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29 CFR Part 2510

Electronic Registration Requirements for Investment Advisers To Be Investment Managers Under Title I of ERISA; Proposed Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2510

RIN 1210-AA94

Electronic Registration Requirements for Investment Advisers To Be Investment Managers Under Title I of ERISA

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains a proposed regulation relating to the definition of investment manager in section 3(38)(B) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Under the proposed regulation, in lieu of filing a copy of their state registration forms with the Secretary of Labor, state-registered investment advisers seeking to obtain or maintain investment manager status under Title I of ERISA would have to electronically register through the Investment Adviser Registration Depository (IARD) as an investment adviser with the state in which they maintain their principal office and place of business. The IARD is a centralized electronic filing system, established by the Securities and Exchange Commission (SEC) in conjunction with state securities authorities. The IARD enables investment advisers to satisfy SEC and state registration obligations through the use of the Internet, and current filing information in the IARD database is readily available to the Department and the general public via the Internet. If adopted, the proposed regulation would make electronic registration through the IARD the exclusive method for state-registered investment advisers to satisfy filing requirements for investment manager status under section 3(38)(B)(ii) of Title I of ERISA. The proposed regulation would affect plan trustees, investment managers, other fiduciaries, and plan participants and beneficiaries.

DATES: Written comments (either in print or electronic format) are invited and must be submitted to the Department of Labor on or before February 9, 2004.

ADDRESSES: Interested persons are invited to submit written comments (preferably with three copies) to the Office of Regulations and Interpretations, Room N–5669, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210, Attention: ERISA Investment Manager Electronic Registration NPRM. Written comments may also be sent by Internet to the following address: *E–ORI.EBSA@dol.gov.* All submissions received will be available for public inspection and copying from 8:30 a.m. to 4:30 p.m. at the Public Disclosure Room, Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Ave. NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Florence M. Novellino, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, Washington, DC 20210, telephone (202) 693–8518 (not a toll free number).

SUPPLEMENTARY INFORMATION:

A. Background

Under Title I of the Employee Retirement Income Security Act of 1974 (ERISA), named fiduciaries of plans may appoint investment managers to manage assets of the plan. If the investment manager is a registered investment adviser, bank or insurance company, and meets the other requirements for being an ''investment manager'' as defined in section 3(38) of ERISA, the plan trustees are relieved from certain liabilities relating to the investment manager's performance.[1]

In 1996, the National Securities Market Improvement Act (NSMIA) amended the Investment Advisers Act of 1940 (Advisers Act) to divide certain investment adviser regulatory responsibilities, including the registration requirements, between the Securities and Exchange Commission (SEC) and the states. Prior to 1996, most investment advisers were required to register with the SEC and in each state in which they were doing business. Pursuant to paragraph (1) of section 203A(a) of the Advisers Act, and SEC rule at 17 CFR 275.203A–1, certain investment advisers are prohibited from registering with the SEC but must register with the state in which the adviser maintains it principal office and place of business.[2] The legislative history of NSMIA indicates that this division of regulatory responsibilities was intended, among other things, to encourage the SEC and state regulators to create a uniform system for ''one-stop'' filing that would benefit investors, reduce regulatory and paperwork burdens for registered investment advisers, and facilitate supervision of investment advisers.[3]

The SEC implemented that legislative intent at the federal level by publishing a final rule in September of 2000 at 17 CFR 275.203–1 which made electronic filing with the Investment Adviser Registration Depository (IARD) mandatory for SEC-registered advisers. Additionally, all states accept forms filed via the IARD to satisfy state registration requirements, and many mandate state registration via the IARD.[4] Accordingly, the IARD has become a ''one-stop'' Internet-based centralized filing system that enables investment advisers to satisfy filing obligations with both federal and state securities regulators. Pertinent state registration information in the IARD database is available on the Internet to the general public through the Investment Adviser Public Disclosure (IAPD) Web site that may be directly accessed through the SEC's Web site or through links from various state and investor Web sites. The IAPD Web site contains investment adviser registration data, including information about current registration forms, registration status, services provided, fees charged, and disclosures about certain conflicts of interest and disciplinary events, if any. The IAPD Web site includes information on investment advisers that currently are registered with the SEC or a state, and also contains information on investment advisers that were registered

[1] Section 402(c)(3) of ERISA states that a plan may provide that with respect to control or management of plan assets a named fiduciary may appoint an investment manager or managers to manage (including the power to acquire and dispose of) plan assets. Section 405(d) of ERISA provides in part that, if an investment manager or managers have been appointed under section 402(c)(3), then no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

