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**Reporting by Multiple Employer Welfare
Arrangements and Certain Other Entities
That Offer or Provide Coverage for
Medical Care to the Employees of Two or
More Employers; Assessment of Civil
Penalties under Section 502(c)(5) of
ERISA; Procedures for Administrative
Hearings Regarding the Assessment of
Civil Penalties Under Section 502(c)(5) of
ERISA; Final Rules**

DEPARTMENT OF LABOR**Employee Benefits Security Administration****29 CFR Part 2520**

RIN 1210-AA64

Reporting by Multiple Employer Welfare Arrangements and Certain Other Entities that Offer or Provide Coverage for Medical Care to the Employees of Two or More Employers**AGENCY:** Employee Benefits Security Administration, Department of Labor.**ACTION:** Final rule.

SUMMARY: This document contains a final rule governing certain reporting requirements under Title I of the Employee Retirement Income Security Act of 1974 (ERISA) for multiple employer welfare arrangements (MEWAs) and certain other entities that offer or provide coverage for medical care to the employees of two or more employers. The final rule generally requires the administrator of a MEWA, and certain other entities, to file a form with the Secretary of Labor for the purpose of determining whether the requirements of certain recent health care laws are being met.

DATES: *Effective Date:* This final rule is effective January 1, 2004.

Compliance Dates: If a filing is required for an entity, it is due on or before each March 1 following the period to be reported. A 90-day origination report is also required to be filed as described in paragraph (e)(2)(ii) of §2520.101-2. (Therefore, the first filing required under this final rule is the 2003 Form M-1, which is generally required to be filed by March 1, 2004. Prior to that date, filings are due in accordance with §2520.101-2 contained in the 29 CFR revised as of July 1, 2002.

FOR FURTHER INFORMATION CONTACT: Amy J. Turner or Deborah S. Hobbs, Employee Benefits Security Administration, U.S. Department of Labor, Room C-5331, 200 Constitution Avenue, NW., Washington, DC 20210 (telephone (202) 693-8335).

SUPPLEMENTARY INFORMATION:

Customer Service Information: The Department of Labor's Employee Benefits Security Administration (EBSA) is committed to working together with administrators to help them comply with this filing requirement. The Form M-1, as well as the publication MEWAs; Multiple Employer Welfare Arrangements Under the Employee Retirement Income Security Act: A Guide to Federal and

State Regulation, are available by calling EBSA toll free at 1-866-444-3272 and on the Internet at: <http://www.dol.gov/ebsa>. In addition, the EBSA Help Desk (telephone (202) 693-8360) is available to answer questions (such as whether an entity is required to file a report) and to provide assistance in completing a report. If you have other questions about this reporting requirement, or about the requirements of the recent health care laws in Part 7 of ERISA, you may call the Office of Health Plan Standards and Compliance Assistance at 202-693-8335. If you have questions about the definition of a MEWA (including the exception for collectively bargained plans under 29 CFR 2510.3-40), or coverage questions concerning whether a plan is or is not subject to the provisions of Title I of ERISA, you may call the Office of Regulations and Interpretations, Division of Coverage, Reporting and Disclosure at 202-693-8500. Copies of Form M-1 filings are available over the Internet at: askebsa.dol.gov/epds.

A. Background

The Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104-191) (HIPAA) amended ERISA to provide for, among other things, improved portability and continuity of health insurance coverage. The Mental Health Parity Act of 1996 (Pub. L. 104-204, as amended by Pub. L. 107-116 and Pub. L. 107-147) (MHPA) amended ERISA to provide parity in the application of annual and lifetime dollar limits for certain mental health benefits with such dollar limits on medical and surgical benefits. The Newborns' and Mothers' Health Protection Act of 1996 (Pub. L. 104-204) (Newborns' Act) amended ERISA to provide new protections for mothers and their newborn children with regard to the length of hospital stays in connection with childbirth. The Women's Health and Cancer Rights Act of 1998 (WHCRA) (Pub. L. 105-277) amended ERISA to provide individuals new rights for reconstructive surgery in connection with a mastectomy. All of the foregoing provisions are set forth in part 7 of subtitle B of title I of ERISA (Part 7).

HIPAA also added a new section 101(g) to ERISA providing the Secretary with the authority to require, by regulation, annual MEWA reporting. Specifically, this section provides that the Secretary of Labor may, by regulation, require multiple employer welfare arrangements providing benefits consisting of medical care (within the meaning of section 733(a)(2)) which are not group health plans to report, not more frequently than annually, in such

form and such manner as the Secretary may require for the purpose of determining the extent to which the requirements of Part 7 are being carried out in connection with such benefits.

The term "multiple employer welfare arrangement" is defined in section 3(40) of ERISA to mean, in pertinent part an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing [welfare plan benefits] to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained under or pursuant to one or more agreements which the Secretary of Labor finds to be collective bargaining agreements, by a rural electric cooperative, or by a rural telephone cooperative association.

For purposes of this definition, 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, and 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.¹

An interim final rule implementing the MEWA reporting requirement was published in the **Federal Register** on February 11, 2000 at 65 FR 7152. The interim final rule generally required the administrator of a MEWA (or certain other entity that offers or provides coverage for medical care to the employees of two or more employers) to file the Form M-1 Annual Reporting Requirement for Multiple Employer

¹ This provision was added to ERISA by the Multiple Employer Welfare Arrangement Act of 1983, Sec. 302(b), Pub. L. 97-473, 96 Stat. 2611, 2612 (29 U.S.C. 1002(40)), which also amended section 514(b) of ERISA. Section 514(a) of ERISA provides that state laws that relate to employee benefit plans are generally preempted by ERISA. Section 514(b) sets forth several exceptions to the general rule of section 514(a) and subjects employee benefit plans that are MEWAs to various levels of state regulation depending on whether the MEWA is fully insured. Sec. 302(b), Pub. L. 97-473, 96 Stat. 2611, 2613 (29 U.S.C. 1144(b)(6)).

Welfare Arrangements and Certain Entities Claiming Exception with the Secretary of Labor for the purpose of determining whether the requirements of part 7 are being met.

This reporting requirement also responds to a 1992 recommendation of the General Accounting Office (GAO). See "Employee Benefits: States Need Labor's Help Regulating Multiple Employer Welfare Arrangements," March 1992, GAO/HRD-92-40. In that report, the GAO detailed a history of fraud and abuse by some MEWAs and recommended that the Department develop a mechanism to help states identify MEWAs. The problems pointed out in that report continue to this date. By the end of Fiscal Year 2002, the Department had initiated approximately 522 civil and 90 criminal investigations (with 70 criminal convictions) affecting over 1.825 million participants and beneficiaries and involving monetary violations of over \$121.6 million. During the last three years, the Department has had an average of over 100 MEWA cases under active investigation. Thus, the identification of problem MEWAs and correction of violations remains an important investigative priority and consumes substantial resources.

