DRAFT 6.30.2011

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2571

RIN 1210-AB48

Procedures for administrative hearings on the issuance of cease and desist orders under ERISA Sec. 521 – multiple employer welfare arrangements

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Proposed rule.

SUMMARY: This document contains a proposed rule on administrative hearing and appeal procedures for multiple employer welfare arrangements (MEWAs) that are the subject of temporary cease and desist orders issued by the Secretary of Labor. Section 521 of the Employee Retirement Income Security Act (ERISA) authorizes the Secretary to issue a cease and desist order, without prior notice or hearing, when it appears that the alleged conduct of a 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 procedures in this document set forth the

procedures for use by administrative law judges (ALJs) and the Secretary when a MEWA or other person challenges a temporary cease and desist order. A separate document, also published today, contains a proposed rule describing the manner in which the Secretary will issue a temporary cease and desist order.

DATES: Written comments on the proposed regulations should be submitted to the Department of Labor on or before [**INSERT DATE 90 DAYS AFTER PUBLICATION IN FEDERAL REGISTER**].

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

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

Department of Labor. Comments to the Department of Labor, identified by RIN 1210-AB48, by one of the following methods:

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

- Email: E-OHPSCA521Procedures.EBSA@dol.gov
- Mail or Hand Delivery: Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N-5653, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, Attention: RIN 1210—AB48; Section 521 Procedures Proposed Regulation.

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

SUPPLEMENTARY INFORMATION:

I. Background

Section 521 of ERISA, 29 U.S.C. 1151, provides that the Secretary of Labor may issue ex parte cease and desist orders when it appears to the Secretary that the alleged conduct of a multiple employer welfare arrangement (MEWA) under section 3(40) of the Act, 29 U.S.C. 1002(40), 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(b) 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. Regulations published today separately from this document address the standards and procedures for the Secretary to follow in issuing cease and desist orders under ERISA section 521. The instant regulations describe the

procedures before the Office of Administrative Law Judges (OALJ) when a person seeks an administrative hearing for review of such an order. These proposed procedural 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 proposed 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.

The following discussion summarizes the specific modifications to the rules in 29 CFR Part 18 being proposed for adoption in this notice.

II. Overview of the Regulations

These proposed procedural rules apply only to adjudicatory proceedings before ALJs of the U.S. Department of Labor. A separate proposed regulation to be codified at 29 CFR 2560.521, which is also being published today, sets forth the standards relating to the issuance of cease and desist orders under ERISA section 521. Under these procedural rules, an adjudicatory proceeding before an ALJ is commenced only after a person who is the subject of a temporary cease and desist order requests a hearing and files an answer showing cause why the temporary order should be modified or set aside.

The definitional section of this proposed rule 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.

Proceedings before the Administrative Law Judge

The party that is subject to a cease and desist order issued under ERISA section 521 has the burden to initiate an adjudicatory proceeding before an ALJ. Proposed section 2571.3 governs the service of documents necessary to initiate ALJ proceedings by such a party on the Secretary of Labor and the OALJ. This proposed section would apply in such cases in lieu of 29 CFR 18.3.

The proposed section 2571.4 on the designation of parties also differs somewhat from its counterpart under 29 CFR Part 18.10. This proposed rule specifies that the respondent in these proceedings will be the party who is challenging the temporary cease and desist order.

Proposed rules published separately today, and to be codified at 29 CFR 2560.521-1(h), govern the Secretary's service of the temporary cease and desist order on the affected parties. Under proposed 29 CFR 2560.521-1(e) a person who is subject to an order must request a hearing within 30 days after service of the order. Section 2571.5 of the instant proposed rule provides that a failure by a person on whom the order is served to request a hearing and file a timely answer shall be deemed a waiver of the right to appear and contest the temporary cease and desist order and an admission of the facts alleged in the temporary order. Proposed section 2571.5 also makes clear that, in the event of a failure to timely request a hearing and file an answer the temporary cease and desist order becomes final agency action within the meaning of 5 U.S.C. 704.