[2] Specifically, subject to certain exceptions, investment advisers fall into three categories under the NSMIA amendments. First, investment advisers having assets under management of less than $25 million generally are prohibited from registering with the SEC but must register with the state regulatory authority in the state where the investment adviser maintains its principal office and place of business. Those with at least $25 million but less than $30 million may register with the SEC in lieu of filing with state authorities. Those with $30 million or more must register with the SEC. Section 203A(a) of the Advisers Act is codified at 15 U.S.C. 80b–3a(a). *See also* 17 CFR 275.203A–2 for exemptions from the prohibition for certain investment advisers registering with the SEC.

[3] S. Rep. No. 104–293, at 5 (1996).

[4] The State of Wyoming has not promulgated a state investment adviser regulation requirement; therefore all Wyoming-based investment advisers are required to register under the Advisers Act with the SEC via the IARD. *See* 65 FR 57438, 57445 (Sept. 22, 2000).

in the previous two years but are no longer registered.

Section 3(38)(B) of Title I of ERISA was also amended to reflect the above-described changes to the investment adviser registration requirements under the Advisers Act.[5] Specifically, section 3(38)(B) of ERISA requires that, to be an investment manager under Title I, an investment adviser must: (i) be registered with the SEC under the Advisers Act of 1940, or (ii) if not registered under such Act by reason of paragraph (1) of section 203A(a) of such Act, be registered as an investment adviser under the laws of the state in which it maintains its principal office and place of business and, at the time the investment adviser last filed the registration form it most recently filed with such state in order to maintain its registration under the laws of such state, it also filed a copy of such form with the Secretary of Labor.

To implement the filing requirements in section 3(38)(B)(ii) of ERISA, the Department announced on January 14, 1998, that state-registered investment advisers seeking to qualify, or remain qualified, as investment managers must file a copy of their most recent state registration form for the state in which it maintains its principal office and place of business with the Department prior to November 10, 1998, and thereafter file with the Department copies of any subsequent filings with that state. The ongoing obligation to file copies with the Department was, however, to be temporary in nature and remain in effect until a centralized database containing the state registration forms, or substantially similar information, was available to the Department.[6]

The current requirement to file with the Department copies of state registration filings already accessible to the Department and the general public via the IAPD Web site places an unnecessary administrative burden on the regulated community. The requirement also results in the Department allocating resources to receive, sort, and store paper copies of information readily available in electronic form. It is the Department's view that use of the IARD as a centralized electronic database would improve the ability of the Department, plan fiduciaries, and plan participants and beneficiaries to readily access registration information regarding investment advisers eligible to be investment managers of ERISA-covered plans. As noted above, not only does the SEC require electronic filing through the IARD for registration under the Advisers Act, but most states also require IARD filing for compliance with state investment adviser registration requirements. While a few states do not make electronic filing through the IARD mandatory, as noted above, all states permit investment advisers to use the IARD to satisfy registration requirements. As described more fully below, the Department believes the majority of investment managers of ERISA-covered plans already file registration forms electronically through the IARD under the Advisers Act or under applicable state securities laws. In the Department's view, the benefits to plan trustees, plan participants and beneficiaries, and the Department of this proposed regulation outweigh the relatively small incremental cost that some investment managers may incur to file state registration filings through the IARD.

B. Summary of the Proposed Regulation

The proposed regulation would add § 2510.3–38 to title 29 of the Code of Federal Regulations. Section 2510.3–38(a) would describe the general filing requirement with the Secretary set forth in section 3(38)(B)(ii) applicable to state-registered investment advisers seeking to become or remain investment managers under Title I of ERISA. The regulation would also make clear that its purpose is to establish the exclusive means to satisfy that filing obligation. Section 2510.3–38(b) would provide that, for a state-registered investment adviser to satisfy the filing requirement in section 3(38)(B)(ii) of ERISA, it must electronically file the required registration forms through the IARD. Section 2510.3–38(b) would also provide that submitting a copy of state registration forms to the Secretary does not constitute compliance with section 3(38)(B)(ii) of ERISA. Section 2510.3–38(c) would define the term ''Investment Adviser Registration Depository'' and ''IARD'' for purposes of the regulation as the centralized electronic depository described in 17 CFR 275.203–1. Finally, § 2510.3–38(d) would provide a cross-reference to the SEC Internet site at *http://www.sec.gov/iard* for information on filing investment advisor registration forms with the IARD.