In the preamble to the February 2000 interim final regulation, the Department sought comments from those affected. After consideration of all the comments received on the MEWA reporting requirement, the Department is publishing this final rule. The final rule does not significantly modify the reporting requirement established in the interim rule. Instead, several clarifications were added to make clearer the application of the reporting requirement to different types of arrangements. Some of these clarifications were initially issued in the form of question-and-answer guidance during the period of interim effectiveness of this rule and were included in the instructions to the Form M-1 in Years 2000, 2001, and 2002.

B. Overview of the Final Rule

(1) Definitions

(a) *Entity Claiming Exception (ECE)*. The final rule retains the term "entity claiming exception" or "ECE." An "ECE" is defined as an entity that claims it is not a MEWA due to the exception in section 3(40)(A)(i) of ERISA. In general, this exception is for entities that are established or maintained under or pursuant to one or more agreements that the Secretary finds to be collective bargaining agreements. In connection with this

exception, today the Department is also publishing a final regulation under ERISA section 3(40) setting forth specific criteria that, if met and if certain other factors set forth in the regulation are not present, constitute a finding by the Secretary of Labor that a plan is maintained pursuant to one or more collective bargaining agreements and, therefore, excluded from the definition of a MEWA. See 29 CFR 2510.3-40. In a separate regulation also published today, the Department adopts a process pursuant to which a plan or other arrangement may, if subject to an action under state law, seek an individualized finding from a Department of Labor Administrative Law Judge (ALJ). See 29 CFR 2570.150 through 2570.159.

However, because some entities may incorrectly claim the exemption under § 2510.3-40, this final rule retains the requirement that ECEs file a Form M-1 with the Department for three years following an "origination" (the three-year rule). Of course, if an entity does have a determination from an ALJ that it is a collectively-bargained plan, that entity does not have to file while the opinion remains in effect unless the circumstances underlying the determination change.

Moreover, because some operators of insurance fraud schemes continue to market health coverage to small employers under the guise of collectively bargained plans using, among other things, sham unions and collective bargaining agreements, in an effort to avoid state insurance regulation, the retention of the three-year rule provides an important enforcement tool for the Department and state insurance departments, while imposing little burden on bona fide collectively bargained plans. Finally, bona fide collectively bargained plans and their sponsors also benefit from the early identification of sham MEWA operators.

Under the final rule, as under the interim final rule, the term origination continues to be defined as the occurrence of any of the following three events: (1) The MEWA or ECE first begins offering or providing coverage for medical care to the employees of two or more employers (including one or more self-employed individuals); (2) The MEWA or ECE begins offering or providing coverage for medical care to the employees of two or more employers (including one or more self-employed individuals) after a merger with another MEWA or ECE (unless all of the MEWAs or ECEs that participate in the merger previously were last originated at least three years prior to the merger); or (3)

The number of employees receiving coverage for medical care under the MEWA or ECE is at least 50 percent greater than the number of such employees on the last day of the previous calendar year (unless the increase is due to a merger with another MEWA or ECE under which all MEWAs and ECEs that participate in the merger were last originated at least three years prior to the merger).

(b) *Excepted Benefits*. The final rule adds a definition of "excepted benefits" and defines the term by reference to section 733(c) of ERISA and 29 CFR 2590.732(b). This definition was added because of a clarification that MEWAs or ECEs that provide coverage consisting solely of excepted benefits are not required to report under this section. This clarification is discussed in more detail below, under the heading Persons required to report.

(2) Persons Required To Report

Paragraph (c) of the final rule sets forth the persons required to report under the final rule. As under the interim final rule, the final rule requires filing by the administrator of a MEWA that provides benefits consisting of medical care, whether or not the MEWA is a group health plan. It also requires filing by the administrator of an ECE that offers or provides coverage consisting of medical care during the first three years after the ECE is originated.

The final rule also contains language to clarify the scope of the reporting requirement. The clarifications were initially included in question-and-answer guidance published by the Department in April and June of 2000, and are described in the Instructions to the Form M-1 for the Years 2000, 2001, and 2002.

(a) *Exception for coverage consisting solely of excepted benefits*. First, because coverage consisting solely of excepted benefits is not subject to the requirements of part 7 of ERISA (pursuant to ERISA sections 732 and 733 and § 2590.732), the final rule provides that a MEWA or ECE is not subject to this filing requirement if it provides coverage that consists solely of excepted benefits. However, if the MEWA or ECE provides coverage that consists of both excepted benefits and other benefits for medical care that are not excepted benefits (and is, therefore, subject to the requirements of part 7 of ERISA), the administrator of the MEWA or ECE is required to file the Form M-1.

(b) *Exceptions for coverage not subject to ERISA*. In addition, because governmental plans, church plans, and

plans maintained solely for the purpose of complying with workmen's compensation laws (as defined in sections 4(b)(1), 4(b)(2) and 4(b)(3) of ERISA, respectively) are not covered by Title I of ERISA, the final rule provides that a MEWA or ECE is not subject to the filing requirement if it is a governmental plan, church plan, or plan maintained solely for the purpose of complying with workmen's compensation laws. Similarly, the final rule also provides that a MEWA or ECE is not subject to the filing requirement under this section if it provides coverage only through governmental plans, church plans, or plans maintained solely for the purpose of complying with workmen's compensation laws (or other arrangements not covered by Title I of ERISA, such as health insurance coverage offered to individuals other than in connection with a group health plan, known as individual market coverage). However, if a MEWA provides coverage both to group health plans that meet the definition of a governmental plan, church plan, or plan maintained solely for the purpose of complying with workmen's compensation laws and to any group health plan that is subject to part 7 of ERISA, the MEWA is required to file the Form M-1.

(c) *Other exceptions.* Finally, the final rule also contains a clarification that reporting is not required if an entity would not constitute a MEWA or ECE but for any of the three circumstances described below.

(1) *Common control interest of at least 25 percent.* The first of these circumstances relates to the treatment of two or more trades or businesses as a single employer for purposes of the definition of MEWA if the trades or businesses are within the same control group. Section 3(40)(a)(1)(B) defines the term "control group" to mean a group of trades or businesses under common control, and provides that trades or businesses that are part of the same "control group" are deemed to be a single employer for purposes of the definition of MEWA. It then states that the determination of whether a trade or business is under "common control" with another trade or business is to 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, except that common control shall not be based on an interest of less than 25 percent. The Department has not issued any regulations under this provision.

Commenters argued that arrangements where businesses maintain significant ownership interests in other businesses and provide benefits under the same health plan are not the kinds of arrangements that historically have been found to lead to problems with fraud and failure to provide promised benefits. The Department agrees and has modified the final rule accordingly.

The final rule clarifies that a filing is not required on behalf of certain plans or other arrangements that provide coverage to the employees of two or more employers that share a common control interest. Specifically, if an entity would not constitute a MEWA or ECE but for the fact that it provides coverage to the employees of two or more trades or businesses that share a common control interest of at least 25 percent at any time during the plan year (applying the principles applied under section 414(b) or (c) of the Internal Revenue Code), a Form M-1 filing is not required. However, while use of a 25 percent test may result in a determination of common control for purposes of the Form M-1 filing requirement, common control generally means, under sections 414 (b) and (c) of the Internal Revenue Code, an 80 percent interest in the case of a parent-subsidary group of trades or businesses and a more than 50 percent interest in the case of a brother-sister relationship among organizations controlled by five or fewer persons that are the same persons with respect to each organization.

