DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Parts 2509 and 2510

RIN 1210–AA94

Electronic Registration Requirements for Investment Advisers To Be Investment Managers Under Title I of ERISA

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This document contains a regulation relating to the definition of investment manager in section 3(38)(B) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Under the final regulation, in lieu of filing a copy of their state registration forms with the Secretary of Labor, state-registered investment advisers seeking to obtain or maintain investment manager status under Title I of ERISA must electronically register through the Investment Adviser Registration Depository (IARD) as an investment adviser with the state in which they maintain their principal office and place of business. The IARD is a centralized electronic filing system, established by the Securities and Exchange Commission (SEC) in conjunction with state securities authorities. The IARD enables investment advisers to satisfy SEC and state registration obligations through the use of the Internet, and current filing information in the IARD database is readily available to the Department and the general public via the Internet. The final regulation makes electronic registration through the IARD the exclusive method for state-registered investment advisers to satisfy filing requirements for investment manager status under section 3(38)(B)(ii) of Title I of ERISA. The regulation affects plan trustees, investment managers, other fiduciaries, and plan participants and beneficiaries. This document also contains conforming amendments to 29 CFR 2509.75–5 at FR–6 and FR–7, to conform them to the provisions in the final regulation.

DATES: The effective date of the changes to parts 2509 and 2510 is October 25, 2004.

FOR FURTHER INFORMATION CONTACT: Florence M. Novellino, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, Washington, DC 20210, telephone (202) 693–8518 (not a toll free number).

SUPPLEMENTARY INFORMATION:

A. Background

Under Title I of the Employee Retirement Income Security Act of 1974 (ERISA), named fiduciaries of plans may appoint investment managers to manage plan assets. If the investment manager is a registered investment adviser, bank or insurance company, and meets the other requirements for being an ''investment manager'' as defined in section 3(38) of ERISA, the plan trustees are relieved from certain obligations relating to the assets for which the investment manager is responsible.[1] In 1996, the National Securities Markets Improvement Act of 1996 (NSMIA), Public Law 104–290, 110 Stat. 3416, amended the Investment Advisers Act of 1940 (Advisers Act) to divide certain investment adviser regulatory responsibilities, including the registration requirements, between the Securities and Exchange Commission (SEC) and the states. Prior to 1996, most investment advisers were required to register with the SEC and in each state in which they were doing business. Paragraph (1) of section 203A(a) of the Advisers Act, as amended by NSMIA, and SEC rule at 17 CFR 275.203A–1, prohibit certain investment advisers from registering with the SEC and instead requires that they register with the states in which they maintain their principal offices and places of business.[2] The legislative history of NSMIA indicates that this division of regulatory responsibilities was intended, among other things, to encourage the SEC and state regulators to create a uniform system for ''one-stop'' filing that would benefit investors, reduce regulatory and paperwork burdens for registered investment advisers, and facilitate supervision of investment advisers.[3]

The SEC implemented that legislative intent at the federal level by publishing a final rule in September of 2000 at 17 CFR 275.203–1 which made electronic filing with the Investment Adviser Registration Depository (IARD) mandatory for SEC-registered advisers. Additionally, all states accept forms filed via the IARD to satisfy state registration requirements, and many mandate state registration via the IARD.[4] Accordingly, the IARD has become a ''one-stop'' Internet-based centralized filing system that enables investment advisers to satisfy filing obligations with both federal and state securities regulators. Pertinent state registration information in the IARD database is available on the Internet to the general public through the Investment Adviser Public Disclosure (IAPD) Web site that may be directly accessed through the SEC's Web site or through links from various state and investor Web sites. The IAPD Web site contains investment adviser registration data, including information about current registration forms, registration status, services provided, fees charged, and disclosures about certain conflicts of interest and disciplinary events, if any. The IAPD Web site includes information on investment advisers that currently are registered with the SEC or a state, and also contains information on investment advisers that were registered in the previous two years but are no longer registered.

