registration. *See* Direct Wholesale, 69 FR 11654 (2004); ANM Wholesale, supra, 69 FR 11652; Shani Distributors, 68 FR 62324 (2003).

Based on the foregoing, the Deputy Administrator concludes that granting the pending application of Value would be inconsistent with the public interest. In sum, by its past conduct, Value has displayed a continuing history of illegal activity and an inability to discharge the responsibilities of a registrant.

Accordingly, the Deputy Administrator of the drug Enforcement Administration, pursuant to the authority vested in her by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders the pending application for DEA Certificate of Registration, previously submitted by Value Wholesale be, and it hereby is, denied. This order is effective November 1, 2004.

Dated: September 13, 2004.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 04–21948 Filed 9–29–04; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated May 5, 2004, and published in the **Federal Register** on May 26, 2004, (69 FR 29979), Varian, Inc. Lake Forest, 25200 Commercentre Drive, Lake Forest, California 92630–8810, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Phencyclidine (7471)	II
1-Piperidinocyclohexane-. carbonitrile (8603)	II
Benzoylecgonine (9180)	II

The company plans to manufacture small quantities of controlled substances for use in diagnostic products.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Varian, Inc. Lake Forest to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Varian, Inc. Lake Forest to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: September 16, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 04–21956 Filed 9–29–04; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF LABOR

Employment and Training Administration

Workforce Security Programs: Unemployment Insurance Program Letter Interpreting Federal Law

The Employment and Training Administration interprets Federal law requirements pertaining to unemployment compensation. These interpretations are issued in Unemployment Insurance Program Letters (UIPLs) to the State Workforce Agenices. UIPL 30–04 is published in the **Federal Register** to inform the public.

This UIPL concers the SUTA Dumping Prevention Act of 2004 (Pub. L. 108–295); SUTA refers to state unemployment tax acts. All states will need to amend their laws regarding the transfer of unemployment experience as a result of the new Federal law. This UIPL includes a detailed explanation of the law in question and answer format, draft legislative language, a conformity checklist for states, and the text of P.L. 108–295.

Dated: September 22, 2004.

Emily Stover DeRocco,

Assistant Secretary for Employment and Training.

Employment and Training Administration, Advisory System, U.S. Department of Labor, Washington, DC 20210

Classification: SUTA Dumping.

Correspondence Symbol: DL.

Date: August 13, 2004.

Advisory: Unemployment Insurance Program Letter No. 30–04.

To: State Workforce Agencies.

From: Cheryl Atkinson s/s, Administrator, Office of Workforce Security.

Subject: SUTA Dumping—Amendments to Federal Law affecting the Federal-State Unemployment Compensation Program.

1. *Purpose:* To advise states of the amendments to Federal law designed to prohibit ''SUTA Dumping.''

2. *References.* Public Law (Pub. L. 108–295, the ''SUTA Dumping Prevention Act of 2004,'' signed by the President on August 9, 2004; the Social Security Act (SSA); the Internal Revenue Code (IRC), including the Federal Unemployment Tax Act (FUTA); and Unemployment Insurance Program Letters (UIPLs) 29–83 (56 FR 54891 (October 23, 1991)), 29–83, Change 3 (61 FR 39156 (July 26, 1996)), 30–83, 15–84, and 34–02.

3. *Background.*

a. *In General.* Some employers and financial advisors have found ways to manipulate state experience rating systems so that these employers pay lower state unemployment compensation (UC) taxes than their unemployment experience would otherwise allow. This practice is called SUTA dumping. (''SUTA'' refer to state unemployment tax acts, but has also been said to stand for, among other things, ''State Unemployment Tax Avoidance.'') Most frequently, it involves merger, acquisition or restructuring schemes, especially those involving shifting of workforce/payroll. The legality of these SUTA dumping schemes varies depending on state laws. Public Law 108–295 amended the SSA to add a new Section 303(k) establishing a nationwide minimum standard for curbing SUTA dumping. All states will need to amend their UC laws to conform with new legislation.

Recissions: None.

Expiration Date: Continuing.

b. *Experience Rating.* All states operate experience rating systems in order for employers in the state to receive the additional credit against the Federal unemployment tax. (The tax credit scheme is explained in UIPL 30–83 and experience rating in UIPL 29–83.) Under experience rating, the state unemployment tax rate of an employer is, in most states, based on the amount of UC paid to former employees. The more UC paid to its former employees, the higher the tax rate of the employer, up to a maximum established by state law. Experience ratings helps ensure an equitable distribution of costs of the UC program among employers, encourages employers to stabilize their workforce, and provides an incentive for employers

to fully participate in the UC program. SUTA dumping thwarts these purposes.

c. *SUTA Dumping and the Amendments Made by P.L. 108–295.* The amendments to the SSA made by P.L. 108–295 are intended to prohibit the following two methods of SUTA dumping:

• An employer escapes poor experience (and high experience rates) by setting up a shell company and then transferring some or all of its workforce (and the accompanying payroll) to the shell company after the shell has earned a low experience rate. The transferred payroll is then taxed at the shell's lower rate.

