DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2520

RIN 1210–AB51

Filings Required of Multiple Employer Welfare Arrangements and Certain Other Related Entities

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Proposed rule.

SUMMARY: This document contains a proposed rule under title I of the Employee Retirement Income Security Act (ERISA) that, upon adoption, would implement reporting requirements for multiple employer welfare arrangements (MEWAs) and certain other entities that offer or provide health benefits for employees of two or more employers. The proposal amends existing reporting rules to incorporate new provisions enacted as part of the Patient Protection and Affordable Care Act (Affordable Care Act) to more clearly address the reporting obligations of MEWAs that are ERISA plans. This regulation is designed to impose the minimal amount of burden on legally compliant MEWAs and entities claiming exception (ECEs) while implementing the Secretary's authority to take enforcement action against fraudulent or abusive MEWAs included in the Affordable Care Act and working to protect health benefits for businesses and their employees. This proposed rule implements the new provisions while preserving the filing structure and provisions of the 2003 regulations which direct plan MEWAs and non-plan MEWAs to report annually and file upon registration or origination.

Elsewhere in this edition of the **Federal Register,** the Employee Benefits Security Administration (EBSA) is publishing a Notice of Proposed Rulemaking related to the Secretary's new enforcement authority with respect to MEWAs and Notices of proposed revisions of the Form M–1 and the Form 5500.

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

FOR FURTHER INFORMATION CONTACT: Suzanne Bach or Kevin Horahan, Employee Benefits Security Administration, Department of Labor, at (202) 693–8335. This is not a toll-free number.

ADDRESSES: Written comments may be submitted to the address specified below. All comments will be made available to the public. *Warning:* Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines. Comments may be submitted anonymously.

Department of Labor. Comments to the Department of Labor, identified by RIN 1210–AB51, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: E-HPSCAMEWARegistration.EBSA@dol.gov.*
- *Mail or Hand Delivery:* Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N–5653, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, *Attention:* RIN 1210–AB51; MEWA Registration Proposed Regulation.

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

SUPPLEMENTARY INFORMATION:

I. Background

The Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191, 110 Stat. 1936) (1996)) (HIPAA) amended ERISA to provide for, among other things, improved portability and continuity of health insurance coverage. HIPAA also added section 101(g) to ERISA, 29 U.S.C. 1021(g), providing the Secretary with the authority to require, by regulation, annual reporting by MEWAs that are not ERISA-covered plans. Section 6606 of the Patient Protection and Affordable Care Act (Affordable Care Act), Pub. L. 111–148, 124 Stat. 119 (2010), amended section 101(g) of ERISA to require that such MEWAs register with the Department prior to operating in a State. Specifically, this section now provides that multiple employer welfare arrangements providing benefits consisting of medical care (within the meaning of section 733(a)(2) of ERISA, 29 U.S.C. 1191b(a)(2)) which are not ERISA-covered group health plans must register with the Secretary prior to operating in a State. The Secretary may also, by regulation, direct such multiple employer welfare arrangements to report, not more frequently than annually, in such form and such manner as the Secretary specifies for the purpose of determining the extent to which the requirements of part 7 of subtitle B of title I of ERISA are being carried out in connection with such benefits.

The term ''multiple employer welfare arrangement'' is defined in section 3(40) of ERISA, 29 U.S.C. 1002(40) in pertinent part, as 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 medical 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 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) of ERISA, 29 U.S.C. 1301(b), except that, for purposes of this paragraph, common control shall not be based on an interest of less than 25 percent.[1]

The original MEWA reporting requirement created under HIPAA was enacted in response to a 1992 General

[1] This provision was added to ERISA by section 302(b) of the Multiple Employer Welfare Arrangement Act of 1983, Public Law 97–473, 96 Stat. 2611, 2612 which also amended section 514(b) of ERISA, 29 U.S.C. 1144(a). 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), Public Law 97–473, 96 Stat. 2611, 2613 (29 U.S.C. 1144(b)(6)).

Accounting Office (GAO) report.[2] In the report, the GAO detailed a history of MEWA fraud and abuse.[3] The GAO recommended that the Department develop a mechanism to help States identify MEWAs. The Secretary exercised the authority under the HIPAA provision by creating the Form M–1 under a 2000 interim final rule and 2003 final rule,[4] which generally require non-plan and ERISA-covered MEWAs (and certain other entities that offer or provide group health benefits to the employees of two or more employers) to file the Form M–1 annually with the Secretary. The final rule generally directed the administrator of a MEWA, whether or not an ERISA-covered group health plan, (and certain other entities that offer or provide health benefits to the employees of two or more employers) to file the Form M–1 with the Secretary. The purpose of this form is to allow the Department to determine whether the requirements of part 7 are being met. Part 7 of ERISA includes statutory amendments made by HIPAA and other statutes for which MEWAs must annually report compliance. These include, but are not limited to, the Patient Protection and Affordable Care Act of 2010 (Pub. L. 111–148, 124 Stat. 119), and the Health Care and Education Reconciliation Act (Pub. L. 111–152, 124 Stat. 1029) (these are collectively known as the ''Affordable Care Act''), the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (Div. C, title V, Subtitle B of Pub. L. 110–343, 122 Stat. 3881), and the Genetic Information Nondiscrimination Act of 2008 (Pub. L. 110–233, 122 Stat. 881).

Despite the reporting rules, many of the MEWA abuses discussed in the GAO report persist today. MEWAs frequently are marketed by unlicensed entities that avoid State insurance reserve, contribution, and consumer protection requirements. By avoiding these requirements, such entities often are able to market insurance coverage at rates substantially lower than licensed insurers, making them particularly attractive to some small employers that find it difficult to obtain affordable health insurance for their employees. Unfortunately, due to insufficient funding and inadequate reserves, and in some situations, excessive administrative fees and fraud, some MEWAs have become insolvent and unable to pay medical benefit claims. Therefore, affected employees and their dependents have become financially responsible for paying medical claims they presumed were covered by insurance after paying health insurance premiums to MEWAs that become insolvent. The unfortunate reality is that currently, the Department often does not find out about insolvent or fraudulent MEWAs until significant harm has occurred to employers and participants. Furthermore, while the Department—often working with State insurance departments—has had some success with both civil and criminal cases against MEWA operators, the monetary judgments are often uncollectible leaving the employers and/or individual participants without coverage for claims that are sometimes very large. This proposal implements the statutory requirements in a way that limits the burden on legitimate MEWAs but gives the Secretary, employers, and the participants and beneficiaries of the plans those employers sponsor additional information about these entities and a stronger enforcement scheme. Having this information will aid the enforcement and prevention of fraudulent and insolvent MEWAs.[5]

Pursuant to the Affordable Care Act's change to section 101(g) of ERISA, this proposed rule would amend the 2003 final rule, as well as the rules related to annual reports required of MEWAs that are group health plans, and solicit comments regarding the restructured reporting requirements. Specifically, the Affordable Care Act amended section 101(g) of ERISA to require MEWAs that provide benefits consisting of medical care (within the meaning of section 733(a)(2) of ERISA) which are not group health plans to register with the Secretary prior to their operating in a State, in addition to reporting annually regarding their compliance with part 7 of ERISA including the Public Health Service Act (PHS Act) market reforms incorporated by reference in section 715 of ERISA. These proposed regulations implement the 101(g) MEWA registration provision which directs MEWAs to report compliance with the part 7 rules including the PHS Act sections 2701 through 2728. By requiring MEWAs to register with the Department before operating in a State by filing the Form M–1 to provide additional information, this proposed rule would enhance the State and Federal governments' joint mission to prevent and take enforcement action against fraudulent and abusive MEWAs and limit the losses suffered by American workers, their families, and businesses in instances when abusive MEWAs become insolvent and fail to reimburse medical claims.