C. Effective Date and Interim Reliance

This regulation is proposed to be effective 60 days after publication of a final rule in the **Federal Register.** If adopted, the proposed regulation would be applicable to investment adviser registration filings due after the effective date of the final regulation. Until the effective date of the final regulation, investment advisers seeking to obtain or maintain investment manager status under Title I of ERISA will be treated as having met the filing obligations with the Secretary of Labor described in section 3(38)(B)(ii) of ERISA for any registration filing due on or after the date the proposed regulation is published in the **Federal Register** if they satisfy the conditions of the proposed regulation.

D. Regulatory Impact Analysis

Summary

The Department has undertaken this proposed rulemaking for the purpose of establishing a single and readily accessible source of consistent information about the registration of investment advisers that are investment managers by virtue of meeting the requirements of section 3(38)(B)(ii) of ERISA. The Department believes the regulation, if implemented as proposed, would benefit plan fiduciaries, investment advisers, and ultimately the participants and beneficiaries of employee benefit plans. Although the anticipated benefits of the proposal are not quantified here, they are expected to more than justify its relatively modest estimated cost.

The estimated cost of the implementation of electronic registration through the IARD for approximately 500 advisers that submitted copies of their state registrations to the Secretary of Labor, and that currently register in only those states that do not mandate IARD filing, is just under $400,000. Ongoing annual costs are estimated at $50,000. These costs will be offset by efficiency gains for plan fiduciaries and for investment advisers that wish to be appointed by plan fiduciaries. As a result of the electronic registration requirement, plan fiduciaries will be able to access a single source of registration information regardless of the size or location of the adviser, and advisers may more readily demonstrate their eligibility to be investment managers in order to gain appointments by plan fiduciaries. Over time, these investment managers may also reduce the handling of paper and the time required to complete the Form ADV, which is the joint SEC and state registration form that is also currently

[5] *See* sec. 308(b)(1) of Title III of NSMIA and Act of November 10, 1997, Sec. 1, Pub. L. 105–72, 111 Stat. 1457.

[6] Pub. L. 105–72 provided that a fiduciary shall be treated as meeting the requirement for filing a copy of the required state registration form with the Secretary if a copy of the form (or substantially similar information) is available to the Secretary from a centralized electronic or other record-keeping database. See Act of November 10, 1997, Sec. 1(b), Pub. L. 105–72, 111 Stat. 1457.

accepted by all the states for State registration purposes. Electronic availability of registration information will also support better and more transparent decision making with respect to the appointment of investment managers, which ultimately benefits the participants and beneficiaries of the plans involved.

Discussion

The proposal would benefit plan fiduciaries that wish to appoint an investment manager pursuant to section 402(c)(3) of ERISA. Under section 405(d)(1) of ERISA, plan fiduciaries are not liable for the acts or omissions of the investment manager, and have no obligation to invest assets subject to management by the investment manager. The centralized source of readily accessible registration information offered by the IARD will help plan fiduciaries more efficiently locate information needed to determine whether advisers they may consider appointing are eligible to be an investment manager under ERISA. The source and format of information will no longer differ based on the size or principal business location of the adviser.

Uniform use of the IARD for all advisers who wish to be or remain as investment managers under ERISA will benefit these advisers as well. The change to electronic filing will not change the incentives for investment advisers to become investment managers under ERISA, but should promote increased efficiency for doing so. Advisers are not required to be an investment manager to conduct advisory activities for any customer. The Department assumes that an adviser's decision whether to meet the definition of investment manager under ERISA is based on factors unrelated to the form or format of their registration. It is therefore expected that those state-registered advisers who filed paper copies of their state registration forms with the Secretary chose to do so to gain an advantage in securing appointments by plan fiduciaries.

In any case, this proposed regulation will not change the content of the filings for these advisers because all states accept the joint SEC and state filing form (Form ADV) for state registration, and with certain exceptions, all of the copies submitted to the Secretary were made on Form ADV.[7] Mandatory use of the IARD will, however, change the format and manner in which the information is transmitted. While the Department expects advisers to incur a cost to establish a procedure for electronic filing through the IARD plus an annual fee, the change to an electronic format and transmission method is expected to be more efficient and less costly over time. Use of the IARD will reduce the paper handling, filing, and mailing costs associated with providing copies to the State or States as well as to the Secretary, and reduce handling to obtain and reproduce signatures. The SEC cited similar efficiency gains in its regulatory impact analysis of the final rule implementing mandatory electronic filing for federally regulated advisers. Securities and Exchange Commission, Electronic Filing by Investment Advisers; Final Rule, 65 FR 57438, Sept. 22, 2000.

