

§ 2520.104–44, the information prescribed in paragraph (c) of this section; and

(2) Any statements or information required by the instructions to the Form 5500 relating to multiple employer welfare arrangements, including information regarding compliance with the filing requirements under § 2520.101–2.

\* \* \* \* \*

4. Section 2520.104–20 is amended by removing the reference “and” in paragraph (b)(2)(iii), removing the period at the end of the sentence and adding the reference “and” to the end of the sentence in paragraph (b)(3)(ii), and adding a new paragraph (b)(4) to read as follows:

**§ 2520.104–20 Limited exemption for certain small welfare plans.**

\* \* \* \* \*

(b)(4) Which are not multiple employer welfare arrangements subject to the filing requirements under § 2520.101–2.

\* \* \* \* \*

5. In § 2520.104–41, revise paragraph (c) to read as follows:

**§ 2520.104–41 Simplified annual reporting requirements for plans with fewer than 100 participants.**

\* \* \* \* \*

(c) *Contents.* The administrator of an employee pension or welfare benefit plan described in paragraph (b) of this section shall file, in the manner described in § 2520.104a–5, a completed Form 5500 “Annual Return/Report of Employee Benefit Plan” or, to the extent eligible, a completed Form 5500–SF “Short Form Annual Return/Report of Small Employee Benefit Plan,” and any required schedules or statements prescribed by the instructions to the applicable form, including, if applicable, the information described in § 2520.103–1(f)(2), and, unless waived by § 2520.104–44 or § 2520.104–46, a report of an independent qualified public accountant meeting the requirements of § 2520.103–1(b).

Signed this 28th day of November 2011.

**Phyllis C. Borzi,**

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

[FR Doc. 2011–30918 Filed 12–5–11; 8:45 am]

**BILLING CODE 4510–29–P**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### 29 CFR Parts 2560 and 2571

**RIN 1210–AB48**

#### Ex Parte Cease and Desist and Summary Seizure Orders—Multiple Employer Welfare Arrangements

**AGENCY:** Employee Benefits Security Administration, Department of Labor.

**ACTION:** Proposed rules.

**SUMMARY:** This document contains two proposed rules under the Employee Retirement Income Security Act of 1974 (ERISA) to facilitate implementation of new enforcement authority provided to the Secretary of Labor by the Patient Protection and Affordable Care Act (Affordable Care Act). The Affordable Care Act authorizes the Secretary to issue a cease and desist order, ex parte (i.e. without prior notice or hearing), when it appears that the alleged conduct of a multiple employer welfare arrangement (MEWA) is fraudulent, creates an immediate danger to the public safety or welfare, or is causing or can be reasonably expected to cause significant, imminent, and irreparable public injury. The Secretary may also issue a summary seizure order when it appears that a MEWA is in a financially hazardous condition. The first proposed regulation establishes the procedures for the Secretary to issue ex parte cease and desist orders and summary seizure orders with respect to fraudulent or insolvent MEWAs. The second proposed regulation establishes the procedures for use by administrative law judges (ALJs) and the Secretary when a MEWA or other person challenges a temporary cease and desist order.

**DATES:** *Written comments on the proposed regulations should be submitted to the Department of Labor on or before March 5, 2012.*

**FOR FURTHER INFORMATION CONTACT:** Stephanie Lewis, Plan Benefits Security Division, Office of the Solicitor, Department of Labor, at (202) 693–5588 or Suzanne Bach, Employee Benefits Security Administration, Department of Labor, at (202) 693–8335. These are not toll-free numbers.

**ADDRESSES:** Written comments may be submitted to the address specified below. All comments will be made available to the public. **Warning:** Do not include any personally identifiable information (such as name, address, or other contact information) or

confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines. Comments may be submitted anonymously.

*Department of Labor.* Comments may be submitted to the Department of Labor, identified by RIN 1210–AB48, by one of the following methods:

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

- *Email:* [E-OHPSCA521Orders.EBSA@dol.gov](mailto:E-OHPSCA521Orders.EBSA@dol.gov).

- *Mail or Hand Delivery:* Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N–5653, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, *Attention:* RIN 1210–AB48; Section 521 Orders Proposed Regulations.

Comments received by the Department of Labor will be posted without change to <http://www.regulations.gov> and <http://www.dol.gov/ebsa>, and made available for public inspection at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, 200 Constitution Avenue NW., Washington, DC 20210.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Section 6605 of the Patient Protection and Affordable Care Act (Affordable Care Act), Public Law No. 111–148, 124 Stat. 119 adds section 521 to ERISA, which gives the Secretary of Labor new enforcement authority with respect to MEWAs.<sup>1</sup> 124 Stat. 780. This section authorizes the Secretary to issue ex parte cease and desist orders when it appears to the Secretary that the alleged conduct of a MEWA is “fraudulent, or creates an immediate danger to the public safety or welfare, or is causing or can be reasonably expected to cause significant, imminent, and irreparable public injury.” 29 U.S.C. 1151(a). A person that is adversely affected by the issuance of a cease and desist order may request an administrative hearing regarding the order. 29 U.S.C. 1151(b). This section also allows the Secretary to issue an order to seize the assets of a MEWA that the Secretary determines to be in a financially hazardous condition. 29 U.S.C. 1151(e).

ERISA section 521 gives the Secretary legal remedies to address fraudulent and

<sup>1</sup> The term “multiple employer welfare arrangement” is defined at ERISA § 3(40), 29 U.S.C. 1002(40).

abusive MEWAs.<sup>2</sup> Although MEWAs that are properly operated provide an option for small employers seeking affordable employee health coverage, some have been marked by fraudulent practices and financial instability.<sup>3</sup> Some self-insured MEWAs, in particular, have been found to have failed to use sound underwriting practices and have paid excessive amounts to operators and service providers. In *Chao v. Graf*, 2002 WL 1611122 (D. Nev. 2002), for instance, the evidence indicated that the MEWA set premium rates, not based on sound actuarial analysis, but by setting a premium amount that was less than the average of a sample of rates it selected from the internet. The evidence also indicated that the defendants made unreasonably large payments from plan assets, including for services not rendered at all.

In some cases, the MEWA may have simply lacked sufficient resources or financial and administrative expertise to carry out their contractual and legal obligations. In others, a MEWA's financial instability results from fraud. When such MEWAs become insolvent, they may leave consumers with millions of dollars in unpaid medical bills.<sup>4</sup> The financial impact on employers or employee organizations that have paid premiums or made contributions to the MEWA can be as significant. The ex parte cease and desist and summary seizure order authority will serve as an additional enforcement tool to protect plan participants, plan beneficiaries, employers or employee organizations, or other members of the public against fraudulent, or financially unstable MEWAs.

In addition to addressing the standards for the Secretary to follow in issuing ex parte cease and desist and summary seizure orders under ERISA section 521, these proposed regulations describe the procedures before the Office of Administrative Law Judges (OALJ) when a person seeks an

administrative hearing for review of an ex parte cease and desist order. These proposed procedural regulations maintain the maximum degree of uniformity with rules of practice and procedure under 29 CFR part 18 that generally apply to matters before the OALJ. At the same time, they reflect the unique nature of orders issued under ERISA section 521, and are controlling to the extent they are inconsistent with 29 CFR part 18. This preamble summarizes the specific modifications to the rules in 29 CFR part 18 being proposed for adoption in this notice.

## II. Overview of the Regulations

### A. Ex Parte Cease and Desist and Summary Seizure Order Regulations (29 CFR § 2560.521)

#### Purpose and definitions

Pursuant to section 6605 of the Affordable Care Act, this proposed rule sets forth procedures for the Secretary to issue ex parte cease and desist orders and summary seizure orders and for administrative review of such cease and desist orders. The proposed rule applies to any cease and desist order and any summary seizure order issued under section 521 of ERISA and sets forth when the Secretary proposes to apply the orders. Paragraph (a) of section 2560.521–1 of the proposed rule specifies that orders may apply to MEWAs and to persons having custody or control of assets of a MEWA, any authority over management of a MEWA, or any role in the transaction of a MEWA's business. It also generally sets forth the criteria under which the Secretary may issue orders.

Paragraph (b) of this section contains key definitions. The new section 521 applies the Secretary's cease and desist and seizure order authority to MEWAs as defined under section 3(40) of ERISA, 29 U.S.C. 1002(40). Reflecting this statutory definition, paragraph (b)(1) provides that a "multiple employer welfare arrangement" is an employee welfare benefit plan or other arrangement, which is established or maintained for the purpose of offering or providing welfare plan benefits, including health benefits to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries. 29 U.S.C. 1002(40)(A). A MEWA does not, however, include any plan or arrangement established or maintained (1) Under or pursuant to one or more agreements that the Secretary of Labor finds to be collective bargaining agreements, (2) by a rural electric cooperative, or (3) by a rural telephone

cooperative association. 29 U.S.C. 1002(40)(A)(i)–(iii).

