

**SECRETARY 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:** Final rules.

**SUMMARY:** This document contains two final 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 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 regulation establishes the procedures for use by administrative law judges and the Secretary when a MEWA or other person challenges a temporary cease and desist order.

**DATES:** *Effective date.* These final regulations are effective [***INSERT 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER***].

**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.

**SUPPLEMENTARY INFORMATION:**

**I. Executive Summary**

**A. Purpose of the Regulatory Action**

**1. Need for Regulatory Action**

The Patient Protection and Affordable Care Act (Affordable Care Act) gives the Secretary authority to issue a cease and desist order when a multiple employer welfare arrangement (MEWA) engages in conduct that is fraudulent, creates an immediate danger to the public safety or welfare, or causes or can be reasonably expected to cause significant, immediate, and irreparable injury. The act also gives the Secretary authority to issue a summary seizure order

when a MEWA is in a financially hazardous condition. These new powers strengthen the Secretary's ability to protect plan participants, beneficiaries, employers, employee organizations, and other members of the public from fraudulent, abusive, and financially unstable MEWAs.

These two regulations are necessary to set forth the criteria for determining whether the statutory grounds for issuing an order have been met, and, in the case of a cease and desist order, to establish reasonable administrative review procedures. The Secretary will generally obtain judicial authorization before issuing a summary seizure order. The substantive criteria for issuing an order are based on several decades of enforcement experience by the Department and the States regarding fraudulent or financially hazardous conduct of MEWAs (and persons acting as their agents and employees). The administrative procedures will allow affected persons to challenge a cease and desist order and obtain expeditious review, including the right to a hearing.

## **2. Legal Authority**

Section 521 of ERISA, 29 U.S.C. 1151, sets out the Secretary's authority to issue cease and desist orders and summary seizure orders. Section 521(f) provides that "the Secretary may promulgate such regulations or other guidance as may be necessary or appropriate to carry out" this new enforcement authority. Section 505 of ERISA, 29 U.S.C. 1135, also provides the Secretary with authority to prescribe such regulations as necessary or appropriate to carry out the provisions of Title I of ERISA, which includes the new section 521.

### **B. Summary of the Major Provisions of This Regulatory Action**

These rules generally set forth the statutory criteria under which the Secretary may issue cease and desist orders and summary seizure orders. They also specify that orders may apply to

MEWAs and to persons having custody or control of assets of a MEWA, any authority over management of a MEWA, or any role in the transaction of a MEWA's business. Paragraph (b) of this section contains key definitions. Most notably, this paragraph sets forth the criteria for determining if it appears that the MEWA or any person acting as an agent or employee of the MEWA has engaged in conduct that would support issuance of an order under the statute. The regulations address the scope of the cease and desist order and the process for a person who is the subject of a temporary cease and desist order to request an administrative hearing to show cause why the order should be modified or set aside. The regulations also establish the procedures for such hearings.

Although the Secretary may issue a cease and desist order without first seeking court approval, the procedure for a summary seizure order is somewhat different. The regulations generally require that the Secretary obtain judicial authorization before issuing a summary seizure order. They also require that the Secretary seek court appointment of a receiver or independent fiduciary and obtain court authorization for other actions to assert control over the MEWA's and plan assets.

Orders issued under these final rules are effective upon service and remain in effect until modified or set aside by the Secretary, an administrative law judge, or a reviewing court. Issued final orders will be made available to the public as will modifications and terminations of such final orders. Further, to facilitate coordination with the States, Federal agencies, and foreign authorities, the Secretary may disclose the issuance of any order (whether temporary or final) and any information and evidence of any proceedings and hearings related to the order to other Federal, State, or foreign authorities. (The sharing of such information, however, does not constitute a waiver of any applicable privilege or claim of confidentiality.)

The Secretary remains committed to helping MEWAs and plan officials comply with legal requirements and serve plan participants and beneficiaries properly. These new enforcement tools will enhance the Department's ability to protect plan participants and beneficiaries when MEWAs and plan actors fail to comply with their obligations. The Secretary will also continue to use any other investigatory and enforcement tools available under title I of ERISA

### **C. Costs and Benefits**

These final regulations will improve MEWA compliance and deter abusive practices. They will also enable the Secretary to take enforcement action against fraudulent, abusive, and financially unstable MEWAs more effectively. The Department's primary judicial remedy for violations of ERISA by MEWAs is court-ordered relief based on a breach of fiduciary duty. Gathering sufficient evidence to prove a fiduciary breach may be very time-consuming and labor intensive, even where it is clear that the MEWA is insolvent or unable to meet its financial commitments. In many MEWA cases, important financial records are poor or non-existent. The new authority implemented by these regulations provides an additional, more flexible tool for the Secretary to use, when appropriate, to combat fraudulent and abusive conduct by MEWAs and financially hazardous arrangements. Moreover, these regulations will enable the enforcement process to be more efficient because the subject of a cease and desist order can seek review of the order in an administrative hearing rather than a court. Since the rules do not require any action or impose any requirements on MEWAs, these regulations do not impose any major costs.

## **II. Background**

Multiple employer welfare arrangements (MEWAs)<sup>1</sup> that are properly operated provide an additional option for small employers seeking affordable health coverage for their employees. Nevertheless, fraudulent and abusive practices and financial instability are recurrent themes in ERISA enforcement.<sup>2</sup> Congress enacted section 6605 of the Patient Protection and Affordable Care Act (Affordable Care Act), Pub. L. No. 111-148, 124 Stat. 119, 780 (2010), which adds section 521 to ERISA, to give the Secretary of Labor additional enforcement authority to protect plan participants, beneficiaries, employees or employee organizations, or other members of the public against fraudulent, abusive, or financially hazardous MEWAs.

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).

On December 6, 2011, the Department published in the Federal Register proposed regulations (76 FR 76235) implementing new ERISA section 521 and setting forth the procedures for administrative hearings on the issuance of an ex parte cease and desist order. The Department received three (3) comment letters on these proposed rules. After consideration of

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

<sup>2</sup> See, e.g., Chao v. Graf, 2002 WL 1611122 (D. Nev. 2002), In re Raymond Palombo, et al., 2011 WL 1871438 (Bankr. C.D. CA 2011) and Solis v. Palombo, No. 1:08-CV-2017 (N.D. Ga 2009); Chao v. Crouse, 346 F.Supp.2d 975 (S.D. Ind. 2004).

the comments received, the Department is publishing these final regulations with little modification of the proposed rules.