The proposed regulation will directly affect only those investment advisers who wish to become or remain as investment managers under section 3(38) of ERISA, who generally have $25 million or less under management and consequently do not register with the SEC, and who register only in states that do not mandate use of the IARD to satisfy state registration requirements. Copies of registration forms submitted to the Secretary by State-registered investment advisers indicate that about 500 State-registered advisers have registered in only a non-IARD state.[8] Prior to the implementation of the IARD and many States' decisions to mandate use of the IARD to meet state adviser registration requirements, about 1,500 advisers provided paper copies of their state registration forms to the Secretary. Based on the data contained in those filings, about 1,000 of these already have the capability to file electronically because they are required to register in states that mandate use of the IARD. The Department therefore assumes that this proposed regulation would affect only those advisers that register only in non-IARD states.

Under existing requirements, State-registered advisers incur a State registration filing fee with every State in which they are required to register, plus postage and handling fees for their submissions. Such fees vary by State. Most if not all of the 500 advisers potentially affected by this proposed regulation now register in only one state. When advisers registered only in non-IARD States register through the IARD, the appropriate state registration fee will be forwarded to the state, such that there will be no net change in state filing fees.

The Advisers Act and Form ADV allow for the requirement that states be provided registration statements. To facilitate state registration, the registrant checks the appropriate boxes on the form for each applicable state, and the IARD then distributes the required information electronically to those states. States will be unaffected because they will continue to receive existing fees, although they will be transmitted in a different manner.

These advisers would, however, newly incur the IARD initial filing fee of $150 for advisers of the size under consideration here, and an annual filing fee of $100. It is also expected that the 500 state-registered advisers will incur a cost for the set-up of the electronic filing capability, and an expenditure of time to adjust internal procedures and put existing information into an electronic format. Filing fees for the first year are expected to total $75,000 in the first year and $50,000 in each subsequent year for these advisers.

The cost of the electronic filing set-up is not known. The SEC did not quantify the cost of set-up in the final rule cited above that pertained to mandatory use of the IARD for registration with the SEC. However, for the purpose of this discussion, the cost for establishment of electronic filing capability has been estimated to be $500, or $250,000 for the 500 advisers affected. This is a one-time cost based on available information on annual fees charged to SEC registrants by commercial providers of service in the industry.[9] An examination of a sample of the 500 individual filings showed that many of the advisers in question already use the software of a single provider for completing their Form ADV. Because this provider performs services to IARD filers who are currently SEC registrants as well, we have assumed that their range of services includes a method of facilitating electronic filing. It is also assumed that all advisers make use of electronic technology in the normal course of business and will not be required to make substantial technological changes as a result of this proposal.

A one-time cost is also estimated for the time required for the adviser to adjust its internal procedures to input data electronically, if necessary. A comparison of a sample of the paper

[7] Several exceptions were observed; in those cases, the adviser submitted a copy of the State's action on their registration, such as a license or approval form, rather than the registration form itself. In each case, other advisers' filings for the same State were examined to confirm that the state did accept Form ADV filings.

[8] California, Florida, Kentucky, South Carolina, and West Virginia at the time of this writing.

[9] Such fees are used here as a proxy only; the fees do not pertain specifically to electronic set-up or transmission.

filings received with IARD data indicated that these advisers had not also filed electronically with IARD. It seems likely that many advisers already prepare the forms electronically, regardless of whether they submit them electronically. To account for preparation for electronic transmission, it has been estimated that the advisers will incur the cost of two hours of a financial professional's time at $68 per hour, for a cost of $136 per adviser and a total of $68,000.

The estimated one-time cost of this proposal totals $393,000. The ongoing cost of maintaining registration information and completing and filing Form ADV is not accounted for here because the advisers prepare and file such forms to meet state registration requirements and would continue to do so without regard to this proposed regulation. The ongoing incremental cost of this proposal is therefore $100 per adviser per year, or $50,000.

