



Society of Professional Benefit Administrators

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Office of Health Plan Standards and Compliance Assistance
Employee Benefit Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W., N-5653
Washington, D.C. 20210

Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS 4140-IFC
P.O. Box 8016
Baltimore, MD 21244-1850

Filed Electronically
E-OHPSCAMEWARegistration.EBSA@dol.gov
Regulations.gov

RE: Comments on MEWA Proposed Regulations

Dear Sir or Madam:

The Society of Professional Benefit Administrators appreciates the opportunity to comment on the Multiple Employer Welfare Arrangement (MEWA) series of proposed regulations under 29 CFR Parts 2520; 2560 and 2571; Executive Order 13122; Executive Order 12866 issued on Dec. 6, 2011.

The Society of Professional Benefit Administrators (SPBA) is the largest national association representing independent third party administration firms who are responsible for the administration of the employee benefits of nearly forty percent of all United States workers. SPBA represents over 90 percent of the firms which make third party contract administration of employee benefit plans their primary line of business.

Third party administrators (TPAs) provide continuing professional outside claims and benefit plan administration for employers and benefit plans. TPAs very often become the "employee benefits office" for the covered workers of many small employers. The average TPA client employs some degree of self-funding and clients range from large Taft-Hartley union/management jointly-administered plans, customized plans for single employers of all sizes, and cost-effective plans designed for related groups of employers in trade associations and other multiple employer configurations.

On December 6, 2011, the U.S. Department of Labor issued a proposed rule on Form M-1 filing requirements, a proposed rule on DOL ex parte cease and desist orders, a notice of proposed form revisions to Form M-1 and a notice of proposed form revision to Form 5500 implementing new requirements for multiple employer welfare arrangements under the Patient Protection and Affordable Care Act.

We commend the Departments on their foresight in seeking information from private industry on the impact this change in the law will have on employers, especially small employers who self-insure their benefit plans and Third Party Contract Administrators. TPAs request clarifications from you as they continue to administer health care benefit plans for employers who in this economy are constantly changing and customizing their plans after mergers and acquisitions. As the preeminent representative of third party contract administration firms, SPBA wishes to raise issues, particularly as they relate to the responsibilities of TPAs as they work for welfare benefit plans, and this letter is meant to highlight those issues.

New Reporting and Disclosure Requirements

SPBA appreciates the opportunity to file comments on the proposed revisions to the Form M-1 and Form 5500 and instructions to the Form 5500-SF to accommodate these proposed reporting requirements. According to the proposed regulations, MEWAs that are ERISA plans subject to the Form M-1 filing requirements will also be required to file a Form 5500 Annual Return/Report, regardless of plan size.

The Proposed Rules make clear that the obligation to file Form M-1 extends to all MEWAs, whether or not they are ERISA-covered plans, and ECEs. Although the requirements may differ as to what constitutes a registration event for MEWAs and an origination event for ECEs, the Preamble to the Proposed Rules makes clear the general intent is to require all such arrangements to be subject to similar reporting requirements. The proposed revision to Section 2520 of the DOL regulations would alter reporting requirements for some MEWAs in a way that we believe to be overly broad and vague.

Our primary concern is that under the amended regulations, an employer who sponsors an employee benefit plan subject to ERISA through participation in a MEWA is obligated to file a Form M-1. The employer is statutorily presumed to be the Plan Administrator of the plan it sponsors. We would like to have the regulations note and clarify that under ERISA, a plan sponsor of the welfare benefit plan, should always be considered to be the Plan Administrator. Despite the administrative and ministerial reporting done by the third party contract administrator (TPA) on behalf of the plan, the TPA should never be considered to be the Plan Administrator when they are doing their job as contract service provider.

The Proposed Rules expand the DOL reporting requirements for MEWAs and impose substantial penalties for failure to report. MEWAs that are ERISA plans filing Form 5500 annual reports will now be required to prove their compliance with the Form M-1 filing requirements. Under the proposed regulations, MEWAs that are ERISA plans of small employers (less than 100 employees) will no longer be exempt from the requirement to file a Form 5500 annual report.

In conjunction with the issuance of the Proposed Rules, the DOL proposed changes to Form M-1 to incorporate the new reporting requirements. The proposed Form M-1, among other things, requires contact information of all persons associated with the MEWA, including promoters and third party vendors and providers. Because the Proposed Rules impose civil and criminal penalties for a MEWA's failure to file or for fraudulent filing, we believe that the proposed regulation should make clear that the lack of filing by an employer or surrogate should not inadvertently implicate a third party contract administrator doing their ministerial duties under the plan document.

EBSA Enforcement Authority

The Patient Protection and Affordable Care Act (PPACA) made several changes to the Employee Retirement Income Security Act (ERISA) to address these ongoing issues with MEWAs, including giving DOL new enforcement authority under section 521 of ERISA, revising the MEWA reporting requirements under section 101(g) of ERISA and providing for new criminal penalties under section 519 of ERISA. The proposed regulations with regard to Form M-1 filing requirements included enhanced regulation in the form of ex parte cease and desist orders.

SPBA recognizes that the overall rationale of the MEWA proposed regulations is to reduce the number of failed MEWAs. We recognize that PPACA prohibits false statements or representations of fact about a MEWA's financial condition, benefits provided or its regulatory status in connection with the marketing of MEWAs. However, we believe that the new EBSA enforcement authority is overly broad.

