and assigned OMB Control Number 2120–0056.

(1) The airplane registration and serial number.

(2) The usage frequency in terms of total number of flights per year and total number of flights per year for which the auxiliary fuel tank system is used.

Prevent Usage of Auxiliary Fuel Tank

(g) Before December 16, 2008, deactivate the auxiliary fuel tank system, in accordance with a deactivation procedure approved by the Manager of the Atlanta ACO. Any auxiliary fuel tank system component that remains on the airplane must be secured and must have no effect on the continued operational safety and airworthiness of the airplane. Deactivation may not result in the need for additional Instructions for Continued Airworthiness (ICA).

Note 1: Appendix A of this AD provides criteria that must be included in the deactivation procedure. The proposed deactivation procedures should be submitted to the Atlanta ACO as soon as possible to ensure timely review and approval, prior to implementation.

Note 2: For technical information, contact Robert Bosak, Aerospace Engineer, Propulsion and Services Branch, ACE–118A, FAA, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, Suite 460, Atlanta, Georgia 30349; telephone (770) 703–6094; fax (770) 703–6097.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Atlanta ACO, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Appendix A—Deactivation Criteria

The auxiliary fuel tank system deactivation procedure required by paragraph (g) of this AD must address the following actions.

(1) Permanently drain the auxiliary fuel tank system tanks, and clear them of fuel vapors to eliminate the possibility of out-gassing of fuel vapors from the emptied auxiliary tank.

(2) Disconnect all auxiliary fuel tank system electrical connections from the fuel quantity indication system (FQIS), float, pressure and transfer valves and switches, and all other electrical connections required for auxiliary fuel tank system operation, and stow them at the auxiliary fuel tank interface.

(3) Disconnect all auxiliary fuel tank system fuel supply and fuel vent plumbing interfaces with airplane original equipment manufacturer (OEM) fuel tanks, cap them at the airplane tank side, and secure them. All disconnected auxiliary fuel tank system vent systems must not alter the OEM fuel tank vent system configuration or performance. All empty auxiliary fuel tank system tanks must be vented to eliminate the possibility of structural deformation during cabin decompression. The configuration must not permit the introduction of fuel vapor into any compartments of the airplane.

(4) Pull and collar all circuit breakers used to operate the auxiliary fuel tank system.

(5) Revise the weight and balance document, if required, and obtain FAA approval for any changes to the weight and balance document.

(6) Amend the applicable sections of the applicable Airplane Flight Manual (AFM) to indicate that the auxiliary fuel tank system is deactivated. Remove auxiliary fuel tank system operating procedures to ensure that only the OEM fuel system operational procedures are contained in the AFM. Amend the Limitations Section of the AFM to indicate that the AFM Supplement for the STC is not in effect. Place a placard in the flight deck indicating that the auxiliary fuel tank system is deactivated. The AFM revisions specified in this paragraph may be accomplished by inserting a copy of this AD into the AFM.

(7) Amend the applicable sections of the applicable airplane maintenance manual to remove auxiliary fuel tank system maintenance procedures.

(8) After the auxiliary fuel tank system is deactivated, accomplish procedures such as leak checks, pressure checks, and functional checks deemed necessary before returning the airplane to service. These procedures must include verification that the basic airplane OEM FQIS, fuel distribution, and fuel venting systems function properly and have not been adversely affected by deactivation of the auxiliary fuel tank system.

(9) Include with the proposed deactivation procedures any relevant information or additional steps that are deemed necessary by the operator to comply with the deactivation of the auxiliary fuel tank system and return of the airplane to service.

Issued in Renton, Washington, on February 21, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–3825 Filed 2–28–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2510

RIN 1210–AB02

Amendment of Regulation Relating to Definition of ''Plan Assets''—Participant Contributions

AGENCY: Employee Benefits Security Division, Department of Labor.

ACTION: Proposed rule.

SUMMARY: This document would, upon adoption, establish a safe harbor period of 7 business days during which amounts that an employer has received from employees or withheld from wages for contribution to employee benefit plans with fewer than 100 participants would not constitute ''plan assets'' for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the related prohibited transaction provisions of the Internal Revenue Code. This amendment would provide greater certainty concerning when participant contributions held by an employer do not constitute ''plan assets.'' The proposed rule, if adopted, would affect the sponsors and fiduciaries of contributory group welfare and pension plans covered by ERISA, including 401(k) plans, as well as the participants and beneficiaries covered by such plans and recordkeepers, and other service providers to such plans.

DATES: Written comments on the proposed amendment should be received by the Department on or before April 29, 2008.