### **III. Overview of the Final Regulations**

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

##### Purpose and definitions

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

One commenter expressed concern that applying cease and desist and summary seizure orders to third party administrators (TPAs) would threaten their ability to perform their services, which may include helping MEWAs recover when they are in financial peril. TPAs perform critical services for the plan community. As the commenter notes, an important service TPAs do or can provide is to educate MEWAs about their duty to pay claims and provide promised benefits. TPAs also play an important role in informing the Department about MEWAs that ask them to deceive or defraud plan participants. The Department recognizes the role that

conscientious and knowledgeable TPAs and other service providers may play in protecting plans and their participants and beneficiaries. Where the functions of a service provider are essential to the operation of a MEWA, cease and desist orders will need to cover these functions, whether or not the service provider engaged in conduct giving rise to the order. Moreover, in some cases a service provider may be integrally involved in conduct evidencing an intent to deceive or defraud plans and their participants and beneficiaries or other actions that endanger the public welfare. As an example, in *U.S. v. William Madison Worthy*, No. 7:11-cr-00487-HMH (D. S.C. 2011), Mr. Worthy, who owned the TPA providing services to the MEWA, pleaded guilty for diverting almost \$1 million in premium contributions for coverage provided in connection with the MEWA. Ultimately, about \$1.7 million in claims either went unpaid or had to be paid by plan members.

Moreover, it should be emphasized that orders may often be issued to persons, who were not involved in improper conduct, but whose cooperation is necessary to carry out the purpose of the order. For instance, a bank holding assets of a MEWA may receive a court-approved summary seizure order that directs the bank to freeze those assets. See, e.g., 29 CFR 2560.521-1(f)(4).

Paragraph (b) contains key definitions. ERISA section 521 applies the Secretary's cease and desist and seizure order authority to MEWAs, as defined under section 3(40) of ERISA, 29 U.S.C. 1002(40). As stated in the proposed regulations, Congress did not limit the Secretary's authority to issue orders to MEWAs that are ERISA-covered employee welfare benefits plans (ERISA-covered plans). Section 521 of ERISA also applies if the MEWA provides health coverage to one or more ERISA-covered plans, even if it also provides coverage to other persons unconnected to an ERISA-covered plan. These rules do not, however, apply to MEWAs that provide coverage only in connection with governmental plans, church plans, and plans

maintained solely for the purpose of complying with workers' compensation laws, which are not covered by ERISA. They also do not apply to arrangements that only provide coverage to individuals other than in connection with an employee welfare benefit plan (e.g., individual market coverage). The proposed rules also noted that they did not apply to arrangements licensed or authorized to operate as a health insurance issuer. Though the Department has not changed the substance of the regulations in this regard, it has revised paragraph (b)(1) for the sake of clarity. The definition of a MEWA in ERISA section 3(40) is very broadly worded. Read literally, it could be interpreted to include traditional health insurance issuers (including health maintenance organizations) that are fully licensed (i.e., subject to stringent and comprehensive insurance regulation) to offer health insurance coverage to the public and employers at large in every State in which they offer health insurance coverage. The Department has never, however, applied ERISA's provisions on MEWAs to such organizations. These organizations do not pose the same level of risk for fraud, abuse, and financial instability that ERISA's provisions on MEWAs, including the new ERISA section 521 and these final rules, are designed to address. Consequently, these final rules do not apply to these entities. This exclusion applies to any arrangement that could fall within the definition of MEWA but is covered by the same level and scope of stringent and comprehensive insurance laws of a State (such as laws on licensure, solvency, reporting, anti-fraud, appeals, premium assessment, and guaranty funds) as traditional health insurance issuers (including health maintenance organizations) and that offers health insurance coverage to the public and employers at large.

ERISA section 514(b)(6) makes clear that the States can regulate any MEWA, even a MEWA that is an ERISA-covered plan. The Department retains shared jurisdiction with the States. In some States, some MEWAs are permitted to operate if they have obtained a limited

license from the State (e.g. a license that, for instance, allows them to operate subject to lower requirements or less extensive examination and oversight and/or to offer and provide coverage to a limited population.). These arrangements remain subject to ERISA section 521 and these final rules.

One commenter encouraged the Department to focus its enforcement actions on abusive and fraudulent MEWAs that are self-funded or not fully insured (within the meaning of ERISA section 514(b)(6)(D)). The Department recognizes that fully insured MEWAs have raised fewer concerns than other MEWAs. Nevertheless, a fully insured MEWA that engages in the conduct meeting the statutory criteria could be subject to an order.

ERISA section 521 provides three statutory grounds upon which the Secretary may issue a cease and desist order. Paragraphs (b)(2)-(4) of the final regulations clarify the scope and meaning of the statutory language. The first statutory ground, fraudulent conduct, is described in paragraph (b)(2) of the final rules as an act or omission intended to deceive or defraud plan participants, plan beneficiaries, employers or employee organizations, or other members of the public, the Secretary or a State about the MEWA's financial condition or regulatory status, benefits, management, control, or administration, and other aspects of its operation (e.g. claims review, marketing, etc.) that the Secretary determines are material.<sup>3</sup>

One commenter expressed concern about the definition of fraudulent conduct. In particular, the commenter was concerned that a focus on omissions regarding the financial condition of the MEWA, including the management of plan assets, could inadvertently target service providers

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<sup>3</sup> Similarly, section 519 of ERISA, 29 U.S.C. 1149, (also enacted as part of the Affordable Care Act) prohibits false statements and representations by any person, in connection with a MEWA's marketing or sales, concerning the financial condition or solvency of the MEWA, the benefits provided by the MEWA, and the regulatory status of the MEWA. Under ERISA section 501(b), 29 U.S.C. 1131(b), (as amended by the Affordable Care Act) criminal penalties may apply to a violation of ERISA section 519. Other criminal penalties may apply under other federal provisions as well. See e.g., 29 U.S.C. 1131(a)(willful violations of ERISA reporting and disclosure requirements), 18 U.S.C. 1001 (knowingly and willfully false statements to the U.S. government), and 18 U.S.C. 1027 (knowingly false statement or knowing concealment of facts in relation to documents required by ERISA).

that adjudicate or pay claims. The commenter also expressed concern that service providers would be adversely implicated simply because they interacted with the MEWA and others with respect to claims or marketing. The new enforcement tools under ERISA section 521 are designed to prevent or address serious harm to plan participants, plan beneficiaries, employers, employee organizations, and other members of the public. Fraudulent conduct, as defined in the proposed rules and under these final regulations, requires knowledge and intentionality or a reckless disregard on the part of the MEWA or agent or employee of the MEWA. As stated previously, however, even though an order is based on the conduct of a person other than the service provider, the service provider's activities may be affected simply because the order prohibits all or certain activities with respect to the MEWA, such as marketing, to continue.

The second ground for issuing a cease and desist order, conduct that creates an immediate danger to the public safety or welfare, is described in paragraph (b)(3) of the final rules. Conduct meets this standard if it impairs, or threatens to impair, the MEWA's ability to pay claims or otherwise unreasonably increases the risk of nonpayment of benefits. The third ground, conduct that causes or can be reasonably expected to cause significant, imminent, and irreparable injury, is described in paragraph (b)(4). Conduct meets this statutory standard if it has, or can be reasonably be expected to have, a significant and imminent negative effect that the Secretary reasonably believes will not be fully rectified on one or more of the following: (a) an employee welfare benefit plan that is, or offers benefits in connection with, a MEWA, (b) plan participants and plan beneficiaries, or (c) employers or employee organizations.