Section 3(38)(B) of Title I of ERISA was also amended to reflect the above-described changes to the investment adviser registration requirements under the Advisers Act.[5] Specifically, section 3(38)(B) of ERISA requires that, to be an investment manager under Title I, an investment adviser must: (i) Be registered with the SEC under the Advisers Act of 1940, or (ii) if not registered under such Act by reason of paragraph (1) of section 203A(a) of such Act, be registered as an investment adviser under the laws of the state in which it maintains its principal office

[1] Section 402(c)(3) of ERISA states that a plan may provide that with respect to control or management of plan assets a named fiduciary may appoint an investment manager or managers to manage (including the power to acquire and dispose of) plan assets. Section 405(d) of ERISA provides in part that, if an investment manager or managers have been appointed under section 402(c)(3), then no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

[2] Specifically, subject to certain exceptions, investment advisers fall into three categories under the NSMIA amendments. First, an investment adviser having assets under management of less than $25 million generally is prohibited from registering with the SEC but must instead register with the state regulatory authority in the state where the investment adviser maintains its principal office and place of business. Those with at least $25 million but less than $30 million may register with the SEC in lieu of filing with state authorities. Those with $30 million or more must register with the SEC. Section 203A(a) of the Advisers Act is codified at 15 U.S.C. 80b–3a(a). *See also* 17 CFR 275.203A–2 for exemptions from the prohibition for certain investment advisers registering with the SEC.

[3] S. Rep. No. 104–293, at 5 (1996).

[4] The State of Wyoming has not promulgated a state investment adviser registration requirement; therefore all Wyoming-based investment advisers are required to register under the Advisers Act with the SEC via the IARD. *See* 65 FR 57438, 57445 (Sept. 22, 2000).

[5] *See* sec. 308(b)(1) of Title III of NSMIA and Act of November 10, 1997, Sec. 1, Pub. L. 105–72, 111 Stat. 1457.

and place of business and, at the time the investment adviser last filed the registration form it most recently filed with such state in order to maintain its registration under the laws of such state, it also filed a copy of such form with the Secretary of Labor.

To implement the filing requirements in section 3(38)(B)(ii) of ERISA, the Department announced on January 14, 1998, that state-registered investment advisers seeking to qualify, or remain qualified, as investment managers must file a copy of their most recent state registration form for the state in which they maintain their principal office and place of business with the Department prior to November 10, 1998, and thereafter file with the Department copies of any subsequent filings with that state. The ongoing obligation to file copies with the Department was, however, to be temporary in nature and remain in effect until a centralized database containing the state registration forms, or substantially similar information, was available to the Department.[6]

On December 9, 2003, the Department published a notice in the **Federal Register** (68 FR 68710) seeking public comments on its proposal that would add section 2510.3–38 to Title 29 of the Code of Federal Regulations and require state-registered investment advisers seeking to obtain or maintain investment manager status under Title I of ERISA to electronically register through the IARD as an investment adviser with the state in which they maintain their principal office and place of business.

The Department received two comments regarding the proposal.[7] One comment was from an organization whose membership is comprised of securities regulators from the States (including the District of Columbia and Puerto Rico), Canada and Mexico. The second comment was submitted by a professional self-regulatory organization for financial planners. Both commenters supported the proposal and agreed that requiring state-registered investment advisers seeking investment manager status under ERISA to register electronically with IARD would provide Federal and State securities regulators as well as the public with easy access to up-to-date information regarding investment advisers. They also concluded that the regulation would not impose undue burdens on investment advisers or affect the ability of state securities regulators to oversee the registration and licensing of in-state and out-of-state investment advisers.

The Department continues to believe that the requirement to file with the Department copies of state registration filings already accessible to the Department and the general public via the IAPD Web site placed an unnecessary administrative burden on the regulated community. The requirement also results in the Department allocating resources to receive, sort, and store paper copies of information readily available in electronic form. It continues to be the Department's view that use of the IARD as a centralized electronic database would improve the ability of the Department, plan fiduciaries, and plan participants and beneficiaries to readily access registration information regarding investment advisers eligible to be investment managers of ERISA-covered plans. As noted above, not only does the SEC require electronic filing through the IARD for registration under the Advisers Act, but most states also require IARD filing for compliance with state investment adviser registration requirements. While a few states do not make electronic filing through the IARD mandatory, as noted above, all states permit investment advisers to use the IARD to satisfy registration requirements. As described more fully below, the Department believes the majority of investment managers of ERISA-covered plans already file registration forms electronically through the IARD under the Advisers Act or under applicable state securities laws. In the Department's view, the benefits to plan trustees, plan participants and beneficiaries, and the Department of this regulation outweigh the relatively small incremental cost that some investment managers may incur if they do not already register with their states through the IARD. Accordingly, the Department is adopting the final regulation without change from the proposal.