The Affordable Care Act reorganizes, amends, and adds to the provisions in part A of title XXVII of the PHS Act, 42 U.S.C. 300gg–1 *et seq.,* relating to group health plans and health insurance issuers in the group and individual markets. The term ''group health plan'' is defined in title XXVII of the PHS Act, part 7 of ERISA, and chapter 100 of the Code and includes both insured and self-insured group health plans. The Affordable Care Act adds section 715(a)(1) to ERISA, 29 U.S.C. 1185d(a)(1), and section 9815(a)(1) to the Internal Revenue Code (the Code), 26 U.S.C. 9815(a)(1), to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and make them applicable to group health plans, and health insurance issuers providing health insurance coverage in connection with group health plans. The PHS Act sections incorporated by this reference are sections 2701 through 2728. PHS Act sections 2701 through 2719A are substantially new, though they incorporate some provisions of prior law. PHS Act sections 2722 through 2728 are sections of prior law renumbered, with some, mostly minor, changes. Section 1251 of the Affordable Care Act, as modified by section 10103 of the Affordable Care Act and section 2301 of the Reconciliation Act, 42 U.S.C. 18011, specifies that certain plans or coverage existing as of the date of enactment (*i.e.,* grandfathered health plans) are only subject to certain provisions.

[2] *See, Employee Benefits: States Need Labor's Help Regulating Multiple Employer Welfare Arrangements,* March 1992, GAO/HRD–92–40.

[3] For example, the 1992 GAO report indicated that between 1988 and 1991, MEWAs left at least 398,000 participants and beneficiaries with over $123 million in unpaid claims. Meanwhile more than 600 MEWAs failed to comply with State insurance laws. *See* supra note 2.

[4] 65 FR 715 (02/11/2000) and 68 FR 17494 (04/09/2003). The Form M–1 has been updated and is reissued each year in December by the Department and modified periodically to address changes to the statutory provisions in part 7 of ERISA.

[5] *See, United States* v. *Edwards,* plea agreement, 1:05CR 265 (M.D.N.C. 2006) (In 2005, a MEWA operator, whom the Department showed collected over 36 million dollars in healthcare insurance premiums and failed to obtain health insurance coverage for its employer clients which resulted in thousands of uncovered employees and approximately $8 million in unpaid claims) *see also Solis* v. *W.I.N. Ass'n, L.L.C., et. al.,* slip op. 4:11–cv–00616 (S.D. Tex. 2011) (the Department investigated a MEWA which failed to make payments on health care claims, charged excessive fees, engaged in self-dealing, and failed to disclose fees to the client employers in the plan. The Department obtained a Consent Judgment and Order against the MEWA operators for leaving hundreds of participants without coverage and permanently enjoining them from acting as fiduciaries in the future. Also, the court authorized the Secretary to bring a collection action for the plan losses against one of the MEWA operators relative to his ability to restore those plan losses.)

II. Overview of Proposal

A. Proposed Amendment to 29 CFR § 2520.101–2 Under ERISA Section 101(g)

These proposed rules would amend existing filing rules for MEWAs and ECEs in order to implement changes made to ERISA section 101(g) in the Affordable Care Act. Like the 2003 regulations, ECEs and MEWAs are treated largely the same for filing purposes. The main distinction in filing requirements is that ECEs are only subject to annual M–1 filings for the first three years following an origination event. We preserved this special rule included in the 2003 regulations for ECEs as well as e the special filing events applicable to MEWAs. In keeping with this structure, we propose to extend the new filing events prescribed by the Affordable Care Act provision to MEWAs and ECEs alike.

Paragraph (a) of the proposal sets forth section 101(g) of ERISA that directs MEWAs that provide benefits consisting of medical care (within the meaning of section 733(a)(2) of ERISA) to register with the Secretary prior to operating in a State, and to report annually regarding compliance with part 7 of ERISA. While the language in section 101(g) of ERISA only applies to MEWAs that are not group health plans (''non-plan MEWAs''), the proposal preserves the structure promulgated as part of the final 2003 regulations, which required both MEWAs that are group health plans (''plan MEWAs'') and non-plan MEWAs to file the Form M–1, based on authority found in sections 505 and 734 of ERISA. 29 U.S.C. 1135 and 1191c. Section 505 of ERISA states that the Secretary may prescribe such regulations as she finds necessary or appropriate to carry out the provisions of Title I of ERISA. Section 734 of ERISA allows the Secretary to promulgate such regulations as may be necessary or appropriate to carry out the provisions of part 7 of ERISA.

Paragraph (b) defines the terms used in the proposal, with some additions and modifications from the 2003 final rule. Amended paragraph (c) sets forth the requirement that, with certain exceptions, all MEWAs and certain entities that claim not to be a MEWA solely due to the exception in section 3(40)(A)(i) of ERISA (referred to as Entities Claiming Exception or ECEs) file reports with the Department.

Paragraph (d) describes how MEWAs and ECEs will comply with the proposed rule by filing the Form M–1, and the conditions under which the Secretary may reject a filing.

Paragraph (e) sets forth the times when MEWAs and ECEs will file the Form M–1. Paragraph (f) directs that the Form M–1 be filed electronically. In addition to minimizing errors and providing faster access to reported data, electronic filing will also be less burdensome on the filer. Once information about the MEWA or ECE is entered into the system, filers will have the option of allowing the system to copy information provided on a past filing into a new filing. This transfer of past information provides filers an easy way to update or verify information. The information provided through Form M–1 filings will then be accessible by the public and other interested parties such as State regulators.

Paragraph (g) explains the civil penalties that may result from a failure to comply with the proposed rule. Civil penalties for failure to file a report required by ERISA section 101(g) or § 2520.101–2 have been applicable for non-plan MEWAs under ERISA section 502(c)(5) since May 1, 2000. Under these proposed regulations, the Department has extended similar civil penalties for a failure to file an annual report by plan MEWAs under ERISA section 502(c)(2).

Also, new criminal penalties were added by the Affordable Care Act under ERISA section 519 for any person who knowingly submits false statements or false representations of fact in filing reports required under the proposal. See paragraph 2 below for these changes that are being proposed to §§ 2520.103–1, 104–20, and 104–41 to further enhance the Department's ability to enforce these provisions with regard to MEWAs that are group health plans.

1. Basis and Scope

These proposed regulations set forth rules implementing section 101(g) of ERISA, as amended by section 6606 of the Affordable Care Act, which directs MEWAs that are not group health plans to register with the Secretary prior to operating in a State. These proposed regulations also update the existing requirement in section 101(g) of ERISA that MEWAs, which are group health plans, and certain other entities claiming an exception, file the Form M–1 upon the occurrence of specified events as well as annually.

2. Definitions

a. Operating. Paragraph (b)(8) of the proposed rule adds a definition of ''operating,'' and defines it as any activity including but not limited to marketing, soliciting, providing, or offering to provide benefits consisting of medical care. This definition, which includes marketing and administrative activities, governs registration and origination filing events for the Form M–1 filing for MEWAs and ECEs.

b. Origination. In order to implement the Affordable Care Act amendment to ERISA section 101(g), the Department amended the 2003 filing rules. The rule is meant to apply equally to MEWAs and ECEs. The 2003 rules treated MEWAs and ECEs equally for purposes of special filings by having a combined rule for both of these entities to determine if special filings were necessary which relied on the origination definition. The Department concluded it to be more responsive to the change in the section 101(g) statutory language to now refer to special filings by MEWAs as a registration. The effect of this is that MEWAs and ECEs are no longer collectively referencing the term origination, but now have separate origination and registration terms—albeit subject to the same special filing events.

The proposed rule first indicates events which require a special filing in the definition of origination. A special filing is required when (in the case of an ECE):

''(i) The ECE first begins operating (within the meaning of (b)(8) of this section) with regard to the employees of two or more employers (including one or more self-employed individuals); (ii) The ECE, while required to report pursuant to paragraph (c)(1)(ii) of this section, begins operating in any additional State; (iii) The ECE begins operating following a merger with another ECE (unless all of the ECEs that participate in the merger previously were last originated at least three years prior to the merger); (iv) The number of employees receiving coverage for medical care under the 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 ECE under which all ECEs that participate in the merger were last originated at least three years prior to the merger); or (v) The ECE experiences a material change in the information reported on the most recently filed Form M–1 as defined by the Form M–1 instructions. Event (i) Was modified to comply with the new statutory requirement that filings be made prior to operating in a State. Events (ii) and (v) are new special filing events which were added to instruct entities to re-file with the Department so that it has the most up-to-date information.

c. Reporting. The proposed rule adds a definition of ''reporting.'' ''Reporting''

or ''to report'' means to file the Form M–1 as required pursuant to section 101(g) of ERISA; § 2520.101–2; or the instructions to the Form M–1. The term ''reporting'' is used in order to correspond to the terminology of § 2560.502c–5 which uses the generic term ''report'' to describe the Form M–1 filing process, including the annual report, registration, and origination filings.

d. State. The proposed rule adds a definition of ''State'' and defines the term by reference to § 2590.701–2. This definition was added because MEWAs must register, and ECEs must make an origination filing, prior to operating in a State.