• An entity commencing a business purchases an existing small business with a low UC tax rate. Instead of being assigned the higher new employer rate, the entity receives the small business's lower rate. Typically, the new business ceases the business activity of the purchased business and commences a different type of business activity.

Among other things, the SSA, as amended, requires state laws to prohibit these forms of SUTA dumping as a condition of states receiving administrative grants for the UC program. It also requires states to impose penalties for knowingly violating (or attempting to violate) these provisions of state law.

A more detailed discussion of these amendments, including effective dates, is contained in Attachment I. Draft language for use in crafting state legislation is contained in Attachment II. Attachment III contains a checklist for assisting states in determining the conformity of their laws with these amendments. Attachment IV contains the text of P.L. 108–295.

P.L. 108–295 also requires the Secretary of Labor to conduct a study ''of the implementation of'' the amendments ''to assess the status and appropriateness of State actions to meet'' their requirements. P.L. 108–295 also requires the Secretary to submit to the Congress, not later than July 15, 2007, a report that (1) assesses the statute and appropriateness of state actions to meet its new requirements, and (2) recommends any further Congressional action that the Secretary considers necessary to improve the effectiveness of the amendments. (See Section 2(b) of P.L. 108–295).

d. *Access to the National Directory of New Hires.* P.L. 108–295 also amended the SSA to permit the use of certain information in the National Directory of New Hires to be used by state UC agencies in the administration of Federal and state UC laws. The Department of Labor (Department) will provide more information on this amendment and its implementation in the future. It is not anticipated that this amendment will require states to amend their UC laws.

4. *Action.* State administrators should distribute this advisory to appropriate staff. States must adhere to the requirements of Federal law contained in this advisory.

5. *Inquiries.* Questions should be addressed to your Regional Office.

6. *Attachments.*

Attachment I—Detailed Explanation of Section 303(k), SSA—Questions and Answers.

Attachment II—Draft Legislative Language.

Attachment III—Conformity Checklist for State SUTA Dumping Laws.

Attachment IV—Text of P.L. 108–295[1]

Detailed Explanation of Section 303(k), SSA Questions and Answers

In General

1. Question: How do the SUTA dumping amendments affect the federal-state UC program?

Answer: States must assure their UC laws provide for the following:

• Mandatory Transfers. Unemployment experience must be transferred whenever there is substantially common ownership, management or control of two employers, and one of these employers transfers its trade or business (including its workforce), or a portion thereof, to the other employer. This requirement applies to both total and partial transfers of business

• Prohibited Transfers. Unemployment experience may not be transferred, and a new employer rate (or the state's standard rate) will instead be assigned, when a person who is not an employer acquires the trade or business of an existing employer. This prohibition applies only if the UC agency finds that such person acquired the business solely or primarily for the purpose of obtaining a lower rate of contributions.

• Penalties for SUTA Dumping. ''Meaningful'' civil and criminal penalties must be imposed on persons ''knowingly'' violating or attempting to violate the two requirements discussed above. These penalties must also be applicable to any person (including the person's employer) who knowingly gives advice leading to such a violation.

• Procedures. Procedures for identifying SUTA dumping must be established. The exact procedures do not need to be specified in state law, but state law must specifically provide for the establishment of such procedures.

These are the minimum requirements which all state laws must meet. States may provide for more stringent provisions, provided they are otherwise consistent with Federal UC law. For example, instead of requiring a partial transfer of experience only when there is common ownership, management or control, a state may require transfers of experience whenever a partial transfer of trade or business occurs.

2. *Question.* Do the SUTA dumping amendments require my state to completely overhaul its provisions relating to transfers of experience?

Answer. No. The amendments do not change the way states handle transfers except as discussed in the preceding Q&A. As a result, a state may leave its current provisions intact while amending its law to provide that any state law provisions implementing Section 303(k), SSA, override these other provisions. The draft legislative language attached to this UIPL takes this approach.

Mandatory Transfers—Section 303(k)(1)(A), SSA

3. *Question.* Under what conditions must experience be transferred?

Answer. Unemployment experience must be transferred whenever there is substantially common ownership, management or control of two employers, and one of these employers transfers its trade or business, or a portion thereof, to the other employer. Thus, this requirement applies to both total and partial transfers.

4. *Question.* Provide an example of when experience must be transferred under the amendments.

Answer. Corporation A is assigned the state's maximum UC contribution rate of 5.4%. It establishes a shell corporation that is treated as a separate employer for UC purposes. The shell eventually qualifies for the state's minimum UC contribution rate of .5%. (How the new entity obtains this rate may vary depending on how it was established and on the state's UC law. It may, for example, simply wait out a new employer period. If state law permits, it may use voluntary contributions to ''buy down'' to the minimum rate.) Corporation A then transfers all or some of its workforce to the shell. The result, absent the amendments, would be that, even though Corporation A controls the shell and its operations, it escapes a rate of 5.4% on the transferred workforce and instead pays at a rate of .5%.

Under the amendments, if the workforce is transferred to the shell, then the unemployment experience attributable to the transferred workforce must also be transferred to the shell. The shell's experience would be recomputed based on its experience as well as the experience transferred from Corporation A. Assuming a total transfer of workforce and experience to the shell, the shell might even continue to receive the maximum rate of 5.4%.