The Department considered alternatives to this proposal, including issuing no guidance and implementing a standard that would provide the adviser an option to either file a print copy of its state registration or make use of the IARD. The value of greater efficiency through the elimination of dual sources of registration information and promotion of greater accessibility of consistent information through electronic methods was considered to outweigh the relatively modest estimated cost of about $800 per adviser in the first year, and $100 per adviser in each subsequent year. As a result, the Department elected to issue this proposal and seek public comment on its views.

Executive Order 12866

Under Executive Order 12866, the Department must determine whether the regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the 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.

Pursuant to the terms of the Executive Order, it has been determined that this action is ''significant'' within the meaning of section 3(f)(4) of the Executive Order and has therefore been reviewed by OMB. The Department has also undertaken the assessment of the costs and benefits of this regulatory action presented above.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, EBSA is soliciting comments concerning the proposed information collection request (ICR) included in this Notice of Proposed Rulemaking concerning Electronic Registration Requirements for Investment Advisers to be Investment Managers Under Title I of ERISA (ERISA Investment Manager Electronic Registration). A copy of the ICR may be obtained by contacting the individual identified in the PRA Addresses section below.

The Department has submitted a copy of the proposed information collection to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

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

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. Although comments may be submitted through February 9, 2004, OMB requests that comments be received within 30 days of publication of the Notice of Proposed Rulemaking to ensure their consideration.

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

The Department is issuing these proposed rules to establish the uniform availability of investment adviser registration information in a centralized electronic database. The proposed rule would affect investment advisers that register with the states rather than SEC by virtue of the requirements of NSMIA, who do not currently register electronically through the IARD, and who wish to fall within the definition of investment manager for purposes of ERISA section 3(38)(B). Such advisers currently file a paper copy of the applicable state registration form with the Secretary of Labor pursuant to section 3(38)(B)(ii) of the statute. The information collection is found in the proposed regulation at section 2520.3–38(b). The basis for the burden estimates is found in the discussion above.

Type of Review: New collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: ERISA Investment Manager Electronic Registration.

OMB Number: 1210–0NEW.

Affected Public: Individuals or households; Business or other for-profit.

Respondents: 500.

Frequency of Response: Annually.

Responses: 500.

Estimated Total Burden Hours: 1,000.

Total Annualized Capital/Startup Costs: $275,000.

Total Burden Cost (Operating and Maintenance): $50,000.

Total Annualized Cost: $325,000.

After the year of implementation, the startup cost will be fully defrayed.The ongoing annual operating and maintenance cost will be $50,000.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, this proposed rule does not include any federal mandate that may result in expenditures by State, local, or tribal governments in the aggregate of more than $100 million, or increased expenditures by the private sector of more than $100 million.

Small Business Regulatory Enforcement Fairness Act

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

Regulatory Flexibility Act

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

For purposes of analysis under the RFA, EBSA normally considers a small entity to be an employee benefit plan with fewer than 100 participants, on the basis of the definition found in section 104(a)(2) of ERISA. However, this proposed regulation pertains to investment advisers that are prohibited from registering with the SEC pursuant to section 203(A) of the Advisers Act and SEC rules. This generally includes those advisers that have assets of less than $25 million under management. In its final rule relating to Electronic Filing by Investment Advisers (65 FR 57445, note 86), the SEC states that for purposes of the Advisers Act and the RFA, an investment adviser generally is a small entity if (a) it manages assets of less than $25 million reported on its most recent Schedule I to Form ADV, (b) it does not have total assets of $5 million or more on the last day of the most recent fiscal year, and (c) it is not in a control relationship with another investment adviser that is not a small entity (Rule 0–7 under the Advisers Act).

Because the entities potentially affected by this rule are similar if not identical to those that fall within the SEC definition of small entity for RFA purposes, and because the regulation is expected to have a direct impact on an existing cost of doing business that investment advisers would assume without regard to this proposal, but no economic impact that would be passed on to employee benefit plans, the Department considers it appropriate in this limited circumstance to use the SEC definition for evaluating potential impacts on small entities. The Department invites comments on its election to use this definition. Using this definition, the Department certifies that this proposed regulation would not have a significant economic impact on a substantial number of small entities. The factual basis for this conclusion is described below.

The SEC States that of about 20,000 investment advisers in the United States, some 12,000 do not file with them. As discussed above, approximately 500 investment advisers are expected to incur costs under this regulation. This represents 2.5 percent of the approximately 20,000 advisers doing business in the U.S., or 4 percent of the 12,000 small advisers that do not currently file with the SEC. Thus the number of advisers that will incur costs under this regulation is substantial neither in absolute terms nor as a fraction of the universe of all or of small advisers.