Paragraphs (b)(2)-(4) also provide examples of conduct that falls within those standards. A single act or omission within the categories of conduct set forth in the regulation may provide the basis for a cease and desist order. However, because the categories set forth in the statute are

broad and overlapping, the examples may provide more than one basis for a cease and desist order.

The new ERISA section 521 also further expands the Secretary's enforcement options with respect to MEWAs by authorizing the Secretary to issue a summary seizure order to remove plan assets and other property from the management, control, or administration of a MEWA when it appears that the MEWA is in a financially hazardous condition. Under paragraph (b)(5) a MEWA is in a financially hazardous condition when the Secretary has probable cause to believe that a MEWA is, or is in imminent danger of becoming, unable to pay benefit claims as they become due, or that a MEWA has sustained, or is in imminent danger of sustaining, a significant loss of assets. Under the definition, a MEWA may also be in a financially hazardous condition if the Secretary has issued a cease and desist order to a person responsible for the management, control, or administration of the MEWA or plan assets associated with the MEWA.

Paragraph (b)(6) defines a person, for purposes of these regulations, to be an individual, partnership, corporation, employee welfare benefit plan, association, or other entity or organization. One commenter posited that the definition of person in the proposed rules was too broad because it reached service providers to MEWAs. The Department does not agree that the definition of person is overbroad. As discussed above, persons that provide services to MEWAs may engage in conduct that is grounds for the issuance of an order. Moreover, as previously noted, if a MEWA is being operated in a fraudulent or financially hazardous manner, an order may need to apply to persons providing services to a MEWA in order to achieve its purpose. For example, it may be necessary for a cease and desist order to apply to an individual performing marketing services for a fraudulent MEWA even if the individual was not engaged in fraudulent conduct. In addition, the Department observes that the definition of person in ERISA section

3(9), while different from that in the proposed and these final rules, already encompasses service providers.

#### Cease and Desist Order

Paragraph (c) of § 2560.521-1 addresses the scope of the cease and desist order. This paragraph is structured the same as in the proposed rules. Paragraph (c)(2)(i) notes that the Secretary may enjoin a MEWA or person from the conduct that served as the basis for the order and from activities in furtherance of that conduct through a cease and desist order. In addition, the cease and desist order may provide broader relief as the Secretary determines is necessary and appropriate to protect the interests of plan participants, plan beneficiaries, employers or employee organizations, or other members of the public. Paragraph (c)(2)(ii) provides that an order may prohibit a person from taking any specified actions with respect to, or exercising authority over, specified funds of any MEWA or of any welfare or pension plan. Paragraph (c)(2)(iii) provides that an order may also bar a person from acting as a service provider to MEWAs or plans. This provision allows the Secretary to issue an order preventing a person from, for example, performing any administrative, management, financial, or marketing services for any MEWA or any welfare or pension plan. A cease and desist order containing such a prohibition against transacting business with any MEWA or plan would prevent the MEWA or a person from avoiding the cease and desist order by shutting the MEWA down and re-establishing it in a new location or under a new identity. Such a prohibition may be necessary in cases of serious harmful conduct where it would be contrary to the interests of plan participants, plan beneficiaries, employers or employee organizations, or other members of the public for a person whose conduct gave rise to the order to gain a position with other MEWAs or welfare or pension

plans where they could repeat that conduct. The Department has added paragraph (c)(3) to clarify that it may require documentation from the subject of the order confirming compliance with the cease and desist order. Paragraph (d) of this section preserves the Secretary's existing ability to seek additional remedies under ERISA.

Under the new section 521(b) of ERISA, a person who is the subject of a temporary cease and desist order may request an administrative hearing to show cause why the order should be modified or set aside. Under the statute, the burden of proof rests with the person requesting the hearing. The process for the administrative hearing, set forth in paragraph (e) of § 2560.521-1 in these final regulations, is basically the same process set forth in the proposed rules. If parties subject to a cease and desist order fail to request a hearing before an administrative law judge within 30 days after receiving notice of the order, the order becomes final. If a party makes a timely request for an administrative hearing, the order is not final until the conclusion of the process set forth in 29 CFR part 2571. It remains, however, in effect and enforceable throughout the administrative review process unless stayed by the Secretary, an administrative law judge, or a court. The section was slightly revised to clarify the nature of evidence the Secretary and the person requesting the hearing must provide to the administrative law judge. The proposed rules simply stated that the Secretary must offer evidence supporting the findings made in issuing the order. The final rules were revised to clarify the findings that must be supported by evidence, *i.e.*, the Secretary's findings that she had reasonable cause to believe that the MEWA (or a person acting as an employee or agent of the MEWA) engaged in the conduct specified in the new ERISA section 521(a) and § 2560.521-1(c)(1) of the proposed and these final rules. The proposed rules further stated that the person requesting the hearing has the burden of proof to show that the order was not necessary to protect the interests of the plan, plan participants, plan

beneficiaries, and others. The final rules were revised to state that the person requesting the hearing has the burden of proof to show that the MEWA (or a person acting as an employee or agent of the MEWA) did not engage in the conduct specified in the new ERISA section 521(a) and § 2560.521-1(c)(1) of the proposed and these final rules or that the requirements imposed by the order are arbitrary and capricious. This revision clarifies how the person requesting the hearing shows that the order was not necessary.

#### Summary Seizure Order

The new section 521(e) of ERISA and paragraph (f)(1) of § 2560.521-1 of these rules authorize the Secretary to issue a summary seizure order when it appears that a MEWA is in a financially hazardous condition. Pursuant to the Fourth Amendment of the U.S. Constitution, the Secretary will generally obtain judicial authorization before issuing a summary seizure order. (See Colonnade Catering Corp. v. U.S., 397 U.S. 72 (1970): “Where Congress has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply.”) As in the proposed rules, paragraph (f)(2) provides for such judicial authorization. A court’s authorization may be sought ex parte when the Secretary determines that prior notice could result in removal, dissipation, or concealment of plan assets. On its own initiative, the Department has slightly revised paragraph (f)(2) to clarify that it may seek appointment of a receiver or independent fiduciary by the court and other relief at the time it obtains judicial authorization. Paragraph (f)(3) clarifies that the Secretary may act on a summary seizure order prior to judicial authorization, however, if the Secretary reasonably believes that delay in issuing the order will result in the removal, dissipation, or concealment of

assets. Under these circumstances, the Secretary will promptly seek judicial authorization after service of the order.

Paragraph (f)(4) of § 2560.521-1 describes the general scope of a seizure order.<sup>4</sup> Under paragraph (f)(4), the Secretary may seize books, documents, and other records of the MEWA. She may also seize the premises, other property, and financial accounts for the purpose of transferring such property to a court-appointed receiver or independent fiduciary. In addition, the order may prohibit the MEWA and its operators from transacting any business or disposing of any property of the MEWA. This paragraph also clarifies that the order may be directed to any person holding assets that are the subject of the order, including banks or other financial institutions.