ADDRESSES: To facilitate the receipt and processing of comments, EBSA encourages interested persons to submit their comments electronically to *www.regulations.gov* (follow instructions for submission of comments) or *e-ORI@dol.gov*. Persons submitting comments electronically are encouraged not to submit paper copies. Persons interested in submitting comments on paper should send or deliver their comments to: Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N–5655, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attn: Participant Contribution Regulation Safe Harbor. All comments will be available to the public, without charge, online at *www.regulations.gov* and *www.dol.gov/ebsa,* and at the Public Disclosure Room, Room N–1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Janet A. Walters, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, Washington, DC 20210, (202) 693–8510. This is not a toll free number.

SUPPLEMENTARY INFORMATION:

A. Background

In 1988, the Department of Labor (the Department) published a final rule (29 CFR 2510.3–102) in the **Federal Register** (53 FR 17628, May 17, 1988), defining

when certain monies that a participant pays to, or has withheld by, an employer for contribution to an employee benefit plan are ''plan assets'' for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and the related prohibited transaction provisions of the Internal Revenue Code (the Code).[1] The 1988 regulation provided that the assets of a plan included amounts (other than union dues) that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his or her wages by an employer, for contribution to a plan, as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets, but in no event to exceed 90 days from the date on which such amounts are received or withheld by the employer. In 1996, the Department published in the **Federal Register** (61 FR 41220, August 7, 1996), amendments to the 1988 regulation modifying the outside limit beyond which participant contributions to a pension plan become plan assets. Under the 1996 amendments, the outer limit for participant contributions to a pension plan was changed to the 15th business day of the month following the month in which participant contributions are received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the 15th business day of the month following the month in which such amounts would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages). The general rule—providing that amounts paid to or withheld by an employer become plan assets on the earliest date on which they can reasonably be segregated from the employer's general assets—did not change. The maximum time period applicable to welfare plans also did not change as a result of the 1996 amendments.

In the course of investigations of 401(k) and other contributory pension plans and in discussions with representatives of employers, plan administrators, consultants and others, it is commonly represented to the Department that, while efforts have been made to clarify the application of the general rule (i.e., participant contributions become plan assets on the earliest date on which they can reasonably be segregated from the employer's general assets),[2] many employers, as well as their advisers, continue to be uncertain as to how soon they must forward these contributions to the plan in order to avoid the requirements associated with holding plan assets. At the same time, the Department devotes significant enforcement resources to cases involving delinquent employee contributions and the vast majority of applications under the Department's Voluntary Fiduciary Correction Program involve delinquent employee contribution violations.[3]

The Department believes that it is in the interest of both plan sponsors and plan participants and beneficiaries to amend the participant contribution regulation to provide a higher degree of compliance certainty with respect to when an employer has made timely deposits of participant contributions to the plan. In this regard, the Department proposes a safe harbor under which participant contributions will be considered to have been deposited with the plan in a timely fashion when such contributions are deposited within 7 business days. The Department believes that the adoption of such a safe harbor affords certainty to employers receiving participant contributions regarding the status of such funds. At the same time, the safe harbor would protect participants by encouraging employers to deposit participant contributions with plans within the safe harbor period.

Under the proposed safe harbor, participant contributions to a pension or welfare benefit plan with fewer than 100 participants at the beginning of the plan year will be treated as having been made to the plan in accordance with the general rule (i.e., on the earliest date on which such contributions can reasonably be segregated from the employer's general assets) when contributions are deposited with the plan no later than the 7th business day following the day on which such amount is received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the 7th business day following the day on which such amount would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages). As under the current regulation, participant contributions will be considered deposited when placed in an account of the plan, without regard to whether the contributed amounts have been allocated to specific participants or investments of such participants.

In attempting to define the appropriate period for a safe harbor, the Department reviewed data collected in the course of its investigations of possible failures to deposit participant contributions in a timely fashion. These data indicate that smaller plans, typically need more time than larger plans to segregate participant contributions from their general assets. In this regard, the data indicates that on average, employers with small plans—defined for purposes of this regulation as employers sponsoring plans with fewer than 100 participants—are capable of depositing participant contributions with their plans, on a consistent basis, by the 7th business day following the date of receipt or withholding. On the basis of this data, the Department concluded that adoption of a ''7-business day'' safe harbor rule would allow most employers with small plans to take advantage of the safe harbor and, thereby, benefit from the certainty of compliance afforded by the proposed regulation. Moreover, the Department believes that adoption of a ''7-business day'' safe harbor rule would present little, if any, additional risk to plan participants and beneficiaries. In this regard, the Department believes that most employers with small plans that are taking longer than 7 business days to deposit participant contributions will expedite the depositing of those contributions to take advantage of the safe harbor. The Department also believes that where participant contributions are being made by employers with small plans within a period shorter than 7 business days, few employers with small plans will incur the costs attendant to modifying their payroll system in order to hold such contributions for a few additional days. The Department invites comments on the proposed safe harbor.