3. Persons Required To Report

Paragraph (c) of the proposed rule sets forth the persons required to report under the proposed rule. As under the 2003 final rule, the proposed rule directs the administrator of a MEWA that provides benefits consisting of medical care, whether or not the MEWA is a group health plan, to file the Form M–1. 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.

4. Information To Be Reported

Paragraph (d) of the proposed rule clarifies that the reporting requirements of § 2520.101–2 will only be satisfied by filing a completed copy of the Form M–1, including any additional statements pursuant to the Form M–1 Instructions.

5. Reporting Requirements and Timing

Paragraph (e) of the proposed rule retains from the 2003 final rule's standards that both MEWAs and ECEs must file the Form M–1 annually, with ECEs only having to file annually for the first 3 years following an origination.

As mentioned previously, MEWAs and ECEs are also subject to special filings in certain circumstances. Special filing events were included in the 2003 regulation, but have been relabeled and expanded to implement statutory language under the proposed rules. To clarify the new section 101(g) registration standard for MEWAs and make parallel changes to the origination events for ECEs, the proposed rule contains five registration and origination events for MEWAs and ECEs, only one of which is new (a second filing event existed in the 2003 rules but has been modified).

The 2003 regulation generally requires a special filing when a MEWA or ECE (1) Begins operating or providing coverage for medical care to employees of two or more employers; (2) begins offering or providing coverage for medical care to employees of two or more employers after a merger with another MEWA or ECE; or (3) increases the number of employees receiving medical care under the MEWA or ECE by at least 50 percent over the number of employees on the last day of the previous calendar year. These filing events are generally preserved in the proposed rules. However, the first event was modified to conform to the statutory language under ERISA section 101(g) directing MEWAs to register with the Secretary by filing a Form M–1 prior to operating in any State. Additionally, the proposed rule directs that a filing be made in the event a MEWA or ECE expands its operations into additional States or experiences a material change as defined in the Form M–1 instructions. This filing event was added to direct an entity to update its Form M–1 filing in the event that it experiences changes in its financial or custodial information. In the event an entity experiences a material change, the online filing system will allow them to log on to the online filing system, give them the option of importing data from its most recent completed filing, and make the necessary changes. The Department is particularly interested in receiving comments on this requirement. Consistent with the 2003 regulations, while this rule directs MEWAs to submit filings for the duration of their existence, ECEs are only required to file during the three year period following an origination event that is not a material change. ECEs that experience a material change must file during this period but are not required to file beyond that three year period.

The proposed rule also applies new timing standards on MEWAs and ECEs for these special filings. Under the 2003 regulations, MEWAs and ECEs file the Form M–1 within 90 days of the occurrence of a special filing event. The proposed rule directs entities to file 30 days prior to or within 30 days of the event, depending on the type. The timing requirements implement section 6606 of the Affordable Care Act which says that the filling must happen ''prior to operating in a State'' and will also facilitate the Department's timely receipt of information related to the other special filing events described above.

A provision is included in the proposed rule to discourage ''blanket filings,'' *i.e.,* registration or origination filings that cover multiple States, unless the filer expects to begin operating in all the named States in the near future. Blanket filings that list States where the filer has no immediate intent to operate could frustrate the law's goal of gathering and maintaining timely and accurate information on MEWAs. Under this provision, a filing is considered lapsed with respect to a State if benefits consisting of medical care are not offered or provided in the State (or States) during the calendar year immediately following the filing. A new filing would be submitted if the filer intends to continue to operate in that State.

To minimize the burden of compliance, we propose to permit MEWAs and ECEs to make a single filing to satisfy multiple filing events so long as the filing is timely for each filing.

As in the 2003 rule, filing extensions are available in this proposal. Any filing deadline that is a Saturday, Sunday, or federal holiday is automatically extended to the next business day. A more substantial extension is available for MEWAs and ECEs that request such an extension following the procedure outlined in the Instructions to the Form M–1.

6. Electronic Filing

Paragraph (f) of the proposed rule eliminates the option to file a paper copy of the completed Form M–1. As is now the case for all Form 5500 Annual Report filings, and consistent with the goals of E-government, as recognized by the Government Paperwork Elimination Act[6] and the E-Government Act of 2002,[7] we propose that the Form M–1 be filed electronically. Electronic filing of benefit plan information, among other program strategies, would facilitate EBSA's achievement of its Strategic Goal to ''assure the security of the retirement, health and other workplace related benefits of American workers and their families.'' EBSA's strategic goal directly supports the Secretary of Labor's Strategic Goal to ''secure health benefits.''[8] A cornerstone of our enforcement program is the collection, analysis, and disclosure of benefit plan information. Electronic filing will minimize errors and provide faster access to reported data, assisting EBSA in its enforcement, oversight, and disclosure roles and ultimately enhancing the security of plan benefits. Electronic filing of the M–1 would also reduce the paperwork burden and costs

[6] Title XVII, Public Law 105–277, 112 Stat. 2681 (Oct. 21, 1998).

[7] Public Law 107–347, 116 Stat. 2899 (Dec. 17, 2002).

[8] For further information on the Department of Labor's Strategic Plan and EBSA's relationship to it, see *http://www.dol.gov/_sec/stratplan/.*

related to printing and mailing forms and, with the use of secure account access, allow updating of previously reported information to facilitate simplified future reporting. Finally, consistent with current practice, the information would be available for reference by participants, beneficiaries, participating employers, and other interested parties such as State regulators.

7. Penalties

a. Civil penalties and procedures. The proposed rule retains the references to section 502(c)(5) of ERISA, 29 U.S.C. 1132(c)(5) and § 2560.502c–5 regarding civil penalties and procedures.

b. Criminal penalties and procedures. The Affordable Care Act section 6601 added ERISA section 519 which prohibits a person from making false statements or representations of fact in connection with a MEWAs financial condition, the benefits it provides, or its regulatory status as it relates to marketing or sale of a MEWA. The Affordable Care Act also amended ERISA section 501(b) to impose criminal penalties on any person who is convicted of violating the prohibition in ERISA section 519. The proposed rule adds a cross-reference to section 501(b) and 519 of ERISA, 29 U.S.C. 1131 and 1149 for the purpose of implementing these new rules as they relate to filing a Form M–1 prior to operating in a State or other registration and origination filings.

c. Cease and desist and summary seizure and procedures. Section 6605 of the Affordable Care Act adds section 521 to ERISA, which authorizes the Secretary to issue cease and desist orders, without prior notice or a hearing, when it appears to the Secretary that the alleged conduct of a MEWA is ''fraudulent, or creates an immediate danger to the public safety or welfare, or is causing or can be reasonably expected to cause significant, imminent, and irreparable public injury.'' This section also allows the Secretary to issue an order to seize the assets of a MEWA that the Secretary determines to be in a financially hazardous condition. The regulation providing guidance on the cease and desist orders and summary seizure rules published elsewhere in this **Federal Register** also include regulatory guidance on the procedural rules for this process. A cease and desist order containing a prohibition against transacting business with any MEWA or plan would prevent the MEWA or a person from avoiding the cease and desist order by shutting the MEWA down and re-establishing it in a new location or under a new identity.

As such, the proposed rule adds a cross-reference to section 521 of ERISA and § 2560.521 regarding the Secretary's authority to issue cease and desist and summary seizure orders.

B. Proposed Amendment to Regulations Under ERISA Section 104(a)(1), 29 U.S.C. 1024(a)(1)

Additional changes are being proposed to further enhance the Department's ability to enforce § 2520.101–2. The primary change is the addition of a new paragraph (f) to § 2520.103–1 regarding the content of the annual report. As part of this proposal, existing paragraph (f) of § 2520.103–1 would be redesignated paragraph (g), but would be otherwise unchanged. New § 2520.103–1(f) would apply to all MEWAs that are ERISA-covered plans and that are subject to the requirements of § 2520.101–2. This change provides that all such MEWAs must prove compliance with § 2520.101–2 (filing the Form M–1) in order to satisfy the annual reporting requirements of § 2520.103–1. Pursuant to ERISA section 502(c)(2), 29 U.S.C. 1132(c)(2), a plan administrator who fails to file a Form 5500 Annual Return/Report with a proof of compliance with § 2520.101–2 may be subject to a civil penalty of up to $1,100 a day (or higher amount if adjusted pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended) for each day a plan administrator fails or refuses to file a complete report. Although ERISA sections 505 and 734 give the Secretary the authority to require MEWAs that are group health plans to comply with the requirements of § 2520.101–2, there is, however, no corresponding ERISA civil penalty for a failure to comply with those requirements. These proposed changes to the Form 5500 annual reporting requirements for MEWAs that are group health plans will enhance the Department's ability to enforce the Form M–1 requirements and ensure that MEWAs are subject to the same rules under the law.