(2) *Temporary MEWAs created by a change in control.* The second of these circumstances that will not, by itself, trigger a filing relates to temporary arrangements providing medical benefits to the employees of more than one employer that are created by a change in control of the business. This exception was suggested by a commenter who argued that entities that end up covering employees of another employer for a brief period of time by virtue of a change in business ownership should not be required to file a Form M-1. The commenter suggested that the Department define "temporary" to mean that the arrangement does not extend beyond the end of the plan year following the plan year in which the change in control occurs.

Commenters explained how change in control transactions may take place over a period of time, and the health plan for a control group may therefore be providing medical benefits to the employees of more than one employer for a temporary period. According to one source cited by a commenter, reasons that a transaction may occur

over a period of time include the need to obtain financing, the need to obtain various regulatory approvals, and the need to "iron out the details" of the transaction.

The Department agrees with the comment and has modified the final rule to create an exception for arrangements that would not constitute MEWAs but for their creation in connection with a change in control of businesses (such as a merger or acquisition) and which are temporary in nature (*i.e.*, do not extend beyond the end of the plan year following the plan year in which the change in control occurs). The change in control must occur for a purpose other than avoiding Form M-1 filing.

(3) *Very small number of persons who are not employees or former employees.* The last of the circumstances that will not, by itself, trigger a filing is an exception for entities that would not be a MEWA or ECE but for the fact that they cover a very small number of persons (excluding spouses and dependents) who are not employees or former employees of the plan sponsor. For example, an arrangement may cover non-employee members of the board of directors of the plan sponsor or individuals classified as independent contractors. The final rule provides that any entity is not required to file the Form M-1 if it would not be a MEWA but for the fact that it provides coverage to persons who are not employees nor former employees (including those participants on COBRA continuation coverage)² of the sponsor (excluding spouses and dependents) and the number of such persons does not exceed one percent of the total number of employees or former employees covered by the arrangement, determined as of the last day of the year to be reported (or, in the case of a 90-day origination report, determined as of the 60th day following the origination date).

(d) *Persons not excepted.* Some commenters argued that MEWAs that are fully-insured should not be required to report. One commenter argued that coverage under insurance contracts that have been approved by state regulators complies with part 7 by virtue of this

² The term "employee" is defined in section 3(7) of ERISA as any individual employed by an employer, and includes all common law employees. See also *National Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992) ("Darden does not cite, and we do not find, any provision [of ERISA] either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. Thus, we adopt a common-law test for determining who qualifies as an 'employee' under ERISA * * *").

state approval. The final rule makes no change to the scope of the reporting requirement because the purpose of the Form M-1 filing requirement is largely to evaluate compliance with part 7 of ERISA. The evaluation of part 7 compliance requires a determination that the group health plan is in compliance both on the face of the plan documents (including the plan's insurance policy) and in operation. The Form M-1 requires the administrator of the MEWA to answer as to whether the coverage it provides is in compliance with part 7. The answer to this question should address compliance both on the face of the documents and in operation. This evaluation is as important for fully-insured arrangements as it is for self-insured arrangements.

Moreover, as noted earlier, the Form M-1 reporting requirement is an important enforcement tool for the Department and state insurance departments. While, in part, this reporting requirement serves as a vehicle for reviewing compliance with the requirements of part 7 of ERISA, the Form M-1 also serves as the only national registry of MEWAs operating throughout the United States. For this reason, it is important that fully-insured MEWAs continue to file the Form M-1.

One commenter asked what authority the Department has to ask about compliance with part 7 by insured group health plans, presumably because of the fact that section 502(b)(3) of ERISA provides that the Secretary is not authorized to enforce any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan. The Secretary does, however, have authority to enforce the requirements of part 7 against all group health plans, whether insured or self-insured.

Several comments on the MEWA/ECE reporting requirement were also received from representatives of Professional Employer Organizations (PEOs). In general, PEO representatives have argued that, for a variety of reasons, they should be treated as "co-employers" and, accordingly, their group health plans should not be considered MEWAs. While PEOs have sought to distinguish themselves from employee leasing companies on the basis of a "co-employer" relationship with employees, the Department is unable to conclude that the group health plans maintained by PEOs, like the plans maintained by employee leasing companies, do not cover the employees

of more than one employer.³ For this reason the final regulation does not create an exception from the filing requirement.

The Department recognizes that other arguments were also made on behalf of PEOs to support either a complete or limited exception from the requirement to file a Form M-1. However, this registration regulation allows the Department to collect information to facilitate compliance with the requirements of part 7. As noted earlier, it is also an important enforcement tool for the Department and state insurance departments and serves as the only national registry of MEWAs operating throughout the United States. It also responds to the GAO's recommendation in its 1992 GAO report entitled "States Need Labor's Help Regulating Multiple Employer Welfare Arrangements," where the GAO detailed a history of fraud and abuse by MEWAs and recommended a federal MEWA registration requirement. GAO/HRD-92-40, March 1992.

(3) Extensions

An extension may be granted for filing reports if the administrator complies with the extension procedure prescribed in the Instructions to the Form M-1.

One commenter argued that the extension of time to file should be longer than the 60 days provided in the Instructions to the Form M-1 in certain special circumstances. Specifically, the commenter stated that the 60-day period is not adequate for a merger or acquisition context. This comment has been addressed in the final regulation by creating an exception from the filing requirement for a MEWA that is created by a change in control of businesses and is temporary in nature. (This exception to the reporting requirement is discussed above, under the discussion of Persons Required to Report).

(4) Civil Penalties and Procedures

Paragraph (g) of the final rule contains a cross-reference for civil penalties and procedures. The penalty and procedure regulations are being published

³ The Department has issued a number of advisory opinions over the years under which an arrangement providing benefits for medical care and sponsored by an employee leasing company was found to be a MEWA. See, e.g., Advisory Opinion 91-17A to L.J. Darter, III (April 5, 1991); Advisory Opinion 91-47A to Lee P. Jedziniak (December 20, 1991); Advisory Opinion 92-04A to Sandra Milburn (January 27, 1992); Advisory Opinion 92-05A to Chuck Huff (January 27, 1992); Advisory Opinion 92-07A to Lee P. Jedziniak (February 20, 1992); Advisory Opinion 93-29A to Alfred W. Gross (November 2, 1993); Advisory Opinion 95-22A to Dale Robison (August 25, 1995); and Advisory Opinion 95-29A to Kevin W. Ahern (December 7, 1995).

separately in this issue of the **Federal Register**.⁴ In this regard, ERISA section 502(c)(5), as amended by HIPAA, provides for the assessment of a penalty for the failure or refusal to file a report pursuant to section 101(g) of ERISA, as amended by HIPAA. The penalty and procedure regulations are designed to parallel the procedures set forth in 29 CFR 2560.502c-2 regarding civil penalties under section 502(c)(2) of ERISA relating to reports required to be filed under ERISA section 101(b)(4). In general these regulations provide that, in the event of no filing, an incomplete filing, or a late filing, a penalty may apply of up to \$1,000 a day (or a higher amount if adjusted pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996) for each day that the administrator of a MEWA or ECE fails or refuses to file a complete report. For information relating to administrative hearings and appeals in connection with the assessment of civil penalties under section 502(c)(5) of ERISA, see 29 CFR 2570.90 through 2570.101 (published in this issue of the **Federal Register**).

