.139 (review by the Secretary), the petitioner has the ultimate burden of establishing each of the elements of subparagraph (b)(4) of section 2570.134, relating to whether the entity qualifies

as an employee welfare benefit plan established or maintained under or pursuant to one or more collective bargaining agreements. At the outset, however, the petitioner would meet its burden of going forward when it makes a *prima facie* showing that it satisfies the criteria of 29 CFR 2510.3-40(b).

Paragraph (a) of section 2570.138, relating to the decision of the ALJ, permits the ALJ to allow parties to file proposed findings of fact, conclusions of law and a proposed order together with supporting briefs. Paragraph (b) of section 2570.138 permits the ALJ to request that the parties present oral arguments in lieu of briefs and, in such an instance, requires the ALJ to issue a decision at the close of oral argument. Paragraph (c) of section 2570.138 provides that the ALJ shall issue a decision, containing findings of fact and conclusions of law, and reasons supporting the same, no later than 30 days, or as soon as possible thereafter, after the receipt of proposed findings of fact, conclusions of law and a proposed order, or within 30 days of receipt of an agreement containing consent findings and order disposing of the whole of the disputed issue. Paragraph (c) of section 2570.138 further provides, among other things, that the ALJ's order be based on the whole record, and that it be supported by reliable and probative evidence.

The proposed rule concerning the review by the Secretary of the decision of the ALJ (2570.139) differs from its counterpart at section 18.57 of this title in that it states that the decision of the ALJ in a Section 3(40) Finding Procedure shall become the final decision of the Secretary unless a timely appeal is filed. The procedures for appeals of ALJ decisions under section 3(40) of ERISA are governed solely by the rules set forth in section 2570.139, and without any reference to the appellate procedures contained in Subpart A of 29 CFR Part 18. Paragraph (a) of section 2570.139 establishes a 20-day time limit within which such appeals must be filed. Paragraph (b) of section 2570.139 requires that the issues for appeal be stated with specificity in a party's request for review, and that the request for appeal be filed on all parties to the proceeding. Paragraph (c) of section 2570.139 provides that review by the Secretary shall not be *de novo*, but rather on the basis of the record before the ALJ. Paragraph (e) of section 2570.139 states that the decision of the Secretary on such an appeal shall be a final agency action within the meaning of 5 U.S.C. 704. As noted above, the authority of the Secretary with respect to the appellate procedures has been

delegated to the Assistant Secretary for Pension and Welfare Benefits. As required by the Administrative Procedure Act (5 U.S.C. 552(a)(2)(A)), all final decisions of the Department under section 502(c)(5) of ERISA shall be compiled in the Public Documents Room of the Pension and Welfare Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

Economic Analysis Under Executive Order 12866

Under Executive Order 12866, the Department must determine whether the regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the 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.

Pursuant to the terms of the Executive Order, it has been determined that this action is "significant" and therefore subject to review by the Office of Management and Budget (OMB). OMB has determined that this proposed regulation is significant within the meaning of section 3(f)(4) of the Executive Order. Consistent with the Executive Order, the Department has undertaken an assessment of the costs and benefits of this regulatory action.

The analysis is detailed below.

Summary

Pursuant to the requirements of Executive Order 12866 the Department undertook an analysis of the economic impact of this proposed regulation. Based on its analysis, the Department has concluded that the proposed regulation's benefits exceed its costs

although neither has been quantified.¹ The Department seeks data on benefits and costs. The Department has concluded that the proposed regulation will benefit plans, states, insurers, and organized labor by reducing the cost of resolving some disputes over states' jurisdiction to regulate certain multiple employer welfare benefit arrangements, likely facilitating the conduct of hearings, reducing disputes over plans' and arrangements' status, and by improving the efficiency and ensuring the consistency in determinations of such jurisdiction.

The regulation establishes procedures for administrative hearings to obtain a determination from the Secretary as to whether a multiple employer welfare benefit plan is established or maintained under or pursuant to one or more collective bargaining agreements. Plans so established or maintained are excluded from the definition of multiple employer welfare arrangements (MEWAs) and consequently are not subject to state regulation. When state jurisdiction is asserted over entities that claim this collective bargaining exclusion, they would have the option of using these procedures to resolve the dispute. In the absence of the promulgation of specific criteria which would form the basis of a determination concerning whether a given plan is established or maintained pursuant to a collective bargaining agreement, such disputes have generally been resolved in courts. It is expected that giving entities over whom state jurisdiction has been asserted the opportunity to resolve disputes via the procedures established by the proposed regulation will generally be more efficient and less costly than resolving them in courts when these procedures are chosen. It is also expected that determinations made in the single, specialized venue of the administrative hearings provided for in the proposed regulation may be more consistent than determinations made in multiple, non-specialized court venues.