Conforming changes adding references to new § 2520.103–1(f) are proposed for §§ 2520.103–1(a)(2), (b), (c) and § 2520.104–41. A corresponding change is also proposed for § 2520.104–20 to eliminate the limited filing exemption for insured or unfunded, fully insured, or combination unfunded/fully insured plan MEWAs with fewer than 100 participants. It is important to note that while the addition of § 2520.103–1(f) and the change to § 2520.104–20 would eliminate the annual reporting exemption for such plan MEWAs with fewer than 100 participants, these plan MEWAs are subject to the existing (and proposed) standards of § 2520.101–2. Moreover, the impact of satisfying the annual reporting would be substantially less burdensome because in addition to being eligible for the simplified annual reporting for small welfare plans, these plan MEWAs would be exempt under § 2520.104–44 from completing Schedule I (Financial Information).[9] Thus, these changes give the Secretary an important enforcement tool while imposing minimal burden on plan MEWAs. Because it is not clear that there are any unfunded/fully insured plan MEWAs with fewer than 100 participants, the Department does not believe this is overly burdensome but rather ensures that all MEWAs are treated the same. Nonetheless, the Department is particularly interested in receiving comments regarding any undue burden this elimination may create.

III. Regulatory Impact Analysis

A. Executive Order 12866

Under Executive Order 12866, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and 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 on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering

[9] These plan MEWAs would only need to file Form 5500 annual return/report and, if applicable, Schedule A (Insurance Information) and Schedule G, Part III (nonexempt transactions). They would not be eligible to file the Form 5500–SF (Short Form 5500 Annual Return/Report of Small Employee Benefit Plan) under § 2520.104–41 and § 2520.103–1(c)(2)(ii). The Form 5500–SF does not include Schedule A insurance information and the Department believes that plan MEWAs subject to this proposal that claim to provide insured benefits should be required to complete the Schedule A so that enforcement officials and the public have information about the insurance policy and insurance company through which the MEWA is providing insurance coverage. In addition, an unrelated technical correction to § 2520.104–41 is being included in this rulemaking to add an express reference to the Form 5500–SF.

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. OMB has determined that this action is not economically significant within the meaning of section 3(f)(1) of the Executive Order but is significant under section 3(f)(4) of the Executive Order, because it raises novel legal or policy issues arising from the President's priorities.

The Department estimates that the total cost of this proposed rule would be approximately $124,300 in the first year, or an average of approximately $272 for each of the 457 entities expected to file the Form M–1. These costs are all associated with the information collection request contained in this proposal and, therefore, are discussed in the Paperwork Reduction Act Section, below.

1. Summary and Need for Regulatory Action

As discussed earlier in this preamble, section 6606 of the Affordable Care Act amended section 101(g) of ERISA to require the Secretary of Labor to promulgate regulations requiring MEWAs providing medical care benefits (within the meaning of section 733(a)(2) of ERISA) that are not ERISA-covered group health plans (non-plan MEWAs) to register with the Secretary before operating in a State.

Before this proposed amendment, ERISA section 101(g) permitted the Secretary to establish an annual reporting requirement on non-plan MEWAs that provide medical care benefits to determine whether such MEWAs comply with the requirements of Part 7 of ERISA. The Secretary exercised this authority by creating the Form M–1 under a 2000 interim final rule and 2003 final rule.[10]

The original MEWA reporting requirement was enacted by Congress as part of the Health Insurance Portability and Accountability Act of 1996 in response to a 1992 General Accounting Office (GAO) recommendation contained in a GAO report.[11] As discussed above, the GAO recommended that the Department develop a mechanism to help States identify fraudulent and abusive MEWAs. The HIPAA provision led to the Department's creation of the Form M–1, which generally requires non-plan and ERISA-covered MEWAs (and certain other entities that offer or provide group health benefits to the employees of two or more employers) to file Form M–1 annually with the Secretary.

In addition to amending the Department's MEWA reporting regulation to require MEWAs to register with the Secretary before operating in a State, these proposed rules also direct Form M–1 filers to provide additional information regarding the MEWA or ECE and apply new timing standards for the special filings that are made when a MEWA's or ECE's status changes. These amendments will aid the Department in its oversight of MEWAs consistent with its expanded authority provided by the Affordable Care Act[12] and allow it to provide critical information to State insurance departments that coordinate their investigations and enforcement actions against fraudulent and abusive MEWAs with the Department.

Over the last several years, the Department has observed a downward trend in the number of MEWAs that file the Form M–1, raising concerns that some existing MEWAs are not filing the form. Under the 2003 regulations, the Department has the ability to impose penalties on ERISA-covered MEWAs that fail to file the M–1 only in limited circumstances and if a determination regarding plan status were made by the Secretary. To address this issue and encourage compliance with the M–1 filing requirement, the Department also is proposing as part of this regulatory action to amend the Form 5500 annual reporting standards by requiring all ERISA-covered MEWAs, including MEWAs with less than 100 participants,[13] to file Form 5500 and provide on the form proof of a timely filed Form M–1 in order for the plan administrator to avoid the Department's imposition of ERISA section 502(c)(2) penalties.[14]

These proposed amendments to the Department's MEWA reporting standards would provide a cost effective means to implement the expanded MEWA reporting as enacted in the Affordable Care Act. As stated above, the Department estimates that the average cost for each entity that the Department expects to file the revised form would average approximately $272.

2. Benefits of Proposed Rule

As discussed earlier in this preamble, section 6606 of the Affordable Care Act amended section 101(g) of ERISA directing the Secretary of Labor to promulgate regulations requiring MEWAs providing medical care benefits (within the meaning of section 733(a)(2) of ERISA) that are not ERISA-covered group health plans (non-plan MEWAs) to register with the Secretary before operating in a State. By implementing this statutory amendment, the Department would receive prior notice of a MEWA's intention to commence operations in a State. Such notification would help the Department and State insurance commissioners to ensure that MEWAs are being lawfully operated and that sufficient insurance has been purchased or adequate reserves established to pay benefit claims before the MEWAs begin operating[15] in a State. The proposed rule would improve MEWA compliance and deter fraudulent and abusive MEWA practices, thereby protecting and securing the benefits of participants and beneficiaries by ensuring that MEWA assets are preserved and benefits timely paid. These potential benefits have not been

[10] 65 FR 715 (02/11/2000) and 68 Fed. Reg. 17494 (04/09/2003). The Form M–1 has been updated and is reissued each year in December by the Department and modified periodically to address changes to the statutory provisions in part 7 of ERISA.

[11] *See, Employee Benefits: States Need Labor's Help Regulating Multiple Employer Welfare Arrangements,* March 1992, GAO/HRD–92–40.

[12] As part of the Affordable Care Act, Congress also enacted ERISA section 521, which authorized the Secretary to issue cease and desist orders, without prior notice or a hearing, when it appears to the Secretary that a MEWA's alleged conduct is fraudulent, creates an immediate danger to the public safety or welfare, or causes or can reasonably be expected to cause significant, imminent, and irreparable public injury. Section 521 also authorizes the Secretary to issue a summary order to seize the assets of a MEWA that the Secretary determines to be in financially hazardous condition. The Department also is proposing rules for these provisions, which are published elsewhere in today's **Federal Register**.

[13] The proposal would remove the small welfare plan filing exemption under § 2520.104–20. Currently, under § 2520.104–20, small insured or unfunded welfare benefit plans, including small plan MEWAs, are exempt from certain reporting and disclosure provisions, including the requirement to file an annual Form 5500. By removing this exemption, all plan MEWAs will now be required to file a Form 5500 with a proof of filing a timely Form M–1 filing in order to satisfy the annual reporting requirements under ERISA Sections 103 and 104. However, small insured and unfunded plan MEWAs would be exempt under § 2520.104–44 from completing Schedule I (Financial Information). As with other small welfare benefit plans subject to the annual reporting requirements, small plan MEWAs would be required to complete Schedule A (Insurance Information), if applicable.