It does not matter whether the employer transfers all or some of its trade or business to the shell. Experience commensurate with the trade or business transferred must be transferred to the shell.

5. *Question.* Why is the employer's workforce part of the employer's ''trade or business'' and thus subject to the SUTA dumping amendments?

Answer. The employer's workforce is necessarily a part of its business and is the

[1] Attachment IV is available on the ETA Website at *http://ows.eta.gov/dmstree/uipl/uipl2k4/uipl_3004.htm.*

means by which an employer effectuates its trade or business. Without a workforce, there would be neither trade nor business. Thus, when some or all of the workforce is transferred, the employer no longer has the means of performing its trade or business with respect to the transferred workforce.

As noted elsewhere in this UIPL, the best-known means of SUTA dumping is the manipulation of an employer's workforce/payroll. Senate Majority Leader Frist specifically addressed this manipulation on the floor of the Senate when he stated that the amendment ''prohibits shifting employees into shell companies * * *'' (150 Cong. Rec. S8804 (daily ed. July 22, 2004)). The mandatory transfer provisions of the SUTA dumping amendments would have little, if any, effect if the workforce/payroll were not considered to be part of the employer's trade or business.

6. *Question.* How does a state determine if there is ''substantially'' common ownership, management, or control of two employers?

Answer. The state must examine the facts of each case using reasonable factors. Among other things, the state would consider the extent of commonality or similarity of: Ownership; any familial relationships; principals or corporate officers; organizational structure; day-to-day operations; assets and liabilities; and stated business purposes. The Department is not at this time establishing a bright line test of who constitutes ''substantially'' common ownership, management, or control.

Nothing prohibits a state from exceeding the minimum Federal requirement by lowering this threshold test to ''any'' common ownership, management or control. This will meet the Federal law requirement as it will include all cases where ''substantially common ownership, management or control'' exists.

7. *Question.* When is the transfer of trade or business effective?

Answer. When an acquisition of trade or business is concluded is usually determined by examining the legal documents related to any purchase or acquisition of the trade or business. However, in SUTA dumping cases among businesses with common ownership, management, or control, such an acquisition will generally not take place. Instead, there may simply be a different entity issuing the paychecks. That a different entity is issuing paychecks is both an indication of the transfer of the workforce and the effective date of the transfer of the workforce.

8. *Question.* Following the mandatory transfer of experience, when must states reassign the employers' rates?

Answer. Although the amendments require that the experience be combined, it does not specify when revised rates must be reassigned. As a result, states may either (1) assign revised rates for the predecessor and successor employers immediately upon completion of the transfer of trade or business, or (2) assign revised rates for the predecessor and successor the next time the state calculates rates for all employers.

For purposes of implementing this new mandatory transfer, the Department strongly recommends that states reassign rates immediately upon completion of the transfer. If rates are not reassigned until a later date, it is possible that a successful ''SUTA dump'' will be achieved during the period between the completion of the transfer and the assignment of a new rate. For example, if an employer with a rate of 5.4% transfers 1,000 employees into a shell with a rate of .1% on the first day of the rate year, the employer will have accomplished a ''SUTA'' dump for that rate year.

9. *Question:* An employee of one legal entity is moved to another legal entity. Although each entity is treated as a separate employer for UC purposes, there is substantially common control over the two entities. Does this mean that unemployment experience must be transferred?

Answer: No. When a single person is moved from one entity to another, it is merely a transfer of an individual rather than a transfer of trade or business.

10. *Question:* A state's UC law provides that any corporate shell or spin-offs where there is ''a continuity of control of the business enterprise'' will not be treated as a new employer for UC purposes, but instead as the same employer. Does this constitute an acceptable alternative to the mandatory transfer requirement?

Answer: While this provision prohibits many (if not most) SUTA dumps, it will not necessarily address all situations where there are cases of ''substantially common *ownership, management,* or control.'' (Emphasis added.) There may, for example, be cases where substantially common ownership exists, but that ownership does not exert a controlling interest. (For example, it is possible that a majority owner of two corporations could have non-voting stock.) This situation would require a transfer of experience under Section 303(k), SSA, even if ''substantially common control'' did not exist.

States with such ''continuity'' provisions will meet the requirements of Section 303(k)(1)(A), SSA, concerning mandatory transfers if they amend their provisions to be as specific as the Federal requirement. This is, the ''continuity'' provision may be amended to provide that there is no new employer where there is ''substantially common ownership, management, or control.''

Instead of providing for amendments addressing the mandatory transfer of experience, states may wish to amend their laws to provide for a ''continuity'' provision. A ''continuity'' provision may be easier to administer because, if all entities with substantially common ownership, management and control are always treated as being a single employer under the state UC law, the issue of transfers or experience would not arise. An example of such a law is California's, which was quoted in UIPL 34–02. (Note that California's law is limited to continuity of control, and thus, does not currently meet the Federal requirement.) The penalties described below would need to apply to violations and attempted violations of any ''continuity'' provision.

11. *Question:* How are professional employer organizations (PEOs) affected by the new mandatory transfer requirement?