Background

A multiple employer welfare arrangement (MEWA) is a group benefit program which is geared toward providing welfare benefits, most frequently to small employers and their employees. Because they provide health, life, disability or other welfare benefits, all MEWAs, whether or not they are ERISA-covered employee benefit plans, are subject to state insurance regulation unless they fall

¹ See below for data relevant to the number of MEWAs and collectively bargained plans and the costs of filing petitions.

under one of the statutory exceptions to ERISA's MEWA definition. The exception relevant here states that the term MEWA does not include plans which are established or maintained under or pursuant to one or more agreements which the Secretary of Labor (the Secretary) finds to be collective bargaining agreements. Some unscrupulous MEWA operators have taken advantage of the "collective bargaining agreements" exception to establish sham MEWAs which are often underfunded and incapable of paying employees health benefit claims. A General Accounting Office Report, published in March 1992, entitled, "Employee Benefits: States Need Labor's Help Regulating Multiple Employer Welfare Arrangements" (GAO/HRD-92-40) stated that, "Between January 1988 and June 1991, MEWAs left at least 398,000 participants and their beneficiaries with more than \$124 million in unpaid claims and many other participants without insurance. More than 600 MEWAs failed to comply with state insurance laws, and some violated criminal statutes." The Department is proposing today, two regulations, one defining what is a plan established or maintained under or pursuant to one or more collective bargaining agreements (29 CFR 2510.3-40), and this regulation, providing for a procedure before a Department Administrative Law Judicial Hearing (ALJ) concerning the legal status of an entity when a state's jurisdiction has been asserted over or against that entity.

Historically, the usual means for determining a plan's legal status under state insurance laws has been a judgment in a court of law. The 1992 GAO Report noted that although most states were able to establish jurisdiction without going to court, thirteen states had found it necessary to establish jurisdiction in a court of law. States described these legal battles as costly in terms of staff and time. Moreover, states claimed that, on occasion, fraudulent MEWAs claimed the collective bargaining agreement exemption in order to stall state action and continue collecting premiums from unsuspecting employers. States contacted by GAO recommended that the Department clarify ERISA's collective bargaining preemption provision in a regulation. Ultimately, the Report recommended, "that the Secretary of Labor direct the Assistant Secretary for PWBA to * * * (2) improve procedures to quickly answer questions about such issues as ERISA preemption and state regulatory authority, thus enabling states to more

aggressively deal with problem MEWAs."

Recognizing that additional guidance was needed, in 1995 the Department proposed criteria and a process for determining whether an employee benefit plan was established or maintained under or pursuant to one or more agreements that the Secretary finds to be a collective bargaining agreement. The approach proposed in the 1995 NPRM did not provide for individual findings by the Department but instead relied on state regulators to make the determination as to whether a collective bargaining agreement existed—a procedure which drew negative comments from the public.

Convinced that guidance was still needed, in 1998 the Secretary established the ERISA Section 3(40) Negotiated Rulemaking Advisory Committee under the Negotiated Rulemaking Act and the Federal Advisory Committee Act. The Committee included representatives from labor unions, multiemployer plans, state governments, employers, third party administrators, insurance carriers, brokers and agents providing health care products and services, and the National Railway Labor Conference. As a result of the Committee's work and as an alternative to the 1995 proposed regulation, the Department is proposing two regulations: this regulation, which establishes procedures for administrative hearings to obtain a determination from the Secretary as to whether a plan is established or maintained under or pursuant to one or more collective bargaining agreements, and its accompanying regulation, which sets forth standards for distinguishing whether a plan is so established or maintained.

In formulating the process for an administrative hearing, the Committee reviewed the applicability of the rules of practice and procedure currently used by the Office of Administrative Law Judges (ALJs) and adopted many, though not all, of the provisions. These proposed rules relate specifically to procedures for ALJ determinations under section 3(40) of the Act and are controlling to the extent that they are inconsistent with any portion of the ALJ published rules of practice and procedure.

In order to initiate adjudicatory proceedings, an entity will be required to file with the ALJ a petition for a determination under section 3(40) of the Act. The petition shall: (1) Provide the name and address of the entity for which the petition is filed; (2) provide the names and addresses of the plan administrator and plan sponsor(s) of the

plan or other arrangement for which the finding is sought; (3) identify the state or states whose law or jurisdiction the petitioner claims has been asserted over the plan or other arrangement at issue, and provide the addresses and names of responsible officials; (4) include affidavits or other written evidence showing that (i) state jurisdiction has been asserted over or legal process commenced against the plan or other arrangement pursuant to state law; (ii) the plan is an employee welfare benefit plan as defined at section 3(1) of ERISA and is covered by ERISA pursuant to section 4 of the Act; (iii) the plan is established or maintained for the purpose of offering or providing benefits described in section 3(1) of ERISA to employees of two or more employers (including one or more self-employed individuals) or their beneficiaries; (iv) the plan satisfies the criteria in new section 3-40(b); and (v) service has been made as provided by this proposed regulation; (5) affidavits shall set forth such facts as would be admissible in evidence in a proceeding under part 18 of this title and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The affidavit or other written evidence must set forth specific facts showing the factors required under subparagraph (b)(4). In addition, copies of all documents shall be served on all parties of record, attorneys for the parties, and the Secretary. If an entity chooses to request an expedited proceeding, the motion must be made in writing, with a description of the circumstances necessitating an expedited hearing, the harm which would result if the motion were denied, and supporting affidavits.

The section of the proposed rule on the allocation of the burden of proof provides that for purposes of a final decision by the ALJ (and for purposes of review by the Secretary) the petitioner has the ultimate burden of establishing each of the elements relating to whether the entity qualifies as an employee welfare benefit plan established or maintained under or pursuant to one or more collective bargaining agreements. The decision of the ALJ is final unless an appeal is filed with the Secretary within twenty days. A request for review by the Secretary must state the issue(s) in the administrative law judge's final decision upon which review is sought and shall be served on all parties to the proceeding. The review by the Secretary is the final agency action.