[14] If a MEWA fails to prove that it filed the M–1 on its Form 5500, it could be subject to a civil penalty of up to $1,000 a day for each day the plan administrator fails or refuses to file a complete report.

[15] Section 2520.101–2(b)(8) of the proposed rule provides that the term ''operating'' means any activity including but not limited to marketing, soliciting, providing, or offering to provide medical care benefits.

quantified, but the Department expects that they will more than justify their costs.

3. Costs of Proposed Rule

The costs of the proposed rule are associated with the amendments to the Form M–1 and Form 5500 reporting requirements and are therefore discussed in the Paperwork Reduction Act section, below.

B. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in this proposed rule. A copy of the ICR may be obtained by contacting the individual identified below in this notice. The Department has submitted a copy of the proposed information collection to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

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

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; *Attention:* Desk Officer for the Employee Benefits Security Administration. Although comments may be submitted through February 6, 2012. Address requests for copies of the ICR to G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N 5647, Washington, DC 20210. Telephone (202) 219–8410; *Fax:* (202) 219–4745. These are not toll free numbers.

Between 2006 and 2009, an average of 457 entities filed Form M–1 with the Department (a high of 508 in 2006 and a low of 397 in 2009). Of the total filings, on average, 197 were submitted via mail and 260 were submitted electronically through the Form M–1 electronic filing system provided by the Department via the Internet. The fraction filing electronic returns has been increasing and reached nearly 65 percent in 2009. This proposed rule will require all filings to be submitted electronically.

As discussed above and pursuant to section 6606, the proposed rule would amend the information required to be disclosed on the Form M–1 by adding new data elements. Therefore, the Department assumes that all MEWA plan administrators that file the Form M–1 in-house (an estimated 10 percent of filers) would spend two hours familiarizing themselves with the changes to the form that would be made by the proposed regulation. This would result in a total hour burden of 92 hours (46 MEWAs * 2 hours). The Department estimates that Part I of the Form (the identifying information) would require five minutes to complete. The time required to complete Part II would vary based on the number of States in which the entity provides coverage, and the Department estimates that this would require 60 minutes for single-State filers and 120 minutes for multi-State filers. The Department expects the time required to complete Part III would be 15 minutes for fully-insured filers and 30 minutes for self-insured filers. Table 1 below summarizes the estimates of time required to complete each part of the form. Based on the foregoing, the Department estimates that the total hour burden for MEWAs to file the Form M–1 using in-house resources would be 178 hours in the first year with an equivalent cost of $16,200 assuming all work will be performed by an employee benefits professional at $91.21 per hour.[16] The cost to submit electronic filings would be negligible.

The Department estimates that the annual hour burden for Form M–1 filings prepared in-house in subsequent years would be approximately 94 hours as summarized in Table 2.[17] The Department estimate is based on the assumption that approximately 41 new MEWAs[18] will file the Form M–1 each year, and thus, approximately four new MEWAs will prepare Form M–1 in-house. The Department estimates that it would take two hours for these administrators, resulting in an hour burden of eight hours. The Department estimates that MEWAs preparing the form in-house would spend four hours completing part I, 68 hours completing Part II, and 15 hours completing part III. The equivalent cost of this annual hour burden is estimated to be $8,600, assuming a $91.21 hourly labor rate for an employee benefits professional.

TABLE 1—TIME TO FILL OUT FORM

[Minutes]

	Fully-insured		Self-insured	
	One State	Multi States	One State	Multi States
New Filing	120	120	120	120
Part I	5	5	5	5
Part II	60	120	60	120

[16] EBSA estimates of labor rates include wages, other benefits, and overhead based on the National Occupational Employment Survey (May 2009, Bureau of Labor Statistics) and the Employment Cost Index (October 2010, Bureau of Labor Statistics).

[17] These are rounded values. The totals may differ slightly as a result.

[18] There were 46 MEWA originations in 2006, 52 originations in 2007 and 26 originations in 2008. This averages to 41 originations per year.

TABLE 1—TIME TO FILL OUT FORM—Continued

[Minutes]

	Fully-insured		Self-insured	
	One State	Multi States	One State	Multi States
Part III	15	15	30	30

TABLE 2—HOUR BURDEN TO PREPARE FORM M–1, IN-HOUSE PREPARATION

	Fully-insured		Self-insured		Total
	One State	Multi States	One State	Multi States	
Number of MEWAs	16	17	8	5	46
Review: Year 1	32	34	16	10	92
New Filing: Subsequent Years	3	3	1	1	8
Part I	1	1	1	0.5	4
Part II	16	33	8	11	68
Part III	4	4	4	3	15
Total Time: Year 1	53	73a	29	24	178
Total Time: Subsequent Years	24	41	14	15	94

1. Cost Burden

The Department assumes that 90 percent of the 457 MEWAs (411 MEWAs) that will file the Form M–1 will use third-party service providers to complete and submit the Form M–1.[19] Because the Department is proposing to add additional data elements to the form, the Department assumes that in the year of implementation, all service providers would spend additional time familiarizing themselves with the changes. The Department estimates that MEWAs that use third party service providers would incur the cost of one hour for service providers to review the new rule as service providers likely will provide this service for multiple MEWAs and therefore spread this burden across multiple MEWAs. This results in a one-time cost burden of $37,500 (411 MEWAs * 1 hour * $91.21).

The total estimated cost burden for preparing the form is arrived at by multiplying the number of filers (found in Table 3) by the amount of time required to prepare the documents (Table 1) and multiplying this result by the hourly cost of an employee benefits professional ($91.21 dollars an hour). Based on the foregoing, the total cost burden for MEWAs that use purchased third-party resources to file the M–1 form is $108,100 hours in the first year and $70,700 in later years. Table 3 summarizes the estimates of the cost burden.

TABLE 3—COST BURDEN TO PREPARE FORM M–1, THIRD-PARTY PREPARATION

	Fully-insured		Self-insured		Total
	One State	Multi States	One State	Multi States	
Number of MEWAs	140	149	73	49	411
Review: Year 1	$12,800	$13,600	$6,700	$4,500	$37,500
New Filing: Subsequent Years	$0	$0	$0	$0	$0
Part I	$1,100	$1,100	$600	$400	$3,100
Part II	$12,800	$27,100	$6,600	$8,900	$55,400
Part III	$3,200	$3,400	$3,300	$2,200	$12,100
Total Time: Year 1	$29,800	$45,200	$17,200	$15,900	$108,100
Total Time: Subsequent Years	$17,100	$31,600	$10,500	$11,500	$70,700

Note: The displayed numbers are rounded to the nearest hundred and therefore may not add up to the totals.

The proposed regulations direct an ERISA-covered plan MEWA that is subject to Form M–1 requirements to include proof of filing the Form M–1 as part of the Form 5500. Accordingly, the Department is proposing to add a new Part III to the Form 5500, which would ask for information regarding whether the employee welfare benefit plan is a MEWA subject to the Form M–1 requirements, and if so, whether the plan is currently in compliance with the Form M–1 requirements under § 2520.101–2. Plan administrators that indicate the plan is a MEWA subject to the Form M–1 requirements also would be required to enter the receipt confirmation code for the most recent Form M–1 filed with the Department. Failure to answer the Form M–1 compliance questions will result in rejection of the Form 5500 Annual Return/Report as incomplete and civil penalties may be assessed pursuant to ERISA section 502(c)(2). The Department believes that the burden associated with this revision would be

[19] This assumption is made in connection with EBSA's principal reporting form, the Form 5500, and was validated through a filer survey.

de minimis, because plan administrators would know whether the plan MEWA is subject to and in compliance with the Form M–1 requirements and they would have the receipt confirmation code for the most recent Form M–1 filing readily available.