C. Regulatory Impact Analysis

The total cost of the reporting requirement as implemented by this final rule is estimated to be \$403,000, or about \$200 for each of the 2,000 entities expected to be required to file the annual reporting form for MEWAs, the Form M-1. No additional cost is attributable to the clarifying changes made in this final rule. Although the benefits have not been quantified, EBSA believes that the cost of the filing requirement is more than justified by the benefits associated with ensuring uniform adherence to the requirements and protections added to ERISA by HIPAA, MHPA, the Newborns' Act, and WHCRA. HIPAA amended ERISA to add section 101(g), which authorizes the Secretary of Labor to require reporting by MEWAs that are not group health plans for the purpose of determining their compliance with part 7 of ERISA. The principal intent of Congress in enacting this provision was to ensure that all participants and beneficiaries of such arrangements receive these health care protections.

The reporting requirement implemented by this final rule provides the most cost effective means of facilitating compliance with part 7 of ERISA, as well as with the full range of other Federal and State requirements

⁴ Moreover, other relevant criminal penalties may apply. See, e.g., ERISA § 501 and 18 U.S.C. 1021, 1027, and 1035.

that may apply to MEWAs under ERISA, the Internal Revenue Code, the Public Health Service Act, and State insurance laws. The data collected as a result of the filing requirement will ultimately serve as the only source of complete and uniform information identifying these arrangements, helping Federal and State regulators to evaluate their compliance with all applicable requirements. Evaluation of compliance based on the information reported is significantly more cost effective for both governmental entities and MEWAs than the alternative of active intervention by compliance examiners.

Ensuring compliance by these arrangements is beneficial to participants and beneficiaries who are able to fully realize their rights under these statutes. The greater assurance of compliance is also beneficial because compliance by these arrangements with various provisions that apply to them has been shown to be inconsistent. Although the provisions of Title I of ERISA generally supercede State laws that relate to employee benefit plans, the regulation of MEWAs is a joint Federal and State responsibility pursuant to ERISA.

Because State insurance statutes are not uniform, an arrangement doing business in more than one State may be required to comply with a range of States' varying requirements. Identification of these entities through this reporting requirement helps to ensure that administrators of these arrangements are aware of the requirements that apply, and that the protections intended to be provided are actually implemented for the benefit of employers and of participants who obtain their group health coverage through these arrangements.

Ancillary benefits arise from the public disclosure of this data. Participants with greater access to information about the arrangements through which they obtain their group health coverage may better exercise their rights in the event of a dispute with the arrangement. The data collected also enhance capability to conduct analysis of the market segment represented by MEWAs, which is useful to policy makers in evaluating the role of these entities in providing access to employment-based health care benefits.

When the Department developed its initial estimates of the number of filers and the costs potentially associated with these filings, it acknowledged a significant degree of uncertainty with respect to the number of entities that would be required to file. Although reasonable estimates were available from the Form 5500 Annual Return/

Report of Employee Benefit Plan data for the potential number of Entities Claiming Exemption and multiple-employer group health plans that file the Form 5500, no information was available that specifically identified the universe of MEWAs that are not group health plans under ERISA.

To develop the estimates used in the analysis of the potential impact of the interim final rule, the Department considered information from several sources. The first of these was the GAO study from 1992,⁵ which indicated there were about 1,000 MEWAs doing business in the states in 1991. These figures are not current, and the MEWA universe is known to be variable over time relative to health insurance market cost fluctuations. Surveys of association members⁶ with respect to group health plan sponsorship were also reviewed. This information, adjusted conservatively for low response rates, suggested the existence of about 1,200 health plans sponsored by associations. The overlap between plan and non-plan MEWAs within this number is unclear, however.

A third source of information was a RAND Corporation analysis of the 1997 Robert Wood Johnson Foundation Employer Health Insurance Survey as it pertains to pooled purchasing arrangements.⁷ This analysis suggested the existence of 4,000 to 4,800 multiple employer arrangements, including collectively bargained group health plans, association plans, and MEWAs. The data reviewed was establishment-based, and the imputation of the number of arrangements reported by establishments to employer sponsored group health plans was thought to introduce additional uncertainty into the estimate of the possible universe of filers.

As a result of data limitations and uncertainty within available data, the Department conservatively estimated that about 2,700 entities would file Form M-1. A substantial degree of uncertainty remained about this estimate, and we reported a possible range of 1,000 to 4,000. Actual filer counts have been significantly lower, totaling approximately 600 in each of the three years (*i.e.*, 1999–2001) for which complete data are available at this time. In the Department's view,

⁵ "EMPLOYEE BENEFITS—States Need Labor's Help Regulating Multiple Employer Welfare Arrangements," GAO/HRD-92-40.

⁶ "Survey of Association Member Health Plans," W.G. Morneau & Associates/American Society of Association Executives, 1993 and 1997.

⁷ "Pooled Purchasing: Who Are the Players?" Stephen H. Long and M. Susan Marquis, "Health Affairs," July–August 1999.

actual experience to date may differ from the estimate for several reasons, the first of these being the limited level of confidence in the original estimate. Based on past history of non-compliance of MEWAs with a variety of regulatory requirements, the Department assumes that the actual number of filers continues to reflect incomplete compliance with this still relatively new filing requirement. Further, the Department is still in the process of implementing its civil penalty enforcement program to correct compliance failures, which faces the same significant challenges in identifying non-filers as are faced in developing reliable estimates of the number of MEWAs doing business at any given time. Finalization of this rule and the clarifications incorporated in the final rule may also help to ensure that potentially affected parties are aware of the filing requirement.

The Department still has no data to support a more accurate estimate of the filer universe than that represented by actual filers. However, it reviewed available information on its active enforcement cases involving MEWAs to determine the degree to which those MEWAs had complied with the M-1 filing requirement. This information showed that about 42% of the MEWAs undergoing investigation that were required to file the M-1 had complied with the requirement. If this rate of non-compliance applies to all MEWAs, about 1,400 MEWAs would be required to file the M-1 annually.

Because the rate of non-compliance may differ from that found in the sample of enforcement cases, and because the Department continues to believe that full compliance has not yet been achieved, it has selected 2,000 as a conservative estimate of the number of potential filers of the M-1. This is approximately the mid-point between the number projected at the time of publication of the interim final rule, and the 1,400 developed from the number of actual filers adjusted for what is known about non-compliance in the available sample of MEWAs.