In the case of employers sponsoring large plans—defined for purposes of this regulation as employers sponsoring plans with 100 or more participants—it is unclear if these plans have the same need for a safe harbor period within which participant contributions should be required to be deposited with a plan. The Department intends, as part of the final regulation, to include a safe harbor for employers with large plans if commenters provide information and data sufficient to evaluate the current contribution practices of such

[1] While the rule effects the application of ERISA and Code provisions, it has no implications for and may not be relied upon to bar criminal prosecutions under 18 U.S.C. 644. *See* paragraph (a) of 29 CFR 2510.3–102.

[2] *See* preamble to Final Rule, 61 FR 41220, 41223 (August 7, 1996). *See also* Field Assistance Bulletin 2003–2 (May 7, 2003).

[3] Since the inception of the Voluntary Fiduciary Correction Program in 2000, close to 90% of the applications have involved delinquent participant contribution violations.

employers and to conclude that it is a net benefit to such employers and participants to have a safe harbor. In this regard, the Department specifically requests information concerning the time period within which employers with large plans deposit participant contributions following the date of receipt or withholding. The Department also requests comments on the need for a safe harbor, and the corresponding size of the plans for which there appears to be a need for such a safe harbor. The Department proposes to amend paragraph (f) of 2510.3–102 to update the examples and illustrate the safe harbor and invites comments on the amendment of paragraph (f) of 2510.3–102.

As proposed, the safe harbor would be available for both participant contributions to pension benefit plans and participant contributions to welfare benefit plans.

The Department also is proposing to amend paragraph (a)(1) of 2510.3–102 to extend the application of the regulation to amounts paid by a participant or beneficiary or withheld by an employer from a participant's wages for purposes of repaying a participant's loan (regardless of plan size). In Advisory Opinion 2002–02A (May 17, 2002),[4] the Department expressed the view that, while the participant contribution regulation, as drafted, did not apply to participant loan repayments, the principles for determining when participant loan repayments become plan assets generally are the same as those specified in the participant contribution regulation. The Department, therefore, concluded that participant loan repayments made to an employer for purposes of transmittal to the plan, or withheld from employee wages by the employer for transmittal to the plan, become plan assets on the earliest date on which such repayments can reasonably be segregated from the employer's general assets.

The proposed amendment to paragraph (a)(1) would adopt the principles applicable to determining when participant loan repayments constitute plan assets. This proposal also would serve to extend the availability of the 7-business day safe harbor to loan repayments to plans with fewer than 100 participants, relief that would not otherwise be available in the absence of this proposal.

[4] This advisory opinion may be accessed at *http://www.dol.gov/ebsa/regs/aos/ao2002-02a.html* (May 17, 2002).

C. Effective Date and Enforcement Policy

The Department contemplates making the safe harbor and the proposed amendments to paragraph (a)(1) and (f)(1) of 2510.3–102 effective on the date of publication of the final regulation in the **Federal Register**. The safe harbor will provide a means for certain employers to assure themselves that they are not holding plan assets, without having to determine that participant contributions were forwarded to the plan at the earliest reasonable date. By providing such assurance, the safe harbor will grant or recognize an exemption or relieve a restriction within the meaning of 5 U.S.C. 553(d)(1). Moreover, the safe harbor will encourage certain employers to take immediate steps to review their systems and, if necessary, shorten the period within which participant contributions are forwarded to the plan in order to take advantage of the safe harbor and, thereby, extend the benefit of earlier contributions to participants and beneficiaries earlier than might otherwise occur with a deferred effective date. In this regard, the Department invites comments concerning the effective date of the final safe harbor amendment.

Before the effective date of the final safe harbor regulation, the Department will not assert a violation of ERISA based on the general rule that participant contributions or loan repayments become plan assets on the earliest date on which they can reasonably be segregated from the employer's general assets, so long as such contributions or repayments to a plan with fewer than 100 participants have been transferred to the plan in accordance with the 7-business day safe harbor period in this proposal.

D. Regulatory Impact Analysis

Summary

The proposed safe harbor will provide employers with increased certainty that their remittance practices, to the extent that they meet the safe harbor time limits, will be deemed to comply with the regulatory requirement that participant contributions be forwarded to the plan on the earliest date on which they can reasonably be segregated from the employer's general assets. This increased certainty will produce benefits to employers, participants, and beneficiaries by reducing disputes over compliance and allowing easier oversight of remittance practices. In addition, the tendency to conform to the safe harbor time limit may serve to reduce the existing variations in remittance times, providing increased certainty for employers and other plan sponsors and participants. In the case of employers that expedite their remittance practices to take advantage of the safe harbor, plan participants may derive an additional benefit in the form of increased investment earnings. The Department estimates that accelerated remittances could result in $34.5 million in additional income to be credited annually to participant accounts under the plans if no employers choose to delay remittances in response to the safe harbor and $15 million annually even if all eligible employers were to delay remittances to the full duration of the safe harbor.