With respect to consent orders or settlements, proposed section 2571.6 provides that the ALJ's decision shall include the terms and conditions of any consent order or

settlement which has been agreed to by the parties. Under this section, the decision of the ALJ which incorporates the consent order shall become the final agency action within the meaning of 5 U.S.C. 704. This section of the proposed rule also sets forth the process for when there is a settlement that does not include all the parties that are subject to a cease and desist order.

Section 2571.7 of this proposed rule states that the ALJ may order discovery only upon a showing of good cause by the party seeking discovery. In addition, the ALJ must expressly limit the scope and terms of discovery to the circumstances for which good cause has been shown. To the extent that an ALJ's discovery order does not specify rules for the conduct of discovery, the rules governing the conduct of discovery from 29 CFR part 18 are to be applied in these proceedings under ERISA section 521. For example, if the discovery order permits interrogatories only on certain subjects, the rules under 29 CFR Part 18 concerning the servicing and answering of the interrogatories shall apply. The procedures under 29 CFR Part 18 for the submission of facts to the ALJ during the hearing will also apply in proceedings under ERISA section 521.

This proposed section 2571.7 also clarifies that any evidentiary privileges, including the attorney-client privilege and work product privilege, apply in proceedings under this rule. Further, it makes clear that the fiduciary exception to such privileges also applies. Consequently, communications between an attorney and a plan administrator or other fiduciary or work product that fall under the fiduciary exception are not protected from discovery.

Proposed section 2571.8 authorizes an ALJ to issue a summary decision which may become a final order when there are no genuine issues of material fact in a case arising

under ERISA section 521. Proposed section 2571.9 states that the ALJ's decision shall become a final agency action unless a timely appeal is filed.

Review by the Secretary

The procedures for appeals of ALJ decisions under ERISA section 521 are governed solely by the rules set forth in proposed sections 2571.10 through 2571.12 and without any reference to the appellate procedures contained in 29 CFR Part 18. Proposed section 2571.10 establishes the time within which a party must file a notice of appeal, the manner in which the issues for appeal are determined, and the procedures for making the entire record before the ALJ available to the Secretary for review. Proposed section 2571.11 provides that review by the Secretary (or a designee) shall be on the record before the ALJ without an opportunity for oral argument. Proposed section 2571.12 sets forth the procedure for establishing a briefing schedule for appeals and states that the decision of the Secretary on an appeal shall be the final agency action within the meaning of 5 U.S.C. 704.

The authority of the Secretary with respect to the appellate procedures has been delegated to the Assistant Secretary for the Employee Benefits Security Administration pursuant to Secretary's Order 3-2010. 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 compiled 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.

III. Regulatory Impact Analysis

Executive Order 12866

Under Executive Order 12866, the Department must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive Order and 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.

The Department has determined that this regulatory action is not economically significant within the meaning of section 3(f)(1) of the Executive Order. However, the Office of Management and Budget (OMB) has determined that the action is significant

within the meaning of section 3(f)(4) of the Executive Order, and the Department accordingly provides the following assessment of its potential benefits and costs.

Need for Regulatory Action

As discussed earlier in this preamble, Section 521 of ERISA provides that the Secretary of Labor may 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.[1] ERISA section 521(b) 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. This proposed regulation is necessary to implement the requirements of ERISA section 521(b) by describing the procedures that would apply when a party seeks an administrative hearing for review of a cease and desist order.

Benefits and Costs of Proposed Rule

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

[1] Regulations published today separately from this document address the standards and procedures for the Secretary to follow in issuing cease and desist orders under ERISA section 521.

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 the combination of this proposed rule and the companion regulation setting forth the standards and procedures the Department would use to implement its cease and desist authority under ERISA section 521, also published in today's Federal Register, 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 proposed regulation 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 this regulation 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 ALJ 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 an ALJ's knowledge of federal law should facilitate an expeditious hearing, reduce costs, and introduce a consistent legal standard to the proceeding. The Department invites public comments on the comparative cost of a Federal court proceeding versus an administrative hearing.