To develop the current cost estimate of the cost of the filing requirement, the Department looked at the characteristics of the actual filers and applied the relevant factors to the projected number of filers. In its original estimates, the Department differentiated filing preparation time by whether a filer did business in more than one state, and whether or not the filer was fully insured. The existing filer data offers more information about the actual characteristics of filers. For purposes of these estimates, it is assumed that

available data is representative of all filers.

Original estimates, as well as those shown here, were based on the assumption that 2 hours of start-up time for learning the law and becoming familiar with the form and instructions would be required for all filers, and that a range of 50 minutes for single state filers to 1 hour and 35 minutes for multiple state filers would be required for Part III of the form. Part IV was estimated to require 15 minutes for fully insured filers, and 30 minutes for non-fully insured filers. It was also assumed that 100% of filings would be made by providers of service to the MEWA administrators, and thus result in the payment of fees rather than in the expenditure of time.

Approximately 50% of actual filers report doing business in multiple states, and 50% in single states. Also, about 50% of all filers, without regard to the number doing business in single or multiple states, report being fully insured in most or all of the states in which they do business. Applying these ratios to the estimate of 2,000 filers results in estimates of 1,000 MEWAs doing business in multiple states, 1,000 in single states, 1,000 fully insured MEWAs, and 1,000 not-fully insured. The resulting cost estimate is about \$403,000, or \$200 per filer on average. This estimate incorporates updated assumptions for wage rates and increased postage rates. Of the projected filers, about 15%, or about 300 filers are expected to have fewer than 100 participants, based upon the number of actual filers with fewer than 100 participants. As noted earlier, this is the total estimated cost of the filing requirement; no incremental cost is considered to be associated with this final rule.

Executive Order 12866 Statement

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 subject to review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a "significant regulatory action" is an action that is likely to result in a rule (1) having an annual effect of 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. This action is significant under section 3(f)(4) because it raises novel legal or policy issues arising from the President's priorities. Accordingly, OMB has reviewed this regulatory action.

Paperwork Reduction Act

The Department of Labor submitted the Form M-1 and instructions to OMB for emergency review and approval at the time of publication of the interim final rule on February 11, 2000. OMB subsequently approved the ICR on March 2, 2000 under control number 1210-0116. On November 22, 2000, OMB approved the Department's request for extension of the emergency approval for a three-year period ending November 30, 2003. This final rule does not implement any substantive or material change to the information collection, and as such, no change is made to the ICR, and no further review is requested of OMB at this time. The estimated burden hours and costs associated with the information collection have been adjusted to reflect an updated estimate of the likely number of respondents as well as updated wage and postal rates. Estimates of the number of filers and burden hours and costs are shown below.

You may address requests for copies of the ICR to Joseph S. Piacentini, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N-5718, Washington, DC 20210. Telephone: (202) 693-8410; Fax: (202) 219-5333. These are not toll-free numbers

Agency: U.S. Department of Labor, Employee Benefits Security Administration.

Title: Annual Report for Multiple Employer Welfare Arrangements and Certain Entities Claiming Exception.

Form: M-1.

Affected Public: Business or other for-profit; Individuals or households, Not-for-profit institutions.

OMB Control Number: 1210-0116.

Frequency of Response: Annually.

Respondents: 2,000.

Response time: Ranges from 2 hours to 3 hours and 50 minutes based on characteristics of filer.

Responses: 2,000.

Estimated Burden Hours: 1.

Estimated Annual Cost (Operating and Maintenance): \$403,000.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and likely to have a significant economic impact on a substantial number of small entities. Unless the agency certifies that a rulemaking action subject to section 553(b) is not likely to have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present a final regulatory flexibility analysis at the time of publication of the notice of final rulemaking describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions.

Because these rules were issued as interim final rules and not as a notice of proposed rulemaking, the RFA does not apply and the Department is not required to either certify that the rule will not have a significant economic impact on a substantial number of small entities, or conduct a regulatory flexibility analysis. The Department did, however, take the potential impact on small entities into account in developing the interim final and final rules. The Department defines a small entity for purposes of its RFA analyses as an employee benefit plan with fewer than 100 participants. This definition is grounded in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for certain employee benefit plans which cover fewer than 100 participants. Based on actual filer data, about 15% of filers are expected to be small. This results in an estimate of 300 small MEWAs being required to file Form M-1. The average cost to all filers, including the highest average cost filers—those not-fully insured and those doing business in multiple states—is about \$200 per year. The cost to small MEWA filers is expected to be lower than average due to the lower likelihood that they are not fully insured, and that they do business in many states. This cost is not expected to be considered substantial for any entity. The Department has developed a form for the collection of data, and has included voluntary worksheets with the form that are designed to assist with compliance and ease compliance burdens for all filers.

Small Business Regulatory Enforcement Fairness Act

The final rule being issued here is subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been transmitted to Congress and the Comptroller General for review. The rule is not a "major rule" as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Unfunded Mandates Reform Act

Pursuant to provisions of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), this rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or the private sector, which may impose an annual burden of \$100 million or more.

Federalism Statement Under Executive Order 13132

Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the states, the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Agencies promulgating regulations that have these federalism implications must consult with state and local officials, and describe in the preamble to the regulation the extent of their consultation and the nature of the concerns of state and local officials, as well as the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of state and local officials have been met.

In the Department's view, these final regulations do not have federalism implications because they do not have substantial direct effects on the states, the relationship between the national government and the states, or on the distribution of power and

responsibilities among various levels of government. Not only do these regulations not reduce state discretion, the reports they require will facilitate state enforcement of their own laws as they apply to MEWAs since the reports will be available to the states and will identify MEWAs operating in each state.

Although the Department concludes that these final regulations do not have federalism implications, in keeping with the spirit of the Executive Order that agencies shall closely examine any policies that may have federalism implications or limit the policy making discretion of the states, the Department of Labor engages in extensive efforts to consult with and work cooperatively with affected state and local officials.

For example, the Department attends quarterly meetings of the National Association of Insurance Commissioners (NAIC) to listen to the concerns of state insurance departments. The NAIC is a non-profit corporation established by the insurance commissioners in the 50 states, the District of Columbia, and the four U.S. territories that, among other things, provides a forum for the development of uniform policy when uniformity is appropriate. Its members meet, discuss, and offer solutions to mutual problems. The NAIC sponsors quarterly meetings to provide a forum for the exchange of ideas, and in-depth consideration of insurance issues by regulators, industry representatives, and consumers. In addition to the general discussions, committee meetings, and task force meetings, the NAIC sponsors standing HIPAA meetings for members during the quarterly conferences, including a Centers for Medicare and Medicaid Services (CMS)/Department of Labor (DOL) meeting on HIPAA issues. (This meeting provides CMS and DOL the opportunity to provide updates on regulations, bulletins, enforcement actions, and outreach efforts regarding HIPAA.) In these quarterly meetings, issues relating to MEWAs and the implementation of the Form M-1 filing requirement are frequently discussed and, periodically, entire sessions are scheduled that are dedicated exclusively to MEWA/Form M-1 issues.