Costs attendant to the proposed safe harbor arise principally from one-time start-up costs to alter remittance practices to conform to the safe harbor and from any additional on-going administrative costs attendant to quicker, and possibly more frequent, transmissions of participant contributions from employers to plans. The Department believes that the costs likely to arise from either source will be small and that the benefits of this regulation will justify its costs.[5]

The data, methodology, and assumptions used in developing these estimates are more fully described below in connection with the Department's analyses under Executive Order 12866 and the Regulatory Flexibility Act (RFA).

Executive Order 12866 Statement

Under Executive Order 12866 (58 FR 51735), 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

[5] A key factor limiting the cost of this regulation is that it requires no action of the part of any employer, plan, or participant; it creates an incentive for employers to remit participant contributions on more regular schedules.

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. OMB has determined that this action is significant under section 3(f)(4) because it raises novel legal or policy issues arising from the President's priorities. Accordingly, the Department has undertaken an analysis of the costs and benefits of the proposed regulation. OMB has reviewed this regulatory action.

This proposal would establish a safe harbor rule for employers' timely remittance of participant contributions to employee benefit plans. The safe harbor, as proposed, is available only to employer remittances of participant contributions to plans with fewer than 100 participants. Under the proposed rule, employers that remit participant contributions within 7 business days after the date on which received or withheld would be deemed to have complied with the requirement of 29 CFR 2510.3–102 to treat participant contributions as plan assets ''as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets.''

This rule is likely to encourage some eligible employers whose current remittance practices involve holding participant contributions for longer than 7 business days to change their remittance practices to conform to the 7-business day time limit. Because the rule is not mandatory and changes in remittance practices are likely to entail some cost to employers, only those employers that believe they will benefit from the protection of the safe harbor will elect to take advantage of the safe harbor.

Based on data from the Form 5500 filings for the year 2004, which is the most recent available data, the Department estimates that the proposed safe harbor would be available to an estimated 311,000 single employer defined contributions plans with fewer than 100 participants.[6] These plans hold approximately 18% of the $2.2 trillion held by all contributory single employer defined contribution plans.[7]

In order to analyze the potential economic impact of this proposal, the Department examined data from a representative sample of contributory single employer defined contribution pension plans.[8] Using these data, the Department analyzed the current remittance practices of the employers sponsoring these plans, extrapolated the results to characterize the remittance practices of plans in general, and projected the potential impact of this safe harbor rule. The Department considered both the extent to which data on remittance records of these plans reveal a preference or standard practice regarding timing, and the extent to which changes in the length of time between withholding and receipt by the plan might result in an increase (or decrease) in investment income to participants' accounts.

The sample data indicate that employers' remittance patterns for participant contributions to plans vary substantially, both across payroll periods of an individual employer and across employers. Based on analysis of these data, the Department has concluded that most employers sponsoring plans with fewer than 100 participants will not find it difficult to take advantage of the proposed safe harbor.[9] Twenty-one percent of all plans with fewer than 100 participants for which data was obtained had remittance times within 7 business days for all pay periods; an additional 69% remitted participant contributions for at least some of the employer's payroll periods within 7 business days. Based on this data, the Department has concluded that a 7-business day safe harbor would be achievable for a large majority of the contributory plans and would reduce the time taken to make at least some deposits to a substantial proportion of contributory plans. The Department recognizes that to take advantage of the safe harbor, many of the firms that currently remit employee contributions within 7 business days for some, but not all, pay periods would have to change their remittance schedule from monthly remittances to remittances following each weekly or biweekly pay period.

The Department anticipates that a substantial number of employers that currently take longer than 7 business days to remit participant contributions will speed up their remittances in order to take advantage of the safe harbor. At the same time, it is possible that some employers that currently remit participant contributions more quickly than the proposed safe harbor rule will slow their remittances due to the safe harbor. Such behavior might benefit the remitting employers by reducing their administrative costs and by increasing the time they are holding the remittances. However, the Department believes that only a small fraction of that group, if any, would elect to incur the expense and risk of negative participant reaction that might arise from slowing down their remittances to take full advantage of the safe harbor time period, especially because the amount of the potential income transfer on a per-plan basis is very small.[10] The potential consequences of reliance on the safe harbor for earnings on participant contributions are further described in the Benefits section below.

Costs

On the basis of information from EBSA's Employee Contributions Project 2004 Baseline Project (''ECP''),[11] the Department believes that an estimated 21% of eligible single employer defined contribution plans (approximately 64,000 plans) currently receive all participant contributions within 7 or fewer business days. The employers that sponsor such plans would not have to modify their current systems and, as a

[6] While the safe harbor is available to contributory defined benefit plans and contributory multiemployer defined contribution plans, the number of such plans affected by the regulation is very small. The safe harbor also is available to contributory welfare benefit plans; however, most of these plans are not affected by the regulation, because they are not required to comply with ERISA's trust requirement. Based on available data, contributory single employer defined contribution plans constitute about 97 % of plans that could benefit from the safe harbor. Accordingly, the Department has focused its regulatory impact analysis on contributory single employer defined contribution plans and believes that focusing on such plans provides highly meaningful data for estimating potential impacts.