Answer: The same rules apply to PEOs as any other employer. If a PEO sets up a shell corporation and transfers some or all of its trade or business to the shell, then the unemployment experience associated with the transferred trade or business must be transferred to the shell. Similarly, if the conditions prohibiting transfers of experience are met, as discussed in Questions and Answers 16–18, they would apply to PEOs.

Except for these mandatory/prohibited transfers, the amendments do not otherwise affect the relationship between the PEO and its clients. States currently vary in their treatment of PEOs and their clients for experience rating purposes. Some states treat the client as the employer for experience rating purposes and others treat the PEO as the employer for these purposes. The amendments do not require states to change this treatment.

12. *Question:* A PEO sets up several different shells. Each year it shifts all its clients to a different shell. For example, in the first year the client contracts with Shell A; in the second, it contracts with Shell B; and in the third it contracts with Shell C. When this occurs, must experience be transferred from Shell A to Shell B and then to Shell C?

Answer: Yes. By dictating that the client must sign with a particular shell (or otherwise manipulating which shell the client signs with), the PEO is effectively transferring its trade/business—that is, the trade/business of performing services as a PEO for a client—from Shell A to Shell B and then to Shell C. The control exercised by the PEO over which shell is the contracting entity meets the test of ''substantial control.'' Since a transfer of trade/business has occurred and substantial commonality of control exists, experience must be transferred.

13. *Question:* May my state limit the mandatory transfer provision to large transfers of experience, such as those where 300 or more employees are transferred?

Answer: No. The SUTA dumping amendments apply to all transfers, large and small, where there is substantially common ownership, management or control.

14. *Question:* Current state law requires partial transfers of experience only when an ''identifiable and segregable'' component of an employer has been transferred to another employer. Is this an acceptable limitation on partial transfers?

Answer: No. States must transfer experience whenever ''a part'' of an existing business is transferred.

The bill that eventually became P.L. 108–295 was H.R. 3463. As introduced, H.R. 3463 required transfers of experience only when there was a transfer of an ''identifiable and segregable'' component of the employer. That language was deleted after the Department alerted Congressional staff of concerns that it would create a loophole allowing SUTA dumping. Thus, states must transfer experience whenever ''a part'' of an existing business is transferred.

For example, larger businesses are often divided into separate legal entities. Under the ''identifiable and segregable'' test as commonly applied under many current state UC laws, a transfer of experience would be mandated only if all of the trade and business

of one legal entity is acquired by another legal entity. Conversely, if only a part of the entity is acquired by another entity, then no ''identifiable and segregable'' component could be identified and no transfer of experience would be required. As a result, the limitation relating to an ''identifiable and segregable'' component could easily be circumvented through transferring the majority of employees from one entity into a shell that had earned the state's minimum tax rate.

15. *Question:* How is experience transferred when no identifiable and segregable component of a business can be identified? For example, Business A sets up a shell. Business A then transfers 90% of its workforce to the shell.

Answer: States may prorate the payroll of the employees transferred against benefit charges/ reserve balance/benefit wages, whichever is appropriate. In determining the payroll transferred, the state may use either taxable or total payroll, but it must be the payroll immediately prior to the transfer of workforce.

Thus, assuming a state uses total payroll, if 90% of Business A's total payroll was transferred to the shell, 90% of the experience attributable to Business A (that is, benefit charges, reserve balance, or benefit wages, or payroll, whichever is appropriate) must be transferred to the shell. This method is acceptable only when no identifiable and segregable component can be identified.

It should be noted that, in this case, a ''continuity'' provision, as discussed in Question and Answer #10, would hold that the shell is not a separate employer. As a result, the issue of a transfer of experience would not arise.

Prohibited Transfers—Section 303(k)(1)(B), SSA

16. *Question:* Under what conditions are states prohibited from transferring experience under the SUTA dumping amendments?

Answer: Unemployment experience may not be transferred, and a new employer rate or the state's standard rate will instead be assigned, when a person who is not an employer acquires the trade or business of an existing employer. However, this prohibition applies only if the UC agency finds that such person acquired the business solely or primarily for the purpose of obtaining a lower rate of contributions. (The identification of a state's standard rate is explained in UIPL 15–84.)

17. *Question:* Provide an example of when experience may not be transferred under the amendments.

Answer: The amendment prohibiting transfers is intended to address situations where a person, who is not an employer, purchases a small business solely or primarily for the purpose of obtaining its low rate of contributions when it commences its new business. Generally, the small business is converted to a different type of business.

For example, Person A is not an employer. Person A purchases a flower shop, which has earned the minimum UC rate of .5 percent to begin a manufacturing business. Person A either stops the flower business, or it becomes incidental as non-flower-shop payroll overwhelms it. Had Person A not purchased the flower shop, it would have been assigned a new employer rate of 4.5 percent based on its non-flower shop industry. The facts here should lead the state UC agency to conclude that the purchase was primarily for the purpose of obtaining a lower rate of contributions. Thus, under the amendments, state laws may not permit the experience of the flower shop to be transferred to Person A. Instead, Person A will be assigned the applicable new employer rate (or the state's standard rate) until such time as Person A qualifies for a rate based on experience.