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

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<sup>4</sup> The scope of the summary seizure order in this rule is similar to that provided for in section 201(B) in the National Association of Insurance Commissioners (NAIC) Insurer Receivership Model Act (October 2007).

appropriate. There were no comments on the procedures for issuing summary seizure orders or implementing other actions. With the minor exception noted above, and certain clarifying changes in paragraph (f)(5), the provisions in the proposed rules have been adopted without further modification.

The provisions related to effective date of orders (paragraph g), disclosure (§ 2560.521-2), and effect of ERISA section 521 on other enforcement authority (§ 2560.521-3) have not changed from the proposed rules. Paragraph (h) of § 2560.521-1 of the proposed rules regarding the service of orders on persons who are corporations, associations, or other entities or organizations, was slightly revised for these final rules to state that service could also be made to any person designated for service of process under State law or the applicable plan document. Orders issued under these final rules are effective upon service and remain in effect until modified or set aside by the Secretary, an administrative law judge, or a reviewing court. Issued final orders will be made available to the public, as will modifications and terminations of such final orders.

Further, coordination and collaboration with other Federal agencies and the States are integral and instrumental to successful MEWA enforcement efforts. The Secretary remains committed to working closely with them to help detect, prevent, and address MEWA fraud, abuse, and financial insolvency. To facilitate this collaborative approach to MEWA enforcement, the Secretary may disclose the issuance of any order (whether temporary or final) and any information and evidence of any proceedings and hearings related to the order to other Federal, State, or foreign authorities. The sharing of such information, however, does not constitute a waiver of any applicable privilege or claim of confidentiality as to the information so shared.

The Secretary also remains committed to helping MEWAs and plan officials comply with legal requirements and serve plan participants and beneficiaries properly. Section 521 is not, however, the only enforcement tool available to the Secretary with regard to MEWAs. She will continue to use the other investigatory and enforcement tools which were available to the Secretary under title I of ERISA prior to the enactment of ERISA section 521.

#### Cross-reference

These rules finalize the standards for the issuance of ex parte cease and desist and summary seizure orders. The Department has also finalized in this Notice rules for administrative hearings on ex parte cease and desist orders. In addition, elsewhere in this issue of the Federal Register is a separate regulation amending 29 CFR 2520-101.2, 2520.103-1, 2520.104-20, and 2520.104-41 to implement section 101(g), as amended by the Affordable Care Act, and to enhance the Department's ability to enforce requirements under 29 CFR 2520-101.2.

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

#### Purpose and Definitions

These final procedural rules apply only to adjudicatory proceedings before administrative law judges of the U.S. Department of Labor. Under these procedural rules, an adjudicatory proceeding before an administrative law judge is commenced only after a person who is the subject of a temporary cease and desist order timely requests a hearing and files an answer

showing cause why the temporary order should be modified or set aside. These procedural regulations are largely consistent with rules of practice and procedure under 29 CFR part 18 that generally apply to matters before the Department's Office of Administrative Law Judges (OALJ). At the same time, they reflect the unique nature of orders issued under ERISA section 521. The definitional section of this rule, for instance, incorporates the basic adjudicatory principles set forth at 29 CFR part 18, but includes terms and concepts of specific relevance to proceedings under ERISA section 521. These rules are controlling to the extent they are inconsistent with 29 CFR part 18.

The authority of the Secretary with respect to the orders and proceedings covered by this rule has been delegated to the Assistant Secretary for the Employee Benefits Security Administration pursuant to Secretary's Order 1-2011, 77 FR 1088 (Jan. 9, 2012). With respect to appeals of administrative law judge decisions to the Secretary, the Assistant Secretary has redelegated this authority to the Director of the Office of Policy and Research of the Employee Benefits Security Administration. As required by the Administrative Procedure Act (5 U.S.C. 552(a)(2)(A)) all final decisions of the Department under section 521 of ERISA shall be maintained, and available for public inspection, in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Ave., N.W., Washington, D.C. 20210.

There were no comments on the proposed administrative procedures. The proposed rules are being published as final rules with only minor clarifying changes. Of note, under § 2571.4(d) of the proposed rules, if the administrative law judge denies a petition to participate in the hearing by persons not named in a temporary order, the administrative law judge shall treat the petition as a request for participation as an *amicus curiae*. The final rules give the administrative law

judge discretion on the treatment of denied petitions and state that the administrative law judge may consider whether to treat the petition as a request for participation as amicus curiae. In addition, as stated in the preamble and § 2571.7 of the proposed rules, the fiduciary exception to the attorney-client and work product privileges applies. Consequently, the administrative law judge may not protect from discovery nor from use in the proceedings communications between an attorney and a plan administrator or other plan fiduciary, or work product, that fall under the fiduciary exception. The final rules clarify that the fiduciary exception applies to communications and work product between an attorney and plan fiduciary concerning plan administration and other fiduciary activities, and not to communications made or documents prepared to aid the fiduciary personally or for settlor acts. See Solis v. The Food Employers Labor Relations Ass'n, 644 F.3d 221 (4<sup>th</sup> Cir. 2011). This provision should not be interpreted as excluding consideration by the administrative law judge of other relevant exceptions to the privileges.

#### **IV. Economic Impact and Paperwork Burdens**

##### **A. Summary**

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

also authorizes the Secretary to issue a summary order to seize the assets of a MEWA the Secretary determines to be in a financially hazardous condition. These final regulations implement ERISA section 521(a) by setting forth procedures the Secretary will follow to issue ex parte cease and desist and summary seizure orders.

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

#### B. Executive Order 12866 and 13563 Statement

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility. It also requires federal agencies to develop a plan under which the agencies will periodically review their existing significant regulations to

make the agencies' regulatory programs more effective or less burdensome in achieving their regulatory objectives.

Under Executive Order 12866, a regulatory action deemed “significant” is subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a “significant regulatory action” as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as “economically significant”); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

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

1. Need for Regulatory Action

Properly structured and managed MEWAs that are licensed to operate in a State provide a viable option for some employers to purchase affordable health insurance coverage. However, some MEWAs are marketed by unlicensed entities attempting to avoid State insurance reserve, contribution, and consumer protection requirements. By avoiding these requirements, such entities often are able to market insurance coverage at lower rates than licensed insurers, making

them particularly attractive to some small employers that find it difficult to obtain affordable health insurance coverage for their employees. Due to insufficient funding and inadequate reserves, and in some situations, fraud, some MEWAs have become insolvent and unable to pay benefit claims. In addition, certain promoters set up arrangements that they claim are not MEWAs subject to state insurance regulation, because they are established pursuant to collective bargaining agreements. Often, however, these collective bargaining agreements are nothing more than shams designed to avoid state insurance regulation.

Employees and their dependents have become financially responsible for paying medical claims they presumed were covered by insurance after paying health insurance premiums to fraudulent MEWAs.<sup>5</sup> The impact, financial and otherwise, on individuals and families can be devastating when MEWAs become insolvent. Moreover, employees and their dependents may be deprived of medical services if they cannot afford to pay medical claims out-of-pocket that are not paid by the MEWA.