[7] This percentage is based on an EBSA tabulation of its 2004 Form 5500 research file.

[8] The sample data used in this analysis comes from data collected in EBSA Employee Contribution Project 2004 Baseline Project, which was undertaken by the Department in order to develop a better understanding of current employer practices regarding contributory individual account pension plans. The Project was based on a representative sample of 487 contributory, single employer defined contribution plans. In 2004, the Department collected detailed data on the remittance practices of the employers sponsoring the sample plans. The collected data covered the 12-month period preceding the date in 2004 on which EBSA interviewed the employer-sponsor and included, for example, the exact dates on which wages were withheld from employees and the exact dates on which participant contributions were deposited in the plan's accounts. For purposes of this analysis, the sample data has been weighted to the 2004 Form 5500 universe of contributory, single employer defined contribution plans.

[9] The data indicate that 90% of plans with fewer than 100 participants currently receive at least some participant contributions within 7 business days after withholding.

[10] The employers having the most to gain from delaying remittances to the full extent that would satisfy the safe harbor would be those who currently remit employee contributions most promptly. For example, an employer that currently remits contributions on the day they are received or withheld and responds to the safe harbor by delaying remittances to the 7-business day safe harbor limit would gain use of the funds for 7 business days. At an annual rate of 8%, the value of the float gain would be less than one-quarter of one percent of employee contributions.

[11] See fn. 8, supra.

result, would incur no additional costs to obtain the compliance certainty available under the safe harbor provisions. On the other hand, 10% of the eligible plans (approximately 32,000 plans) consistently receive participant contributions later than 7 business days from the date of the employer's receipt or withholding.[12] The remaining 69% of the eligible plans (approximately 215,000 plans) are estimated to receive participant contributions within 7 business days for some, but not all, of their payroll dates, and the Department assumes that these employers would have to make only minor modifications in order to take advantage of the safe harbor.

In deciding whether to rely on the safe harbor, employers will weigh the benefits of compliance certainty against the cost of changes needed to make quicker and possibly more frequent deposits. Because the cost of modifying remittance practices or systems will depend, to some extent, on the length of time currently taken to make remittances, the Department believes it is reasonable to assume that those employers currently transmitting some of the participant contributions within an 8 to 14 day period may find it less expensive to modify their practices to take advantage of the safe harbor than employers currently operating under remittance practices or systems with longer delays. The cost to the former group of employers to shorten the remittance period to conform to the safe harbor may be modest or negligible. However, the Department has no current, reliable data concerning the cost of required changes relating to shortening the remittance period for participant contributions and therefore did not attempt to estimate that cost. Because conformance to the safe harbor is voluntary, the Department believes that the transition cost for employers electing to conform will be offset by elimination of the current cost attributable to existing uncertainty about how to meet the ''earliest date'' standard of § 2510.3–102. Those employers that already conform will not incur any costs, but will benefit from the safe harbor. The Department specifically invites information and comments on this point.

Benefits

The rule will produce benefits for both participants and employers in the form of increased certainty regarding timely remittance of participant contributions to plans. This increased certainty will decrease costs for both employers and participants by reducing the need to determine, on an individualized basis in light of particular circumstances, whether timely remittances have been made. Employers that conform to the safe harbor will also benefit by obviating the need to determine and monitor how quickly participant contributions can be segregated from their general assets. They also will face a reduced risk of challenges to their particular remittance practices from participants and the Department.

In the case of plan sponsors that elect to expedite the deposit of participant contributions to take advantage of the safe harbor, contributions will be credited to the investment accounts earlier than previously and will be able to accrue investment earnings for a longer time period. The Department has calculated these potential investment gains, but acknowledges that lack of knowledge about how employers will react to a regulatory safe harbor renders these estimates uncertain. If, for illustration, the safe harbor results in a 7-business day remittance of all remittances that are currently taking more than 7 business days, then the regulatory safe harbor would result in an estimated additional $34.5 million in investment earning for participants each year.[13] These potential gains would be reduced by any losses that would occur due to any slow-down in response to the safe harbor by employers with currently quicker remittance times. The Department, however, believes it unlikely that a significant fraction of employers would slow down remittances for the sole purpose of taking advantage of the minor[14] income transfer resulting from retaining contributions for the full safe harbor period.[15]

Alternatives Considered

The Department's consideration of alternatives primarily focused on striking the right balance between a time frame that is not so short as to foreclose any meaningful number of plans from taking advantage of the safe harbor and a time frame that is not so long as to create financial incentives for employers to hold participant contributions longer that necessary, taking into account current practices. Among others, the Department considered the following two alternative time periods: (1) A 5-business day safe harbor, and (2) a 10-business day safe harbor. After reviewing the available data, however, the Department rejected these alternatives in favor of the proposed 7-business day safe harbor for the reasons discussed below.