For purposes of this definition of a MEWA, two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group. The term "control group" means a group of trades or businesses under common control. The determination of whether a trade or business is under "common control" with another trade or business shall be determined under regulations of the Secretary applying principles similar to the principles applied in determining whether employees of two or more trades or businesses are treated as employed by a single employer under section 4001(b), except that for purposes of this paragraph common control shall not be based on an interest of less than 25 percent. 29 U.S.C. 1002(40)(B)(i)–(iii).<sup>5</sup>

In general, ERISA's provisions are limited to employee welfare benefit plans, other than governmental plans, church plans, and plans maintained solely for the purpose of complying with workers' compensation laws (as defined in sections 4(b)(1), 4(b)(2), and 4(b)(3) of ERISA, 29 U.S.C. 1003(b)(1), 1003(b)(2) and 1003(b)(3)). However, Congress did not limit the Secretary's authority to issue cease and desist and seizure orders under section 521 of ERISA to MEWAs that are employee welfare benefit plans (ERISA-covered plans). In concordance with the 2003 final regulations<sup>6</sup> on reporting by MEWAs, the Secretary's authority applies to MEWAs regardless of whether they are group health plans. Most notably, it extends to any arrangements that control the management or the assets of ERISA-covered plans established and maintained by others. Under this proposed rule, a MEWA that is an ERISA-covered plan or that is an arrangement that provides coverage to one or more ERISA-covered plans will be subject to section 521 of ERISA. Section 521 of ERISA applies if the MEWA also provides coverage to others unconnected to an ERISA-covered plan. The statute and this proposed rule are not, however, meant to apply to MEWAs that provide coverage only in connection with governmental plans, church plans, and plans maintained

<sup>2</sup> See, e.g., *Private Health Insurance: Employers and Individuals Are Vulnerable to Unauthorized or Bogus Entities Selling Coverage*, February 2004, GAO-04-312.

<sup>3</sup> In *re Raymond Palombo, et al*, 2011 WL 1871438 (Bankr. C.D. CA 2011) (See also *Solis v. Palombo*, No. 1:08-CV-2017 (N.D. Ga 2009)), for example, the court found that the defendant had, among other things, diverted substantial plan assets for his own benefit. The court also noted that "when the Fund stopped operating, it had no assets, thousands of unprocessed claims, and no meaningful administrative records. Rather, it had only raw claims and provider invoices stuffed in cardboard boxes at [its] office." The court found the defendant liable to the Fund for nearly \$3 million.

<sup>4</sup> Kofman, Mila, Bangit, Eliza, and Lucia, Kevin, *MEWAs: The Threat of Plan Insolvency and Other Challenges* (The Commonwealth Fund March 2004).

<sup>5</sup> No regulations have been issued under this provision. In the absence of regulations under section 3(40)(B)(iii), the Department would generally follow ERISA section 4001(b), 29 U.S.C. 1301(b) and therefore the Internal Revenue Code section 414(c) rules, in interpreting ERISA's MEWA preemption provisions. DOL Information Letter to The Honorable Mike Kreidler, dated March 1, 2006.

<sup>6</sup> 68 FR 17494 (04/09/2003).

solely for the purpose of complying with workers' compensation laws. They are also not meant to apply to arrangements that only provide coverage to individuals other than in connection with an employee welfare benefit plan (e.g., individual market coverage).

In addition, a MEWA, as defined in this proposed regulation, does not include an arrangement that is licensed or authorized to operate as a health insurance issuer in every State in which it offers or provides coverage for medical care to employees. However, it includes an arrangement that is not licensed in a State in which it operates even if it is established or maintained by a health insurance issuer that is authorized to operate in the State.

Proposed paragraphs (b)(2)–(4) define the three statutory grounds upon which the Secretary may issue a cease and desist order: (1) Fraudulent conduct; (2) conduct that creates an immediate danger to the public safety or welfare; or (3) conduct that causes or can be reasonably expected to cause significant, immediate, and irreparable injury. In order to apply these statutory standards, these proposed regulations set forth the criteria for determining if it appears that the MEWA or any person acting as an agent or employee of the MEWA has engaged in these forms of alleged conduct.

Proposed paragraph (b)(2) of section 2560.521–1 addresses the statutory standard of fraudulent conduct. Under the proposed rules, fraudulent conduct is an act or omission intended to deceive or to defraud plan participants, plan beneficiaries, employers or employee organizations, or other members of the public, the Secretary, or a State about certain matters described in the paragraphs below.<sup>7</sup> False claims by some MEWAs that they are not subject to State insurance regulation are a matter of longstanding concern to the Secretary.<sup>8</sup> The Secretary, for example, frequently finds MEWA operators

making this claim based on the false assertion that the arrangement is established pursuant to a collective bargaining agreement. Collectively bargained arrangements are not subject to State insurance laws, including laws relating to solvency, financial reporting, management, and governance. Other matters of concern to the Department include MEWAs that do not have sufficient funding and reserves for the benefits they promise and fraudulent MEWA operators that misuse assets from the MEWA or the member plans. Misuse of assets comes in many guises. Instead of payment of benefit claims, fraudulent MEWA operators may use plan premiums for many inappropriate expenses including personal overseas travel, improper payments to personal accounts, unreasonable commissions to brokers, and inappropriate food, beverage, and alcohol purchases.<sup>9</sup>

These and similar problems have informed the proposed definition of fraudulent conduct that may give rise to a cease and desist order. Specifically, the proposed regulation focuses on fraudulent acts or omissions related to the financial condition of a MEWA (including its solvency and the management of plan assets), its regulatory status under Federal or State law, and aspects of its operation (e.g., claims review, marketing, *etc.*) that the Secretary determines are material.<sup>10</sup> This standard would therefore reach, for example, a MEWA or any person acting as an employee or agent of the MEWA who fraudulently claims that the MEWA was a collectively bargained plan or arrangement, and thus, exempt from ERISA's definition of MEWA and State insurance regulation.

Proposed paragraph (b)(3) defines the standard in section 521 that provides that the Secretary may issue a cease and desist order if the MEWA's conduct or the conduct of any person acting as an agent or employee of the MEWA creates an immediate danger to the public safety or welfare. Under the proposed rule, conduct meets this standard if it impairs, or threatens to impair, the MEWA's ability to pay claims or otherwise unreasonably increases the risk of nonpayment of benefits to plan participants, plan beneficiaries, employers or employee organizations, or other members of the public. A

threatened inability to pay claims, whether it is the result of a serious crime, management inexperience, or neglect poses an immediate and serious danger to plan enrollees, employers, and potentially taxpayers.

This definition addresses MEWAs that fail (or are at risk of failing) to pay claims because of insufficient funding and inadequate reserves. A failure to hold plan assets in trust as required under ERISA, a systematic failure to properly process or pay benefit claims, or a failure to maintain a recordkeeping system that tracks the claims made, processed, or paid also places plan assets at significant risk and threatens a MEWA's ability to pay claims.

Proposed paragraph (b)(4) of section 2560.521–1 describes how the Secretary will determine if a MEWA's conduct causes or can be reasonably expected to cause significant, immediate, and irreparable injury, as provided in section 521 of ERISA. Under the proposed rule, conduct meets this statutory standard if it has, or can be reasonably expected to have, a significant and imminent negative effect that the Secretary reasonably believes cannot be fully rectified on one or more of the following: (a) An employee welfare benefit plan that is, or offers benefits in connection with, a MEWA, (b) plan participants and plan beneficiaries, or (c) employers or employee organizations. Siphoning off a MEWA's resources, and thus depleting the funds available to pay claims and other reasonable plan expenses, by embezzling funds or paying excessive, unwarranted fees are examples of conduct that causes or may be reasonably expected to cause significant, immediate, and irreparable injury.

A single act or omission within the categories of conduct set forth in the regulation may provide the basis for a cease and desist order. However, because the categories set forth in the statute are broad and overlapping, the examples provided in the proposed regulation may provide more than one basis for a cease and desist order.

The new section 521 further expands the Secretary's enforcement options with respect to MEWAs by authorizing the Secretary to issue a summary seizure order to remove plan assets and other property from the management, control, or administration of a MEWA. This authority differs from the Secretary's longstanding ability to petition a United States district court for a temporary restraining order (TRO) freezing a MEWA's assets or removing its operators. To obtain a TRO, the Secretary must present evidence that a

<sup>7</sup> In addition, criminal penalties may apply to such conduct under other federal provisions, including ERISA section 501(b), 29 U.S.C. 1131(b) (knowingly false statements or false representations of fact with regards to certain matters in connection with marketing a MEWA in violation of ERISA section 519, 29 U.S.C. 1149)), 29 U.S.C. 1131(a) (willful violations of ERISA reporting and disclosure requirements), 18 U.S.C. 1001 (knowingly and willfully false statements to the U.S. government), and 18 U.S.C. 1027 (knowingly false statement or knowing concealment of facts in relation to documents required by ERISA).

<sup>8</sup> ERISA section 514(a), 29 U.S.C. 1144(a), provides that state laws that relate to employee benefit plans are generally preempted by ERISA. ERISA section 514(b)(6), 29 U.S.C. 1144(b)(6), provides an exception to this broad preemption provision and allows states to regulate all MEWAs that are ERISA-covered plans at varying levels, depending on if the MEWA is a fully-insured plan.

<sup>9</sup> E.g., *Chao v. Crouse*, 346 F.Supp.2d 975, 980–81, 987 (S.D. Ind. 2004).

<sup>10</sup> Similarly, the new section 519 of ERISA, 29 U.S.C. 1149, prohibits false statements and representations by any person, in connection with a MEWA's marketing or sales, concerning the financial condition or solvency of the MEWA, the benefits provided by the MEWA, and the regulatory status of the MEWA.

fiduciary breach has taken place and that the government will likely prevail on the merits. In contrast, the new section 521 of ERISA allows the Secretary to issue a summary seizure order when it appears that the MEWA is in a financially hazardous condition. Proposed paragraph (b)(5) defines when a MEWA meets this standard. It provides that the Secretary may issue a summary seizure order when it has probable cause to believe that a MEWA is, or is in imminent danger of becoming, unable to pay benefit claims as they become due, or that a MEWA has sustained, or is in imminent danger of sustaining, a significant loss of assets. Under the definition, a MEWA may also be in a financially hazardous condition if the Secretary has issued a cease and desist order to a person responsible for the management, control, or administration of the MEWA or plan assets associated with the MEWA. In that circumstance, the Secretary may seek a court-appointed receiver to manage the MEWA during the pendency of a hearing on the order.