The Department also cooperates with the states in several ongoing outreach initiatives, through which information is shared among federal regulators, state regulators, and the regulated community. For example, the Department has established a Health Benefits Education Campaign with more than 70 partners, including CMS, the NAIC, and many business and consumer groups. In addition, the Department website offers links to important state websites and other resources,

facilitating coordination between the state and federal regulators and the regulated community.

The Department also coordinates with state insurance departments to freeze assets when a MEWA operator is committing fraud or operating in a financially unsound manner. In these situations, typically, a state will obtain a cease and desist order to stave off further action by the MEWA in that state. In certain situations, the Department will then obtain a temporary restraining order (TRO) to freeze assets of the MEWA nationwide. In one case this year, the Department obtained a TRO to freeze assets of a MEWA whose operators were committing fraud and not paying benefits. This case affects more than 23,000 participants and beneficiaries in 50 states and the amount of unpaid claims could exceed \$6 million. In a similar case last year, the Department obtained a TRO to freeze assets of a MEWA that was diverting plan assets for personal use of the MEWA's operators. That case affected at least 1,500 participants and \$2.8 million in unpaid claims. A court order was also issued in that case appointing an independent fiduciary to manage the MEWA.

In conclusion, the Department has stayed in contact with state regulators and considered their concerns in developing these regulations. These regulations should help the states enforce their own laws as they apply to MEWAs since the reports they require will be available to them and will identify MEWAs operating in each state.

Statutory Authority

29 U.S.C. 1021, 1027, 1059, 1132, 1135, 1181-1183, 1181 note, 1185, 1185a-b, 1191, 1191a-c; Secretary of Labor's Order 1-2003, 68 FR 5374 (Feb. 3, 2003).

List of Subjects in 29 CFR Part 2520

Accounting, Employee benefit plans, Pensions, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, part 2520 of Chapter XXV of Title 29 of the Code of Federal Regulations is amended as follows:

PART 2520—[AMENDED]

■ 1. The authority for part 2520 continues to read:

Authority: 29 U.S.C. 1021-1025, 1027, 1029-31, 1059, 1134 and 1135; Secretary of Labor's Order 1-2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2520.101-2 also issued under 29 U.S.C. 1132, 1181-1183, 1181 note, 1185, 1185a-b, 1191, and 1191a-c. Secs. 2520.102-

3, 2520.104b-1 and 2520.104b-3 also issued under 29 U.S.C. 1003, 1181-1183, 1181 note, 1185, 1185a-b, 1191, and 1191a-c. Secs. 2520.104b-1 and 2520.107 also issued under 26 U.S.C. 401 note, 111 Stat. 788. Sec. 2520.101-3 is also issued under 29 U.S.C. 1021(i).

■ 2. Section 2520.101-2 is revised to read:

§ 2520.101-2 Annual Reporting by Multiple Employer Welfare Arrangements and Certain Other Entities Offering or Providing Coverage for Medical Care to the Employees of Two or More Employers.

(a) *Basis and scope.* Section 101(g) of the Employee Retirement Income Security Act (ERISA) permits the Secretary of Labor to require, by regulation, multiple employer welfare arrangements (MEWAs) providing benefits that consist of medical care (within the meaning of section 733(a)(2) of ERISA), and that are not group health plans, to report, not more frequently than annually, in such form and manner as the Secretary may require, for the purpose of determining the extent to which the requirements of part 7 of subtitle B of title I of ERISA (part 7) are being carried out in connection with such benefits. Section 734 of ERISA provides that the Secretary may promulgate such regulations as may be necessary or appropriate to carry out the provisions of part 7. This section sets out requirements for annual reporting by MEWAs that provide benefits that consist of medical care and by certain entities that claim not to be a MEWA solely due to the exception in section 3(40)(A)(i) of ERISA (referred to in this section as Entities Claiming Exception or ECEs). These requirements apply regardless of whether the MEWA or ECE is a group health plan.

(b) *Definitions.* As used in this section, the following definitions apply:

Administrator means—

(1) The person specifically so designated by the terms of the instrument under which the MEWA or ECE is operated;

(2) If the MEWA or ECE is a group health plan and the administrator is not so designated, the plan sponsor (as defined in section 3(16)(B) of ERISA); or

(3) In the case of a MEWA or ECE for which an administrator is not designated and a plan sponsor cannot be identified, jointly and severally the person or persons actually responsible (whether or not so designated under the terms of the instrument under which the MEWA or ECE is operated) for the control, disposition, or management of the cash or property received by or contributed to the MEWA or ECE, irrespective of whether such control, disposition, or management is exercised

directly by such person or persons or indirectly through an agent, custodian, or trustee designated by such person or persons.

Entity Claiming Exception (ECE) means an entity that claims it is not a MEWA on the basis that the entity is established or maintained pursuant to one or more agreements that the Secretary finds to be collective bargaining agreements within the meaning of section 3(40)(A)(i) of ERISA and 29 CFR 2510.3-40.

Excepted benefits means *excepted benefits* within the meaning of section 733(c) of ERISA and 29 CFR 2590.732(b).

Group health plan means a *group health plan* within the meaning of section 733(a) of ERISA and 29 CFR 2590.701-2.

Health insurance issuer means a *health insurance issuer* within the meaning of section 733(b)(2) of ERISA and 29 CFR 2590.701-2.

Medical care means *medical care* within the meaning of section 733(a)(2) of ERISA and 29 CFR 2590.701-2.

Multiple employer welfare arrangement (MEWA) means a multiple employer welfare arrangement within the meaning of section 3(40) of ERISA and 29 CFR 2510.3-40.

Origination means the occurrence of any of the following three events (and a MEWA or ECE is considered to have been *originated* when any of the following three events occurs)—

(1) The MEWA or ECE first begins offering or providing coverage for medical care to the employees of two or more employers (including one or more self-employed individuals);

(2) The MEWA or ECE begins offering or providing coverage for medical care to the employees of two or more employers (including one or more self-employed individuals) after a merger with another MEWA or ECE (unless all of the MEWAs or ECEs that participate in the merger previously were last originated at least three years prior to the merger); or

(3) The number of employees receiving coverage for medical care under the MEWA or ECE is at least 50 percent greater than the number of such employees on the last day of the previous calendar year (unless the increase is due to a merger with another MEWA or ECE under which all MEWAs and ECEs that participate in the merger were last originated at least three years prior to the merger).

(c) *Persons required to report*—(1) *General rule.* Except as provided in paragraph (c)(2) of this section, the following persons are required to report under this section—

(i) The administrator of a MEWA that offers or provides benefits consisting of medical care, regardless of whether the entity is a group health plan; and

(ii) The administrator of an ECE that offers or provides benefits consisting of medical care during the first three years after the ECE is originated.