The proposed regulations also would remove the exemption from filing the Form 5500 for ERISA-covered MEWAs that are unfunded or insured and have fewer than 100 participants. Following the methodology used to calculate the burden in the Form 5500 regulations, the Department estimates that small ERISA-covered MEWAs filing a Form 5500 and completing Schedule A and Part III of Schedule G would incur an annual cost of $450 to engage a third-party service provider to prepare the form and schedules for submission. The Department does not have sufficient data to determine the number of small, ERISA-covered MEWAs that would be required to file the Form 5500 under the proposed rule, but believes that the number of such MEWAs would be small, because 90 percent of MEWAs that file Form M–1 with the Department cover more than 100 participants.

2. Cost to the Government

The Department estimates that the cost to the Federal government to process Form M–1s is approximately $7,200. This includes the cost to process online submissions and maintain the processing system, and was estimated by the offices within EBSA that are responsible for overseeing these activities.

TABLE 4—*Cost of Federal Government of Form M–1*

Processing of M1 Forms:	
Online	$2,200
Maintenance of System	5,000
Total	7,200

These paperwork burden estimates are summarized as follows:

Type of Review: Revised collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: MEWA Form M–1.

OMB Control Number: 1210–0116.

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

Estimated Number of Respondents: 457 (first year); 457 (three-year average).

Estimated Number of Responses: 457 (first year); 457 (three-year average).

Frequency of Response: Annually.

Estimated Annual Burden Hours: 178 (first year); 122 (three-year average).

Estimated Annual Burden Cost: $108,100 (first year); $83,200 (three-year average).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities. Small entities include small businesses, organizations and governmental jurisdictions.

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

The Small Business Administration uses a size standard of less than $7 million in average annual receipts as the cut off for small business in the finance and insurance sector.[20] While the Department does not collect revenue information on the Form M–1, it does collect data regarding the number of participants covered by MEWAs that file Form M–1 and can use participant data and average premium data to determine the number of MEWAs that are small entities, because their revenues do not exceed the $7 million threshold. For 2009, the average single coverage annual premium was $4,717 and the average annual family coverage premium was $12,696.[21] Combining these premium estimates with estimates of the ratio of policies to the covered population from the Current Population Survey at employers with less than 500 workers (0.309 for single coverage and 0.217 for family coverage), the Department estimates that 60 percent of MEWAs (243 MEWAs) are small entities.

While this number is a relatively large fraction of all MEWAs, it is about 7 percent when expressed as a fraction of all participants covered by MEWAs. In addition, the Department notes that the reporting burden that would be imposed on all MEWAs by the proposed rule is estimated as an average cost of $272 for each MEWA filing Form M–1. For all but the smallest MEWAs (less than 15 participants), this represents less than one-half of one percent of revenues.

The proposed regulations also would remove the exemption from filing the Form 5500 for ERISA-covered MEWAs that are unfunded or insured, fully insured, or combination unfunded/fully insured covering fewer than 100 participants. As discussed in the PRA section above, the Department estimates that these small ERISA-covered MEWAs would incur an annual cost of $450 to engage a third-party service provider to prepare the form and schedules for submission. The Department does not have sufficient data to determine the number of small plan MEWAs that would be required to file the Form 5500 under the proposed rule. About 10 percent (48) of MEWAs filing Form M–1 in 2009 had less than 100 participants. However, the 2009 Form M–1 lacks information on the source of funding to determine which of these small MEWAs would be subject to the proposed rule.

Accordingly, the Department hereby certifies that this proposed regulation would not have a significant economic impact on a substantial number of small entities. The Department invites public comments regarding this finding.

D. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*), as well as Executive Order 12875, this proposed rule does not include any federal mandate that may result in expenditures by State, local, or tribal governments, or the private sector, which may impose an annual burden of $100 million.

E. Executive Order 13132

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

[20] U.S. Small Business Administration, ''Table of Small Business Size Standards Matched to North American Industry Classification System Codes,'' *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.*

[21] Kaiser Family Foundation and Health Research Educational Trust ''Employer Health Benefits, 2009 Annual Survey.'' The reported numbers are from Exhibit 1.2 and are for the category Annual, all Small Firms (3–199 workers).

need to issue the regulation, and a statement of the extent to which the concerns of the State have been met.

This regulation has federalism implications, because the States and the Federal government share dual jurisdiction over MEWAs that are employee benefit plans or hold plan assets. Generally, States are primarily responsible for overseeing the financial soundness and licensing of MEWAs under State insurance laws. The Department enforces ERISA's fiduciary responsibility provisions against MEWAs that are ERISA plans or hold plan assets.

Over the years, the Department and State insurance departments have worked closely and coordinated their investigations and other actions against fraudulent and abusive MEWAs. For example, EBSA regional offices have met with State officials in their regions and supported their enforcement efforts to shut down fraudulent and abusive MEWAs. By requiring MEWAs to register with Department before operating in a State by filing Form M–1 and to provide additional information, this proposed rule would enhance the State and Federal governments' joint mission to take enforcement action against fraudulent and abusive MEWAs and limit the losses suffered by American workers, their families, and businesses when abusive MEWAs become insolvent and fail to reimburse medical claims.

List of Subjects in 29 CFR Part 2520

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

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Chapter XXV

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 is revised to read:

Authority: 29 U.S.C. 1021–1024, 1027, 1029–31, 1059, 1134 and 1135; Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010). Sec. 2520.101–2 also issued under 29 U.S.C. 1181–1183, 1181 note, 1185, 1185a–d, and 1191–1191c. Sec. 2520.103–1 also issued under 26 U.S.C. 6058 note. Sec. 2520.101–6 also issued under § 502(a)(3), 120 Stat. 780, 940 (2006); 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–d, 1191, and 1191a–c. Secs. 2520.104b–1 and 2520.107 also issued under 26 U.S.C. 401 note, 111 Stat. 788;

2. Section 2520.101–2 is revised to read as follows:

§ 2520.101–2 Filing by Multiple Employer Welfare Arrangements and Certain Other Related Entities.

(a) *Basis and scope.* Section 101(g) of the Employee Retirement Income Security Act (ERISA), as amended by the Patient Protection and Affordable Care Act, requires the Secretary of Labor (the Secretary) to establish, by regulation, a requirement that multiple employer welfare arrangements (MEWAs) providing benefits that consist of medical care (as described in paragraph (b)(6), below), which are not group health plans, register with the Secretary prior to operating in a State. Section 101(g) also permits the Secretary to require, by regulation, such MEWAs 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 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). The reporting 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:

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

(ii) 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

(iii) 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.

(2) *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 § 2510.3–40.

(3) *Excepted benefits* means *excepted benefits* within the meaning of section 733(c) of ERISA and § 2590.701–2.

(4) *Group health plan* means a *group health plan* within the meaning of section 733(a) of ERISA and § 2590.701–2.

(5) *Health insurance issuer* means a *health insurance issuer* within the meaning of section 733(b)(2) of ERISA and § 2590.701–2.

(6) *Medical care* means *medical care* within the meaning of section 733(a)(2) of ERISA and § 2590.701–2.

(7) *Multiple employer welfare arrangement (MEWA)* means a *multiple employer welfare arrangement* within the meaning of section 3(40) of ERISA.

(8) *Operating* means any activity including but not limited to marketing, soliciting, providing, or offering to provide benefits consisting of *medical care.*

(9) *Origination* means the occurrence of any of the following events (and an ECE is considered to have been *originated* when any of the following events occurs)—

(i) The ECE begins operating with regard to the employees of two or more employers (including one or more self-employed individuals);

(ii) The ECE, while required to report pursuant to paragraph (c)(1)(ii) of this section, begins operating in any additional State;

(iii) The ECE begins operating following a merger with another ECE (unless all of the ECEs that participate in the merger previously were last originated at least three years prior to the merger);

(iv) The number of employees receiving coverage for medical care under the 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 ECE under which all ECEs that participate in the merger were last originated at least three years prior to the merger); or

(v) The ECE, during the three-year period following an event described in (b)(9)(i)–(iv) above, experiences a

material change as defined in the Form M–1 instructions.

(10) *Reporting or to report* means to file the Form M–1 as required pursuant to sections 101(g); § 2520.101–2; or the instructions to the Form M–1.

(11) *State* means *State* within the meaning of § 2590.701–2.

(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 regardless of whether the entity is a group health plan; and

(ii) The administrator of an ECE during the three year period following an event described in (b)(9)(i)–(iv).

(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 described under this paragraph (c)(2)(i).

(A) A MEWA or ECE 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) A MEWA or ECE that 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) A MEWA or ECE that is a group health plan 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) A MEWA or ECE that 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 under this paragraph (c)(2)(ii).