Resolving Disputes Efficiently

An administrative hearing under the proposed regulation will economically

benefit the small number of plans or arrangements that dispute state-asserted jurisdiction. The Department foresees improved efficiencies through use of administrative hearings that are used at the option of entities over whom state jurisdiction has been asserted. An administrative hearing will allow the various parties to obtain a decision in a more timely and efficient manner than is customary in federal or state court proceedings and will provide cost savings for the plan or arrangement, its participating employers and employees.

For purposes of this economic analysis, the Department considered the cost of obtaining determinations of plans' or arrangements' status and states' jurisdiction under the proposed regulation relative to the cost of obtaining such determinations in the current environment. The current practice for determining whether a plan is established or maintained under or pursuant to a collective bargaining agreement is for a plan or state to obtain a decision in a federal or state court. Accordingly, this analysis relates to determining plans' or arrangements' legal status through adjudication.

The Department's analysis of costs involved in adjudication in a federal or state court versus an administrative hearing assumes that entities and states incur a baseline cost to resolve the question of their status in federal or state court. This baseline cost includes, but is not limited to, expenditures for document production, attorney fees, filing fees, depositions, etc. Because a determination of jurisdiction in a federal or state court may be determined in motions or pleadings in cases where jurisdiction is not the primary litigated issue, the direct cost of using the courts as a decision-maker for jurisdictional issues only is too variable to specify; however, custom and practice indicate that the cost of an administrative hearing will be similar to or will represent a cost savings compared with the baseline cost of litigating in federal or state court.

Because the procedures and evidentiary rules of an administrative hearing generally track the Federal Rules of Civil Procedure and of Evidence, document production will be similar for both an administrative hearing and for a federal or state court. Documents such as by-laws, administrative agreements, and collective bargaining agreements, etc., are generally kept in the normal course of business for welfare benefit plans and it is unlikely that there will be any additional cost for an administrative hearing beyond that which would be required in preparation for litigation in

a federal or state court. Certain administrative hearing practices and other new procedures initiated by this regulation may, however, represent a cost savings over litigation. For example, neither party need employ an attorney; the prehearing exchange is short and general; either party may move to shorten the time for the scheduling of a proceeding, including the time for conducting discovery; the general formality of the hearing may vary, particularly depending on whether the petitioner is appearing *pro se*; an expedited hearing is possible; and, the ALJ generally has 20 working days after receipt of the transcript of an oral hearing or after the filing of all documentary evidence if no oral hearing is conducted to reach a decision.

The Department cannot predict that any or all of these conditions will exist, nor can it predict that any of these factors represent a cost-savings, but, it is likely that the knowledge of state and federal laws which the ALJ brings to the decision-making process will facilitate the hearing, reduce costs, and introduce a consistent standard to what has been a confusion of jurisdictional decisions. ALJ case histories will educate MEWAs and states by articulating the characteristics of a collectively bargained plan, which clarity will in turn benefit participants and beneficiaries with secure contributions and paid-up claims. The Department welcomes comment on the comparative cost of a trial in federal or state court versus an administrative hearing on the issue of the legal status of a welfare benefit plan as it pertains to the existence of a plan that is established or maintained under or pursuant to an agreement or agreements that the Secretary finds to be collective bargaining agreements for purposes of section 3(40) of ERISA.

Determining Jurisdiction Accurately and Consistently

The proposed regulation that accompanies this one establishes criteria for determining whether a welfare benefit plan is established or maintained under or pursuant to one or more collective bargaining agreements. While the proposed criteria will largely eliminate confusion in determining whether a MEWA falls under the collective bargaining agreement exception, given the wide variety and constructs of agreements, MEWA operators and the states may still disagree about the legal status of an entity. For this reason, the Department is proposing this second regulation establishing procedures that permit, in certain limited circumstances, an entity

to seek an administrative hearing to obtain a finding by the Secretary that a particular plan is established or maintained under or pursuant to one or more collective bargaining agreements.

Accurate and consistent determinations under this proposed regulation and the objective standards provided in the substantive proposal together are expected to reduce uncertainty and the incidence of disputes over plans' and arrangements' status. The Department has attributed expected cost savings from reductions in uncertainty and disputes to the substantive regulation, because that regulation sets forth the standards on which determinations will be based.

Efficiently and accurately determining the legal status of a plan or arrangement will also benefit employers and employees as it will provide greater assurance that the entity is complying with appropriate federal and state laws. Due at least in part to the interaction of federal and state requirements, historical compliance with the various requirements which apply to MEWAs has been shown to be inconsistent. Although the provisions of Titles I and IV of ERISA generally supersede state laws that relate to employee benefit plans, certain state laws which regulate insurance may apply to MEWAs, and knowledge of both federal and state requirements is necessary for consistency in determining plans' or arrangements' legal status. This is particularly important where these entities are doing business in more than one state and each state's laws may apply independently to the MEWAs doing business in that state. The Department believes that the administrative hearing process will provide for the uniform interpretation and application of both federal and state regulations and will avoid confusion resulting from a variety of jurisdictional procedures and laws. Employers and employees will benefit from an administrative decision by assurances as to which protections, be they federal or both state and federal, apply to their particular arrangement. The Department has attributed the net benefit from the reclassification of currently inaccurately classified plans or arrangements (and the consequent application of appropriate state or federal protections) to the substantive proposed regulation, which sets for the standards that will assure accurate classifications.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the

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

For purposes of analysis under the RFA, PWBA 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 the Employee Retirement Income Security Act of 1974 (ERISA), which permits the Secretary of Labor to prescribe simplified annual reports for pension plans which 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 most small plans are maintained by small employers. Thus, PWBA believes that assessing the impact of this proposed rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business which 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.*). PWBA therefore requests comments on the appropriateness of the size standard used in evaluating the impact of this proposed rule on small entities.