The Department estimates that the cost of the proposed regulation would total approximately $177,000 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 $540. The data and methodology used in developing these estimates are described more fully in the Paperwork Reduction Act section, below.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in this Proposed Rule on Procedures for Administrative Hearings Regarding the Issuance of Cease and Desist Orders under ERISA section 521 – Multiple Employer Welfare Arrangements. A copy of the ICR may be obtained by contacting the individual identified below in this notice. The Department has submitted a copy of the proposed information collection to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and

- Minimize the burden of the collection of information on those who are to respond, including through the use of 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 [insert date that is 60 days after publication in the Federal Register], OMB requests that comments be received within 30 days of publication of the Notice of Proposed Rulemaking to ensure their consideration. Address requests for copies of the ICR to G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N 5647, Washington, DC 20210. Telephone (202) 219-8410; Fax: (202) 219 4745. These are not toll free numbers.

This proposed regulation establishes procedures for hearings and appeals before an Administrative Law Judge (ALJ) 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 ALJ to revoke or modify a cease and desist order.[2] Most of the factual information necessary to prepare the petition

[2] As stated in the Departments April 2010 Fact Sheet on MEWA Enforcement, the Department has filed 97 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

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 a 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 40 hours at $442 per hour.[3] The majority of the attorney's 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 $18,000 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: Proposed 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-NEW.

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

Respondents: 10.

Responses: 10.

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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.

[3] The Department's estimate for the attorney's hourly rate is taken from the Laffy 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.

Estimated Total Burden Hours: 20 hours.

Estimated Total Burden Cost (Operating and Maintenance): $177,100.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

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 which 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.

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

The Small Business Administration uses a size standard of less than $7 million in average annual receipts to determine whether businesses in the finance and insurance sector are small entities.[4] 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 the 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.[5] 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 that about 60 percent of MEWAs (240 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 and request an administrative hearing to revoke or modify the order, the Department examined the number of civil claims the Department filed against MEWAs since FY 1990. During this time, the Department filed 97 civil complaints against MEWAs, an average of approximately five complaints per year. For purposes of this analysis, the Department believes that an average of ten complaints a year is a reasonable upper bound estimate of the number of MEWAs that could be expected to request an administrative hearing in a year.[6]

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[4] 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

[5] 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).

[6] 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

Based on the foregoing, the Department estimates that the greatest number of MEWAs likely to petition for an administrative hearing represents a small fraction (4.2 percent) of the total number of small MEWAs. Accordingly, the Department hereby certifies that this proposed regulation will not have a significant economic impact on a substantial number of small entities and invites public comments regarding this finding.

Unfunded Mandates Reform Act

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

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.

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.

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

Over the years, the Department and state insurance departments have worked closely and coordinated their investigations and other actions against fraudulent and abusive MEWAs. For example, EBSA regional offices have met with state officials in their regions and 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. By providing procedures for use by ALJs and the Secretary of Labor when a MEWA or other person challenges a temporary cease and desist order, this proposed rule would enhance the state and federal government's joint mission to take immediate action against fraudulent and abusive MEWAs and limit the devastating losses suffered by American workers and their families when abusive MEWAs become insolvent and fail to reimburse medical claims.

List of Subjects in 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 forth in the preamble, the Secretary proposes to add part 2571 of chapter XXV of title 29 of the Code of Federal Regulations 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.

Subpart A – Procedures for Administrative Hearings on the Issuance of Cease and Desist Orders Under ERISA Section 521 – multiple employer welfare arrangements

Authority: 29 U.S.C. §§ 1002(40), 1132, 1135; and 1151, Secretary of Labor's Order 3-2010, 75 FR 55354 (September 10, 2010).

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 or the Act). 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 typewritten when possible on standard size 8 ½ x 11 inch paper.

(2) Illegible documents, whether handwritten, typewritten, 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 shall then 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 under section 521 of the Act. 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. An exception to these privileges, however, exists when an attorney advises a plan fiduciary on matters involving the performance of his or her fiduciary duties (called the "fiduciary exception"). Consequently, the administrative law judge may not protect from discovery communications between an attorney and a plan administrator or other fiduciary or work product that fall under the fiduciary exception to the attorney-client or work product privileges.

§ 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. (1) 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 29 CFR 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 paragraph, 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 paragraph 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 29 CFR 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 [__ DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE].

Signed at Washington, DC, this [ ] day of [ ], 2011.

PHYLLIS C. BORZI,

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