Proposed paragraph (b)(6) defines a person, for purposes of this regulation, to be an individual, partnership, corporation, employee welfare benefit plan, association, or other entity or organization.

#### Cease and Desist Order

Proposed paragraph (c) of section 2560.521-1 addresses the proposed scope of the cease and desist order. Proposed paragraph (c)(2)(i) notes that the Secretary may enjoin a MEWA or person from the conduct that served as the basis for the order and from activities in furtherance of that conduct though a cease and desist order. In addition, the cease and desist order may provide broader relief as the Secretary determines is necessary and appropriate to protect the interest of plan participants, plan beneficiaries, employers or employee organizations, or other members of the public. Proposed paragraph (c)(2)(ii) provides that an order may prohibit a person from taking any specified actions with respect to, or exercising authority over, specified funds of any MEWA or of any welfare or pension plan. Proposed paragraph (c)(2)(iii) provides that an order may also bar a person from acting as a service provider to MEWAs or plans. This proposed provision allows the Secretary to issue an order preventing a person from, for example, performing any administrative, management, financial, or marketing services for any MEWA or any welfare or pension plan. A cease and desist order containing a prohibition against transacting business

with any MEWA or plan would prevent the MEWA or a person from avoiding the cease and desist order by shutting the MEWA down and re-establishing it in a new location or under a new identity. Such a prohibition may also be necessary in cases of serious harmful conduct. In such cases it may be contrary to the interests of plan participants, plan beneficiaries, employers or employee organizations, or other members of the public for a person whose conduct gave rise to the order to gain a position with any MEWA or any welfare or pension plan where they could repeat that conduct.

Proposed paragraph (d) of this section preserves the Secretary's existing ability to seek additional remedies under ERISA. For example, when a cease and desist order prohibits a MEWA's management from carrying on its responsibilities, the Secretary may petition the court to appoint a receiver under section 521(e) (relating to summary seizure orders) or section 502(a)(5) of ERISA, 29 U.S.C. 1132(a)(5), so that the MEWA may continue paying claims during the proceedings related to the cease and desist order. In some circumstances, the Secretary may conclude that the public interest is best served through legal proceedings under ERISA sections 502(a)(2) and (a)(5), such as proceedings to recover monetary losses from breaching fiduciaries. Proposed paragraph (d) accordingly makes clear that the issuance of a temporary or final cease and desist order does not foreclose the Secretary from seeking other remedies in court or under ERISA.

Under the new section 521(b) of ERISA, a person who is the subject of a temporary cease and desist order may request an administrative hearing regarding the order. Paragraph (e) of this proposed regulation sets forth the process for doing so. Parties subject to a cease and desist order have 30 days from receiving the order in which to request a hearing before an administrative law judge. If they fail to request the hearing within 30 days, the order becomes final. Proposed paragraphs (e)(3) and (e)(4) state that the hearing shall be held, and an opinion issued, expeditiously.

If a party requests an administrative hearing before an administrative law judge, the provision also clarifies that the Secretary must offer evidence supporting the findings that gave rise to the issuance of a cease and desist order. Pursuant to ERISA section 521(c), 29 U.S.C. 1151(c), the burden of proof is on the party who requested the hearing to show by a preponderance of the evidence that the statutory standards are

not satisfied or that a modification of the order would provide sufficient protection to plan participants, plan beneficiaries, employers or employee organizations, and other members of the public. If a party seeks an administrative hearing, the order is not final until the conclusion of the process set forth in 29 CFR 2571. It remains, however, in effect and enforceable throughout the administrative review process.

#### Summary Seizure Order

The new section 521(e) of ERISA and this proposed rule authorize the Secretary to issue a summary seizure order when it appears that a MEWA is in a financially hazardous condition. Pursuant to the Fourth Amendment of the U.S. Constitution, the Secretary will generally obtain judicial authorization before issuing a summary seizure order. (*Colonnade Catering Corp. v. U.S.*, 397 U.S. 72 (1970): "Where Congress has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply.") Proposed paragraph (f)(2) provides for such judicial authorization. A court's authorization may be sought ex parte when the Secretary determines that prior notice could result in removal, dissipation, or concealment of plan assets. See e.g., *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 319 n. 12 and n. 15 (1978) (noting that the Occupational Safety and Health Act authorized the Secretary to seek warrants on an ex parte basis for inspections.) Proposed paragraph (f)(3) clarifies that the Secretary may act on a summary seizure order prior to judicial authorization, however, if the Secretary reasonably believes that delay in issuing the order will result in the removal, dissipation, or concealment of assets. Under these circumstances, the Secretary will promptly seek judicial authorization after service of the order.

Proposed paragraphs (f)(4) and (f)(5) of this section describe the proposed general scope of a seizure order.<sup>11</sup> Under paragraph (f)(4), the Secretary may seize books, documents, and other records of the MEWA. It may also seize the premises, other property, and financial accounts for the purpose of transferring such property to a court-appointed receiver. In addition, the order may prohibit the MEWA and its operators from transacting any business or disposing of any property of the MEWA. This proposed paragraph also

<sup>11</sup> The scope of the summary seizure order in this proposed rule is similar to that provided for in section 201(B) in the National Association of Insurance Commissioners (NAIC) Insurer Receivership Model Act (October 2007).

clarifies that the order also may be directed to any person holding plan assets that are the subject of the order, including banks or other financial institutions.

The principal purpose of a seizure order is to preserve the assets of an employee welfare benefit plan that is a MEWA and any employee welfare benefit plans under the control of a MEWA that are in a hazardous financial condition so that such assets are available to pay claims and other legitimate expenses of the MEWA and its participating plans. The Secretary will also issue summary seizure orders to prevent abusive operators from illegally using or acquiring plan assets. Seized assets are not placed in the U.S. Treasury. Instead they are managed by a court-appointed receiver or independent fiduciary. Proposed paragraph (f)(5) states that following a seizure the Secretary must pursue judicial proceedings to, among other things, obtain court appointment of a receiver to perform any necessary functions of the MEWA, and court authorization for further actions in the best interest of plan participants, plan beneficiaries, employers or employee organizations, or other members of the public, including the liquidation and winding down of the MEWA, if appropriate.

#### Effective Date of Orders

Paragraph (g) of section 2560.521–1 provides that orders issued under this rule are effective upon service and remain in effect unless and until modified or set aside by the Secretary or a reviewing court.

#### Notice and Service

Paragraph (h) of this section describes the manner in which the cease and desist and summary seizure orders will be served. Under paragraph (h)(1), service of an order may be accomplished by: (1) Delivering a copy to the person who is the subject of the order; (2) delivering a copy at the principal office, principal place of business, or residence of such person; or (3) mailing a copy to the last known address of such person. A person's attorney may accept service on behalf of such person. Proposed paragraph (h)(2) makes clear that service is complete upon mailing if service is made by certified mail. Service is complete upon receipt if made by regular mail.

#### Disclosure

The Secretary has determined that it is in the public interest for plan participants, plan beneficiaries, employers or employee organizations,

policymakers, and other citizens to be aware of the existence of any MEWA or person that has engaged in misconduct resulting in a final cease and desist or summary seizure order. Proposed section 2560.521–2(a) provides that the Secretary shall make issued orders available to the public as well as modifications and terminations of such final orders.

In addition, other federal agencies and the States have been instrumental partners in the Secretary's enforcement efforts against unscrupulous MEWAs. Paragraph (b) of section 2560.521–2 provides that the Secretary may disclose the issuance of any order (whether temporary or final) and any information and evidence of any proceedings and hearings related to the order with other Federal, State, or foreign authorities. Paragraph (c) provides that the sharing of such documents, material, or other information and evidence under this paragraph does not constitute a waiver of any applicable privilege or claim of confidentiality.

#### Effect on Other Enforcement Authority

Section 521 is not the only enforcement tool available to the Secretary with respect to the conduct of MEWAs or any persons acting as agents or employees of MEWAs. Section 2560.521–3 states that any other enforcement tool available to the Secretary prior to the enactment of section 521 remains available. This regulation shall not be construed as limiting the Secretary's ability to exercise its investigatory and enforcement authority under any other provision of title I of ERISA. The enforcement tools in this proposed rule are designed to prevent or address imminent, serious harm to plan participants, beneficiaries, employers, employee organizations, and other members of the public, and will be used judiciously and as necessary and appropriate to achieve these ends. In addition to the use of her investigatory and enforcement tools, the Secretary remains committed to helping MEWAs and plan officials comply with legal requirements and serve plan participants and beneficiaries properly and working closely with State regulators to help detect and prevent fraud, abuse, and financial insolvency.

#### Cross-Reference

Proposed section 2560.521–4 contains a cross-reference for proposed rules for administrative hearings.

In addition, elsewhere in this issue of the **Federal Register** is a separate proposed regulation to amend 29 CFR 2520–101.2, 2520.103–1, 2520.104–20,

and 2520.104–41 to implement section 101(g), as amended by the Affordable Care Act, and to enhance the Department's ability to enforce requirements under 29 CFR 2520–101.2.

#### *B. Procedures for Administrative Hearings on the Issuance of Cease and Desist Orders Regulation (29 CFR Part 2571)*

##### Purpose and Definitions

These proposed procedural rules apply only to adjudicatory proceedings before ALJs of the U.S. Department of Labor. Under these procedural rules, an adjudicatory proceeding before an ALJ is commenced only after a person who is the subject of a temporary cease and desist order requests a hearing and files an answer showing cause why the temporary order should be modified or set aside.

The definitional section of this proposed rule incorporates the basic adjudicatory principles set forth at 29 CFR part 18, but includes terms and concepts of specific relevance to proceedings under ERISA section 521.