B. Summary of the Final Rule

Section 2510.3–38(a) of the final regulation describes the general filing requirement with the Secretary set forth in section 3(38)(B)(ii) applicable to state-registered investment advisers seeking to become or remain investment managers under Title I of ERISA and makes it clear that the regulation's purpose is to establish the exclusive means to satisfy that filing obligation. Section 2510.3–38(b) of the regulation provides that, for a state-registered investment adviser to satisfy the filing requirement in section 3(38)(B)(ii) of ERISA, it must electronically file the required registration information through the IARD. Section 2510.3–38(b) also provides that submitting a copy of state registration forms to the Secretary does not constitute compliance with section 3(38)(B)(ii) of ERISA. Section 2510.3–38(c) of the regulation defines the term ''Investment Adviser Registration Depository'' and ''IARD'' for purposes of the regulation as the centralized electronic depository described in 17 CFR 275.203–1. Finally, section 2510.3–38(d) of the regulation provides a cross-reference to the SEC Internet site at *www.sec.gov/iard* for information on filing investment advisor registration forms with the IARD.[8]

C. Conforming Changes to 29 CFR 2509.75–5

The amendment to section 3(38)(B) of ERISA relating to state-registered investment advisers and the final regulation resulted in a need to make certain conforming amendments to 29 CFR 2509.75–5 (Interpretive Bulletin 75–5). Specifically, Interpretive Bulletin 75–5 includes various questions and answers relating to fiduciary responsibility, including FR–6 and FR–7 relating to persons that may be eligible to be appointed as an investment manager under section 402(c)(3) of ERISA. Neither FR–6 nor FR–7 recognize that an investment adviser not registered with the SEC under the Advisers Act may still be eligible to be appointed as an investment manager if they are not registered under the Advisers Act by reason of paragraph 1 of section 203A(a) of that Act but are state-registered in accordance with ERISA section 3(38)(B). As an interpretive rule, section 2509.75–5 is

[6] Pub. L. 105–72 provided that a fiduciary shall be treated as meeting the requirement for filing a copy of the required state registration form with the Secretary if a copy of the form (or substantially similar information) is available to the Secretary from a centralized electronic or other record-keeping database. *See* Act of November 10, 1997, Sec. 1(b), Pub. L. 105–72, 111 Stat. 1457.

[7] The comments received in response to the proposed regulation are available for inspection by the public in the Department's Public Disclosure Room, 200 Constitution Avenue, NW., N–1513, Washington, DC 20210.

[8] The comment from the organization whose membership is comprised of securities regulators from the States (including the District of Columbia and Puerto Rico), Canada and Mexico also suggested that, in addition to referencing SEC's Web site at *http://www.sec.gov/iard,* the regulation should include a reference to IARD materials on its website and on NASD's information Website dedicated to the IARD. The Department modeled its website reference on the Website reference in the SEC's regulation at 17 CFR 275.203–1. Referencing multiple governmental and non-governmental websites in the regulation may lead to confusion and require the Department to monitor multiple websites and update the regulation in the event website addresses change. The Department also notes that the NASAA and NASD Websites are included as links on the SEC site that is referenced in the regulation. Accordingly, the Department decided not to adopt the suggestion to add additional websites references to the regulatory text.

not subject to notice and comment rulemaking requirements under section 553(b) of the Administrative Procedure Act, 5 U.S.C. 553(b). Therefore, the Department is publishing these changes to Interpretive Bulletin 75–5 in final form without prior publication of a notice of proposed rulemaking. Because these changes merely make the interpretive bulletin conform with the amendments to ERISA section 3(38) enacted by Public Law 105–72 and the provisions in 29 CFR 2510.3–38 being finalized in this document, the changes to FR–6 and FR–7 shall be deemed effective as of the effective date of this final rule.[9]