(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 similar to the principles of section 414(c) of the Internal Revenue Code;

(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, determined as of the 60th day following the date the MEWA or ECE began operating in a manner such that a filing is required pursuant to paragraph (e)(2)(ii), (iii), or (iv) of this section.

(3) *Examples.* The rules of this paragraph (c) are illustrated by the following examples:

Example 1. (i) *Facts.* MEWA *A* begins operating by offering coverage to the employees of two or more employers on January 1, 2012. MEWA *A* 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 1,* the administrator of MEWA *A* is not required to report via Form M–1. MEWA *A* meets the exception to the filing requirement in paragraph (c)(2)(i)(A) of this section 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 2. (i) *Facts.* Company *B* maintains a group health plan that provides benefits for medical care for its employees (and their dependents). Company *B* establishes a joint venture in which it has a 25 percent stock ownership interest, determined by applying the principles under section 414(c) of the Internal Revenue Code, and transfers some of its employees to the joint venture. Company *B* continues to cover these transferred employees under its group health plan.

(ii) *Conclusion.* In this *Example 2,* the administrator is not required to file the Form M–1 because Company *B's* group health plan meets the exception to the filing requirement in paragraph (c)(2)(ii)(A) of this section. This is because Company *B'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 3. (i) *Facts.* Company *C* maintains a group health plan that provides benefits for medical care for its employees. The plan year of Company *C's* group health plan is the fiscal year for Company *C,* which is October 1st–September 30th. Therefore, October 1, 2012–September 30, 2013 is the 2013 plan year. Company *C* decides to sell a portion of its business, Division *Z,* to Company *D.* Company *C* signs an agreement with Company *D* under which Division *Z* will be transferred to Company *D,* effective September 30, 2013. The change in control of Division *Z* therefore occurs on September 30, 2013. Under the terms of the agreement, Company *C* agrees to continue covering all of the employees that formerly worked for Division *Z* under its group health plan until Company *D* has established a new group health plan to cover these employees. Under the terms of the agreement, it is anticipated that Company *C* will not be required to cover the employees of Division *Z* under its group health plan beyond the end of the 2014 plan year, which is the plan year following the plan year in which the change in control of Division *Z* occurred.

(ii) *Conclusion.* In this *Example 3,* the administrator of Company *C's* group health plan is not required to report via Form M–1 on March 1, 2014 for fiscal year 2013 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 2013 Form M–1 because it is anticipated that Company *C* will not be required to cover the employees of Division *Z* under its group health plan beyond the end of the 2014 plan year, which is the plan year following the plan year in which the change in control of businesses occurred.

Example 4. (i) *Facts.* Company *E* 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 *E's* group health plan uses calendar year data to report for purposes of the Form M–1. The administrator of Company *E'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 2012 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 2012.

(ii) *Conclusion.* In this *Example 4,* the administrator of Company *E's* group health plan is not required to report via Form M–

1 for calendar year 2012 (a filing that is otherwise due by March 1, 2013) 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.

(d) *Information to be reported*— (1) Any reporting required by this section shall consist of a completed copy of the Form for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs) (Form M–1) and any additional statements required pursuant to the Instructions to the Form M–1.

(2) *Rejected filings.*—The Secretary may reject any filing under this section if the Secretary determines that the filing is incomplete, in accordance with § 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 § 2560.502c–5).

(e) *Reporting requirements and timing*—(1) *Period for which reporting 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 is operating.

(2) *Filing deadline*—(i)(A) *General March 1 filing due date for annual filings.* Except as provided in paragraph (e)(2)(i)(B) of this section, a completed copy of the Form M–1 is required to be filed on or before each March 1 that follows a period for which reporting is required (as described in paragraph (e)(1) of this section).

(B) *Exception.* Paragraph (e)(2)(i) of this section does not apply to ECEs and MEWAs if, between October 1 and December 31, they experience an origination or registration event and make the subsequent, timely filing. Thus, no annual report is due in March if a MEWA has a registration event or an ECE has an origination event between October 1 and December 31. However the exception applies only if the MEWA or ECE makes a timely filing pursuant to paragraph (e)(2)(ii), (iii), or (iv) of this section.

(ii) *Special rule requiring an Origination Filing when an ECE is originated*—(A) *In general.* Except as provided in paragraph (e)(2)(ii)(B) of this section, when an ECE is originated, the administrator of the ECE is also required to file a completed copy of the Form M–1 30 days prior to the origination date.

(B) *Exception.* Paragraph (e)(2)(ii)(A) of this section does not apply to ECEs that experience an origination as described in paragraphs (b)(9)(iii), (iv), or (v) of this section. Such entities are required to file a completed copy of the Form M–1 by the 30th day following the origination date.

(iii) *Special rule requiring that a MEWA register with the Secretary prior to operating in a State*—(A) *In general.* Except as provided in paragraph (e)(2)(iii)(B) of this section, the administrator of the MEWA is required to register with the Secretary by filing a completed Form M–1 30 days prior to operating in any State.

(B) *Exception.* Paragraph (e)(2)(iii)(A) of this section does not apply to MEWAs that, prior to the effective date of this section, were already in operation in a State (or States). Such entities are required to submit an annual filing pursuant to annual reporting rules described in paragraph (e)(2)(i) of this section for that State (or those States).

(iv) *Special rule requiring MEWAs to make additional registration filings.* Subsequent to registering with the Secretary pursuant to paragraph (e)(2)(iii)(A), the administrator of a MEWA shall make an additional registration filing:

(A) 30 days prior to operating in any additional State or States that were not indicated on a previous report filed pursuant to paragraph (e)(2)(i) or (e)(2)(iii)(A);

(B) Within 30 days of the MEWA operating with regard to the employees of an additional employer (or employers, including one or more self-employed individuals) after a merger with another MEWA;

(C) Within 30 days of the date the number of employees receiving coverage for medical care under the MEWA is at least 50 percent greater than the number of such employees on the last day of the previous calendar year; or

(D) Within 30 days of experiencing a material change as defined in the Form M–1 instructions.

(v) *Anti-abuse rule.* If a MEWA or ECE neither offers nor provides benefits consisting of medical care within a State during the calendar year immediately following the year in which an origination filing is made by the ECE pursuant to paragraph (e)(2)(ii) (due to an event described in paragraph (b)(9)(ii)) or a registration filing is made by the MEWA pursuant to (e)(2)(iii)(A) or (e)(2)(iv)(A), with respect to operating in such State, such filing will be considered to have lapsed.

(vi) *Multiple filings not required in certain circumstances.* If multiple filings are required under this paragraph (e)(2), a single filing will satisfy this section so long as the filing is timely for each required filing.

(vii) *Extensions.* (A) An extension may be granted for filing a report required by paragraph (e)(2)(i)(A) of this section, if the administrator complies with the extension procedure prescribed in the Instructions to the Form M–1.

(B) If the filing deadline set forth in this paragraph (e)(2) is a Saturday, Sunday, or federal holiday, the form must be filed no later than the next business day.

(3) *Examples.* The rules of this paragraph (e) 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 on July 1, 2003 (and continues to offer such coverage). MEWA *A* has satisfied all filing requirements to date.

(ii) *Conclusion.* In this *Example 1,* the administrator of MEWA *A* must continue to file a completed Form M–1 each year by March 1 but the administrator is not required to register with the Secretary because MEWA *A* meets the exception to the registration requirement in paragraph (e)(2)(iii)(B) of this section and has not experienced any event described in paragraph (e)(2)(iv) that would require registering with the Secretary.

Example 2. (i) *Facts.* As of February 22, 2012, MEWA *B* is preparing to operate in States *Y* and *Z.* MEWA *B* is not licensed or authorized to operate as a health insurance issuer in any State and does not meet any of the other exceptions set forth in paragraph (c)(2) of this section.

(ii) *Conclusion.* In this *Example 2,* the administrator of MEWA *B* is required to register with the Secretary by filing a completed Form M–1 30 days prior to operating in States *Y* or *Z.* The administrator of MEWA *B* must also report by filing the Form M–1 annually by every March 1 thereafter.