##### Proceedings Before the Administrative Law Judge

The party that is subject to a cease and desist order issued under ERISA section 521 has the burden to initiate an adjudicatory proceeding before an ALJ. Proposed section 2571.3 governs the service of documents necessary to initiate ALJ proceedings by such a party on the Secretary of Labor and the OALJ. This proposed section would apply in such cases in lieu of 29 CFR 18.3.

The proposed section 2571.4 on the designation of parties also differs somewhat from its counterpart under 29 CFR part 18.10. This proposed rule specifies that the respondent in these proceedings will be the party who is challenging the temporary cease and desist order.

Proposed section 2560.521–1(h), governs the Secretary's service of the temporary cease and desist order on the affected parties. Under proposed section 2560.521–1(e) a person who is subject to an order must request a hearing within 30 days after service of the order. Section 2571.5 of the instant proposed rule provides that a failure by a person on whom the order is served to request a hearing and file a timely answer shall be deemed a waiver of the right to appear and contest the temporary cease and desist order and an admission of the facts alleged in the temporary order. Proposed section 2571.5 also makes clear that, in the event of a failure to timely request a hearing and file an answer the temporary cease and desist

order becomes final agency action within the meaning of 5 U.S.C. 704.

With respect to consent orders or settlements, proposed section 2571.6 provides that the ALJ's decision shall include the terms and conditions of any consent order or settlement which has been agreed to by the parties. Under this section, the decision of the ALJ which incorporates the consent order shall become the final agency action within the meaning of 5 U.S.C. 704. This section of the proposed rule also sets forth the process for when there is a settlement that does not include all the parties that are subject to a cease and desist order.

Section 2571.7 of this proposed rule states that the ALJ may order discovery only upon a showing of good cause by the party seeking discovery. In addition, the ALJ must expressly limit the scope and terms of discovery to the circumstances for which good cause has been shown. To the extent that an ALJ's discovery order does not specify rules for the conduct of discovery, the rules governing the conduct of discovery from 29 CFR part 18 are to be applied in these proceedings under ERISA section 521. For example, if the discovery order permits interrogatories only on certain subjects, the rules under 29 CFR part 18 concerning the servicing and answering of the interrogatories shall apply. The procedures under 29 CFR part 18 for the submission of facts to the ALJ during the hearing will also apply in proceedings under ERISA section 521.

This proposed section 2571.7 also clarifies that any evidentiary privileges, including the attorney-client privilege and work product privilege, apply in proceedings under this rule. Further, it makes clear that the fiduciary exception to such privileges also applies. Consequently, communications between an attorney and a plan administrator or other fiduciary or work product that fall under the fiduciary exception are not protected from discovery.

Proposed section 2571.8 authorizes an ALJ to issue a summary decision which may become a final order when there are no genuine issues of material fact in a case arising under ERISA section 521. Proposed section 2571.9 states that the ALJ's decision shall become a final agency action unless a timely appeal is filed.

#### Review by the Secretary

The procedures for appeals of ALJ decisions under ERISA section 521 are governed solely by the rules set forth in proposed sections 2571.10 through 2571.12 and without any reference to the appellate procedures contained in 29 CFR part 18. Proposed section

2571.10 establishes the time within which a party must file a notice of appeal, the manner in which the issues for appeal are determined, and the procedures for making the entire record before the ALJ available to the Secretary for review. Proposed section 2571.11 provides that review by the Secretary (or a designee) shall be on the record before the ALJ without an opportunity for oral argument. Proposed section 2571.12 sets forth the procedure for establishing a briefing schedule for appeals and states that the decision of the Secretary on an appeal shall be the final agency action within the meaning of 5 U.S.C. 704.

The authority of the Secretary with respect to the appellate procedures has been delegated to the Assistant Secretary for the Employee Benefits Security Administration pursuant to Secretary's Order 3-2010. The Assistant Secretary has redelegated this authority to the Director of the Office of Policy and Research of the Employee Benefits Security Administration. As required by the Administrative Procedure Act (5 U.S.C. 552(a)(2)(A)) all final decisions of the Department under section 521 of ERISA shall be compiled in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210.

### III. Economic Impact and Paperwork Burdens

#### A. Summary

These proposed regulations implement amendments made by section 6605 of the Affordable Care Act, which added ERISA section 521. As discussed earlier in this preamble, ERISA section 521 provides the Secretary of Labor with new enforcement authority over MEWAs. Specifically, ERISA section 521(a) authorizes the Secretary to issue cease and desist orders, without prior notice or a hearing, when it appears to the Secretary that a MEWA's alleged conduct is fraudulent, creates an immediate danger to the public safety or welfare, or causes or can be reasonably expected to cause significant, imminent, and irreparable public injury. This section also authorizes the Secretary to issue a summary order to seize the assets of a MEWA the Secretary determines to be in a financially hazardous condition. These proposed regulations implement ERISA section 521(a) by setting forth procedures the Secretary will follow to issue ex parte cease and desist and summary seizure orders.

ERISA section 521(b), as added by Affordable Care Act section 6605, provides that a person that is adversely affected by the issuance of a cease and desist order may request an administrative hearing regarding the order. These proposed regulations also implement the requirements of ERISA section 521(b) by describing the procedures before the Office of Administrative Law Judges (OALJ) that will apply when a person seeks an administrative hearing for review of a cease and desist order. These regulations maintain the maximum degree of uniformity with rules of practice and procedure under 29 CFR part 18 that generally apply to matters before the OALJ. At the same time, these proposed regulations reflect the unique nature of orders issued under ERISA section 521, and are controlling to the extent they are inconsistent with 29 CFR part 18.

#### B. Executive Order 12866

Under Executive Order 12866, the Department must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive Order and 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.

The Department has determined that these regulatory actions are not economically significant within the meaning of section 3(f)(1) of the Executive Order. However, OMB has determined that the actions are significant within the meaning of section 3(f)(4) of the Executive Order, and the Department accordingly provides the following assessment of their potential benefits and costs.

## 1. Need for Regulatory Action

Properly structured and managed MEWAs that are licensed to operate in a State provide a viable option for some employers to purchase affordable health insurance coverage. However, some MEWAs are marketed by unlicensed entities attempting to avoid State insurance reserve, contribution, and consumer protection requirements. By avoiding these requirements, such entities often are able to market insurance coverage at lower rates than licensed insurers, making them particularly attractive to some small employers that find it difficult to obtain affordable health insurance coverage for their employees. Due to insufficient funding and inadequate reserves, and in some situations, fraud, some MEWAs have become insolvent and unable to pay benefit claims. Therefore, affected employees and their dependents have become financially responsible for paying medical claims they presumed were covered by insurance after paying health insurance premiums to MEWAs.<sup>12</sup> The financial impact on individuals and families can be devastating when MEWAs become insolvent.

Before the enactment of ERISA section 521, the Department's primary enforcement tool against fraudulent and abusive MEWAs was court-ordered injunctive relief. In order to obtain this relief, the Department must present evidence to a federal court that an ERISA fiduciary breach occurred and that the Department is likely to prevail based on the merits of the case. Gathering sufficient evidence to prove a fiduciary breach is time-consuming and labor-intensive, in most cases, because the Department's investigators must work with poor or nonexistent financial records and uncooperative parties. As a result, the Department has been unable to shut down fraudulent and abusive MEWAs quickly enough to preserve their assets and ensure that outstanding benefit claims are timely paid. States also encountered problems in their enforcement efforts against MEWAs in the absence of federal authority to shut down fraudulent and abusive MEWAs nationally. When one State succeeded in shutting down an abusive MEWA, in some cases, its operators continued operating in another State.<sup>13</sup> ERISA section 521 provides the Department with stronger legal remedies to combat fraudulent and abusive MEWAs.

ERISA section 521(f) provides the Secretary of Labor with the authority to

promulgate regulations that may be necessary and appropriate to carry out the Department's authority under ERISA section 521. These proposed regulations are necessary, because they set forth standards and procedures the Department would use to implement this new enforcement authority. They also are necessary to provide procedures that a person who is adversely affected by the issuance of a cease and desist order may follow to request an administrative hearing regarding the order pursuant to ERISA section 521(b).

## 2. ERISA Section 521(a), Ex Parte Cease and Desist and Summary Seizure Orders—Multiple Employer Welfare Arrangements (29 CFR 2560.521–1)

### a. Benefits of Proposed Rule

As discussed earlier in this preamble, ERISA section 521(a) authorizes the Secretary to issue an ex parte cease and desist order if it appears to the Secretary that the alleged conduct of a MEWA is fraudulent, or creates an immediate danger to the public safety or welfare, or is causing or can reasonably be expected to cause, significant, imminent, and irreparable public injury. ERISA section 521(e) allows the Secretary to issue a summary seizure order if it appears that a MEWA is in a financially hazardous position. The proposed regulation implements the Department's enhanced enforcement authority under these provisions setting forth the standards and procedures the Department would follow in issuing cease and desist and summary seizure orders. It also defines important statutory terms and clarifies the scope of the Department's authority under ERISA sections 521(a) and (e).

The Department expects that proposed regulations will improve MEWA compliance and deter abusive practices of fraudulent MEWAs, lessening the need for these provisions in the first place. When that fails, as a result of these provisions, the Department would be able to take enforcement action against fraudulent and abusive MEWAs much more quickly and efficiently than under prior law. This will benefit participants and beneficiaries by helping them avoid the financial hardship and potential delayed health care that result from unpaid health claims. They also will allow the Department to fulfill its critical mission of protecting the security of participants and beneficiaries by ensuring that MEWA assets are preserved and benefits timely paid. These benefits have not been quantified.