We understand that the Department is particularly concerned with MEWAs making false claims and seeks to implement sound requirements and enforcement rules to ensure federal laws are being followed. However, several of the proposed changes would incorrectly steer enforcement toward contract third party administrators that serve as mere vendors to the welfare benefits plan. In particular, we note the proposed new enforcement rules establish in the definitional provisions that the term:

“Administrator” includes “the person or persons in control, disposition or management of the cash or property received by or contributed to the MEWA or ECE, irrespective of the control or management is exercised directly or indirectly through an agent, custodian or trustee...”

This provision seeks to establish authority and control in situations where a third party contract administrator may be servicing the welfare benefit plan merely in a ministerial role. This provision should be clarified to exclude TPAs from the definition of “Administrator”.

Similarly, the overreach of the proposed regulations that focus on “omissions” related to the financial condition of a MEWA, to include management of plan assets, casts a very wide net which could inadvertently target contract service providers which act in a ministerial fashion with regard to benefit claims adjudication and payment.

In fact, SPBA member TPAs have for many years, stood in the forefront to report to the Department the fraudulent actions of MEWAs seeking their assistance to defraud plan participants and defy the law. To overreach in the proposed regulation to implicate anyone who interacts in “claims review, marketing” is to unjustly impose a requirement upon TPAs that is beyond their service agreement. In many instances, it is the TPA who serves to educate the Plan Sponsor and Plan Administrator of their duties to pay claims and meet the benefits promised to plan participants. The regulations threaten TPAs ability to do the work of paying claims and making these entities viable and law-abiding at the risk of raising their actions to that of a serious crime.

The DOL's authority to issue cease and desist orders under the proposed regulations is not limited to MEWAs that are ERISA-covered employee welfare benefit plans. Instead, the authority reaches any arrangements that control the assets or management of ERISA-covered plans established and maintained by others. It states that the DOL can issue summary seizure orders when it appears that a MEWA is in a financially hazardous condition. This could occur, for example, if the MEWA is unable to pay benefit claims as they become due or a failure to establish or maintain ERISA claims procedures or a record keeping system. New regulatory section 2560.521 which allows the Department to issue seizure orders could have a devastating impact on the business of innocent TPAs that may have service contracts with inadvertent MEWAs or who are in the process of trying to turn around a program that is temporarily in peril or considering not paying claims. The proposed regulations' definition of “person” in Section 2560.521(b)(6) to include individual, partnership, corporation, employee welfare benefit plan, association or other entity or organization is overbroad because it could likely include work product of service contractors, like TPAs, which have no connection with the MEWA other than to service claims.

Inadvertent MEWAs

While the objective of these rules is to police fraudulent or otherwise abusive arrangements in the marketplace, a bona fide welfare plan covering employees of multiple members of a business enterprise sometimes can also become an inadvertent MEWA, depending on the ownership, control and other structural relationships in that enterprise, especially in situations as change of control of business, merger or acquisition. The consequences of the proposed reporting rules in those circumstances should be carefully considered, e.g.,

where it is discovered after the fact that such a MEWA innocently and unintentionally came into being. We commend the Department for retaining and preserving in the proposed new M-1 filing requirements, the rule that a MEWA used as a temporary arrangement following a change of control of businesses, such as a merger or acquisition, is not required to file Form M-1.

Workers' Compensation Laws

We concur with the exclusion of regulatory reporting of 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.

M-1 Electronic Filing

SPBA concurs with the proposed changes that would eliminate the paper filing option for Form M-1 and require that Form M-1 to be filed electronically. This change would allow filers, among other things, to more efficiently copy or update previously reported information in future filings. The proposal also expands certain special filings events, for example, if a MEWA opens operations in several states. The DOL also proposed related, and substantial, revisions to Form M-1 and its instructions. Among other changes, the proposed Form M-1 would require more extensive custodial and financial information reporting. Impose stricter, 30-day filing deadlines for MEWA registration.

Practical Implications

According to the DOL, the regulations and guidance are intended to address abusive and fraudulent practices by some promoters, marketers and operators of MEWAs. Collectively, the proposed changes would provide the DOL with significant enforcement tools for addressing these abuses.

The disclosures required by MEWAs enables DOL to conduct more informative investigations of a MEWA's finances and operations than had previously been the case. The availability of information, however, also creates a potential for greater liability on the part of an Third Party Contract Administrator who in many cases lacks information required under the proposed regulations. This would mean that Third Party Contract Administrators would have to cancel service contracts on the risk that any service arrangement they enter into could inadvertently create a MEWA. This can occur in a variety of circumstances, such as a merger or acquisition, or the consolidation of plans offered by subsidiaries or affiliates that are independent employers that offer their own benefit plans.

Conclusion

On behalf of third party contract administration firms, the Society of Professional Benefit Administrators appreciates the opportunity to express our comments on this issue. It is respectfully requested that the recommendations cited above be considered in the final regulations. SPBA would like to reserve the opportunity to provide future comments when the final regulations are released. Additionally, if a hearing is scheduled, SPBA requests the opportunity to testify. As the preeminent representative of third party contract administration firms, SPBA would be happy to provide you with additional information or to respond to any additional questions arising as a result of this submission. Please contact me at 301-718-7722 if we can be of further assistance.

Sincerely,

Elizabeth Ysla Leight
Director of Government Relations and Legal Affairs
Society of Professional Benefit Administrators