18. *Question:* How will a state determine if the acquisition of an employer was made ''solely or primarily for the purpose of obtaining a lower rate of contributions?''

Answer: The state should ''use objective factors which may include the cost of acquiring the business, whether the person continued the business enterprise of the acquired business, how doing such business enterprise was continued, or whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted prior to acquisition.'' (The quoted language is from the Draft Legislative Language in Attachment II.) The cost of acquiring a business may be used as an objective factor because this cost, as compared with any potential savings in contributions costs, will indicate the extent to which UC tax savings may accrue.

State law may not arbitrarily limit the criteria to be used. For example, some state laws currently consider only whether the business enterprise of the acquired business is continued. This limitation would allow an impermissible SUTA dump to occur as it does not address situations where the purchaser continues the acquired business while flooding the business (and the experience account) with a substantial number of employees performing duties unrelated to the acquired business. For this reason, the draft legislative language is written to refer to ''objective factors *which include*'' those listed. (Emphasis added.)

Required Penalties—Section 303(k)(1)(D), SSA

19. *Question:* What penalties must be imposed under state law?

Answer: State law must provide that ''meaningful civil and criminal penalties'' are imposed with respect to—

- Persons who ''knowingly violate or attempt to violate'' those provisions of the state's UC law that implement Section 303(k), SSA.
- Persons who ''knowingly advise another person to violate those provisions of'' state UC laws that implement Section 303(k), SSA.

''Knowingly'' is defined as ''having actual knowledge of *or* acting with deliberate ignorance of *or* reckless disregard for the prohibition involved.'' (Emphasis added. Section 303(k)(2)(E), SSA.)

20. *Question:* Must penalties be imposed in every case of SUTA dumping that is identified?

Answer: No. The penalties only apply to persons who ''knowingly violate or attempt to violate'' the SUTA dumping provisions of state law.

However, when a determination issued by the appropriate authority or a consent order establishes that a person ''knowingly'' violated (or attempted to violate) a state's SUTA dumping provisions, then civil penalties must be imposed. States will take into account the amounts at issue and the likelihood of successful projection in determining which cases will result in criminal prosecutions.

In cases where a SUTA dumping investigation results in a settlement between the state and the employer in which the employer admits no wrongdoing, their has been no clear establishment of SUTA dumping. In such cases, Federal law does not require the imposition of a penalty.

21. *Question:* What is a ''meaningful'' penalty?

Answer: To be ''meaningful,'' the penalty musts have the effect of curtailing SUTA dumping. Minimal penalties will not accomplish this end.

Concerning cases where only civil penalties are imposed, a monetary penalty must be of sufficient size that an employer will not be tempted to SUTA dump. A flat fine against SUTA dumping may not be a meaningful deterrent. For example, if a corporation that attempted to dump $2 million in SUTA taxes is fined $5,000, this will likely not be a meaningful deterrent against future attempts to SUTA dump. For that reason, the draft legislative language attached to this UIPL takes the approach that an employer who violated (or attempted to violate) the SUTA dumping prohibitions be assessed the maximum tax rate, or, if assigning the maximum rate does not result in a rate increase of at least 2% of taxable wages, then a penalty rate of 2% of taxable wages will instead be assessed for the rate year in which the violation occurred (or was attempted) and the following three years. States are free to vary this penalty (including assessing both rate increases and fines) but any penalty must have significant financial impact to have a deterrent effect.

22. *Question:* May state law limit the civil penalties to rate increases?

Answer: No. UC rate increases are not applicable to self-employed individuals who knowingly advise employers to SUTA dump. As a result, state law also needs to provide for fines against individuals. The draft legislative language attached to this UIPL takes the approach that rate increases will be applied to employers and fines to non-employers.

23. *Question:* Do the SUTA dumping amendments specify the uses of any financial penalties collected by the UC agency?

Answer. No. The draft legislative language attached to this UIPL operates on the assumption that, as is the case with any other UC contributions payable under a state's UC law, any amounts paid due to any rate increase will be deposited in the state's unemployment fund in which case they may be withdrawn *only* for the payment of benefits. Also, under the draft legislative language, any fines will be deposited in the state's penalty and interest account. States may limit the use of these fines to SUTA dumping and other integrity activities.

Payrolling

24. *Question:* Do the SUTA dumping amendments address situations where one employer reports its payroll under another employer's account?

Answer: No. Although this practice, commonly called ''payrolling,'' has been known for some time, it is not addressed by the amendments. ''Payrolling'' may also include cases where two unrelated businesses negotiate for a fee to have all or part of the employer with the higher UC rate report its payroll as belonging to the other employer. A PEO was recently found to be ''payrolling'' by shifting *its* payroll to the account of a client with a lower rate. In each case, the employers are fraudulently reporting who is the employer of an individual.

Unlike the manipulations the SUTA dumping amendments are designed to prevent, ''payrolling'' should already be explicitly prohibited under all states' UC laws since it involves an employer submitting fraudulent documents concerning who is an individual's employer for UC purposes.