## b. Costs of the Proposed Rule

As discussed earlier in this preamble, the proposed rules would provide standards and procedures the Department would follow to issue ex parte cease and desist and summary seizure orders with respect to MEWAs. The Department does not expect the rule to impose any significant costs, because it does not require any action or impose any requirements on MEWAs as defined in ERISA section 3(40). Therefore, the Department concludes that the proposed rule would provide benefits by enhancing the Department's ability to take immediate action against fraudulent and abusive MEWAs without imposing major costs.

## 3. ERISA Section 521(b), Procedures for Administrative Hearings on the Issues of Cease and Desist Orders—Multiple Employer Welfare Arrangements (29 CFR 2571.1 Through 2571.12)

### a. Benefits of Proposed Rule

The Department expects that administrative hearings held pursuant to ERISA section 521(b) and the procedures set forth in the proposed regulation would benefit the Department and parties requesting a hearing. The Department foresees improved efficiencies through use of administrative hearings, because such hearings should allow the parties involved to obtain a decision in a more timely and efficient manner than is customary in federal court proceedings, which would be the alternative adjudicative forum. The Department expects that this proposed rule setting forth the standards and procedures the Department would use to implement its cease and desist authority under ERISA section 521 will allow it to take action against fraudulent and abusive MEWAs much more quickly and efficiently than under prior law. These benefits have not been quantified.

To access the benefit of improved efficiencies that would result from an administrative proceeding, the Department compared the cost of contesting a cease and desist order under the proposed regulation to the cost of contesting an action taken against a MEWA by the Department before the enactment of the Affordable Care Act. The Department's primary enforcement tool against fraudulent and abusive MEWAs before Congress enacted ERISA section 521 was court-ordered injunctive relief. In order to obtain this relief, the Department must present evidence to a court that an ERISA fiduciary breach occurred and that the Department likely would prevail based on the merits of the case.

<sup>12</sup> GAO Report, *supra* note 2.

<sup>13</sup> *Id.*

Gathering sufficient evidence to prove a fiduciary breach is very time-consuming and labor-intensive, in most cases, because the Department's investigators must work with poor or nonexistent financial records and uncooperative parties.

The Department believes that an administrative hearing should result in cost savings compared with the baseline cost of litigating in federal court. Because the procedures and evidentiary rules of an administrative hearing generally track the Federal Rules of Civil Procedure and Evidence, document production will be similar for both an administrative hearing and a federal court proceeding. It is unlikely that any additional cost will be incurred for an administrative hearing than would be required to prepare for federal court litigation. Moreover, certain administrative hearing practices and other new procedures initiated by this regulation are expected to result in cost savings over court litigation. For example, parties may be more likely to appear pro se; the prehearing exchange is expected to be short and general; a motion for discovery only will be granted upon a showing of good cause; the general formality of the hearing may vary, particularly depending on whether the petitioner is appearing pro se; and the ALJ would be required to make its decision expeditiously after the conclusion of the ERISA section 521 proceeding. The Department cannot with certainty predict that any or all of these conditions will exist nor that any of these factors represent a cost savings, but it is likely that an ALJ's knowledge of federal law should facilitate an expeditious hearing, reduce costs, and introduce a consistent legal standard to the proceeding. The Department invites public comments on the comparative cost of a federal court proceeding versus an administrative hearing.

#### b. Costs of Proposed Rule

The Department estimates that the cost of the proposed regulation would total approximately \$177,000 annually. The total hour burden is estimated to be approximately 20 hours, and the dollar equivalent of the hour burden is estimated to be approximately \$540. The data and methodology used in developing these estimates are described more fully in the Paperwork Reduction Act section, below.

#### C. 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.

This issuance of cease and desist order proposed regulation is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), because it does not contain a "collection of information" as defined in 44 U.S.C. 3502(3).

Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in this Proposed Rule on Procedures for Administrative Hearings Regarding the Issuance of Cease and Desist Orders under ERISA section 521—Multiple Employer Welfare Arrangements. 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 appropriate 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 Employee Benefits Security Administration. Although comments may be submitted

through February 6, 2012, 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 G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N 5647, Washington, DC 20210. Telephone (202) 219-8410; *Fax:* (202) 219 4745. These are not toll free numbers.

This proposed regulation establishes procedures for hearings and appeals before an Administrative Law Judge (ALJ) and the Secretary when a MEWA or other person challenges a temporary cease and desist order. As stated in the Regulatory Flexibility Act analysis below, the Department estimates that, on average, a maximum of 10 MEWAs would initiate an adjudicatory proceeding before an ALJ to revoke or modify a cease and desist order.<sup>14</sup> Most of the factual information necessary to prepare the petition should be readily available to the MEWA and is expected to take approximately two hours of clerical time to assemble and forward to legal professionals resulting in an estimated total hour burden of approximately 20 hours.

The Department believes that MEWAs will hire outside attorneys to prepare and file the appeal, which is estimated to require 40 hours at \$442 per hour.<sup>15</sup> The majority of the attorney's time is expected to be spent drafting motions, petitions, pleadings, briefs, and other documents relating to the case. Based on the foregoing, the total estimated legal cost associated with the information collection would be approximately \$18,000 per petition filed. Additional costs material and mailing costs are

<sup>14</sup> As stated in the Departments April 2010 Fact Sheet on MEWA Enforcement, the Department has filed 97 civil complaints against MEWAs since 1990, which averages approximately five complaints per year. With the expanded enforcement authority provided to the Department under the Affordable Care Act, the number of civil complaints brought against MEWAs by the Department could increase. Therefore, for purposes of this Paperwork Reduction Act analysis, the Department assumes that twenty complaints will be filed as an upper bound. The Department is unable to estimate the number of cease and desist orders that will be contested; therefore, for purposes of this analysis it assumes that half of the MEWAs will contest cease and desist orders. The Department's fact sheet on MEWA enforcement can be found on the EBSA Web site at <http://www.dol.gov/ebsa/newsroom/fsMEWAenforcement>.

<sup>15</sup> The Department's estimate for the attorney's hourly rate is taken from the Laffey Matrix which provides an estimate of legal service for court cases in the DC area. It can be found at <http://www.laffeymatrix.com/see.html>. The estimate is an average of the 4–7 and 8–10 years of experience rates.

estimated at approximately \$50.00 per petition.

*Type of Review:* New.

*Agency:* Employee Benefits Security Administration.

*Title:* Proposed Rule on Procedures for Administrative Hearings Regarding the Issuance of Cease and Desist Orders under ERISA section 521—Multiple Employer Welfare Arrangements.

*OMB Number:* 1210–NEW.

*Affected Public:* Business or other for profit; not for profit institutions; State government.

*Respondents:* 10.

*Responses:* 10.

*Estimated Total Burden Hours:* 20 hours.

*Estimated Total Burden Cost (Operating and Maintenance):* \$177,100.

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.

#### *D. Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) applies to most 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.*). Unless an agency certifies that such a rule will not have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to 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. Small entities include small businesses, organizations and governmental jurisdictions.

The Department does not have data regarding the total number of MEWAs that currently exist. The best information the Department has to estimate the number of MEWAs is based on filing of the Form M–1, which is an annual report that MEWAs and certain collectively bargained arrangements file with the Department. Nearly 400 MEWAs filed the Form M–1 with the Department in 2009, the latest year for which data is available.

The Small Business Administration uses a size standard of less than \$7 million in average annual receipts to determine whether businesses in the finance and insurance sector are small entities.<sup>16</sup> While the Department does

not collect revenue information on the Form M–1, it does collect data regarding the number of participants covered by MEWAs that file Form M–1 and can use average premium data to determine the number of MEWAs that are small entities because they do not exceed the \$7 million dollar threshold. For 2009, the average annual premium for single coverage was \$4,717 and the average annual premium for family coverage was \$12,696.<sup>17</sup> Combining these premium estimates with estimates from the Current Population Survey regarding the fraction of policies that are for single or family coverage at employers with less than 500 workers, the Department estimates that about 60 percent of MEWAs (240 MEWAs) are small entities.

In order to develop an estimate of the number of MEWAs that could become subject to a cease and desist order, the Department examined the number of civil claims the Department filed against MEWAs since FY 1990. During this time, the Department filed 99 civil complaints against MEWAs, an average of approximately five complaints per year. For purposes of this analysis, the Department believes that an average of twenty complaints a year is a reasonable upper bound estimate of the number of MEWAs that could be subject to a cease and desist order<sup>18</sup> and that half this number, or an average of ten complaints a year, is a reasonable upper bound estimate of the number of MEWAs that could be expected to request an administrative hearing in a year.

Based on the foregoing, the Department estimates that the greatest number of MEWAs likely to be subject to a cease and desist order represents (8.3 percent) and that the greatest number of MEWAs likely to petition for an administrative hearing (4.2 percent) represents a small fraction of the total number of small MEWAs.

Accordingly, the Department hereby certifies that these proposed regulations will not have a significant economic impact on a substantial number of small

entities and invites public comments regarding this finding.

#### *E. Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*), as well as Executive Order 12875, these proposed rules do 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.

#### *F. Executive Order 13132*

When an agency promulgates a regulation that has federalism implications, Executive Order 13132 (64 FR 43255, August 10, 1999), requires the Agency to 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 regulation has federalism implications, because the States and the Federal Government share dual jurisdiction over MEWAs that are employee benefit plans or hold plan assets. Generally, States are primarily responsible for overseeing the financial soundness and licensing of MEWAs under State insurance laws. The Department enforces ERISA's fiduciary responsibility provisions against MEWAs that are ERISA plans or hold plan assets.

Over the years, the Department and State insurance departments have worked closely and coordinated their investigations and other actions against fraudulent and abusive MEWAs. For example, EBSA regional offices have met with State officials in their regions and provided information necessary for States to obtain cease and desist orders to stop abusive and insolvent MEWAs. The Department also has relied on States to obtain cease and desist orders against MEWAs in individual States while it pursued investigations to gather sufficient evidence to obtain injunctive relief in the federal courts to shut down MEWAs nationally. By providing procedures and standards the Department would follow to issue ex parte cease and desist and summary seizure orders and providing procedures for use by ALJs and the Secretary of Labor when a MEWA or other person challenges a temporary cease and desist order, these proposed rules would enhance the State and Federal

[http://www.sba.gov/sites/default/files/Size\\_Standards\\_Table.pdf](http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf).

