

*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