Example 3. (i) *Facts.* As of March 28, 2012, MEWA *C* is operating in States *V* and *W.* MEWA *C* has satisfied the requirements of (e)(2)(iii) with respect to those States. MEWA *C* is not licensed or authorized to operate as a health insurance issuer in any State and does not meet any of the other exceptions set forth in (c)(2) of this section. On April 1, 2012 MEWA *C* begins operating in State *X.*

(ii) *Conclusion.* In this *Example 3,* the administrator of MEWA *C* is required to make an additional registration filing with the Secretary 30 days prior to operating in State *X.* Additionally, the administrator of MEWA *C* must continue to file the Form M–1 annually by every March 1 thereafter.

Example 4. (i) *Facts.* ECE *A* began offering coverage for medical care to the employees of two or more employers on January 1, 2007 and ECE *A* has not been involved in any mergers or experienced any other origination as described in paragraph (b)(9) of this section.

(ii) *Conclusion.* In this *Example 4,* ECE *A* was originated on January 1, 2007 and has not been originated since then. Therefore, the

administrator of ECE *A* is not required to file a Form M–1 on March 1, 2012 because the last time the ECE *A* was originated was January 1, 2007 which is more than 3 years prior to March 1, 2012. Further, the ECE has satisfied its reporting requirements by making 3 timely annual filings after its origination.

Example 5. (i) *Facts.* ECE *B* wants to begin offering coverage for medical care to the employees of two or more employers on July 1, 2012.

(ii) *Conclusion.* In this *Example 5,* the administrator of ECE *B* must file a completed Form M–1 on or before June 1, 2012 (which is 30 days prior to the origination date). In addition, the administrator of ECE *B* must file an updated copy of the Form M–1 by March 1, 2013 because the last date ECE *B* was originated was June 1, 2012 (which is less than 3 years prior to the March 1, 2013 due date). Furthermore, the administrator of ECE *B* must file the Form M–1 by March 1, 2014 and again by March 1, 2015 (because July 1, 2012 is less than three years prior to March 1, 2014 and March 1, 2015, respectively). However, if ECE *B* is not involved in any mergers and does not experience any other origination as described in paragraph (b)(9) of this section, there would not be a new origination date and no Form M–1 is required to be filed after March 1, 2015.

Example 6. (i) *Facts.* ECE *D,* which currently operates in State *A,* is making preparations to operate in State *B* on November 1, 2012 and thus must make an origination filing by October 2, 2012 (30 days prior to the origination date). ECE *D* makes this filing timely.

(ii) *Conclusion.* In this *Example 6,* ECE *D* experiences an origination and makes a timely filing on October 2, 2012. Thus ECE *D* is exempt from the next annual filing due March 1, 2013 pursuant to the filing deadline exception under (e)(2)(i)(B) of this section. However, the ECE must continue to file annual reports for the subsequent years on March 1, 2014 and March 1, 2015.

Example 7. (i) *Facts.* MEWA *E* begins distributing marketing materials on August 31, 2012.

(ii) *Conclusion.* In this *Example 7,* because MEWA *E* began operating on August 31, 2012, the administrator of MEWA *E* must register with the Secretary by filing a completed Form M–1 on or before August 1, 2012 (30 days prior to operating in any State). In addition, the administrator of MEWA *E* must file the Form M–1 annually by every March 1 thereafter.

Example 8. (i) Facts. Same facts as Example 7, but MEWA *E* registers on or before August 1, 2012 by filing a Form M–1 indicating it will begin operating in every State. However, in the calendar year immediately following the filing, MEWA *E* only offered or provided benefits consisting of medical care to participants in State *Z.*

(ii) Conclusion. In this Example 8, the registration for all States (other than State Z) have lapsed under (e)(2)(v) because MEWA *E* only offered or provided benefits consisting of medical care to participants in State *Z* in the calendar year immediately following the filing. If subsequently, MEWA *E* begins offering or providing benefits consisting of medical care to participants in any additional State (or States), it must make a new registration filing pursuant to (e)(2)(iv)(A) of this section.

(f) *Electronic Filing.* A completed Form M–1 is filed with the Secretary by submitting it electronically as prescribed in the Instructions to the Form M–1.

(g) *Penalties*—(1) *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 § 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 §§ 2570.90 through 2570.101.

(2) *Criminal penalties and procedures.* For information on criminal penalties under section 519 of ERISA for persons who knowingly make false statements or false representation of fact with regards to the information required under this section, see section 501(b) of ERISA.

(3) *Cease and desist and summary seizure orders.* For information on the Secretary's authority to issue a cease and desist or summary seizure order under section 521 of ERISA, see § 2560.521.

3. Section 2520.103–1 is amended by:

a. Revising paragraphs (a) introductory text, (a)(2), (b) introductory text and (c)(1),

b. Amending paragraph (c)(2)(ii)(C) by removing the reference ''and'' at the end of the paragraph,

c. Removing the period at the end of paragraph (c)(2)(ii)(D) and adding the reference ''and'' at the end of paragraph,

d. Adding a new paragraph (c)(2)(ii)(E),

e. Redesignating paragraph (f) as paragraph (g) and add a new paragraph (f).

The revisions and additions read as follows:

§ 2520.103–1 Contents of the annual report.

(a) *In general.* The administrator of a plan required to file an annual report in accordance with section 104(a)(1) of the Act shall include with the annual report the information prescribed in paragraph (a)(1) of this section or in the simplified report, limited exemption or alternative method of compliance described in paragraph (a)(2) of this section.

* * * * *

(2) Under the authority of subsections 104(a)(2), 104(a)(3) and 110 of the Act, and section 1103(b) of the Pension Protection Act of 2006, a simplified report, limited exemption or alternative method of compliance is prescribed for employee welfare and pension benefit plans, as applicable. A plan filing a simplified report or electing the limited exemption or alternative method of compliance shall file an annual report containing the information prescribed in paragraph (b), paragraph (c), or paragraph (f) of this section, as applicable, and shall furnish a summary annual report as prescribed in § 2520.104b–10.

(b) *Contents of the annual report for plans with 100 or more participants electing the limited exemption or alternative method of compliance.* Except as provided in paragraphs (d) and (f) of this section and in §§ 2520.103–2 and 2520.104–44 the annual report of an employee benefit plan covering 100 or more participants at the beginning of the plan year which elects the limited exemption or alternative method of compliance described in paragraph (a)(2) of this section shall include:

* * * * *

(c) * * *

(1) Except as provided in paragraph (c)(2), (d) and (f) of this section, and in §§ 2520.104–43 and 2520.104a–6, the annual report of an employee benefit plan that covers fewer than 100 participants at the beginning of the plan year shall include a Form 5500 ''Annual Return/Report of Employee Benefit Plan'' and any statements or schedules required to be attached to the form, completed in accordance with the instructions for the form, including Schedule A (Insurance Information), Schedule SB (Single Employer Defined Benefit Plan Actuarial Information), Schedule MB (Multiemployer Defined Benefit Plan and Certain Money Purchase Plan Actuarial Information), Schedule D (DFE/Participating Plan Information), Schedule I (Financial Information—Small Plan), and Schedule R (Retirement Plan Information). See the instructions for this form.

(2) * * *

(ii) * * *

(E) Is not a multiple employer welfare arrangement subject to the filing requirements under § 2520.101–2.

* * * * *

(f) *Plans which are multiple employer welfare arrangements.* The annual report of an employee welfare benefit plan that is a multiple employer welfare arrangement subject to the filing requirements under § 2520.101–2 shall include:

(1)(i) For a plan with 100 or more participants, the information prescribed in paragraph (b) of this section; or

(ii) For a plan with fewer than 100 participants, except as provided in

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

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

* * * * *

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

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

* * * * *

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

* * * * *

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

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

* * * * *

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

Signed this 28th day of November 2011.

Phyllis C. Borzi,

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

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

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Parts 2560 and 2571

RIN 1210–AB48

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

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Proposed rules.

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

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

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

ADDRESSES: Written comments may be submitted to the address specified below. All comments will be made available to the public. *Warning:* Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines. Comments may be submitted anonymously.

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

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: E-OHPSCA521Orders.EBSA@dol.gov.*
- *Mail or Hand Delivery:* Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N–5653, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, *Attention:* RIN 1210–AB48; Section 521 Orders Proposed Regulations.

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

SUPPLEMENTARY INFORMATION:

I. Background

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

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

[1] The term ''multiple employer welfare arrangement'' is defined at ERISA § 3(40), 29 U.S.C. 1002(40).