<sup>17</sup> Kaiser Family Foundation and Health Research Educational Trust "Employer Health Benefits, 2009 Annual Survey." The reported numbers are from Exhibit 1.2 and are for the category Annual, all Small Firms (3–199 workers).

<sup>18</sup> With the expanded enforcement authority provided to the Department under the Affordable Care Act, the number of civil complaints brought against MEWAs by the Department could increase. Therefore, for purposes of this analysis, the Department assumes that twenty complaints will be filed as an upper bound. The Department is unable to estimate the number of cease and desist orders that will be contested; therefore, it assumes that half the MEWAs will contest cease and desist orders.

<sup>16</sup> U.S. Small Business Administration, "Table of Small Business Size Standards Matched to North American Industry Classification System Codes."

Government's joint mission to take immediate action against fraudulent and abusive MEWAs and limit the losses suffered by American workers and their families when abusive MEWAs become insolvent and fail to reimburse medical claims.

### List of Subjects

#### 29 CFR Part 2560

Administrative practice and procedure, Employee welfare benefit plans, Employee Retirement Income Security Act, Law enforcement, Pensions, Multiple employer welfare arrangements, Cease and desist, Seizure.

#### 29 CFR Part 2571

Administrative practice and procedure, Employee benefit plans, Employee Retirement Income Security Act, Multiple employer welfare arrangements, Law enforcement, Cease and desist.

For the reasons set out in the preamble, 29 CFR Chapter XXV, Subchapter G is amended as follows:

### PART 2560—RULES AND REGULATIONS FOR ADMINISTRATION AND ENFORCEMENT

1. The authority citation for part 2560 is revised to read as follows:

**Authority:** 29 U.S.C. §§ 1002(40), 1132, 1133, 1134, 1135, and 1151; and Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010).

2. Add § 2560.521–1 to read as follows:

#### § 2560.521–1 Cease and desist and seizure orders under section 521.

(a) *Purpose.* Section 521(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1151(a), authorizes the Secretary of Labor to issue an ex parte cease and desist order if it appears to the Secretary that the alleged conduct of a multiple employer welfare arrangement (MEWA) under section 3(40) of ERISA is fraudulent, or creates an immediate danger to the public safety or welfare, or is causing or can be reasonably expected to cause significant, imminent, and irreparable public injury. Section 521(e) of ERISA authorizes the Secretary to issue a summary seizure order if it appears that a MEWA is in a financially hazardous condition. An order may apply to a MEWA or to persons having custody or control of assets of the subject MEWA, any authority over management of the subject MEWA, or any role in the transaction of the subject MEWA's business. This section sets forth standards and procedures for the Secretary to issue ex parte cease and

desist and summary seizure orders and for administrative review of the issuance of such cease and desist orders.

(b) *Definitions.* When used in this section, the following terms shall have the meanings ascribed in this paragraph (b).

(1) *Multiple employer welfare arrangement* (MEWA) is an arrangement as defined in section 3(40) of ERISA that either:

(i) Is an employee welfare benefit plan subject to Title I of ERISA or

(ii) Offers benefits in connection with one or more employee welfare benefit plans subject to Title I of ERISA. For purposes of section 521 of ERISA, a MEWA does not include an arrangement that is licensed or authorized to operate as a health insurance issuer in every State in which it offers or provides coverage for medical care to employees.

(2)(i) *The conduct of a MEWA is fraudulent* when the MEWA or any person acting as an agent or employee of the MEWA commits an act or omission knowingly and with an intent to deceive or defraud plan participants, plan beneficiaries, employers or employee organizations, or other members of the public, the Secretary, or a State regarding:

(A) The financial condition of the MEWA (including the MEWA's solvency and the management of plan assets);

(B) The benefits provided by or in connection with the MEWA;

(C) The management, control, or administration of the MEWA;

(D) The existing or lawful regulatory status of the MEWA under Federal or State law; or,

(E) Any other material fact, as determined by the Secretary, relating to the MEWA or its operation.

(ii) *Fraudulent conduct includes:*

(A) Any false statement regarding any of paragraphs (b)(2)(i) (A) through (E) that is made with knowledge of its falsity or that is made with reckless indifference to the statement's truth or falsity, and

(B) The knowing concealment of material information regarding any of paragraphs (b)(2)(i) (A) through (E). Examples of fraudulent conduct include, but are not limited to, misrepresenting the terms of the benefits offered by or in connection with the MEWA or the financial condition of the MEWA or engaging in deceptive acts or omissions in connection with marketing or sales or fees charged to employers or employee organizations.

(3) *The conduct of a MEWA creates an immediate danger to the public safety or welfare* if the conduct of a MEWA or

any person acting as an agent or employee of the MEWA impairs, or threatens to impair, a MEWA's ability to pay claims or otherwise unreasonably increases the risk of nonpayment of benefits to an employee welfare benefit plan that is, or offers benefits in connection with, a MEWA, plan participants, plan beneficiaries, employers or employee organizations, or other members of the public. Intent to create an immediate danger is not required for this criterion. Examples of such conduct include, but are not limited to, a systematic failure to properly process or pay benefit claims, including failure to establish and maintain a claims procedure that complies with the Secretary's claims procedure regulations (29 CFR 2560.503–1 and 29 CFR 2590.715–2719), failure to establish or maintain a recordkeeping system that tracks the claims made, paid, or processed or the MEWA's financial condition, a substantial failure to meet applicable disclosure, reporting, and other filing requirements, including the annual reporting and registration requirements under sections 101(g) and 104 of ERISA, failure to establish and implement a policy or method to determine that the MEWA is actuarially sound with appropriate reserves and adequate underwriting, failure to comply with a cease and desist order issued by a government agency or court, and failure to hold plan assets in trust.

(4)(i) *The conduct of a MEWA is causing or can be reasonably expected to cause significant, imminent, and irreparable public injury:* (A) If the conduct of a MEWA, or of a person acting as an agent or employee of the MEWA, is having, or is reasonably expected to have, a significant and imminent negative effect on one or more of the following:

(i) An employee welfare benefit plan that is, or offers benefits in connection with, a MEWA;

(2) The sponsor of such plan or the employer or employee organization that makes payments for benefits provided by or in connection with a MEWA; or

(3) Plan participants and plan beneficiaries; and

(B) If it is not reasonable to expect that such effect may be fully repaired or rectified.

(ii) Intent to cause injury is not required for this criterion. Examples of such conduct include, but are not limited to, conversion or concealment of property of the MEWA; improper disposal, transfer, or removal of funds or other property of the MEWA, including unreasonable compensation or payments to MEWA operators and

service providers (e.g. brokers, marketers, and third party administrators); employment by the MEWA of a person prohibited such employment pursuant to section 411 of ERISA, and embezzlement from the MEWA. For purposes of section 521 of ERISA, compensation that would be excessive under 26 CFR 1.162-7 will be considered unreasonable compensation or payments for purposes of this regulation. Depending upon the facts and circumstances, compensation may be unreasonable under this regulation even if it is not excessive under 26 CFR 1.162-7.

(5) *A MEWA is in a financially hazardous condition if:* (i) the Secretary has probable cause to believe that a MEWA:

(A) Is, or is in imminent danger of becoming, unable to pay benefit claims as they come due, or

(B) Has sustained, or is in imminent danger of sustaining, a significant loss of assets; or

(ii) A person responsible for management, control, or administration of the MEWA's assets is the subject of a cease and desist order issued by the Secretary.

(6) *A person*, for purposes of this regulation, is an individual, partnership, corporation, employee welfare benefit plan, association, or other entity or organization.

(c) *Temporary Cease and Desist Order.* (1) The Secretary may issue a temporary cease and desist order when the Secretary finds there is reasonable cause to believe that the conduct of a MEWA, or any person acting as an agent or employee of the MEWA, is—

(i) Fraudulent;

(ii) Creates an immediate danger to the public safety or welfare; or

(iii) Is causing or can be reasonably expected to cause significant, imminent, and irreparable public injury.

(iv) A single act or omission may be the basis for a temporary cease and desist order.

(2) A temporary cease and desist order may as the Secretary determines is necessary and appropriate to stop the conduct on which the order is based, and to protect the interests of plan participants, plan beneficiaries, employers or employee organizations, or other members of the public—

(i) Prohibit specific conduct or prohibit the transaction of any business of the MEWA;

(ii) Prohibit any person from taking specified actions, or exercising authority or control, concerning funds or property of a MEWA or of any employee benefit plan, regardless of whether such funds

or property have been commingled with other funds or property; and,

(iii) Bar any person either directly or indirectly, from providing management, administrative, or other services to any MEWA or to an employee benefit plan or trust,

(d) *Effect of Order on Other Remedies.* The issuance of a temporary or final cease and desist order shall not foreclose the Secretary from seeking additional remedies under ERISA.

(e) *Administrative hearing.* (1) A temporary cease and desist order shall become a final order as to any MEWA or other person named in the order 30 days after such person receives notice of the order unless, within this period, such person requests a hearing in accordance with the requirements of this paragraph (e).

(2) A person requesting a hearing must file a written request and an answer to the order showing cause why the order should be modified or set aside. The request and the answer must be filed in accordance with 29 CFR 2571 and section 18.4 of this title.

(3) A hearing shall be held expeditiously following the receipt of the request for a hearing by the Office of the Administrative Law Judges, unless the parties mutually consent, in writing, to a later date.