D. Interim Reliance

The proposed regulation provided that until the effective date of the final regulation, state-registered investment advisers seeking to obtain or maintain investment manager status under Title I of ERISA will be treated as having met the filing obligations with the Secretary of Labor described in section 3(38)(B)(ii) of ERISA for any registration filing due on or after December 9, 2003 if they satisfy the conditions of the proposed regulation. Accordingly, the Department will continue to treat investment advisers seeking to obtain or maintain investment manager status under Title I of ERISA as having met the filing obligations with the Secretary of Labor described in section 3(38)(B)(ii) of ERISA for any registration filing due before the effective date of the final regulation but on or after December 9, 2003 if they satisfied the conditions of the proposed regulation.

E. Regulatory Impact Analysis

Executive Order 12866

Under Executive Order 12866, the Department must determine whether the 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), the 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.

Pursuant to the terms of the Executive Order, it has been determined that this final action is ''non-significant'' within the meaning of section 3(f)(4) of the Executive Order. Accordingly, it does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. Nonetheless, when the Department issued the proposed regulation on December 9, 2003, it sought public comment on an initial analysis of costs and benefits. The Department received only commentary that supported the proposal. Although no further economic analysis is required under the Executive Order, the Department has included, for information purposes only a final assessment of costs and benefits.

Summary

The Department undertook this rulemaking for the purpose of establishing a single and readily accessible source of consistent information about the registration of investment advisers that are investment managers by virtue of meeting the requirements of section 3(38)(B)(ii) of ERISA. The Department believes the regulation will benefit plan fiduciaries, investment advisers, and ultimately the participants and beneficiaries of employee benefit plans. Although the anticipated benefits of the regulation are not quantified here, they are expected to more than justify its relatively modest estimated cost.

The estimated cost of the implementation of electronic registration through the IARD for approximately 500 advisers that submitted copies of their state registrations to the Secretary of Labor, and that currently register in only those states that do not mandate IARD filing, is just under $400,000. Ongoing annual costs are estimated at $50,000. These costs will be offset by efficiency gains for plan fiduciaries and for investment advisers that wish to be appointed by plan fiduciaries. As a result of the electronic registration requirement, plan fiduciaries will be able to access a single source of registration information regardless of the size or location of the adviser, and advisers may more readily demonstrate their eligibility to be investment managers in order to gain appointments by plan fiduciaries. Over time, these investment managers may also reduce the handling of paper and the time required to complete the Form ADV, which is the joint SEC and state registration form that is also currently accepted by all the states for state registration purposes. Electronic availability of registration information will also support better and more transparent decision making with respect to the appointment of investment managers, which ultimately benefits the participants and beneficiaries of the plans involved.

Discussion

The regulation benefits plan fiduciaries that wish to appoint an investment manager pursuant to section 402(c)(3) of ERISA. Under section 405(d)(1) of ERISA, plan fiduciaries are not liable for the acts or omissions of the investment manager, and have no obligation to invest assets subject to management by the investment manager. The centralized source of readily accessible registration information offered by the IARD will help plan fiduciaries more efficiently locate information needed to determine whether advisers they may consider appointing are eligible to be an investment manager under ERISA. The source and format of information will no longer differ based on the size or principal business location of the adviser.