On this basis, however, PWBA has preliminarily determined that this rule

will not have a significant economic impact on a substantial number of small entities. In support of this determination, and in an effort to provide a sound basis for this conclusion, PWBA has prepared the following regulatory flexibility analysis.

(a) *Reason for the Action.* The Department proposes this regulation in order to establish a procedure for an administrative hearing so that states and entities will be able to obtain a determination by the Secretary as to whether a particular employee welfare benefit plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of an exception to section 3(40) of ERISA.

(b) *Objectives.* The objective of the regulation is to make available to plans an individualized procedure for a hearing before a Department of Labor Administrative Law Judge, and for appeals of an ALJ decision to the Secretary or the Secretary's delegate, which would be appropriate for the resolution of a dispute regarding an entity's legal status in situations where the jurisdiction or law of a state has been asserted against a plan or other arrangement that contends it meets the exception for plans established or maintained under or pursuant to one or more collective bargaining agreements.

(c) *Estimate of Small Entities Affected.* For purposes of this discussion, the Department has deemed 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 which cover fewer than 100 participants. For this purpose, it is assumed that arrangements with fewer than 100 participants and which are (1) multiemployer collectively bargained group welfare benefit plans; (2) non-collectively bargained multiple employer group welfare benefit plans, or; (3) other multiple employer arrangements which provide welfare benefits, are small plans. PWBA believes that assessing the impact of this proposed rule on small plans is an appropriate substitute for evaluating the effect on small entities as that term is defined in the RFA. No small governmental jurisdictions will be affected.

Based on Form 5500 filings and available research, it is estimated that there are a possible 4,180 plans which can be classified as either collectively bargained plans or as MEWAs; however, PWBA estimates that a very small number of these arrangements will have

fewer than 100 participants. By their nature, the affected arrangements must involve at least two employers, which decreases the likelihood of coverage of fewer than 100 participants. Also, underlying goals of the formation of these arrangements, such as gaining purchasing and negotiating power through economies of scale, improving administrative efficiencies, and gaining access to additional benefit design features, are not readily accomplished if the group of covered lives remains small.

While there are no statistics to determine the number of small plans among the 4,180 plans, based on the health coverage reported in the Employee Benefits Supplement to the 1993 Current Population Survey and on a 1993 Small Business Administration survey of retirement and other benefit coverages in small firms, research data indicate that there are more than 2.5 million private group health plans with fewer than 100 participants. Thus, the 4,180 collectively bargained plans or MEWAs, even if all were to have fewer than 100 participants, represent approximately one-tenth of one percent of all small group health plans.

The Department is not aware of any source of information indicating the number of instances in which state jurisdiction has been asserted over these entities, or the portion of those instances which involved the collective bargaining agreement exception. However, in order to develop an estimate of the number of plans which might seek to clarify their legal status by using an administrative hearing as proposed by this regulation, the Department examined the number of lawsuits to which the Department had previously been a party. While this number is not viewed as a measure of the incidence of the assertion of state jurisdiction, it is considered the only reasonable available proxy for an estimate of a maximum number of instances in which the applicability of state requirements might be at issue. The Department has been a party to 375 civil and 75 criminal cases from 1990 to 1999, or an average of 45 cases per year. The proportion of these lawsuits that involved a dispute over state jurisdiction based on plans' or arrangements' legal status is unknown. On the whole, 45 is considered a reasonable estimate of an upper bound number of plans which could have been a party to a lawsuit involving a determination of the plan's legal status. Because this procedural regulation and the related substantive regulation are expected to reduce the number of disputes, the Department assumes that

45 represents a conservatively high estimate of the number of plans or arrangements which would petition for an administrative hearing. Of all small plans, then, the greatest number of plans likely to petition for an administrative hearing represents a very tiny fraction of the total number of small plans. In addition, the Department has assumed that an entity's exercise of the opportunity to petition for a finding will generally be less costly than available alternatives. Accordingly, the Department has concluded that this regulation will not have a significant economic impact on a substantial number of small entities, but requests comments on the comparative costs of establishing a small entity's legal status in a court of law or at ALJ hearing.

(e) *Duplication*. No federal rules have been identified that duplicate, overlap, or conflict with the proposed rule.

(f) *Alternatives*. The proposed regulation represents the consensus report of a committee established in 1998 by the Secretary to provide an alternative to guidance proposed by the Department in 1995. Recognizing that guidance was needed in clarifying collective bargaining exceptions to the MEWA regulation, the Secretary had, in 1995, published a Notice of Proposed Rulemaking on Plans Established or Maintained Pursuant to Collective Bargaining Agreements in the **Federal Register** (60 FR 39209). At that time, the Department also proposed, as part of the NPRM, that it would be within the authority of state insurance regulators to identify and regulate MEWAs operating in their jurisdictions. In other words, the proposed approach did not establish a method for obtaining individual findings by the Department.