(2) *Exceptions*—(i) Nothing in this paragraph (c) shall be construed to require reporting under this section by the administrator of a MEWA or ECE if the MEWA or ECE—

(A) 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;

(B) Provides coverage that consists solely of excepted benefits, which are not subject to Part 7. If the MEWA or ECE provides coverage that consists of both excepted benefits and other benefits for medical care that are not excepted benefits, the administrator of the MEWA or ECE is required to report under this section;

(C) Is a group health plan that is not subject to ERISA, including a governmental plan, church plan, or a plan maintained solely for the purpose of complying with workmen's compensation laws, within the meaning of sections 4(b)(1), 4(b)(2), or 4(b)(3) of ERISA, respectively; or

(D) Provides coverage only through group health plans that are not covered by ERISA, including governmental plans, church plans, or plans maintained solely for the purpose of complying with workmen's compensation laws within the meaning of sections 4(b)(1), 4(b)(2), or 4(b)(3) of ERISA, respectively (or other arrangements not covered by ERISA, such as health insurance coverage offered to individuals other than in connection with a group health plan, known as individual market coverage);

(ii) Nothing in this paragraph (c) shall be construed to require reporting under this section by the administrator of an entity that would not constitute a MEWA or ECE *but for* the following circumstances:

(A) The entity provides coverage to the employees of two or more trades or businesses that share a common control interest of at least 25 percent at any time during the plan year, applying the principles of section 414(b) or (c) of the Internal Revenue Code (26 U.S.C.);

(B) The entity provides coverage to the employees of two or more employers due to a change in control of businesses (such as a merger or acquisition) that occurs for a purpose other than avoiding Form M-1 filing and is temporary in nature. For purposes of this paragraph, "temporary" means the MEWA or ECE

does not extend beyond the end of the plan year following the plan year in which the change in control occurs; or

(C) The entity provides coverage to persons (excluding spouses and dependents) who are not employees or former employees of the plan sponsor, such as non-employee members of the board of directors or independent contractors, and the number of such persons who are not employees or former employees does not exceed one percent of the total number of employees or former employees covered under the arrangement, determined as of the last day of the year to be reported or, in the case of a 90-day origination report, determined as of the 60th day following the origination date.

(d) *Information to be reported*—(1) The annual report required by this section shall consist of a completed copy of the Form M-1 Annual Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs) and any additional statements required in the Instructions to the Form M-1.

(2) The Secretary may reject any filing under this section if the Secretary determines that the filing is incomplete, in accordance with 29 CFR 2560.502c-5.

(3) If the Secretary rejects a filing under paragraph (d)(2) of this section, and if a revised filing satisfactory to the Secretary is not submitted within 45 days after the notice of rejection, the Secretary may bring a civil action for such relief as may be appropriate (including penalties under section 502(c)(5) of ERISA and 29 CFR 2560.502c-5).

(e) *Reporting requirement and timing*—(1) *Period for which report is required.* A completed copy of the Form M-1 is required to be filed for each calendar year during all or part of which the MEWA or ECE offers or provides coverage for medical care to the employees of two or more employers (including one or more self-employed individuals).

(2) *Filing deadline*—(i) *General March 1 filing due date for annual filings.* A completed copy of the Form M-1 is required to be filed on or before each March 1 that follows a period to be reported (as described in paragraph (e)(1) of this section). However, if March 1 is a Saturday, Sunday, or federal holiday, the form must be filed no later than the next business day.

(ii) *Special rule requiring a 90-Day Origination Report when a MEWA or ECE is originated*—(A) *In general.* Subject to paragraph (e)(2)(ii)(B) of this section, when a MEWA or ECE is originated, the administrator of the

MEWA or ECE is also required to file a completed copy of the Form M-1 within 90 days of the origination date (unless 90 days after the origination date is a Saturday, Sunday, or federal holiday, in which case the form must be filed no later than the next business day).

(B) *Exception.* Paragraph (e)(2)(ii)(A) of this section does not apply if the origination occurred between October 1 and December 31. (Thus, no 90-day origination report is due when an entity is originated between October 1 and December 31. However, the March 1 filing deadline of paragraph (e)(2)(i) of this section continues to apply.)

(iii) *Extensions.* An extension may be granted for filing a report if the administrator complies with the extension procedure prescribed in the Instructions to the Form M-1.

(f) *Filing address.* A completed copy of the Form M-1 is filed with the Secretary by sending it to the address prescribed in the Instructions to the Form M-1.

(g) *Civil penalties and procedures.* For information on civil penalties under section 502(c)(5) of ERISA for persons who fail to file the information required under this section, see 29 CFR 2560.502c-5. For information relating to administrative hearings and appeals in connection with the assessment of civil penalties under section 502(c)(5) of ERISA, see 29 CFR 2570.90 through 2570.101.

(h) *Examples.* The rules of this section are illustrated by the following examples:

Example 1. (i) *Facts.* MEWA A began offering coverage for medical care to the employees of two or more employers July 1, 1989 (and continues to offer such coverage). MEWA A does not claim the exception under section 3(40)(A)(i) of ERISA.

(ii) *Conclusion.* In this *Example 1*, the administrator of MEWA A must file a completed copy of the Form M-1 each year by March 1.

Example 2. (i) *Facts.* ECE B began offering coverage for medical care to the employees of two or more employers on January 1, 1992. ECE B has not been involved in any mergers and the number of employees to which ECE B provides coverage for medical care has not grown by more than 50 percent in any given year.

(ii) *Conclusion.* In this *Example 2*, ECE B was originated on January 1, 1992 and has not been originated since then. Therefore, the administrator of ECE B is not required to file a 2003 Form M-1 on March 1, 2004 because the last time the ECE B was originated was January 1, 1992 which is more than 3 years prior to March 1, 2004.

Example 3. (i) *Facts.* ECE C began offering coverage for medical care to the employees of two or more employers on July 1, 2004.

(ii) *Conclusion.* In this *Example 3*, the administrator of ECE C must file a completed

copy of the 2004 Form M-1 on or before September 29, 2004 (which is 90 days after the origination date). In addition, the administrator of ECE C must file an updated copy of the 2004 Form M-1 by March 1, 2005 because the last date C was originated was July 1, 2004, which is less than 3 years prior to the March 1, 2005 due date. Furthermore, the administrator of ECE C must file a 2005 Form M-1 by March 1, 2006 and a 2006 Form M-1 by March 1, 2007 (because July 1, 2004 is less than three years prior to March 1, 2006 and March 1, 2007, respectively). However, if ECE C is not involved in any mergers that would result in a new origination date and if ECE C does not experience a growth of 50 percent or more in the number of employees to which ECE C provides coverage from the last day of the previous calendar year to any day in the current calendar year, then no Form M-1 report is required to be filed after March 1, 2007.

Example 4. (i) *Facts.* MEWA D begins offering coverage to the employees of two or more employers on January 1, 2000. MEWA D is licensed or authorized to operate as a health insurance issuer in every state in which it offers coverage for medical care to employees.

(ii) *Conclusion.* In this *Example 4*, the administrator of MEWA D is not required to file Form M-1 because it is licensed or authorized to operate as a health insurance issuer in every state in which it offers coverage for medical care to employees.

Example 5. (i) *Facts.* MEWA E is originated on September 1, 2004.