Before the enactment of ERISA section 521, the Department's primary enforcement tool against fraudulent and abusive MEWAs was court-ordered injunctive relief. In order to obtain this relief, the Department must present evidence to a federal court that an ERISA fiduciary breach occurred and that the Department is likely to prevail based on the merits of the case. Gathering sufficient evidence to prove a fiduciary breach is time-consuming and labor-intensive, in most cases, because the Department's investigators must work with poor or nonexistent financial records and uncooperative parties. As a result, the Department at times has been unable to shut down fraudulent and abusive MEWAs quickly enough to preserve their assets and ensure that outstanding benefit claims are timely paid.

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<sup>5</sup> GAO Report, supra note 2.

States also encountered problems in their enforcement efforts against MEWAs in the absence of federal authority to shut down fraudulent and abusive MEWAs nationally. When one State succeeded in shutting down an abusive MEWA, in some cases, its operators continued operating in another State.<sup>6</sup> ERISA section 521 provides the Department with stronger legal remedies to combat fraudulent and abusive MEWAs.

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

2. ERISA Section 521(a) and (e), Ex parte cease and desist and summary seizure orders- multiple employer welfare arrangements (29 CFR 2560.521-1)
  - a. Benefits of Final Rules

As discussed earlier in this preamble, ERISA section 521(a) authorizes the Secretary to issue an ex parte cease and desist order if it appears to the Secretary that the alleged conduct of a MEWA is fraudulent, or creates an immediate danger to the public safety or welfare, or is causing or can reasonably be expected to cause, significant, imminent, and irreparable public injury. ERISA section 521(e) allows the Secretary to issue a summary seizure order if it appears that a MEWA is in a financially hazardous condition. These final regulations implement the

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<sup>6</sup> Id.

Department's enhanced enforcement authority by setting forth the standards and procedures the Department will follow in issuing cease and desist and summary seizure orders. They also define important statutory terms and clarify the scope of the Department's authority under ERISA sections 521(a) and (e).

ERISA section 521 and these final regulations will potentially benefit approximately two million MEWA participants<sup>7</sup> by ensuring that MEWA assets are preserved and benefits timely paid. In some cases, individuals have incurred significant medical claims before they learn that their claims are not being paid by improperly operated MEWAs and that they are responsible for paying these claims out-of-pocket. These regulations will help such individuals avoid the financial hardship and adverse health effects that result from unpaid health claims. They also will benefit health care providers that are detrimentally impacted when they are not paid for services they have performed. ERISA section 521 and these final regulations also will improve MEWA compliance and deter abusive practices of fraudulent MEWAs, potentially lessening the need for future use of these provisions. As a result of these statutory and regulatory provisions, the Department will be able to take enforcement action against fraudulent and abusive MEWAs much more quickly and efficiently than under prior law. Common examples of such fraudulent and abusive conduct include a systematic failure to pay benefits claims or a diversion of premiums for personal use. For example, Employers Mutual, a MEWA covering 22,000 individuals which turned out to be a nationwide health insurance fraud, advertised deceptively low premium rates that were far less than necessary to pay promised benefits and misrepresented that the benefits were fully insured. Operators of this MEWA misused and misappropriated premiums so extensively that by the time the Department was able to shut down the MEWA and

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<sup>7</sup> The Department's estimate is based on the number of MEWA participants reported on the 2010 Form M-1. Please note that this is an undercount, because the Form M-1 definition of participants specifically excludes dependents.

appoint an independent fiduciary to take over, the fraud left \$27 million in unpaid benefits. With this new authority, the Department can take steps to protect plan participants and small employers much earlier in the process and before a MEWA's assets have been exhausted. In addition, the Department will be able to take action against fraudulent and abusive MEWAs nationally, which will prevent unscrupulous MEWA operators from moving their operations to another State when they are shut down in a State.

b. Costs of the Final Rules

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

3. ERISA Section 521(b), Procedures for administrative hearings on the issues of cease and desist orders-multiple employer welfare arrangements (29 CFR 2571.1 through 2571.12)

a. Benefits of Final Rule

The Department expects that administrative hearings held pursuant to ERISA section 521(b) and the procedures set forth in the final regulations would benefit the Department and parties requesting a hearing. The Department foresees improved efficiencies through use of administrative hearings, because such hearings should allow the parties involved to obtain a

decision in a more timely and efficient manner than is customary in federal court proceedings, which would be the alternative adjudicative forum. The Department expects that these final rules setting forth the standards and procedures the Department would use to implement its cease and desist authority under ERISA section 521 will allow it to take action against fraudulent and abusive MEWAs much more quickly and efficiently than under prior law. These benefits have not been quantified.

To access the benefit of improved efficiencies that would result from an administrative proceeding, the Department compared the cost of contesting a cease and desist order under the final regulations to the cost of contesting an action taken against a MEWA by the Department before the enactment of the Affordable Care Act. The Department's primary enforcement tool against fraudulent and abusive MEWAs before Congress enacted ERISA section 521 was court-ordered injunctive relief. In order to obtain this relief, the Department must present evidence to a court that an ERISA fiduciary breach occurred and that the Department likely would prevail based on the merits of the case. Gathering sufficient evidence to prove a fiduciary breach is very time-consuming and labor-intensive, in most cases, because the Department's investigators must work with poor or nonexistent financial records and uncooperative parties.

The Department believes that an administrative hearing should result in cost savings compared with the baseline cost of litigating in federal court. Because the procedures and evidentiary rules of an administrative hearing generally track the Federal Rules of Civil Procedure and Evidence, document production will be similar for both an administrative hearing and a federal court proceeding. It is unlikely that any additional cost will be incurred for an administrative hearing than would be required to prepare for federal court litigation. Moreover, certain administrative hearing practices and other new procedures initiated by these regulations

are expected to result in cost savings over court litigation. For example, parties may be more likely to appear pro se; the prehearing exchange is expected to be short and general; a motion for discovery only will be granted upon a showing of good cause; the general formality of the hearing may vary, particularly depending on whether the petitioner is appearing pro se; and the administrative law judge would be required to make its decision expeditiously after the conclusion of the ERISA section 521 proceeding. The Department cannot with certainty predict that any or all of these conditions will exist nor that any of these factors represent a cost savings, but it is likely that the administrative hearing process will create a consistent legal standard for section 521 proceedings.

The Department invited public comments on the comparative cost of a federal court proceeding versus an administrative hearing. The Department did not receive any comments that addressed this issue.

#### b. Costs of Final Rule

The Department estimates that the cost of the final regulation would total approximately \$548,900 annually. The total hour burden is estimated to be approximately 20 hours, and the dollar equivalent of the hour burden is estimated to be approximately \$564. The data and methodology used in developing these estimates are described more fully in the Paperwork Reduction Act section, below.

### C. Paperwork Reduction Act

This issuance of the cease and desist order final regulation is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), because it does not contain a

“collection of information” as defined in 44 U.S.C. 3502(3). The Final Rule on Procedures for Administrative Hearings Regarding the Issuance of Cease and Desist Orders under ERISA section 521 – Multiple Employer Welfare Arrangements contains a collection of information and the associated hour and cost burden are discussed below.