Recognizing that ''payrolling'' has the same effect as SUTA dumping, the Draft Legislative Language is written so that its penalties will apply to ''payrollers.'' It provides that the penalties apply not just to the mandatory and prohibited transfers required by new Section 303(k), SSA but also to violations or attempted violations of ''any other provision of this Chapter related to determining the assignment of a contribution rate.''

Establishing Procedures—Section 303(k)(1)(E), SSA

25. *Question:* What must my state law say regarding establishing procedures to detect SUTA dumping?

Answer: The state law must say that the state will establish procedures to ''identify the transfer or acquisition of a business for purposes of'' detecting SUTA dumping. (Section 303(k)(1)(E), SSA.) The state law is not required to specify the procedures. The Department does not believe that it is desirable to legislate what these procedures *must* be as the most effective procedures may vary over time. As a result, the Draft Language does not specify procedures. However, the state must implement procedures to detect SUTA dumping.

Other

26. *Question:* What does ''person'' mean for purposes of the amendments?

Answer: ''Person'' has ''the meaning given such term by section 7701(a)(1) of the Internal Revenue of 1986.'' (Section 303(k)(2)(F), SSA.) Section 7701(a)(1), IRC, defines ''person'' as meaning ''an individual, a trust, estate, partnership, association, company or corporation.'' Thus, the term ''person'' is very broad; it includes entities that may be employers under state law and it includes individuals who are not employers.

27. *Question:* What does ''employer'' mean for purposes of the amendments?

Answer: ''Employer'' means ''an employer as defined under state law.'' (Section 303(k)(2)(B), SSA) Typically, ''employer'' will mean an entity that pays sufficient wages based on employment to be subject to the state's UC law. If state UC law does not use the term ''employer,'' then, for purposes of determining what entity is an employer, the state should use whatever term it uses to describe this entity. For example, many states use the term ''employing unit'' to describe this entity.

28. *Question:* What does ''business'' mean for purposes of the amendments?

Answer: ''Business'' means ''a trade or business (or a part thereof).'' (Section 303(k)(2)(c), SSA.)

Effective Date

29. *Question:* By what date must the states amend their UC laws?

Answer: The amendments do not specify a date. Instead, they apply to ''rate years beginning after the end of the 26-week period beginning on the first day of the first regularly scheduled session of the State legislature beginning on or after the date of the enactment'' of Public Law 108–295, which was August 9, 2004. (See Section 2(c) of Public Law 108–295.) Thus, transfer of experience required or prohibited under the amendments must be effective for such rate years. Notice prohibits states from providing for earlier effective dates. Indeed, states are encouraged to make their amendments effective as soon as possible.

All states currently have rate years beginning either January 1 or July 1. Also, almost all states' first legislative sessions following the date of enactment will begin in the first three months of 2005. As a result, after taking into account the 26-week grace period, the amendments in most states must be effective for rate years beginning on or after January 1, 2006, or on or after July 1, 2006, whichever is applicable in the state.

For purposes of determining when the 26-week period ends, the state should start counting on the first day of the first regularly scheduled session of the state legislature and count up to 182 (26 weeks × 7 days = 182 days). Any rate year beginning after the 182nd day must apply the SUTA dumping amendments.

The following table indicates the required effective dates:

EFFECTIVE DATES

First day of state's first regularly scheduled session	State's rate year begins	Effective for rate years beginning
January 1–July 3, 2005	January 1	January 1, 2006.
	July 1	July 1, 2006.
July 4–December 31, 2005	January 1	January 1, 2007.
	July 1	July 1, 2006.
January 1–July 3, 2006	January 1	January 1, 2007.
	July 1	July 1, 2007.

30. *Question:* The state's legislature has adjourned. However, it is scheduled to meet in a one-day session that is limited to over-riding vetoes. This one-day session is consistently scheduled to occur a specific number of days after the state legislature has adjourned. Although the legislature adjourned prior to the date of enactment of Public Law 108–295, the one-day session occurs after the date of enactment. Does this veto session count as the ''first day of the first regularly scheduled session'' following enactment?

Answer: No. The effective date provisions recognize that states need time to amend their laws. A legislative session where the introduction and enactment of new legislation is prohibited will, therefore, not be considered as starting the clock for purposes of determining when rates must be assigned consistent with new Section 303(k), SSA. If, one the other hand, legislation may be introduced and enacted in such a one-day session, the clock will start.

Attachment II

Draft Legislative Language

The following language is provided for state use in developing language that meets the requirements of Section 303(k), SSA, as added by Public Law 108–295, on SUTA dumping.

States will need to modify the language to accord with state usage. For example, ''Commissioner'' should be changed to the name of the agency administering the state's UC program if that is the state convention. Similarly, legal usages, such as ''Chapter'' to refer to the state's UC law, should be changed to accord with state convention.

The following language assumes the state wishes to add a separate section addressing SUTA dumping. States may chose instead to integrate the following provisions into existing state law. If this is the case, states should use this language in conjunction with the Checklist in Attachment III to assure all necessary amendments are made. Similarly, states modifying the language should test such modifications against the Checklist.