(ii) *Conclusion.* In this *Example 5*, because MEWA E was originated on September 1, 2004, the administrator of MEWA E must file a completed copy of the Form M-1 on or before November 30, 2004 (which is 90 days after the origination date). In addition, the administrator of MEWA E must file a completed copy of the Form M-1 annually by every March 1 thereafter.

Example 6. (i) *Facts.* Company F maintains a group health plan that provides benefits for medical care for its employees (and their dependents). Company F establishes a joint venture in which it has a 25 percent stock ownership interest, determined by applying the principles under section 414(b) of the Internal Revenue Code, and transfers some of its employees to the joint venture. Company F continues to cover these transferred employees under its group health plan.

(ii) *Conclusion.* In this *Example 6*, the administrator is not required to file the Form M-1 because Company F's group health plan meets the exception to the filing requirement in paragraph (c)(2)(ii)(A) of this section. This is because Company F's group health plan would not constitute a MEWA but for the fact that it provides coverage to two or more trades or businesses that share a common control interest of at least 25 percent.

Example 7. (i) *Facts.* Company G maintains a group health plan that provides benefits for medical care for its employees. The plan year for Company G's group health plan is the fiscal year for Company G, which is October 1st—September 30th. Therefore, October 1, 2004—September 30, 2005 is the 2005 plan year. Company G decides to sell a portion of its business, Division X, to Company H.

Company *G* signs an agreement with Company *H* under which Division *X* will be transferred to Company *H*, effective September 30, 2005. The change in control of Division *X* therefore occurs on September 30, 2005. Under the terms of the agreement, Company *G* agrees to continue covering all of the employees that formerly worked for Division *X* under its group health plan until Company *H* has established a new group health plan to cover these employees. Under the terms of the agreement, it is anticipated that Company *G* will not be required to cover the employees of Division *X* under its group health plan beyond the end of the 2006 plan year, which is the plan year following the plan year in which the change in control of Division *X* occurs.

(ii) *Conclusion.* In this *Example 7*, the administrator of Company *G*'s group health plan is not required to file the Form M-1 on March 1, 2006 for fiscal year 2005 because it is subject to the exception to the filing requirement in paragraph (c)(2)(ii)(B) of this section for an entity that would not constitute a MEWA but for the fact that it is created by a change in control of businesses that occurs for a purpose other than to avoid filing the Form M-1 and is temporary in nature. Under the exception, "temporary" means the MEWA does not extend beyond the end of the plan year following the plan year in which the change in control occurs. The administrator is not required to file the 2005 Form M-1 because it is anticipated that Company *G* will not be required to cover the employees of Division *X* under its group health plan beyond the end of the 2006 plan year, which is the plan year following the plan year in which the change in control of businesses occurred.

Example 8. (i) Facts. Company *I* maintains a group health plan that provides benefits for medical care for its employees (and their dependents) as well as certain independent contractors who are self-employed individuals. The plan is therefore a MEWA. The administrator of Company *I*'s group health plan uses calendar year data to report for purposes of the Form M-1. The administrator of Company *I*'s group health plan determines that the number of independent contractors covered under the group health plan as of the last day of calendar year 2004 is less than one percent of the total number of employees and former employees covered under the plan determined as of the last day of calendar year 2004.

(ii) *Conclusion.* In this *Example 8*, the administrator of Company *I*'s group health plan is not required to file a Form M-1 for calendar year 2004 (which is otherwise due by March 1, 2005) because it is subject to the exception to the filing requirement provided in paragraph (c)(2)(ii)(C) of this section for entities that cover a very small number of persons who are not employees or former employees of the plan sponsor.

Signed at Washington, DC, this 31st day of March 2003.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 03-8115 Filed 4-7-03; 8:45 am]

BILLING CODE 4510-29-P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2560

RIN 1210-AA64

Assessment of Civil Penalties Under Section 502(c)(5) of ERISA

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This document contains a final rule that describes procedures relating to the assessment of civil penalties under section 502(c)(5) of the Employee Retirement Income Security Act of 1974, (ERISA) as amended by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Section 502(c)(5) authorizes the Secretary of Labor (the Secretary) to assess a civil monetary penalty against any person from the date of the person's failure or refusal to file the information required to be filed under section 101(g) of ERISA. The final rule clarifies the manner in which the Secretary will assess penalties under ERISA section 502(c)(5) and the procedures for agency review. Separate documents containing a final rule on the reporting requirement under section 101(g) of ERISA and a final rule relating to procedures for administrative hearings and appeals on assessments of penalties under ERISA section 502(c)(5) appear separately in this issue of the **Federal Register**.

EFFECTIVE DATE: This final rule is effective January 1, 2004.

FOR FURTHER INFORMATION CONTACT:

Amy J. Turner or Deborah S. Hobbs, Employee Benefits Security Administration, U.S. Department of Labor, Room C-5331, 200 Constitution Avenue, NW., Washington, DC 20210 (telephone (202) 693-8335).

SUPPLEMENTARY INFORMATION:

A. Background and Overview of Changes in the Final Rule

This document contains a final rule that provides guidance relating to the assessment of civil penalties under section 502(c)(5) of ERISA for the failure or refusal to file a report pursuant to section 101(g) of ERISA. This regulation is designed to parallel the procedures set forth in § 2560.502c-2 regarding civil penalties under section 502(c)(2) of ERISA.

An interim final rule relating to the assessment of civil penalties under section 502(c)(5) of ERISA was published in the **Federal Register** on

February 11, 2000 at 65 FR 7181. In the February 11, 2000 interim rule, the Department sought comments from affected parties. No comments were received.

On October 21, 2002, the Department published interim final rules relating to notice of blackout periods to participants and beneficiaries (during which their right to direct or diversify investments, obtain a loan, or obtain a distribution under a pension plan may be suspended) and related civil penalties under ERISA section 502(c)(7). Those rules also made conforming changes to the penalty assessment regulations under this section. Specifically, this section was amended to provide an additional five days in which to file a statement of reasonable cause or a request for hearing and answer, as applicable, when the Department serves a notice of intent to assess a penalty or a notice of penalty determination by certified mail, and to provide that service of a notice by the Department by regular mail is complete upon receipt. In addition, conforming amendments were made to provide that statements of reasonable cause are treated as filed on mailing or on transmittal under certain circumstances. Finally, amendments were made to accommodate those changes in the filing and service rules. No comments were received with respect to these conforming amendments.

This regulation finalizes the interim final regulations published February 20, 2000, as amended by the interim final amendments published October 21, 2002. Only one modification was made, involving applicability dates. Specifically, the interim final rule contained a transition safe harbor period under which no civil penalty was assessed against an administrator that had made a good faith effort to comply with a § 2520.101-2 filing that was due in the Year 2000. This transition rule was created because, during the first year in which a report was required to be filed under section 101(g) in particular, the Department was focused on educating administrators about this filing requirement. Because the dates during which the transition rule was applicable have passed, this rule has been deleted from the final rule.

The Department remains committed to working with administrators to help them comply with the Form M-1 filing requirement. Filers who have questions or who need assistance in completing a filing may call the EBSA Help Desk, at 202-693-8360.