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)), the Department submitted an information collection request (ICR) to OMB in accordance with 44 U.S.C. 3507(d), contemporaneously with the publication of the proposed regulation, for OMB’s review and solicited public comment. No public comments were received related to the administrative hearing procedures for cease and desist orders. OMB assigned OMB control number 1210-0148 to the ICR but did not approve the ICR at the proposed rule stage.

In connection with publication of these final rules, the Department submitted a revision to the ICR under OMB Control Number 1210-0116. OMB approved the revised ICR, which is scheduled to expire on February 29, 2016. A copy of the revised ICR may be obtained by contacting the PRA addressee shown below or at <http://www.RegInfo.gov>.

PRA ADDRESSEE: 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) 693-8410; Fax: (202) 219-4745. These are not toll free numbers.

This final regulation establishes procedures for hearings and appeals before an administrative law judge and the Secretary when a MEWA or other person challenges a temporary cease and desist order. As stated in the Regulatory Flexibility Act analysis below, the Department estimates that, on average, a maximum of 10 MEWAs would initiate an adjudicatory proceeding

before an administrative law judge to revoke or modify a cease and desist order.<sup>8</sup> Most of the factual information necessary to prepare the petition should be readily available to the MEWA and is expected to take approximately two hours of clerical time to assemble and forward to legal professionals resulting in an estimated total hour burden of approximately 20 hours.

The Department believes that MEWAs will hire outside attorneys to prepare and file the appeal, which is estimated to require 120 hours at \$457 per hour.<sup>9</sup> The majority of the attorneys' time is expected to be spent drafting motions, petitions, pleadings, briefs, and other documents relating to the case. Based on the foregoing, the total estimated legal cost associated with the information collection would be approximately \$54,840 per petition filed. Additional costs material and mailing costs are estimated at approximately \$50.00 per petition.

Type of Review: New.

Agency: Employee Benefits Security Administration.

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

OMB Number: 1210-0148.

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

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<sup>8</sup> As stated in the Department's December 1, 2011 Fact Sheet on MEWA Enforcement, the Department has filed 99 civil complaints against MEWAs since 1990, which averages approximately five complaints per year. With the expanded enforcement authority provided to the Department under the Affordable Care Act, the number of civil complaints brought against MEWAs by the Department could increase. Therefore, for purposes of this Paperwork Reduction Act analysis, the Department assumes that twenty complaints will be filed as an upper bound. The Department is unable to estimate the number of cease and desist orders that will be contested; therefore, for purposes of this analysis it assumes that half of the MEWAs will contest cease and desist orders. The Department's fact sheet on MEWA enforcement can be found on the EBSA website at <http://www.dol.gov/ebsa/newsroom/fsMEWAenforcement>.

<sup>9</sup> The Department's estimate for the attorney's hourly rate is taken from the Laffey Matrix which provides an estimate of legal service for court cases in the D.C. area. It can be found at <http://www.laffeymatrix.com/see.html>. The estimate is an average of the 4-7 and 8-10 years of experience rates. The proposed rule included an estimate of 40 hours of outside attorney time for an administrative appeal. Though no comments were submitted on that estimate and we cannot state an estimate with certainty, after further consideration of the potential tasks involved we determined that a higher number would be more appropriate.

Respondents: 10.

Responses: 10.

Estimated Total Burden Hours: 20 hours.

Estimated Total Burden Cost (Operating and Maintenance): \$548,900.

#### D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) applies to most Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 et seq.). Unless an agency certifies that such a rule will not have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities. Small entities include small businesses, organizations and governmental jurisdictions. In accordance with the RFA, the Department prepared an initial regulatory flexibility analysis at the proposed rule stage and requested comments on the analysis. No comments were received. Below is the Department's final regulatory flexibility analysis and its certification that these final regulations do not have a significant economic impact on a substantial number of small entities.

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. Form M-1 was filed with the Department by 436 MEWAs in 2010, the latest year for which data is available.

The Small Business Administration uses a size standard of less than \$7 million in average annual receipts to determine whether businesses in the finance and insurance sector are small entities.<sup>10</sup> While the Department does not collect revenue information on the Form M-1, it does collect data regarding the number of participants covered by MEWAs that file Form M-1 and can use average premium data to determine the number of MEWAs that are small entities because they do not exceed the \$7 million dollar threshold. For 2009, the average annual premium for single coverage was \$4,717 and the average annual premium for family coverage was \$12,696.<sup>11</sup> Combining these premium estimates with estimates from the Current Population Survey regarding the fraction of policies that are for single or family coverage at employers with less than 500 workers, the Department estimates approximately 60 percent of MEWAs (258 MEWAs) are small entities.

In order to develop an estimate of the number of MEWAs that could become subject to a cease and desist order, the Department examined the number of civil claims the Department filed against MEWAs since FY 1990. During this time, the Department filed 99 civil complaints against MEWAs, an average of approximately five complaints per year. For purposes of this analysis, the Department believes that an average of twenty complaints a year is a reasonable upper bound estimate of the number of MEWAs that could be subject to a cease and desist order<sup>12</sup> and that half this number, or an average of ten complaints a year, is a reasonable upper

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<sup>10</sup> 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](http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf)

<sup>11</sup> Kaiser Family Foundation and Health Research Educational Trust "Employer Health Benefits, 2009 Annual Survey." The reported numbers are from Exhibit 1.2 and are for the category Annual, all Small Firms (3-199 workers).

<sup>12</sup> With the expanded enforcement authority provided to the Department under the Affordable Care Act, the number of civil complaints brought against MEWAs by the Department could increase. Therefore, for purposes of this analysis, the Department assumes that twenty complaints will be filed as an upper bound. The Department is unable to estimate the number of cease and desist orders that will be contested; therefore, it assumes that half the MEWAs will contest cease and desist orders.

bound estimate of the number of MEWAs that could be expected to request an administrative hearing in a year

Based on the foregoing, the Department estimates that the greatest number of small MEWAs likely to be subject to a cease and desist order (20/258 or 7.8 percent) and the greatest number of MEWAs likely to petition for an administrative hearing (10/258 or 3.9 percent) represents a small fraction of the total number of small MEWAs.

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

E. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 et seq.), as well as Executive Order 12875, these final rules do not include any federal mandate that may result in expenditures by State, local, or tribal governments, or the private sector, which may impose an annual burden of \$100 million adjusted for inflation since 1995.

F. Executive Order 13132

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

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

Over the years, the Department and State insurance departments have worked closely and coordinated their investigations and other actions against fraudulent and abusive MEWAs. For example, EBSA regional offices have met with State officials in their regions and provided information necessary for States to obtain cease and desist orders to stop abusive and insolvent MEWAs. The Department also has relied on States to obtain cease and desist orders against MEWAs in individual States while it pursued investigations to gather sufficient evidence to obtain injunctive relief in the federal courts to shut down MEWAs nationally. States have often lobbied for stronger federal enforcement tools to help combat fraudulent and insolvent MEWAs. By providing procedures and standards the Department would follow to issue ex parte cease and desist and summary seizure orders and providing procedures for use by administrative law judges and the Secretary of Labor when a MEWA or other person challenges a temporary cease and desist order, these final rules address the States' concerns and enhance the State and Federal Government's joint mission to take immediate action against fraudulent and abusive MEWAs and limit the losses suffered by American workers and their families when abusive MEWAs become insolvent and fail to reimburse medical claims.