The Department received numerous comments on the NPRM. Commenters expressed concerns about their ability to comply with the standards set forth in the NPRM and to establish compliance with the criteria proposed by the Department. Commenters also objected to the part of the proposal which would have had state regulators determine whether a particular agreement was a collective bargaining agreement. Commenters strongly preferred that determination of whether a plan was established under or pursuant to a collective bargaining agreement lie with a federal agency and not with individual states.

Based on the comments received, the Department turned to negotiated rulemaking as an appropriate method of developing a revised Notice of Proposed Rulemaking. In September 1998, the Secretary established the ERISA Section 3(40) Negotiated Rulemaking Advisory

Committee under the Negotiated Rulemaking Act. (5 U.S.C. 561 *et seq.*) (NRA). The Committee membership was chosen from the organizations that submitted comments on the Department's August 1995 NPRM and from the petitions and nominations for membership received in response to the Notice of Intent. The membership included representatives from labor unions, multiemployer plans, state governments, employer/management associations, Railway Labor Act plans, third-party administrators, independent agents and brokers of insurance products, insurance carriers, and the federal government. This regulation represents the Committee's consensus, in the form of a proposed rule, for determining the legal status of a welfare benefit plan. Based on the fact that this Notice of Proposed Rulemaking is the result of a Committee decision by consensus, and the fact that the Committee represents a cross section of the state, federal, association, and private sector insurance universe, the Department believes that, as an alternative to the 1995 NPRM, this regulation will accomplish the stated objectives of the Secretary and will have a beneficial impact on MEWAs and on state insurance commissions. No other significant alternatives which would minimize the economic impact on small entities have been identified.

Participating in an administrative hearing to determine legal status is a voluntary undertaking on the part of a MEWA. It would be inappropriate to create an exemption for small MEWAs under the proposed regulation because small MEWAs are as in need of clarification of their legal status as are larger MEWAs.

Paperwork Reduction Act

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

Currently, PWBA is soliciting comments concerning the proposed information collection request (ICR) included in this Proposed Rule

Governing Procedures for Administrative Hearings Regarding Plans Established or Maintained Pursuant to Collective Bargaining Agreements under Section 3(40)(A) of ERISA. A copy of the ICR may be obtained by contacting the individual identified below in this notice.

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

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

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Pension and Welfare Benefits Administration. Although comments may be submitted through December 26, 2000. OMB requests that comments be received within 30 days of publication of the Notice of Proposed Rulemaking to ensure their consideration.

Address requests for copies of the ICR to Gerald B. Lindrew, Office of Policy and Research, U.S. Department of Labor, Pension and Welfare Benefits Administration, 200 Constitution Avenue, NW., Room N-5647, Washington, DC 20210. Telephone (202) 219-4782; Fax: (202) 219-4745. These are not toll-free numbers.

This proposed regulation establishes procedures for hearings before an Administrative Law Judge (ALJ) with respect to determinations under Section 3(40) of the Employee Retirement Income Security Act of 1974 (ERISA). Section 3(40) excepts from the definition of a multiple employer welfare arrangement any plan or

arrangement established or maintained under or pursuant to one or more agreements which the Secretary of Labor (the Secretary) finds to be a collective bargaining agreement. This proposed regulation sets forth administrative procedures pursuant to which an entity may, under limited circumstances, seek an individual determination from the Secretary as to whether it is a plan established or maintained under or pursuant to one or more collective bargaining agreements.

As stated in the Regulatory Flexibility Act analysis, the Department estimates that 45 entities would be the maximum number of petitioners for an ALJ hearing. Those entities seeking a finding under section 3(40) must file a written petition by delivering or mailing to the ALJ a petition which shall: (1) Provide the name and address of the entity for which the petition is filed; (2) provide the names and addresses of the plan administrator and plan sponsor(s) of the plan or other arrangement for which the finding is sought; (3) identify the state or states whose law or jurisdiction the petitioner claims has been asserted over the plan or other arrangement at issue, and provide the addresses and names of responsible officials; (4) include affidavits or other written evidence showing that—(i) state jurisdiction has been asserted over or legal process commenced against the plan or other arrangement pursuant to state law; (ii) the plan is an employee welfare benefit plan as defined in section 3 (1) of ERISA and is covered by ERISA pursuant to section 4 of the Act; (iii) the plan is established or maintained for the purpose of offering or providing benefits described in section 3(1) of ERISA to employees of two or more employers (including one or more self-employed individuals) or their beneficiaries; (iv) the plan satisfies the criteria in 29 CFR 2510.3–40(b); and (v) service has been made as provide in subsection 2570.95; (5) The affidavits shall set forth such facts as would be admissible in evidence in a proceeding under part 18 of Title 1 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The affidavit or other written evidence must set forth specific facts showing the factors required under subparagraph (b)(4).

The Department believes that preparing and filing the petition will require 32 hours of an attorney's time, at \$72 per hour, and that entities will purchase services to complete the petition rather than do this work themselves. Most of the factual information will be readily available in the office of any business or plan and will not require a great deal of time to

assemble, either because they are maintained in the ordinary course of business, or they have been assembled at least in part in response to the assertion of jurisdiction by the state. The majority of the time is expected to be associated with drafting documents describing the facts related to whether a plan is established or maintained under or pursuant to a collective bargaining agreement. The total estimated cost for an attorney's time is \$2,300 per petition filed. Additional costs are estimated at \$10.00 per petition for materials and mailing costs. Additional actions following the establishment of a proceeding by the ALJ are excepted from PRA under the provisions of 5 CFR 1320.4(a)(2).