Uniform use of the IARD for all advisers who wish to be or remain as investment managers under ERISA will benefit these advisers as well. The change to electronic filing will not change the incentives for investment advisers to become investment managers under ERISA, but should promote increased efficiency for doing so. Advisers are not required to be an investment manager to conduct advisory activities for any customer. The Department assumes that an adviser's decision whether to meet the definition of investment manager under ERISA is based on factors unrelated to the form or format of their registration. It is therefore expected that those state-

[9] For prior periods, the Department effectively supplemented the relevant FR–6 and FR–7 provisions by, as noted above, its announcement on January 14, 1998, that a state-registered investment adviser seeking to meet the filing obligations with the Secretary of Labor described in section 3(38)(B)(ii) of ERISA must file a copy of its most recent state registration form for the state in which it maintains its principal office and place of business with the Department prior to November 10, 1998, and thereafter file with the Department copies of any subsequent filings with that state. Further, the Department provided in the proposed regulation published on December 9, 2003 that, until publication of a final rule, state-registered investment advisers seeking to obtain or maintain investment manager status under Title I of ERISA could rely on the proposed regulation to meet the filing obligations with the Secretary of Labor described in section 3(38)(B)(ii) of ERISA.

registered advisers who filed paper copies of their state registration forms with the Secretary chose to do so to gain an advantage in securing appointments by plan fiduciaries.

In any case, this regulation will not change the content of the filings for these advisers because all states accept the joint SEC and state filing form (Form ADV) for state registration, and with certain exceptions, all of the copies submitted to the Secretary were made on Form ADV.[10] Mandatory use of the IARD will, however, change the format and manner in which the information is transmitted. While the Department expects advisers to incur a cost to establish a procedure for electronic filing through the IARD plus an annual fee, the change to an electronic format and transmission method is expected to be more efficient and less costly over time. Use of the IARD will reduce the paper handling, filing, and mailing costs associated with providing copies to the state or states as well as to the Secretary, and reduce handling to obtain and reproduce signatures. The SEC cited similar efficiency gains in its regulatory impact analysis of the final rule implementing mandatory electronic filing for federally regulated advisers. Securities and Exchange Commission, Electronic Filing by Investment Advisers; Final Rule, 65 FR 57438, Sept. 22, 2000.

The regulation will directly affect only those investment advisers who wish to become or remain as investment managers under section 3(38) of ERISA, who generally have $25 million or less under management and consequently do not register with the SEC, and who register only in states that do not mandate use of the IARD to satisfy state registration requirements. Copies of registration forms submitted to the Secretary by state-registered investment advisers indicate that about 500 state-registered advisers have registered in only a non-IARD state.[11] Prior to the implementation of the IARD and many states' decisions to mandate use of the IARD to meet state investment adviser registration requirements, about 1,500 advisers provided paper copies of their state registration forms to the Secretary. Based on the data contained in those filings, about 1,000 of these already have the capability to file electronically because they are required to register in states that mandate use of the IARD. The Department therefore assumes that this regulation affects only those advisers that register solely in non-IARD states.

Under existing requirements, state-registered advisers incur a state registration filing fee with every state in which they are required to register, plus postage and handling fees for their submissions. Such fees vary by state. Most if not all of the 500 advisers affected by this regulation now register in only one state. When advisers registered only in non-IARD states register through the IARD, the appropriate state registration fee will be forwarded to the state, such that there will be no net change in state filing fees.

The Advisers Act and Form ADV allow for the requirement that states be provided registration statements. To facilitate state registration, the registrant checks the appropriate boxes on the form for each applicable state, and the IARD then distributes the required information electronically to those states. States will be unaffected because they will continue to receive existing fees, although they will be transmitted in a different manner.

These advisers would, however, newly incur the IARD initial filing fee of $150 for advisers of the size under consideration here, and an annual filing fee of $100. It is also expected that the 500 state-registered advisers will incur a cost for the set-up of the electronic filing capability, and an expenditure of time to adjust internal procedures and put existing information into an electronic format. Filing fees are expected to total $75,000 in the first year and $50,000 in each subsequent year for these advisers.

The cost of the electronic filing set-up is not known. The SEC did not quantify the cost of set-up in the final rule cited above that pertained to mandatory use of the IARD for registration with the SEC. However, for purposes of this discussion, the cost for establishment of electronic filing capability by an adviser has been estimated to be $500, which amounts to a total of $250,000 for the 500 advisers affected. This is a one-time cost based on available information on annual fees charged to SEC registrants by commercial providers of service in the industry.[12] An examination of a sample of the 500 individual filings showed that many of the advisers in question already use the software of a single provider for completing their Form ADV. Because this provider performs services to IARD filers who are currently SEC registrants as well, we have assumed that their range of services includes a method of facilitating electronic filing. It is also assumed that all advisers make use of electronic technology in the normal course of business and will not be required to make substantial technological changes as a result of this regulation.