## **List of Subjects**

## **29 CFR Part 2560**

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

## **29 CFR Part 2571**

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

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

### **PART 2560 –RULES AND REGULATIONS FOR ADMINISTRATION AND ENFORCEMENT**

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

**Authority:** 29 U.S.C. 1002(40), 1132, 1133, 1134, 1135, and 1151; and Secretary of Labor’s Order 1-2011, 77 FR 1088 (Jan. 9, 2012).

2. Sections 2560.521-1 through 2560.521-4 are added to read as follows:

**2560.521-1 Cease and desist and seizure orders under section 521.**

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

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

(1) Multiple employer welfare arrangement (MEWA) is an arrangement as defined in section 3(40) of ERISA that either is an employee welfare benefit plan subject to Title I of ERISA or offers benefits in connection with one or more employee welfare benefit plans subject to Title I of ERISA. For purposes of section 521 of ERISA, a MEWA does not include a health insurance issuer (including a health maintenance organization) that is licensed to offer or provide health insurance coverage to the public and employers at large in each State in which it offers or provides health insurance coverage, and that, in

each such State, is subject to comprehensive licensure, solvency, and examination requirements that the State customarily requires for issuing health insurance policies to the public and employers at large. The term health insurance issuer does not include group health plans. For purposes of this section, the term “health insurance coverage” has the same meaning as in ERISA section 733(b)(1).

(2) The conduct of a MEWA is fraudulent:

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

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

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

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

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

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

(ii) Fraudulent conduct includes any false statement regarding any of paragraphs (b)(2)(i)(A) through (b)(2)(i)(E) of this section that is made with knowledge of its falsity or that is made with reckless indifference to the statement's truth or falsity, and the knowing concealment of material information regarding any of paragraphs (b)(2)(i)(A) through (b)(2)(i)(E) of this section. Examples of fraudulent conduct include, but are not limited to, misrepresenting the terms of the benefits offered by or in connection with the MEWA or the financial condition of the MEWA or engaging in deceptive acts or omissions in connection with marketing or sales or fees charged to employers or employee organizations.

(3) The conduct of a MEWA creates an immediate danger to the public safety or welfare if the conduct of a MEWA or any person acting as an agent or employee of the MEWA impairs, or threatens to impair, a MEWA's ability to pay claims or otherwise unreasonably increases the risk of nonpayment of benefits. Intent to create an immediate danger is not required for this criterion. Examples of such conduct include, but are not limited to, a systematic failure to properly process or pay benefit claims, including failure to establish and maintain a claims procedure that complies with the Secretary's claims procedure regulations (29 CFR 2560.503-1 and 29 CFR 2590.715-2719), failure to establish or maintain a recordkeeping system that tracks the claims made, paid, or processed or the MEWA's financial condition, a substantial failure to meet applicable

disclosure, reporting, and other filing requirements, including the annual reporting and registration requirements under sections 101(g) and 104 of ERISA, failure to establish and implement a policy or method to determine that the MEWA is actuarially sound with appropriate reserves and adequate underwriting, failure to comply with a cease and desist order issued by a government agency or court, and failure to hold plan assets in trust.

(4) The conduct of a MEWA is causing or can be reasonably expected to cause significant, imminent, and irreparable public injury:

(i) If the conduct of a MEWA, or of a person acting as an agent or employee of the MEWA, is having, or is reasonably expected to have, a significant and imminent negative effect on one or more of the following:

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

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

(C) Plan participants and plan beneficiaries; and

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

Intent to cause injury is not required for this criterion. Examples of such conduct include, but are not limited to, conversion or concealment of property of the MEWA; improper disposal, transfer, or removal of funds or other property of the MEWA, including unreasonable compensation or payments to MEWA operators and service providers (e.g. brokers, marketers, and third party administrators); employment by the MEWA of a person prohibited from such employment pursuant to section 411 of ERISA, and embezzlement from the MEWA. For purposes of section 521 of ERISA, compensation that would be excessive under 26 CFR 1.162-7 will be considered unreasonable compensation or payments for purposes of this regulation. Depending upon the facts and circumstances, compensation may be unreasonable under this regulation even it is not excessive under 26 CFR 1.162-7.

(5) A MEWA is in a financially hazardous condition if:

(i) The Secretary has probable cause to believe that a MEWA:

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

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

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

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

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

(A) Fraudulent;

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

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

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

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

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

(ii) Prohibit any person from taking specified actions, or exercising authority or control, concerning funds or property of a MEWA or of any employee benefit plan, regardless of whether such funds or property have been commingled with other funds or property; and,

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

(3) The Secretary may require documentation from the subject of the order verifying compliance.

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

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

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

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

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

(5) The Secretary must offer evidence supporting the findings made in issuing the order that there is reasonable cause to believe that the MEWA (or a person acting as an employee or agent of the MEWA) engaged in conduct specified in paragraph (c)(1) of this section.

(6) The person requesting the hearing has the burden to show that the order should be modified or set aside. To meet this burden such person must show by a preponderance of the evidence that the MEWA (or a person acting as an employee or agent of the MEWA) did not engage in conduct specified in paragraph (c)(1) of this section or must show that the requirements imposed by the order, are, in whole or part, arbitrary and capricious.

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

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

(f) Summary seizure order. (1) Subject to paragraphs (f)(2) and (3) of this section, the Secretary may issue a summary seizure order when the Secretary finds there is probable cause to believe that a MEWA is in a financially hazardous condition.

(2) Except as provided in paragraph (f)(3) of this section, the Secretary, before issuing a summary seizure order to remove assets and records from the control and management of the MEWA or any persons having custody or control of such assets or records, shall obtain judicial authorization from a federal court in the form of a warrant or other appropriate form of authorization and may at that time pursue other actions such as those set forth in paragraph (f)(5) of this section.

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

Promptly following service of the order, the Secretary shall seek authorization from a

federal court and may at that time pursue other actions such as those set forth in paragraph (f)(5) of this section.

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

(5) In connection with or following the execution of a summary seizure order, the Secretary may –

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

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

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

(g) Effective date of orders. Cease and desist and summary seizure orders are effective immediately upon issuance by the Secretary and shall remain effective, except to the extent and until any provision is modified or the order is set aside by the Secretary, an administrative law judge, or a court.

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

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

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

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

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

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

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

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

(b) Except as prohibited by applicable law, and at his or her discretion, the Secretary may disclose the issuance of a temporary cease and desist order or summary seizure order and information and evidence of any proceedings and hearings related to an order, to any Federal,

State, or foreign authorities responsible for enforcing laws that apply to MEWAs and parties associated with, or providing services to, MEWAs.

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

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

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

**§ 2560.521-4 Cross-reference.**

See 29 CFR 2571.1 through 2571.13 for procedural rules relating to administrative hearings under section 521 of ERISA.