The 7-business day safe harbor is likely to encourage eligible employers whose remittance practices involve holding participant contributions for longer than 7 business days to change their remittance practices to conform to the 7-business day safe harbor time limit. Currently, only 12 percent of the eligible single employer defined contribution plans consistently receive remittances within 5 business days, compared to the 21 percent that consistently receive remittances within 7 business days. Although a 5-business day safe harbor could provide higher potential gains ($40.5 million at the highest maximum estimate) and lower potential losses ($12.2 million) to participants if employers choose to conform to the safe harbor, the shorter remittance period would likely make it unattractive to many employers, because the shorter safe harbor would increase the disparity from current practices. Any employer anticipating large costs of compliance with the safe harbor might not be convinced that its benefits would be sufficient to justify changing its remittance practices. If, as a result, too few employers adopt the safe harbor, the regulation might fail to produce the intended benefit that would flow from the certainty of uniform remittance practices on which employers and participants can rely.

The 10-business day safe harbor, in contrast, was considered to represent little compliance burden, since currently 29 percent of eligible single employer defined contribution plans receive remittances consistently within 10 business days and 94 percent receive remittances that quickly for at least some pay periods. However, because a large proportion of eligible plans

[12] For purposes of this analysis, it is assumed that the sponsors of these plans would have to make significant modification to their remittance practices to take advantage of the safe harbor.

[13] The Department has assumed an average annual return of 8.3% for pension plan assets. This rate is an estimate of the long-term rate of return on defined contribution plan assets implicit in the flow of funds account of the Federal Reserve.

[14] The employers having the most to gain from delaying remittances to the full extent that would satisfy the safe harbor would be those who currently remit employee contributions most promptly. For example, an employer that currently remits contributions on the day they are withheld and responds to the safe harbor by delaying remittances to the 7-business day safe harbor limit would gain use of the funds for 7 business days. Valuing the float gain at an annual rate of 8%, its value would be less than one-quarter of one percent of employee contributions.

[15] If all employers that currently remit contributions in fewer than 7 days were to slow down their remittance times to 7 days, participants might experience transfer losses of as much as $19.5 million annually, but would nonetheless likely experience an aggregate net gain of $14 million.

currently receive some or all participant contributions more quickly, a safe harbor of 10 business days would entail some risk of producing a net aggregate loss of investment income to participant accounts as compared with current practice.[16]

As part of the ECP, EBSA investigators also made judgments as to reasonable periods for each remittance. These data show that while remittance within 5 business days was consistently reasonable for 48% of eligible plans, that percentage increased to 61% by extending the reasonable period to 7 business days. Thus, the two-day longer reasonable period also has the advantage of being consistently reasonable for a clear majority of eligible plans. A further extension of the safe harbor to 10 business days would further increase (to 81%) the percentage of plans for which the safe harbor is consistently reasonable, but was not proposed because it would risk producing net investment losses for participants if employers were to delay remittances to the full extent permitted under the safe harbor.[17]

Taking into account the potential costs and benefits presented by the various alternative safe harbors, the Department believes that the proposed 7-business day safe harbor would best balance the current practices of employers and the potential costs to them of change, as well as the value to participants of encouraging quicker transmission of contributions. As explained earlier, the available data indicate that employers sponsoring plans with fewer than 100 participants are generally able to transmit participant contributions within 7 business days of withholding or receipt. Furthermore, the impact of a 7-business day safe harbor is anticipated to be generally favorable to participants and to result in aggregate net gains to their accounts, even in the unlikely event that all employers that currently remit contributions more quickly than 7 business days were to slow down their remittances to the maximum duration of the safe harbor.

Paperwork Reduction Act

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, 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) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public can clearly understand the Department's collection instructions and provide the requested information in the desired format and that the Department minimizes the public's reporting burden (in both time and financial resources) and can properly assess the impact of its collection requirements.

On August 7, 1996 (61 FR 41220), the Department published in the **Federal Register** a proposed amendment to the Regulation Relating to a Definition of ''Plan Assets''—Participant Contributions (29 CFR 2510.3–102), and simultaneously submitted an information collection request (ICR) to the Office of Management and Budget (OMB) on the paperwork requirements arising from the proposal. This amendment created a procedure through which an employer could extend the maximum period for depositing participant contributions by an additional 10 business days with respect to participant contributions for a single month. OMB approved the ICR under OMB control number 1210–0100. The current proposed amendment of § 2510.3–102 contained in this notice does not propose or make any change to the extension procedure or add any other information collection, and, accordingly, the Department does not intend to submit this proposal to OMB for review under the PRA.