A one-time cost is also estimated for the time required for the adviser to adjust its internal procedures to input data electronically, if necessary. A comparison of a sample of the paper filings received with IARD data indicated that these advisers had not filed electronically with IARD. However, it seems likely that many advisers already prepare the forms electronically, regardless of whether they submit them electronically. Nevertheless, to account for preparation for electronic transmission, it has been estimated that the advisers will incur the cost of two hours of a financial professional's time at $68 per hour, for a cost of $136 per adviser and a total of $68,000.

The estimated one-time cost of this regulation totals $393,000. The ongoing cost of maintaining registration information and completing and filing Form ADV is not accounted for here because the advisers prepare and file such forms to meet state registration requirements and would continue to do so without regard to this regulation. The ongoing incremental cost of this regulation is therefore $100 per adviser per year, or $50,000.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Department submitted the information collection request (ICR) included in this regulation to the Office of Management and Budget (OMB) for review and clearance at the time the Notice of Proposed Rulemaking (NPRM) was published in the **Federal Register** (December 9, 2003, 68 FR 68710). OMB approved the ICR under OMB control number 1210–0125. The approval will expire on January 31, 2007. The public is not required to respond to an information collection request unless it displays a currently valid OMB control number. Because the ICR is unchanged, no additional submission for approval is made in connection with this final rule.

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 rule does not include any federal mandate that may result in

[10] Several exceptions were observed; in those cases, the adviser submitted a copy of the state's action on their registration, such as a license or approval form, rather than the registration form itself. In each case, other advisers' filings for the same state were examined to confirm that the state did accept Form ADV filings.

[11] California, Florida, Kentucky, South Carolina, and West Virginia at the time of this writing.

[12] Such fees are used here as a proxy only; the fees do not pertain specifically to electronic set-up or transmission.

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 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.

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 final rule will not have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires that the agency present a regulatory flexibility analysis at the time of the publication of the notice of final rulemaking describing the impact of the rule on small entities. 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 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 the regulation, 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. At the time of the proposed regulation, the Department sought comments with respect to its election to use this definition and received no comments in response to its request. Accordingly, using this definition, the Department certifies that this regulation will 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 regulation 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 rule mandates electronic submission of small advisers' 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.

At the time of the proposed rule, EBSA requested comments on the potential impact of the proposed regulation on small entities, and on ways in which costs could be limited within the stated objectives of the proposal; no comments were received that would cause the Department to re-evaluate these impacts and costs. On this basis, the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities.

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 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 rule do alter the fundamental reporting and disclosure requirements of section 3(38)(B) of ERISA with respect to state-registered investment advisers, because the duty of these state-registered advisers to report to the states exists independently of ERISA, and the 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 neither a direct implication for the States, nor is there a direct effect on the relationship or distribution of power between the national government and the States. This rule only affects those state-registered investment advisers who choose to seek investment manager status under section 3(38) of ERISA, advisers not seeking such status are unaffected by this regulation.

Statutory Authority

The final regulation and amendments to 29 CFR 2509.75–5 are adopted pursuant to the authority contained in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894; 29 U.S.C. 1135), and the Act of November 10, 1997, Sec. 1, Pub. L. 105–72, 111 Stat. 1457, and under Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003).

List of Subjects

29 CFR Part 2509

Employee benefit plans, Employee Retirement Income Security Act, Fiduciary responsibility, Pensions, Plan assets.

29 CFR Part 2510

Employee benefit plans, Employee Retirement Income Security Act, Pensions, Plan assets.

■ For the reasons set forth in the preamble, 29 CFR parts 2590 and 2510 are amended as follows:

PART 2509—[AMENDED]

■ 1.The authority citation for part 2509 is revised to read as follows:

Authority: 29 U.S.C. 1135; Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003). Secs 2509.75–10 and 2509–75–2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75–5 also issued under 29 U.S.C. 1002.

