

An interim final rule relating to the procedures for administrative hearings and appeals relating to the assessment of civil penalties under section 502(c)(5) of ERISA was published in the **Federal Register** on February 11, 2000, 65 FR 7185. In the February 11, 2000 interim rule, the Department sought comments from those affected by this regulation. No comments were received.

On October 21, 2002, the Department published interim final rules relating to notice of blackout periods to participants and beneficiaries (during which their right to direct or diversify investments, obtain a loan, or obtain a distribution under a pension plan may be suspended) and related civil penalties under ERISA section 502(c)(7). Those rules also made conforming changes to the procedural regulations under this section. Specifically, § 2570.94, which describes “consequences of default” was modified to provide that, if a respondent fails to file an answer to the notice of determination, the notice of determination shall become a final order of the Secretary 45 days from the date of service of the notice. No comments were received with respect to this conforming amendment.

The interim rule is, therefore, being published as a final rule without change.

B. Regulatory Impact Analysis

Executive Order 12866 Statement

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 subject to review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a “significant regulatory action” is 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. On the basis of these criteria, it

has been determined that this regulatory action is significant under section 3(f)(4) of the Executive Order. Accordingly, OMB has reviewed this regulation.

Paperwork Reduction Act

The rule being issued here is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) because it does not contain a “collection of information” as defined in 44 U.S.C. 3502(3).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), (RFA) requires each Federal agency to perform a regulatory flexibility analysis for all rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) unless the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Small entities include small businesses, organizations, and governmental jurisdictions.

Because these rules were issued as interim final rules and not as a notice of proposed rulemaking, the RFA does not apply and the Department is not required to either certify that the rule will not have a significant economic impact on a substantial number of small entities, or conduct a regulatory flexibility analysis. The Department does not anticipate that this final rule will impose a significant impact on a substantial number of small entities, however, regardless of whether one uses the definition of small entity found in regulations issued by the Small Business Administration (13 CFR 121.201) or one defines small entity, on the basis of section 104(a)(2) of ERISA, as an employee benefit plan with fewer than 100 participants.

Small Business Regulatory Enforcement Fairness Act

The final rule being issued here is subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been 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.

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 final rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, and will not impose an annual burden of \$100 million or more on the private sector.

Federalism Statement Under Executive Order 13132

Executive Order 13132 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, the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Agencies promulgating regulations that have these federalism implications must consult with state and local officials, and describe in the preamble to the regulation the extent of their consultation and the nature of the concerns of state and local officials, as well as the agency’s position supporting the need to issue the regulation, and a statement of the extent to which the concerns of state and local officials have been met.

In the Department’s view, these final regulations do not have federalism implications because they do not have substantial direct effects on the states, the relationship between the national government and the states, or on the distribution of power and responsibilities among various levels of government. Not only do these regulations not reduce state discretion, the reports they require will facilitate state enforcement of their own laws as they apply to MEWAs since the reports will be available to the states and will identify MEWAs operating in each state.

Although the Department concludes that these final regulations do not have federalism implications, in keeping with the spirit of the Executive Order that agencies shall closely examine any policies that may have federalism implications or limit the policy making discretion of the states, the Department of Labor engages in extensive efforts to consult with and work cooperatively with affected state and local officials.