Type of Review: New.

Agency: Pension and Welfare Benefits Administration.

Title: Petition for Finding under Section 3(40) of ERISA.

OMB Number: 1210–NEW.

Affected Public: Business or other for-profit; not-for-profit institutions; state government.

Respondents: 45.

Responses: 45.

Average Time per Response: 32 hours.

Estimated Total Burden Hours: 1.

Estimated Total Burden Cost (Operating and Maintenance): \$104,100.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Small Business Regulatory Enforcement Fairness Act

The rule 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.*) and, if finalized, will be 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 or export markets.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L.

104–4), as well as Executive Order 12875, this proposed rule does not include any federal mandate that may result in expenditures by state, local, or tribal governments, or the private sector, which may impose an annual burden of \$100 million.

Executive Order 13132

When an agency promulgates a regulation that has federalism implications, Executive Order 13132 (64 FR 43255, August 10, 1999) requires that the Agency provide a federalism summary impact statement. Pursuant to section 6(c) of the Order, such a statement must include a description of the extent of the agency's consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of the State have been met.

This proposed regulation has Federalism implications because it sets forth standards and procedures for an ALJ hearing for determining whether certain entities may be regulated under certain state laws or whether such state laws are preempted with respect to such entities. The state laws at issue are those that regulate the business of insurance. A representative from the National Association of Insurance Commissioners (NAIC), which represents the interest of state governments in the regulation of insurance, participated in this rulemaking from the inception of the Negotiated Rulemaking Committee.

In the course of this rulemaking, the NAIC raised a concern that the proposed process by which the Department issues ALJ determinations regarding the collectively bargained status of entities, move forward as quickly as possible and not result in a stay of state enforcement proceedings against MEWAs. The regulation specifically states that the proceedings shall be conducted as expeditiously as possible, the parties shall make every effort to avoid delay at each stage of the proceeding, and the companion regulation that establishes criteria provides that proceedings under this regulation are not intended to change existing law regarding stay and abstention.

Statutory Authority

These regulations are proposed pursuant to section 3(40) of ERISA (Pub. L. 97–473, 96 Stat. 2611, 2612, 29 U.S.C. 1002(40)) and section 505 (Pub. L. 93–406, 88 Stat. 892, 894, 29 U.S.C. 1135) of ERISA and under Secretary of Labor's Order No. 1–87, 52 FR 13139, April 21, 1987.

List of Subjects in 29 CFR Part 2570

Administrative practice and procedure, Collective Bargaining, Employee benefit plans, Government employees, Penalties, Pensions, Reporting and recordkeeping requirements, Retirement.

Proposed Regulations

For the reasons set out in the preamble, the Department proposes to amend Part 2570 of Chapter XXV of Title 29 of the Code of Federal Regulations as follows:

PART 2570—[AMENDED]

1. The authority for Part 2570 is revised to read as follows:

Authority: 5 U.S.C. 8477(c)(3); Section 3(40), 502(c)(2), 502(c)(5), 502(i), 505 and 734 of ERISA, 29 U.S.C. 1002(40) 1132(c)(2), 1132(c)(5), 1132(i), 1135, 1191(c); Reorganization Plan No. 4 of 1978; 5 U.S.C. 8477(c)(3); Secretary of Labor Order No. 1-87, 52 FR 13139 (April 21, 1987).

Subpart A is also issued under 29 U.S.C. 1132(c)(1).

Subpart G is also issued under sec. 4, Pub. L. 101-410, 104 Stat. 890 (28 U.S.C. 2461 note), as amended by sec. 31001(s)(1), Publ. L. 104-134, 110 Stat. 1321-373.

2. Subpart G is added in Part 2570 to read as follows:

Subpart G—Procedures for Issuance of Findings Under ERISA § 3(40)

| | |
|----------|---|
| Sec. | |
| 2570.130 | Scope of rules. |
| 2570.131 | In general. |
| 2570.132 | Definitions. |
| 2570.133 | Parties. |
| 2570.134 | Filing and contents of petition. |
| 2570.135 | Service. |
| 2570.136 | Expedited proceedings. |
| 2570.137 | Allocation of burden of proof. |
| 2570.138 | Decision of the Administrative Law Judge. |
| 2570.139 | Review by the Secretary. |

§ 2570.130 Scope of rules.

The rules of practice set forth in this Subpart G apply to “Section 3(40) Finding Proceedings” (as defined in § 2570.132(g)), under section 3(40) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act). Refer to 29 CFR 2510.3-40 for the definition of relevant terms of section 3(40) of ERISA, 29 U.S.C. 1002(40). To the extent that the regulations in this subpart differ from the regulations in subpart A of part 18 of this title, the regulations in this subpart apply to matters arising under section 3(40) of ERISA rather than the rules of procedure for administrative hearings published by the Department’s Office of Administrative Law Judges in subpart A of part 18 of this title. These

proceedings shall be conducted as expeditiously as possible, and the parties shall make every effort to avoid delay at each stage of the proceedings.

§ 2570.131 In general.

If there is an attempt to assert state jurisdiction or the application of state law, either by the issuance of a state administrative or court subpoena to, or the initiation of administrative or judicial proceedings against, a plan or other arrangement that alleges it is covered title I of ERISA, 29 U.S.C. 1003, the plan or other arrangement may petition the Secretary to make a finding under section 3(40) of ERISA that the plan is established or maintained under or pursuant to an agreement or agreements that the Secretary finds to be collective bargaining agreements for purposes of section 3(40) of ERISA.