Section _____. Special Rules Regarding Transfers of Experience and Assignment of Rates. Notwithstanding any other provision

of law, the following shall apply regarding assignment of rates and transfers of experience:

(a) If an employer transfers its trade or business, or a portion thereof, to another employer and, at the time of the transfer, there is substantially common ownership, management or control of the two employers, then the unemployment experience attributable to the transferred trade or business shall be transferred to the employer to whom such business is so transferred. The rates of both employers shall be recalculated and made effective immediately upon the date of the transfer of trade or business.[1]

(b) Whenever a person [2] who is not an employer [3] under this Chapter at the time it acquires the trade or business of an employer, the unemployment experience of the acquired business shall not be transferred to such person if the Commissioner finds that such person acquired the business solely or primarily for the purpose of obtaining a lower rate of contributions. Instead, such person shall be assigned the [applicable] [4] new employer rate under section [insert section of state law]. In determining whether the business was acquired solely or primarily for the purpose of obtaining a lower rate of contributions, the Commissioner shall use objective factors which may include the cost of acquiring the business, whether the person continued the business enterprise of the acquired business, how long such business enterprise was continued, or whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted prior to acquisition.

(c)(1) If a person knowingly violates or attempts to violate subsections (a) and (b) or any other provision of this Chapter related to determining the assignment of a contribution rate,[5] or if a person knowingly advises another person in a way that results in a violation of such provision, the person shall be subject to the following penalties:

(A) If the person is an employer, than such employer shall be assigned the highest rate assignable under this Chapter for the rate year during which such violation or attempted violation occurred and the three rate years immediately following this rate year. However, if the person's business is already at such highest rate for any year, or if the amount of increase in the person's rate would be less than 2 percent for such year, then a penalty rate of contributions of 2 percent of taxable wages shall be imposed for such year.

(B) If the person is not an employer, such person shall be subject to a civil money penalty of not more than $5,000. Any such fine shall be deposited in the penalty and interest account established under [insert appropriate section of state law.]''[6]

(2) For purposes of this section, the term ''knowingly'' means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.

(3) For purposes of this section, the term ''violates or attempts to violate'' includes, but is not limited to, intent to evade, misrepresentation or willful nondisclosure.[7]

(4) In addition to the penalty imposed by paragraph (1), any violation of this section may be prosecuted as a [insert appropriate language; for example ''a class A felony'' or ''a Class B misdemeanor''] under Section [insert appropriate section] of the Criminal Code.[8]

(d) The Commissioner shall establish procedures to identify the transfer or acquisition of a business for purposes of this section.

(e) For purposes of this section—

(1) ''Person'' has the meaning given such term by section 7701(a)(1) of the Internal Revenue Code of 1986, and

(2) ''Trade of business'' shall include the employer's workforce.[9]

(f) This section shall be interpreted and applied in such a manner as to meet the minimum requirements contained in any guidance or regulations issued by the United States Department of Labor.[10]

Attachment III

Conformity Checklist for State SUTA Dumping Laws

Questions	Yes or no
1. **Mandatory Transfers**. If Employer A transfers its trade or business (including its workforce) to Employer B, does the state law mandate the transfer of experience from Employer A to Employer B when there is ''substantially common'' ownership, management or control:	
Does this mandate apply to both total and partial transfers?	
2. **Prohibited Transfer**. Does state law prohibit the transfer of experience (that is, does it require a new employer rate be assigned) when a person becomes an employer by acquiring an existing employer if the purpose of the acquisition was to obtain a lower rate?	
Does this prohibition apply to a ''person'' who, prior to the acquisition of the employer, had (a) no individuals in its employ and (b) some employment, but not enough to be an ''employer'' for purposes of state law?	
3. **Penalties**. Does state law impose ''meaningful civil penalties'' for ''knowingly'' violating and attempting to violate the above?	
Why is the penalty ''meaningful?''	
Does state law impose meaningful criminal penalties for the same?	
Are these penalties applicable to both the person who commits the violation and any person (including the employer of the advice-giver) who knowingly gives advice leading to such a violation?	
Does state law address the situation where the person giving the advice may not be an employer? (*E.g.,* self-employed financial advisors?)	
Does the definition of ''knowingly'' at a minimum mean ''having actual knowledge of or acting with deliberate ignorance of or reckless disregard of the law''?	
4. **Procedures**. Does the law require the establishment of procedures to identify SUTA dumping?	
5. **Additional Procedures/Mandates**. Optional. Does state law require/prohibit the transfer of experience in accordance with any regulations of the Secretary of Labor may prescribe? (If not, future amendments to state laws may be necessary.)	

[1] See Question and Answer 8, which contains the Department's recommendation that rates be recomputed immediately.

[2] The term ''person'' is used consistent with the usage in Section (k)(1)(B), SSA. It encompasses a broad range of entities who are not ''employers.'' It includes both entities who are not ''employers'' because they have no payroll or insufficient payroll. Note the definition of ''person'' given in subsection (e)(1) of the draft language.

[3] States should determine if ''employer'' is the appropriate term here and in other appearances in this draft language. For example, a state may use the term ''employing unit'', ''subject employer,'' or ''employer liable for contributions'' to describe an entity that is subject to taxation under the state's UC law.