(4) The decision of the administrative law judge shall be issued expeditiously after the conclusion of the hearing.

(5) The Secretary must offer evidence supporting the findings made in issuing the order.

(6) If the administrative law judge determines that the Secretary's evidence supports the findings on which the Secretary's order is based, the person requesting the hearing has the burden to show cause why the order should be modified or set aside. To meet this burden, such person must show by a preponderance of the evidence that the order as issued is not necessary to protect the interests of plan participants, plan beneficiaries, employers or employee organizations, or other members of the public.

(7) Any temporary cease and desist order for which a hearing has been requested shall remain in effect and enforceable, pending completion of the administrative proceedings, unless stayed by the Secretary or by a court.

(8) The Secretary may require that the hearing and all evidence be treated as confidential.

(f) *Summary seizure order.* (1) Subject to paragraphs (f)(2) and (3) of this section, the Secretary may issue a summary seizure order when the Secretary finds there is probable cause

to believe that a MEWA is in a financially hazardous condition.

(2) Except as provided in paragraph (f)(3) of this section, the Secretary, before issuing a summary seizure order to remove assets and records from the control and management of the MEWA or any persons having custody or control of such assets or records, shall obtain judicial authorization in the form of a warrant or other appropriate form of authorization from a federal court.

(3) If the Secretary reasonably believes that any delay in issuing the order is likely to result in the removal, dissipation, or concealment of plan assets or records, the Secretary may issue and serve a summary seizure order before seeking court authorization. Promptly following service of the order, the Secretary shall seek authorization from a federal court.

(4) A summary seizure order may authorize the Secretary to take possession or control of all or part of the books, records, accounts, and property of the MEWA (including the premises in which the MEWA transacts its business) to protect the benefits of plan participants, plan beneficiaries, employers or employee organizations, or other members of the public, and to safeguard the assets of employee welfare benefit plans. The order may also direct any person having control and custody of the assets that are the subject of the order not to allow any transfer or disposition of such assets except upon the written direction of the Secretary, or of a receiver or independent fiduciary appointed by a court.

(5) Following execution of a summary seizure order, the Secretary shall initiate a civil action under section 502(a) of ERISA, 29 U.S.C. 1132, to—

(i) Secure appointment of a receiver or independent fiduciary to perform any necessary functions of the MEWA;

(ii) Obtain court authorization for the Secretary, the receiver or independent fiduciary to take any other action to seize, secure, maintain, or preserve the availability of the MEWA's assets; and

(iii) Obtain such other appropriate relief available under ERISA to protect the interest of employee welfare benefit plan participants, plan beneficiaries, employers or employee organizations or other members of the public. Other appropriate equitable relief may include the liquidation and winding up of the MEWA's affairs and, where applicable, the affairs of any person sponsoring the MEWA.

(g) *Effective Date of Orders.* Cease and desist and summary seizure orders are effective immediately upon issuance by the Secretary and shall remain effective, except to the extent and until any

provision is modified or the order is set aside by the Secretary or a court.

(h) *Service of orders.* (1) As soon as practicable after the issuance of a temporary or final cease and desist order and no later than five business days after issuance of a summary seizure order, the Secretary shall serve the order either:

(i) By delivering a copy to the person who is the subject of the order. If the person is a partnership, service may be made to any partner. If the person is a corporation, association, or other entity or organization, service may be made to any officer of such entity. If the person is an employee welfare benefit plan, service may be made to a trustee or administrator. A person's attorney may accept service on behalf of such person;

(ii) By leaving a copy at the principal office, place of business, or residence of such person or attorney; or

(iii) By mailing a copy to the last known address of such person or attorney.

(2) If service is accomplished by certified mail, service is complete upon mailing. If service is done by regular mail, service is complete upon receipt by the addressee.

(3) Service of a temporary or final cease and desist order and of a summary seizure order shall include a statement of the Secretary's findings giving rise to the order, and, where applicable, a copy of any warrant or other authorization by a court.

3. Add § 2560.521–2 to read as follows:

**§ 2560.521–2 Disclosure of order and proceedings.**

(a) Notwithstanding § 2560.521–1(e)(8), the Secretary shall make available to the public final cease and desist and summary seizure orders or modifications and terminations of such final orders.

(b) Except as prohibited by applicable law, and at his or her discretion, the Secretary may disclose the issuance of a temporary cease and desist order or summary seizure order and information and evidence of any proceedings and hearings related to an order, to any Federal, State, or foreign authorities responsible for enforcing laws that apply to MEWAs and parties associated with, or providing services to, MEWAs.

(c) The sharing of such documents, material, or other information and evidence under this section does not constitute a waiver of any applicable privilege or claim of confidentiality.

4. Add § 2560.521–3 to read as follows:

**§ 2560.521–3 Effect on other enforcement authority.**

The Secretary's authority under section 521 shall not be construed to limit the Secretary's ability to exercise his or her enforcement or investigatory authority under any other provision of title I of ERISA. 29 U.S.C. 1001 *et seq.* The Secretary may, in his or her sole discretion, initiate court proceedings without using the procedures in this section.

5. Add § 2560.521–4 to read as follows:

**§ 2560.521–4 Cross-reference.**

*Cross-reference.* See 29 CFR 2571.1 through 2571.13 of this chapter for procedural rules relating to administrative hearings under section 521 of ERISA.

6. Add Part 2571 to read as follows:

**PART 2571—PROCEDURAL REGULATIONS FOR ADMINISTRATION AND ENFORCEMENT UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT**

**Subpart A—Procedures for Administrative Hearings on the Issuance of Cease and Desist Orders Under ERISA Section 521—Multiple Employer Welfare Arrangements**

Sec.

2571.1 Scope of rules.

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2571.11 Scope of review by the Secretary.

2571.12 Procedures for review by the Secretary.

**Authority:** 29 U.S.C. 1002(40), 1132, 1135; and 1151, Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010).

**Subpart A—Procedures for Administrative Hearings on the Issuance of Cease and Desist Orders Under ERISA Section 521—Multiple Employer Welfare Arrangements**

**§ 2571.1 Scope of rules.**

The rules of practice set forth in this part apply to ex parte cease and desist order proceedings under section 521 of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The rules of procedure for administrative hearings published by the Department's Office of Administrative Law Judges at part 18 of this Title will apply to matters arising under ERISA section 521 except as

modified by this section. These proceedings shall be conducted as expeditiously as possible, and the parties and the Office of the Administrative Law Judges shall make every effort to avoid delay at each stage of the proceedings.

**§ 2571.2 Definitions.**

For section 521 proceedings, this section shall apply in lieu of the definitions in § 18.2 of this title:

(a) *Adjudicatory proceeding* means a judicial-type proceeding before an administrative law judge leading to an order;

(b) *Administrative law judge* means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105;

(c) *Answer* means a written statement that is supported by reference to specific circumstances or facts surrounding the temporary order issued pursuant to 29 CFR 2560.521–1(c);

(d) *Commencement of proceeding* is the filing of an answer by the respondent;

(e) *Consent agreement* means a proposed written agreement and order containing a specified proposed remedy or other relief acceptable to the Secretary and consenting parties;

(f) *Final order* means a cease and desist order that is a final order of the Secretary of Labor under ERISA section 521. Such final order may result from a decision of an administrative law judge or of the Secretary on review of a decision of an administrative law judge, or from the failure of a party to invoke the procedures for a hearing under 29 CFR 2560.521–1 within the prescribed time limit. A final order shall constitute a final agency action within the meaning of 5 U.S.C. 704;

(g) *Hearing* means that part of a section 521 proceeding which involves the submission of evidence, either by oral presentation or written submission, to the administrative law judge;

(h) *Order* means the whole or any part of a final procedural or substantive disposition of a section 521 proceeding;

(i) *Party* includes a person or agency named or admitted as a party to a section 521 proceeding;

(j) *Person* includes an individual, partnership, corporation, employee welfare benefit plan, association, or other entity or organization;

(k) *Petition* means a written request, made by a person or party, for some affirmative action;

(l) *Respondent* means the party against whom the Secretary is seeking to impose a cease and desist order under ERISA section 521;

(m) *Secretary* means the Secretary of Labor or his or her delegate;

(n) *Section 521 proceeding* means an adjudicatory proceeding relating to the issuance of a temporary order under 29 CFR 2560.521-1 and section 521 of ERISA;

(o) *Solicitor* means the Solicitor of Labor or his or her delegate; and

(p) *Temporary order* means the temporary cease and desist order issued by the Secretary under 29 CFR § 2560.521-1(c) and section 521 of ERISA.

#### **§ 2571.3 Service: copies of documents and pleadings.**

For section 521 proceedings, this section shall apply in lieu of § 18.3 of this title:

(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, 800 K Street NW., Suite 400, Washington, DC 20001-8002, or to the OALJ Regional Office to which the section 521 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 a copy to the last known address. The Secretary shall be served by delivery to the Associate Solicitor, Plan Benefits Security Division, ERISA Section 521 Proceeding, P.O. Box 1914, Washington, DC 20013 and any attorney named for service of process as set forth in the temporary order. The person serving the document shall certify to the manner of date and service.

(c) *By the Office of Administrative Law Judges.* Service of orders, decisions, and all other documents shall be made in such manner as the Office of Administrative Law Judges determines to the last known address.

(d) *Form of pleadings.* (1) Every pleading or other paper filed in a section 521 proceeding shall designate the Employee Benefits Security Administration (EBSA) 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 8½ × 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.

#### **§ 2571.4 Parties**

For section 521 proceedings, this section shall apply in lieu of § 18.10 of this title:

(a) The term “party” wherever used in these rules shall include any person that is a subject of the temporary order and is challenging the temporary order under these section 521 proceedings, and the Secretary. A party challenging a temporary order shall be designated as the “respondent.” The Secretary shall be designated as the “complainant.”