3. Add part 2571 to read as follows:

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

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

Sec.

2571.1 Scope of rules.

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2571.13 Effective date.

**Subpart B – [Reserved]**

**Authority:** 29 U.S.C. 1002(40), 1132, 1135; and 1151, Secretary of Labor’s Order 1-2011, 77

FR 1088 (January 9, 2012).

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

**§ 2571.1 Scope of rules.**

The rules of practice set forth in this part apply to ex parte cease and desist order proceedings under section 521 of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The rules of procedure for administrative hearings published by the Department's Office of Administrative Law Judges at Part 18 of this Title will apply to matters arising under ERISA section 521 except as modified by this section. These proceedings shall be conducted as expeditiously as possible, and the parties and the Office of the Administrative Law Judges shall make every effort to avoid delay at each stage of the proceedings.

**§ 2571.2 Definitions.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) In general. Copies of all documents shall be served on all parties of record. All documents should clearly designate the docket number, if any, and short title of all matters. All documents

to be filed shall be delivered or mailed to the Chief Docket Clerk, Office of Administrative Law Judges, 800 K Street, N.W., Suite 400, Washington, D.C. 20001-8002, or to the OALJ Regional Office to which the section 521 proceeding may have been transferred for hearing. Each document filed shall be clear and legible.

(b) By parties. All motions, petitions, pleadings, briefs, or other documents shall be filed with the Office of Administrative Law Judges with a copy, including any attachments, to all other parties of record. When a party is represented by an attorney, service shall be made upon the attorney. Service of any document upon any party may be made by personal delivery or by mailing a copy to the last known address. The Secretary shall be served by delivery to the Associate Solicitor, Plan Benefits Security Division, ERISA Section 521 Proceeding, P.O. Box 1914, Washington, D.C. 20013 and any attorney named for service of process as set forth in the temporary order. The person serving the document shall certify to the manner of date and service.

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

(d) Form of pleadings.

(1) Every pleading or other paper filed in a section 521 proceeding shall designate the Employee Benefits Security Administration (EBSA) as the agency under which the

proceeding is instituted, the title of the proceeding, the docket number (if any) assigned by the Office of Administrative Law Judges and a designation of the type of pleading or paper (e.g., notice, motion to dismiss, etc.). The pleading or paper shall be signed and shall contain the address and telephone number of the party or person representing the party. Although there are no formal specifications for documents, they should be printed when possible on standard size 8 ½ x 11 inch paper.

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

#### **§ 2571.4 Parties.**

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

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

The Secretary shall be designated as the “complainant.”

(b) Other persons shall be permitted to participate as parties only if the administrative law judge finds that the final decision could directly and adversely affect them or the class they represent, that they may contribute materially to the disposition of the section 521 proceeding and their

interest is not adequately represented by the existing parties, and that in the discretion of the administrative law judge the participation of such persons would be appropriate.

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

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

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

(3) Who will appear for the petitioner;

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

(5) Whether petitioner intends to present witnesses.

(d) Objections to the petition may be filed by a party within fifteen (15) days of the filing of the petition. If objections to the petition are filed, the administrative law judge shall then determine whether petitioners have the requisite interest to be a party in the section 521 proceeding, as defined in paragraph (b) of this section, and shall permit or deny participation accordingly.

Where persons with common interest file petitions to participate as parties in a section 521 proceeding, the administrative law judge may request all such petitioners to designate a single representative, or the administrative law judge may designate one or more of the petitioners to represent the others. The administrative law judge shall give each such petitioner, as well as the parties, written notice of the decision on his or her petition. For each petition granted, the administrative law judge shall provide a brief statement of the basis of the decision. If the petition is denied, he or she shall briefly state the grounds for denial and may consider whether to treat the petition as a request for participation as *amicus curiae*.

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

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

**§ 2571.6 Consent order or settlement.**

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

(a) In general. At any time after the commencement of a section 521 proceeding, the parties jointly may move to defer the hearing for a reasonable time in order to negotiate a settlement or an agreement containing findings and a consent order disposing of the whole or any part of the section 521 proceeding. The administrative law judge shall have discretion to allow or deny such a postponement and to determine its duration. In exercising this discretion, the administrative law judge shall consider the nature of the section 521 proceeding, the requirements of the public interest, the representations of the parties and the probability of reaching an agreement that will result in a just disposition of the issues involved.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) If there are no objections to the proposed settlement, or if the administrative law judge decides to sign the proposed settlement after reviewing any such objections, the

administrative law judge shall incorporate the consent agreement into a decision meeting the requirements of paragraph (d) of this section; and

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

**§ 2571.7 Scope of discovery.**

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

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

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

disclosure. The administrative law judge may not, however, protect from discovery or use, relevant communications between an attorney and a plan administrator or other plan fiduciary, or work product, that fall under the fiduciary exception to the attorney-client or work product privileges. The fiduciary exception to these privileges exists when an attorney advises the plan administrator or other plan fiduciary on matters concerning plan administration or other fiduciary activities. Consequently, the administrative law judge may not protect such communications from discovery or from use by the Secretary in the proceedings. The administrative law judge also may also not protect attorney work product prepared to assist the fiduciary in its fiduciary capacity from discovery or from use by the Secretary in the proceedings. The fiduciary exception does not apply, however, to the extent that communications were made or documents were prepared exclusively to aid the fiduciary personally or for non-fiduciary matters (e.g. settlor acts), provided that the plan did not pay for the legal services. The Secretary need not make a special showing, such as good cause, merely to obtain information or documents covered by the fiduciary exception. Other relevant exceptions to the attorney-client or work product privileges shall also apply.

#### **§ 2571.8 Summary decision.**

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

(a) No genuine issue of material fact. Where the administrative law judge finds that no issue of a material fact has been raised, he or she may issue a decision which, in the absence of an appeal,

pursuant to §§ 2571.10 through 2571.12, shall become a final agency action within the meaning of 5 U.S.C. 704.

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

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

(2) Any terms and conditions of the ruling.

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

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

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

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

(b) Decision of the administrative law judge. The administrative law judge shall make his or her decision expeditiously after the conclusion of the section 521 proceeding. The decision of the administrative law judge shall include findings of fact and conclusions of law with reasons therefore upon each material issue of fact or law presented on the record. The decision of the administrative law judge shall be based upon the whole record and shall be supported by reliable and probative evidence. The decision of the administrative law judge shall become final agency action within the meaning of 5 U.S.C. 704 unless an appeal is made pursuant to the procedures set forth in §§ 2571.10 through 2571.12.

**§ 2571.10 Review by the Secretary.**

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

(b) A notice of appeal to the Secretary shall state with specificity the issue(s) in the decision of the administrative law judge on which the party is seeking review. Such notice of appeal must be served on all parties of record.

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

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

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

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

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

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

**§ 2571.13 Effective date.**

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

**Subpart B – [Reserved]**

Signed at Washington, DC, this 26th day of February, 2013.

PHYLLIS C. BORZI,

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

[Billing Code 4510-29-P]

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