[4] The word ''applicable'' is intended to address situations where not all ''new'' employers receive the same rate. For example, many states assign new employer rates by industry code.

[5] See Question and Answer 24 regarding payrolling.

[6] This provision permits penalty to be applied to self-employed financial advisers and individual employees of business. See Question and Answer 23 regarding the deposit of the fines in the penalty and interest account.

[7] This provisions—paragraph (3)—is optional. An actual listing of violations may help to deter these violations.

[8] States should assure that the criminal penalties cited are applicable to both individuals and corporations.

[9] See Question and Answer 5 regarding whether workforce is part of the employer's ''trade or business.'' This definition assures that questions will not arise about whether an employer's workforce is included in ''trade or business.''

[10] Subsection (f) is optional. States are encouraged to include such language to avoid potential conflicts with any Federal regulations finalized after enactment of state law. The language is written in terms of minimum Federal requirements to assure states are free to adopt more stringent protections to avoid SUTA dumping.

[FR Doc. 04–21917 Filed 9–29–04; 8:45 am]
BILLING CODE 4510–30–M

OFFICE OF PERSONNEL MANAGEMENT

[RI 20–64, RI 20–64A, and RI 20–64B]

Proposed Collection; Comment Request for Review of a Revised Information Collection

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), this notice announces that the Office of Personnel Management (OPM) intends to submit to the Office of Management and Budget (OMB) a request for review of a revised information collection. RI20–64, You May Provide a Survivor Annuity for Your Former Spouse, is used by the Civil Service Retirement System to provide information about the amount of annuity payable after a survivor reduction and to offer eligible annuitants an opportunity to make a former spouse survivor annuity election. RI 20–64A, Former Spouse Survivor Annuity Election, is the election form the annuitant uses to make such an election. RI 20–64B, Information on Electing a Survivor Annuity for Your Former Spouse, is a pamphlet that provides important information to retirees under the Civil Service Retirement System who want to provide a survivor annuity for a former spouse.

Comments are particularly invited on: whether this information is necessary for the proper performance of functions of OPM, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or others forms of information technology.

Approximately 30 RI 20–64A forms are completed annually. The form takes approximately 45 minutes to complete. The annual estimated burden is 23 hours.

For copies of this proposal, contact Mary Beth Smith-Toomey on (202) 606–8358, FAX (202) 418–3251 or via e-mail to mbtoomey@opm.gov. Please include a mailing address with your request.

DATES: Comments on this proposal should be received within 60 calendar days from the date of this publication.

ADDRESSES: Send or deliver comments to—Ronald W. Melton, Deputy Assistant Director, Retirement Services Program, Center for Retirement and Insurance Services, U.S. Office of Personnel Management, 1900 E Street, NW., Room 3305, Washington, DC 20415–3540.

For Information Regarding Administrative Coordination—Contact: Cyrus S. Benson, Team Leader, Publications Team, Administrative Services Branch, (202) 606–0623.

U.S. Office of Personnel Management.

Kay Coles James,

Director.

[FR Doc. 04–21923 Filed 9–29–04; 8:45 am]
BILLING CODE 6325–38–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Filings and Information Services, 450 Fifth Street, NW., Washington, DC 20549.

Extension:
Rule 15g–9, SEC File No. 270–325, OMB Control No. 3235–0385.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. Sections 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Section 15(c)(2) of the Securities Exchange Act of 1934 (the ''Exchange Act'') authorizes the Commission to promulgate rules that prescribe means reasonably designed to prevent fraudulent, deceptive, or manipulative practices in connection with over-the-counter (''OTC'') securities transactions. Pursuant to this authority, the Commission in 1989 adopted Rule 15a–6 (the ''Rule''), which was subsequently redesignated as Rule 15g–9, 17 CFR 240.15g–9. The Rule requires broker-dealers to produce a written suitability determination for, and to obtain a written customer agreement to, certain recommended transactions in low-priced stocks that are not registered on a national securities exchange or authorized for trading on NASDAQ, and whose issuers do not meet certain minimum financial standards. The Rule is intended to prevent the indiscriminate use by broker-dealers of fraudulent, high pressure telephone sales campaigns to sell low-priced securities to unsophisticated customers.

The staff estimates that approximately 240 broker-dealers incur an average burden of 78 hours per year to comply with this rule. Thus, the total burden hours to comply with the Rule is estimated at 18,720 hours (240 × 78).

The broker-dealer must keep the written suitability determination and customer agreement required by the Rule for at least three years. Completing the suitability determination and obtaining the customer agreement in writing is mandatory for broker-dealers who effect transactions in penny stocks and do not qualify for an exemption, but does not involve the collection of confidential information. Please note that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

General comments regarding the estimated burden hours should be directed to (i) the Desk Officer for the SEC, by sending an email to *David_Rostker@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: September 20, 2004.

Margaret H. McFarland,

Deputy Secretary.

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BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:
Rule 17a–1, SEC File No. 270–244, OMB Control No. 3235–0208.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information discussed below.

Rule 17a–1 under the Securities Exchange Act of 1934 (the ''Act'')