§ 2570.132 Definitions.

For section 3(40) Finding Proceedings, this section shall apply instead of the definitions in 29 CFR 18.2.

(a) *ERISA* means the Employee Retirement Income Security Act of 1974, *et seq.*, 29 U.S.C. 1001, *et seq.*, as amended.

(b) *Order* means the whole or part of a final procedural or substantive disposition by the administrative law judge of a matter under section 3(40) of ERISA. No order will be appealable to the Secretary except as provided in this subpart.

(c) *Petition* means a written request under the procedures in this subpart for a finding by the Secretary under section 3(40) of ERISA that a plan or arrangement is established or maintained under or pursuant to one or more collective bargaining agreements.

(d) *Petitioner* means the plan or arrangement filing a petition.

(e) *Respondent* means:

(1) A state government instrumentality charged with enforcing the law which is alleged to apply or which has been identified as asserting jurisdiction over a plan or other arrangement, including any agency, commission, board, or committee charged with investigating and enforcing state insurance laws, including parties joined under § 2570.136;

(2) The person or entity asserting that state law or state jurisdiction applies to the petitioner;

(3) The Secretary of Labor; and

(4) A state not named in the petition who has intervened under § 2570.133(b).

(f) *Secretary* means the Secretary of Labor, and includes, pursuant to any

delegation or sub-delegation of authority, the Assistant Secretary for Pension and Welfare Benefits or other employee of the Pension and Welfare Benefits Administration.

(g) *Section 3(40) Finding Proceeding* means a proceeding before the Office of Administrative Law Judges relating to whether the Secretary finds a plan to be established or maintained under or pursuant to one or more collective bargaining agreements within the meaning of section 3(40) of ERISA.

§ 2570.133 Parties.

For section 3(40) Finding Proceedings, this section shall apply instead of 29 CFR 18.10.

(a) The term “party” with respect to a Section 3(40) Finding Proceeding means the petitioner and the respondents.

(b) States not named in the petition may participate as parties in a Section 3(40) Finding Proceeding by notifying the OALJ and the other parties in writing prior to the date for filing a response to the petition. After the date for service of responses to the petition, a state not named in the petition may intervene as a party only with the consent of all parties or as otherwise ordered by the ALJ.

(c) The Secretary of Labor shall be named as a “respondent” to all actions.

(d) The failure of any party to comply with any order of the ALJ may, at the discretion of the ALJ, result in the denial of the opportunity to present evidence in the proceeding.

§ 2570.134 Filing and contents of petition.

(a) A person seeking a finding under section 3(40) of ERISA must file a written petition by delivering or mailing it to the Chief Docket Clerk, Office of Administrative Law Judges (OALJ), 800 K Street, NW, Suite 400, Washington, DC 20001-8002.

(b) The petition shall—

(1) Provide the name and address of the entity for which the petition is filed;

(2) Provide the names and addresses of the plan administrator and plan sponsor(s) of the plan or other arrangement for which the finding is sought;

(3) Identify the state or states whose law or jurisdiction the petitioner claims has been asserted over the plan or other arrangement at issue, and provide the addresses and names of responsible officials;

(4) Include affidavits or other written evidence showing that—

(i) State jurisdiction has been asserted over or legal process commenced against the plan or other arrangement pursuant to state law;

(ii) The plan is an employee welfare benefit plan as defined at section 3(1) of ERISA (29 U.S.C. 1002(1)) and 29 CFR 2510.3-1 and is covered by title I of ERISA (*see* 29 U.S.C. 1003);

(iii) The plan is established or maintained for the purpose of offering or providing benefits described in section 3(1) of ERISA (29 U.S.C. 1002(1)) to employees of two or more employers (including one or more self-employed individuals) or their beneficiaries;

(iv) The plan satisfies the criteria in 29 CFR 2510.3-40(b); and

(v) Service has been made as provided in § 2570.135.

(5) The affidavits shall set forth such facts as would be admissible in evidence in a proceeding under part 18 of this title and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The affidavit or other written evidence must set forth specific facts showing the factors required under paragraph (b)(4) of this section.

§ 2570.13 Service.

For section 3(40) proceedings, this section shall apply instead of 29 CFR 18.3. (a) *In general.* Copies of all documents shall be served on all parties of record. All documents should clearly designate the docket number, if any, and short title of all matters. All documents to be filed shall be delivered or mailed to the Chief Docket Clerk, Office of Administrative Law Judges (OALJ), 800 K Street, N.W., Suite 400, Washington, DC 20001-8002, or to the OALJ Regional Office to which the proceeding may have been transferred for hearing. Each document filed shall be clear and legible.

(b) *By parties.* All motions, petitions, pleadings, briefs, or other documents shall be filed with the Office of Administrative Law Judges with a copy, including any attachments, to all other parties of record. When a party is represented by an attorney, service shall be made upon the attorney. Service of any document upon any party may be made by personal delivery or by mailing by first class, prepaid U.S. mail, a copy to the last known address. The Secretary shall be served by delivery to the Associate Solicitor, Plan Benefits Security Division, ERISA Section 3(40) Proceeding, P.O. Box 1914, Washington, DC 20013. The person serving the document shall certify to the manner and date of service.