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 are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a proposed rule is not likely to 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, the Employee Benefits Security Administration (EBSA) continues to consider a small entity to be an employee benefit plan with fewer than 100 participants.[18] The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Under section 104(a)(3), the Secretary may also provide for exemptions or simplified annual reporting and disclosure for welfare benefit plans. Pursuant to the authority of section 104(a)(3), the Department has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46 and 2520.104b–10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans covering fewer than 100 participants and satisfying certain other requirements.

Further, while some large employers may have small plans, in general small employers maintain most small plans. Thus, EBSA believes that assessing the impact of this proposed rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 *et seq.*). EBSA therefore requests comments on the appropriateness of the size standard used in evaluating the impact of this proposed rule on small entities.

EBSA has preliminarily determined that while this rule will impact a substantial number of small entities, it will not have a significant economic impact on these entities. As explained above, the provision being added to the regulation is a safe harbor, compliance with which is wholly voluntary on the part of the employer. Because the proposal would create a safe harbor, rather than a mandatory rule, it is unlikely that any employer will elect to take advantage of the safe harbor if the employer concludes that the benefits of complying with the safe harbor time limit do not exceed the costs of such compliance. Therefore, the Department believes that most of these small plans

[16] If all currently faster remittances were delayed until the tenth business day, annual investment earnings credited to participant accounts could be reduced by as much as $32.3 million. Accelerating all currently slower remittances to the tenth business day would increase such earnings by $27.4 million resulting in an aggregate annual loss of $4.9 million.

[17] EBSA estimates that if the safe harbor were set at 10 business days, then potential losses to participants of $32 million would exceed potential gains of $27 million.

[18] The Department consulted with the Small Business Administration in making this determination as required by 5 U.S.C. 603(c) and 13 CFR 121.903(c).

will elect to take advantage of the safe harbor, provided that doing so does not significantly increase their costs or that any cost increase is offset by reductions in other administrative costs attendant to compliance uncertainty. The Department specifically requests comments on the potential impact of the proposed rule on small entities.

Small Business Regulatory Enforcement Fairness Act

The proposed 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 if finalized will be transmitted to the Congress and the Comptroller General for review.

Unfunded Mandates Reform Act

Pursuant to provisions of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), this 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 or more.

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, 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 would 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. The requirements implemented in this proposed rule do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the national government and the States.

Statutory Authority

This regulation is proposed pursuant to the authority in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894; 29 U.S.C. 1135) and section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), 3 CFR 1978 Comp. 332, and under Secretary of Labor's Order No. 1–2003, 68 FR 5374 (Feb. 3, 2003).

List of Subjects in 29 CFR Part 2510

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

Accordingly, 29 CFR part 2510 is proposed to be amended as follows:

PART 2510—DEFINITION OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

1. The authority citation for part 2510 continues 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.

2. Revise § 2510.3–102, paragraphs (a) and (f), to read as follows:

§ 2510.3–102 Definition of ''plan assets''—participant contributions.

(a)(1) *General rule.* For purposes of subtitle A and parts 1 and 4 of subtitle B of title 1 of ERISA and section 4975 of the Internal Revenue Code only (but without any implication for and may not be relied upon to bar criminal prosecutions under 18 U.S.C. 664), the assets of the plan include amounts (other than union dues) that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his wages by an employer, for contribution or repayment of a participant loan to the plan, as of the earliest date on which such contributions or repayments can reasonably be segregated from the employer's general assets.

(2) *Safe harbor.* For purposes of paragraph (a)(1) of this section, in the case of a plan with fewer than 100 participants at the beginning of the plan year, any amount deposited with such plan not later than the 7th business day following the day on which such amount is received by the employer (in the case of amounts that a participant or beneficiary pays to an employer), or the 7th business day following the day on which such amount would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages), shall be deemed to be contributed or repaid to such plan on the earliest date on which such contributions or participant loan repayments can reasonably be segregated from the employer's general assets.

* * * * *

(f) Examples. The requirements of this section are illustrated by the following examples:

(1) Employer A sponsors a 401(k) plan. There are 30 participants in the 401(k) plan. A has one payroll period for its employees and uses an outside payroll processing service to pay employee wages and process deductions. A has established a system under which the payroll processing service provides payroll deduction information to A within 1 business day after the issuance of paychecks. A checks this information for accuracy within 5 business days and then forwards the withheld employee contributions to the plan. The amount of the total withheld employee contributions is deposited with the trust that is maintained under the plan on the 7th business day following the date on which the employees are paid. Under the safe harbor in paragraph (a)(2) of this section, when the participant contributions are deposited with the plan on the 7th business day following a pay date, the participant contributions are deemed to be contributed to the plan on the earliest date on which such contributions can reasonably be segregated from A's general assets.