(b) Other persons shall be permitted to participate as parties only if the administrative law judge finds that the final decision could directly and adversely affect them or the class they represent, that they may contribute materially to the disposition of the section 521 proceeding and their interest is not adequately represented by the existing parties, and that in the discretion of the administrative law judge the participation of such persons would be appropriate.

(c) A person not named in a temporary order, but wishing to participate as a respondent under this section shall submit a petition to the administrative law judge within fifteen (15) days after the person has knowledge of, or should have known about, the section 521 proceeding. The petition shall be filed with the administrative law judge and served on each person who has been made a party at the time of filing. Such petition shall concisely state:

(1) Petitioner’s interest in the section 521 proceeding (including how the section 521 proceedings will directly and adversely affect them or the class they represent and why their interest is not adequately represented by the existing parties);

(2) How his or her participation as a party will contribute materially to the disposition of the section 521 proceeding;

(3) Who will appear for the petitioner;

(4) The issues on which petitioner wishes to participate; and

(5) Whether petitioner intends to present witnesses.

(d) Objections to the petition may be filed by a party within fifteen (15) days of the filing of the petition. If objections to the petition are filed, the administrative law judge shall then determine whether petitioners have the requisite interest to be a party in the section 521 proceeding, as defined in paragraph (b) of this section, and shall permit or deny participation accordingly. Where persons with common interest file petitions to participate as parties in a section 521 proceeding, the administrative law judge may request all such petitioners to designate a single representative, or the administrative law judge may designate one or more of the petitioners to represent the others. The administrative law judge shall give each such petitioner, as well as the parties, written notice of the decision on his or her petition. For each petition granted, the administrative law judge shall provide a brief statement of the basis of the decision. If the petition is denied, he or she shall briefly state the grounds for denial and shall then treat the petition as a request for participation as *amicus curiae*.

#### **§ 2571.5 Consequences of default.**

For section 521 proceedings, this section shall apply in lieu of § 18.5(b) of this title: Failure of the respondent to file an answer to the temporary order within the 30-day period provided by 29 CFR 2560.521-1(e) shall constitute a waiver of the respondent’s right to appear and contest the temporary order. Such failure shall also be deemed to be an admission of the facts as alleged in the temporary order for purposes of any proceeding involving the order issued under section 521 of ERISA. The temporary order shall then become the final order of the Secretary, within the meaning of 29 CFR 2571.2(f), 30 days from the date of the service of the temporary order.

#### **§ 2571.6 Consent order or settlement.**

For section 521 proceedings, this section shall apply in lieu of § 18.9 of this title:

(a) *In general.* At any time after the commencement of a section 521 proceeding, the parties jointly may move to defer the hearing for a reasonable time in order to negotiate a settlement or an agreement containing findings and a consent order disposing of the whole or any part of the section 521 proceeding. The administrative law judge shall have discretion to allow or deny such a postponement and to determine its duration. In exercising

this discretion, the administrative law judge shall consider the nature of the section 521 proceeding, the requirements of the public interest, the representations of the parties and the probability of reaching an agreement that will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of the section 521 proceeding or any part thereof shall also provide:

(1) That the consent order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which the consent order is based shall consist solely of the notice and the agreement;

(3) A waiver of any further procedural steps before the administrative law judge;

(4) A waiver of any right to challenge or contest the validity of the consent order and decision entered into in accordance with the agreement; and

(5) That the consent order and decision of the administrative law judge shall be final agency action within the meaning of 5 U.S.C. 704.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement containing consent findings and an order to the administrative law judge;

(2) Notify the administrative law judge that the parties have reached a full settlement and have agreed to dismissal of the action subject to compliance with the terms of the settlement; or

(3) Inform the administrative law judge that agreement cannot be reached.

(d) *Disposition.* If a settlement agreement containing consent findings and an order, agreed to by all the parties to a section 521 proceeding, is submitted within the time allowed therefor, the administrative law judge shall incorporate all of the findings, terms, and conditions of the settlement agreement and consent order of the parties. Such decision shall become a final agency action within the meaning of 5 U.S.C. 704.

(e) *Settlement without consent of all respondents.* In cases in which some, but not all, of the respondents to a section 521 proceeding submit an agreement and consent order to the administrative law judge, the following procedure shall apply:

(1) If all of the respondents have not consented to the proposed settlement submitted to the administrative law judge, then such non-consenting parties must receive notice and a copy of the

proposed settlement at the time it is submitted to the administrative law judge;

(2) Any non-consenting respondent shall have fifteen (15) days to file any objections to the proposed settlement with the administrative law judge and all other parties;

(3) If any respondent submits an objection to the proposed settlement, the administrative law judge shall decide within thirty (30) days after receipt of such objections whether to sign or reject the proposed settlement. Where the record lacks substantial evidence upon which to base a decision or there is a genuine issue of material fact, then the administrative law judge may establish procedures for the purpose of receiving additional evidence upon which a decision on the contested issue may be reasonably based;

(4) If there are no objections to the proposed settlement, or if the administrative law judge decides to sign the proposed settlement after reviewing any such objections, the administrative law judge shall incorporate the consent agreement into a decision meeting the requirements of paragraph (d) of this section; and

(5) If the consent agreement is incorporated into a decision meeting the requirements of paragraph (d) of this section, the administrative law judge shall continue the section 521 proceeding with respect to any non-consenting respondents.

#### **§ 2571.7 Scope of discovery.**

For section 521 proceedings, this section shall apply in lieu of § 18.14 of this title:

(a) A party may file a motion to conduct discovery with the administrative law judge. The administrative law judge may grant a motion for discovery only upon a showing of good cause. In order to establish “good cause” for the purposes of this section, the moving party must show that the requested discovery relates to a genuine issue as to a fact that is material to the section 521 proceeding. The order of the administrative law judge shall expressly limit the scope and terms of the discovery to that for which “good cause” has been shown, as provided in this paragraph.

(b) Any evidentiary privileges apply as they would apply in a civil proceeding in federal district court. For example, legal advice provided by an attorney to a client is generally protected from disclosure. Mental impressions, conclusions, opinions, or legal theories of a party’s attorney or

other representative developed in anticipation of litigation are also generally protected from disclosure. An exception to these privileges, however, exists when an attorney advises a plan fiduciary on matters involving the performance of his or her fiduciary duties (called the “fiduciary exception”). Consequently, the administrative law judge may not protect from discovery communications between an attorney and a plan administrator or other fiduciary or work product that fall under the fiduciary exception to the attorney-client or work product privileges.

#### **§ 2571.8 Summary decision.**

For section 521 proceedings, this section shall apply in lieu of § 18.41 of this title:

(a) *No genuine issue of material fact.* Where the administrative law judge finds that no issue of a material fact has been raised, he or she may issue a decision which, in the absence of an appeal, pursuant to 29 CFR 2571.10 through 2571.12, shall become a final agency action within the meaning of 5 U.S.C. 704.

(b) A decision made under this paragraph, shall include a statement of:

(1) Findings of fact and conclusions of law, and the reasons thereof, on all issues presented; and

(2) Any terms and conditions of the ruling.

(c) A copy of any decision under this paragraph shall be served on each party.

#### **§ 2571.9 Decision of the administrative law judge.**

For section 521 proceedings, this section shall apply in lieu of § 18.57 of this title:

(a) *Proposed findings of fact, conclusions, and order.* Within twenty (20) days of the filing of 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, proposed findings of fact, conclusions of law, and order together with a supporting brief expressing the reasons for such proposals. Such proposals and briefs 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 of the administrative law judge.* The administrative law judge shall make his or her decision expeditiously after the conclusion of the section 521 proceeding. The decision of the administrative law judge shall include findings of fact and conclusions of law with reasons therefore 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 and shall be supported by reliable and probative evidence. The decision of the administrative law judge shall become final agency action within the meaning of 5 U.S.C. 704 unless an appeal is made pursuant to the procedures set forth in 29 CFR 2571.10 through 2571.12.

**§ 2571.10 Review by the Secretary.**

(a) The Secretary may review the decision of an administrative law judge. Such review may occur only when a party files a notice of appeal from a decision of an administrative law judge within twenty (20) days of the issuance of such a decision. In all other cases, the decision of the administrative law judge shall become the final agency action within the meaning of 5 U.S.C. 704.

(b) A notice of appeal to the Secretary shall state with specificity the issue(s) in the decision of the administrative law

judge on which the party is seeking review. Such notice of appeal must be served on all parties of record.

(c) Upon receipt of an appeal, the Secretary shall request the Chief Administrative Law Judge to submit to the Secretary a copy of the entire record before the administrative law judge.

**§ 2571.11 Scope of review by the Secretary.**

The review of the Secretary shall be based on the record established before the administrative law judge. There shall be no opportunity for oral argument.

**§ 2571.12 Procedures for review by the Secretary.**

(a) Upon receipt of a notice of appeal, the Secretary shall establish a briefing schedule which shall be served on all parties of record. Upon motion of one or more of the parties, the Secretary may, in her discretion, permit the submission of reply briefs.

(b) The Secretary shall issue a decision as promptly as possible after receipt of the briefs of the parties. The Secretary may affirm, modify, or set aside, in whole or in part, the decision on appeal and shall issue a statement of reasons and bases for the action(s) taken. Such decision by the Secretary shall be the final agency action with the meaning of 5 U.S.C. 704.

**§ 2571.13 Effective date.**

This regulation is effective with respect to all cease and desist orders issued by the Secretary under section 521 of ERISA at any time after [30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE].

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

**Phyllis C. Borzi,**

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

[FR Doc. 2011-30921 Filed 12-5-11; 8:45 am]

**BILLING CODE 4510-29-P**