(c) *By the Office of Administrative Law Judges.* Service of orders, decisions and all other documents shall be made to all parties of record by regular mail to their last known address.

(d) *Form of pleadings*—(1) Every pleading shall contain information indicating the name of the Pension and Welfare Benefits Administration (PWBA) as the agency under which the proceeding is instituted, the title of the proceeding, the docket number (if any) assigned by the Office of Administrative Law Judges and a designation of the type of pleading or paper (*e.g.*, notice, motion to dismiss, etc.). The pleading or paper shall be signed and shall contain the address and telephone number of the party or person representing the party. Although there are no formal specifications for documents, they should be typewritten when possible on standard size 8 1/2 x 11 inch paper.

(2) Illegible documents, whether handwritten, typewritten, photocopies, or otherwise, will not be accepted. Papers may be reproduced by any duplicating process provided all copies are clear and legible.

§ 2570.136 Expedited proceedings

For Section 3(40) Finding Proceedings, this section shall apply instead of 29 CFR 18.42.

(a) At any time after commencement of a proceeding, any party may move to advance the scheduling of a proceeding, including the time for conducting discovery.

(b) Except when such proceedings are directed by the Chief Administrative Law Judge or the administrative law judge assigned, any party filing a motion under this section shall:

(1) Make the motion in writing;

(2) Describe the circumstances justifying advancement;

(3) Describe the irreparable harm that would result if the motion is not granted; and

(4) Incorporate in the motion affidavits to support any representations of fact.

(c) Service of a motion under this section shall be accomplished by personal delivery, or by facsimile, followed by first class, prepaid, U.S. mail. Service is complete upon personal delivery or mailing.

(d) Except when such proceedings are required, or unless otherwise directed by the Chief Administrative Law Judge or the administrative law judge assigned, all parties to the proceeding in which the motion is filed shall have ten (10) days from the date of service of the motion to file an opposition in response to the motion.

(e) Following the timely receipt by the administrative law judge of statements in response to the motion, the administrative law judge may advance pleading schedules, discovery schedules, prehearing conferences, and

the hearing, as deemed appropriate; provided, however, that a hearing on the merits shall not be scheduled with less than five (5) working days notice to the parties, unless all parties consent to an earlier hearing.

(f) When an expedited hearing is held, the decision of the administrative law judge shall be issued within twenty (20) days after receipt of the transcript of any oral hearing or within twenty (20) days after the filing of all documentary evidence if no oral hearing is conducted.

§ 2570.137 Allocation of burden of proof.

For purposes of a final decision under § 2570.138 (Decision of the Administrative Law Judge) or § 2570.139 (Review by the Secretary), the petitioner shall have the burden of proof as to whether it meets 29 CFR 2510.3-40.

§ 2570.138 Decision of the Administrative Law Judge.

For section 3(40) finding proceedings, this section shall apply instead of 29 CFR 18.57.

(a) *Proposed findings of fact, conclusions of law, and order.* Within twenty (20) days of filing the transcript of the testimony, or such additional time as the administrative law judge may allow, each party may file with the administrative law judge, subject to the judge's discretion under 29 CFR 18.55, proposed findings of fact, conclusions of law, and order together with the supporting brief expressing the reasons for such proposals. Such proposals and brief shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision based on oral argument in lieu of briefs.* In any case in which the administrative law judge believes that written briefs or proposed findings of fact and conclusions of law may not be necessary, the administrative law judge shall notify the parties at the opening of the hearing or as soon thereafter as is practicable that he or she may wish to hear oral argument in lieu of briefs. The administrative law judge shall issue his or her decision at the close of oral argument, or within 30 days thereafter.

(c) *Decision of the administrative law judge.* Within 30 days, or as soon as possible thereafter, after the time allowed for the filing of the proposed findings of fact, conclusions of law, and order, or within thirty (30) days after receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the administrative law judge shall make his

or her decision. The decision of the administrative law judge shall include findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact or law presented on the record. The decision of the administrative law judge shall be based upon the whole record. It shall be supported by reliable and probative evidence. Such decision shall be in accordance with the regulations found at 29 CFR 2510.3-40 and shall be limited to whether the petitioner, based on the facts presented at the time of the proceeding, is a plan established or maintained under or pursuant to collective bargaining for the purposes of section 3(40) of ERISA.

§ 2570.139 Review by the Secretary.

(a) A request for review by the Secretary of an appealable decision of the administrative law judge may be made by any party. Such a request must be filed within 20 days of the issuance of the final decision or the final decision of the administrative law judge will become the final agency order for purposes of 5 U.S.C. 701 *et seq.*

(b) A request for review by the Secretary shall state with specificity the issue(s) in the administrative law judge's final decision upon which review is sought. The request shall be served on all parties to the proceeding.

(c) The review by the Secretary shall not be a *de novo* proceeding but rather a review of the record established by the administrative law judge.

(d) The Secretary may, in his or her discretion, allow the submission of supplemental briefs by the parties to the proceeding.

(e) The Secretary shall issue a decision as promptly as possible, affirming, modifying, or setting aside, in whole or in part, the decision under review, and shall set forth a brief statement of reasons therefor. Such decision by the Secretary shall be the final agency action within the meaning of 5 U.S.C. 704.

Signed this 16th day of October 2000.

Leslie B. Kramerich,

Acting Assistant Secretary, Pension and Welfare Benefits Administration.

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