

and the Federal Advisory Committee Act (the FACA), 5 U.S.C. App. 2, to assist the Department in developing proposed regulations to implement section 3(40)(A)(i) of ERISA, 29 U.S.C. 1002(40)(A)(i).

The criteria regulation set forth standards that, if satisfied, would constitute a finding by the Secretary that a plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of section 3(40).

The proposed regulation established four general criteria for a finding that a plan was established or maintained under or pursuant to collective bargaining for purposes of section 3(40)(A)(i). First, the entity in question had to be an employee welfare benefit plan within the meaning of ERISA section 3(1). Second, the preponderance of those participants covered by the plan (at least 80%) had to have a nexus to the bargaining relationships under or pursuant to which the plan was established or maintained (referred to as the "nexus" group or test). Third, the agreements under or pursuant to which the plan is established or maintained had to have certain characteristics that indicate that they were, for purposes of section 3(40) of ERISA only, collective bargaining agreements, including that the agreements were the product of a "*bona fide* collective bargaining relationship." Fourth, the proposed regulation listed eight specific "factors" deemed to indicate the existence, for purposes of section 3(40) only, of a *bona fide* collective bargaining relationship. If at least four of those specified factors were present, the regulation indicated that a *bona fide* collective bargaining relationship underlying the agreements under or pursuant to which the plan is established or maintained could be presumed to exist.

The proposed criteria regulation included a ninth non-specific "factor" in the list. The ninth factor indicated that the Secretary would consider, in making a finding, whether "other objective or subjective indicia of actual collective bargaining and representation" were present. The inclusion of this "catch-all" factor recognized that, in any particular case, other facts might need to be taken into account to determine whether a *bona fide* collective bargaining relationship existed, especially where the entity did not meet at least four of the eight specific factors, or where, despite meeting four of the eight factors, there were other facts indicating that a *bona fide* collective bargaining relationship did not exist.

The proposed criteria regulation also specified circumstances that, if present, would lead to a conclusion that an employee welfare benefit plan is not established or maintained under or pursuant to one or more agreements that the Secretary finds to be collective bargaining agreements. The regulation stated that, for any plan year in which the specified circumstances were present, a plan that otherwise met the criteria of the regulation should not be deemed to be excluded from the MEWA definition by virtue of section 3(40)(A)(i).

The proposed regulation provided that, under certain limited circumstances, an entity would be permitted to petition the Secretary for an individual finding. The ability to petition, however, would arise under the proposed regulation only if a state's law or jurisdiction had been asserted against the entity in an administrative or judicial proceeding. The procedural regulations set forth specific processes for petitioning for an individual finding.

#### Public Comments

Subsequent to publication of the proposed regulations, the Department received seven public comments. The Department reconvened the Committee and held a public meeting on March 1, 2002, to obtain the Committee's views on the public comments. Minutes of this meeting, as well as other meetings, of the Committee are available for inspection by the public in the Department's Public Disclosure Room, 200 Constitution Avenue, NW., N1513, Washington, DC 20210.

The following discussion summarizes the issues raised by the public comments, the Committee's discussion of those issues at the public meeting, and the Department's decisions, which are reflected in the final regulations.

#### 1. Whether the Factors Set Forth in the Proposed Criteria Regulation as Presumptive of Bona Fide Collective Bargaining Should Be Expanded or Modified

Two commenters suggested that the Department should expand the list of factors indicative of a *bona fide* collective bargaining relationship. One commenter argued that such an expansion is necessary to make sure that small employers and employers in manufacturing, warehousing, service and other non-construction related industries could easily meet this criterion. The commenter further suggested that government certification of a union, as a collective bargaining agent should be a stand-alone safe harbor factor. The other commenter

noted that newly established unions, particularly those organizing in the health care field, might have difficulty meeting four of the eight factors. That commenter suggested that an additional factor—that the welfare plan was being administered along sound actuarial principles—be added to the list of factors. The commenter also suggested that the examples set out as part of the non-specific ninth factor be listed individually as separate factors that could be counted towards meeting the "safe harbor."

In discussing these comments, the Committee noted that these issues were not new and had been considered by the Committee in its initial deliberations. It was noted that the language of the proposed regulation went as far as possible to be inclusive of various types of collective bargaining relationships. The purpose of the ninth "catch-all" factor is to take into account that the eight specific factors may not encompass all *bona fide* collective bargaining relationships. Concerns were also expressed about lowering the threshold for what constitutes a *bona fide* collective bargaining relationship. *Bona fide* collectively bargained arrangements are not likely to be challenged under the regulation by the states. The consensus of the Committee was that the eight factors should not be expanded or modified.

After consideration of the comments and the Committee's discussion, the Department has decided not to expand or modify the factors presumptive of a *bona fide* collective bargaining relationship. The final regulation therefore retains, in section 2510.3-40(b)(4)(i)-(viii), the factors as originally proposed. In the view of the Department, the regulation carefully distinguishes between the specific factors that generally evidence a *bona fide* collective bargaining relationship and the types of activities and fact patterns that are common to sham MEWA operators. Expanding or modifying the factors to include less well-established or less common situations, or making any single factor a stand-alone safe-harbor, may make it easier for sham MEWA operators to mimic the regulation's factors presumptive of a *bona fide* collective bargaining relationship.

The Department also declines to add to the factors, as suggested by one commenter, the fact that the plan is maintained on sound actuarial principles. Although maintaining a plan on sound actuarial principles is important in other regards, that a plan is actuarially sound does not necessarily