■ 2. Amend § 2509.75–5 by revising FR–6 and FR–7 to read as follows:

§ 2509.75–5 Questions and answers relating to fiduciary responsibility.

* * * * *

FR–6 Q: May an investment adviser which is neither a bank nor an insurance company, and which is neither registered under the Investment Advisers Act of 1940 nor registered as an investment adviser in the State where it maintains its principal office and place of business, be appointed an investment manager under section 402(c)(3) of the Act?

A: No. The only persons who may be appointed an investment manager under section 402(c)(3) of the Act are persons who meet the requirements of section 3(38) of the Act—namely, banks (as defined in the Investment Advisers Act of 1940), insurance companies qualified under the laws of more than one state to manage, acquire and dispose of plan assets, persons registered as investment advisers under the Investment Advisers Act of 1940, or persons not registered under the Investment Advisers Act by reason of paragraph 1 of section 203A(a) of that Act who are registered as investment advisers in the State where they maintain their principal office and place of business in accordance with ERISA section 3(38) and who have met the filing requirements of 29 CFR 2510.3–38.

FR–7 Q: May an investment adviser that has a registration application pending for federal registration under the Investment Advisers Act of 1940, or pending with the appropriate state regulatory body under State investment adviser registration laws if relying on the provisions of 29 CFR 2510.3–38 to qualify as a state-registered investment manager, function as an investment manager under the Act prior to the effective date of their federal or state registration?

A: No, for the reasons stated in the answer to FR–6 above.

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PART 2510—[AMENDED]

■ 3.The authority citation for part 2510 is revised to read as follows:

Authority: 29 U.S.C. 1002(2), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor's Order 1–2003, 68 FR 5374; Sec. 2510.3–101 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 43 FR 47713, 3 CFR, 1978 Comp., p. 332 and E.O. 12108, 44 FR 1065, 3 CFR, 1978 Comp., p. 275, and 29 U.S.C. 1135 note. Sec. 2510.3–102 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 43 FR 47713, 3 CFR, 1978 Comp., p. 332 and E.O. 12108, 44 FR 1065, 3 CFR, 1978 Comp., p. 275. Section 2510.3–38 is also issued under Sec. 1, Pub. L. 105–72, 111 Stat. 1457.

■ 4.Add § 2510.3–38 to read as follows:

§ 2510.3–38 Filing requirements for State registered investment advisers to be investment managers.

(a) *General.* Section 3(38) of the Act sets forth the criteria for a fiduciary to be an investment manager for purposes of section 405 of the Act. Subparagraph (B)(ii) of section 3(38) of the Act provides that, in the case of a fiduciary who is not registered under the Investment Advisers Act of 1940 by reason of paragraph (1) of section 203A(a) of such Act, the fiduciary must be registered as an investment adviser under the laws of the State in which it maintains its principal office and place of business, and, at the time the fiduciary files registration forms with such State to maintain the fiduciary's registration under the laws of such State, also files a copy of such forms with the Secretary of Labor. The purpose of this section is to set forth the exclusive means for investment advisers to satisfy the filing obligation with the Secretary described in subparagraph (B)(ii) of section 3(38) of the Act.

(b) *Filing Requirement.* To satisfy the filing requirement with the Secretary in section 3(38)(B)(ii) of the Act, a fiduciary must be registered as an investment adviser with the State in which it maintains its principal office and place of business and file through the Investment Adviser Registration Depository (IARD), in accordance with applicable IARD requirements, the information required to be registered and maintain the fiduciary's registration as an investment adviser in such State. Submitting to the Secretary investment adviser registration forms filed with a State does not constitute compliance with the filing requirement in section 3(38)(B)(ii) of the Act.

(c) *Definitions.* For purposes of this section, the term ''Investment Adviser Registration Depository'' or ''IARD'' means the centralized electronic depository described in 17 CFR 275.203–1.

(d) *Cross Reference.* Information for investment advisers on how to file through the IARD is available on the Securities and Exchange Commission website at *''www.sec.gov/iard.''*

Signed at Washington, DC, this 16th day of August, 2004.

Ann L. Combs,

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

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