In addition, the economic impact of the proposal is not expected to be significant for any small entity. Seeking investment manager status for purposes of ERISA is not mandatory; small advisers presumably make efforts to meet the terms of the ERISA investment manager definition only when they compute a net benefit for doing so. The proposed regulation will mandate electronic submission of small adviser's registration information, but will not change the content or other requirements for those registrations. The average cost for affected advisers is estimated to be small: about $800 in the initial year, and $100 in each following year. It is possible that some portion of this cost will be passed on to plans.

On this basis, the Department certifies that this proposed regulation would not have a significant economic impact on a substantial number of small entities. The Department invites comments on the potential impact of this proposed regulation on small entities, and on ways in which costs may be limited within the stated objectives of this proposal.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This proposed rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. Although the requirements in this proposed rule do alter the fundamental reporting and disclosure requirements of section 3(38)(B) of ERISA with respect to state-registered investment managers, because the duty of these state-registered advisers to report to the states exists independently of ERISA, and the proposed rule merely prescribes that investment advisers seeking ERISA investment manager status use a specific filing method that is accepted by all states and available as a choice in all states for registration purposes, there is

neither a direct implication for the States, nor is there a direct effect on the relationship or distribution of power between the national government and the States. This proposal only affects those State-registered investment advisers who choose to seek investment manager status under section 3(38) of ERISA, advisers not seeking such status are unaffected by this proposed regulation.

Statutory Authority

The proposed regulation would be adopted pursuant to the authority contained in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894; 29 U.S.C. 1135), and the Act of November 10, 1997, Sec. 1, Pub. L. 105–72, 111 Stat. 1457, and under Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003).

List of Subjects in 29 CFR Part 2510

Employee benefit plans, Employee Retirement Income Security Act, Pensions, Plan assets.

PART 2510—[AMENDED]

1. The authority citation for part 2510 is revised to read as follows:

Authority: 29 U.S.C. 1002(2), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor's Order 1–2003, 68 FR 5374; Sec. 2510.3–101 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 43 FR 47713, 3 CFR, 1978 Comp., p. 332 and E.O. 12108, 44 FR 1065, 3 CFR, 1978 Comp., p. 275, and 29 U.S.C. 1135 note. Sec. 2510.3–102 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 43 FR 47713, 3 CFR, 1978 Comp., p. 332 and E.O. 12108, 44 FR 1065, 3 CFR, 1978 Comp., p. 275. Section 2510.3–38 is also issued under Sec. 1, Pub. L. 105–72, 111 Stat. 1457.

2. Add § 2510.3–38 to read as follows:

2510.3–38 Filing requirements for State registered investment advisers to be investment managers.

(a) *General.* Section 3(38) of the Act sets forth the criteria for a fiduciary to be an investment manager for purposes of section 405 of the Act. Subparagraph (B)(ii) of section 3(38) of the Act provides that, in the case of a fiduciary who is not registered under the Investment Advisers Act of 1940 by reason of paragraph (1) of section 203A(a) of such Act, the fiduciary must be registered as an investment adviser under the laws of the State in which it maintains its principal office and place of business, and, at the time the fiduciary files registration forms with such State to maintain the fiduciary's registration under the laws of such State, also files a copy of such forms with the Secretary of Labor. The purpose of this section is to set forth the exclusive means for investment advisers to satisfy the filing obligation with the Secretary described in subparagraph (B)(ii) of section 3(38) of the Act.

(b) *Filing requirement.* To satisfy the filing requirement with the Secretary in section 3(38)(B)(ii) of the Act, a fiduciary must be registered as an investment adviser with the State in which it maintains its principal office and place of business and file through the Investment Adviser Registration Depository (IARD), in accordance with applicable IARD requirements, the information required to be registered and maintain the fiduciary's registration as an investment adviser in such State. Submitting to the Secretary investment adviser registration forms filed with a State does not constitute compliance with the filing requirement in section 3(38)(B)(ii) of the Act.

(c) *Definitions.* For purposes of this section, the term ''Investment Adviser Registration Depository'' or ''IARD'' means the centralized electronic depository described in 17 CFR 275.203–1.

(d) *Cross reference.* Information for investment advisers on how to file through the IARD is available on the Securities and Exchange Commission Web site at *http://www.sec.gov/iard.*

Signed at Washington, DC this 3rd day of December, 2003.

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