(2) Employer B is a large national corporation which sponsors a 401(k) plan with 600 participants. B has several payroll centers and uses an outside payroll processing service to pay employee wages and process deductions. Each payroll center has a different pay period. Each center maintains separate accounts on its books for purposes of accounting for that center's payroll deductions and provides the outside payroll processor the data necessary to prepare employee paychecks and process deductions. The payroll processing service issues the employees' paychecks and deducts all payroll taxes and elective employee deductions. The payroll processing service forwards the employee payroll deduction data to B on the date of issuance of paychecks. B checks this data for accuracy and transmits this data along with the employee 401(k) deferral funds to the plan's investment firm

within 3 business days. The plan's investment firm deposits the employee 401(k) deferral funds into the plan on the day received from B. The assets of B's 401(k) plan would include the participant contributions no later than 3 business days after the issuance of paychecks.

(3) Employer C sponsors a self-insured contributory group health plan with 90 participants. Several former employees have elected, pursuant to the provisions of ERISA section 602, 29 U.S.C. 1162, to pay C for continuation of their coverage under the plan. These checks arrive at various times during the month and are deposited in the employer's general account at bank Z. Under paragraphs (a) and (b) of this section, the assets of the plan include the former employees' payments as soon after the checks have cleared the bank as C could reasonably be expected to segregate the payments from its general assets, but in no event later than 90 days after the date on which the former employees' participant contributions are received by C. If however, C deposits the former employees' payments with the plan no later than the 7th business day following the day on which they are received by C, the former employees' participant contributions will be deemed to be contributed to the plan on the earliest date on which such contributions can reasonably be segregated from C's general assets.

* * * * *

Signed at Washington, DC, this 21st day of February, 2008.

Bradford P. Campbell,

Assistant Secretary, Employee Benefits Security Administration Department of Labor.

[FR Doc. E8–3596 Filed 2–28–08; 8:45 am]

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DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 2 and 7

[Docket No. PTO–T–2007–0051]

RIN 0651–AC18

Changes in Rules Regarding Filing Trademark Correspondence by Express Mail or Under a Certificate of Mailing or Transmission

AGENCY: United States Patent and Trademark Office, Commerce.

ACTIONS: Proposed rule.

SUMMARY: The United States Patent and Trademark Office (''Office'') proposes to amend the Trademark Rules of Practice to provide that the procedures for filing trademark correspondence by Express Mail or under a certificate of mailing or transmission do not apply to certain specified documents for which an electronic form is available in the Trademark Electronic Application System (''TEAS''). The purpose of the rule change is to promote electronic filing, increase efficiency, and improve the quality and integrity of critical data in the Office's automated systems.

DATES: Comments must be received by April 29, 2008 to ensure consideration.

ADDRESSES: The Office prefers that comments be submitted via electronic mail message to *TMMailingRules@uspto.gov.* Written comments may also be submitted by mail to Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313–1451, attention Mary Hannon; by hand delivery to the Trademark Assistance Center, Concourse Level, James Madison Building-East Wing, 600 Dulany Street, Alexandria, Virginia, attention Mary Hannon; or by electronic mail message via the Federal eRulemaking Portal. See the Federal eRulemaking Portal Web site (*http://www.regulations.gov*) for additional instructions on providing comments via the Federal eRulemaking Portal. The comments will be available for public inspection on the Office's Web site at *http://www.uspto.gov,* and will also be available at the Office of the Commissioner for Trademarks, Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia.

FOR FURTHER INFORMATION: Contact Mary Hannon, Office of the Commissioner for Trademarks, by telephone at (571) 272–9569.

SUPPLEMENTARY INFORMATION: References below to ''the Act,'' ''the Trademark Act,'' or ''the statute'' refer to the Trademark Act of 1946, 15 U.S.C. 1051 *et seq.*, as amended. References to ''TMEP'' or *''Trademark Manual of Examining Procedure''* refer to the 5th edition, September 2007.

Express Mail Procedure

Section 2.198 of the Trademark Rules of Practice provides a procedure for obtaining a filing date as of the date that correspondence is deposited with the United States Postal Service (''USPS'') as ''Express Mail.'' Currently, § 2.198(a)(1) provides that the Express Mail procedure does not apply to the following documents for which an electronic form is available in TEAS: applications for registration of marks; amendments to allege use under section 1(c) of the Trademark Act; statements of use under section 1(d) of the Act; requests for extension of time to file a statement of use under section 1(d) of the Act; affidavits or declarations of use under section 8 of the Act; renewal applications under section 9 of the Act; and requests to change or correct addresses. If any of these documents are filed by Express Mail, they are given a filing date as of the date of receipt in the Office (Eastern time) rather than the date of deposit with the USPS. These exclusions have been in effect since June 24, 2002. *See* notice at *67 FR 36099 (May 23, 2002*). The Express Mail procedure also does not apply to responses to notices of irregularity under § 7.14 and requests for transformation under § 7.31, pursuant to § 7.4(b)(2).

The Office proposes to amend § 2.198(a)(1) to add exclusions for the following additional documents for which a form is available in TEAS: Preliminary amendments; responses to examining attorneys' Office actions; requests for reconsideration after final action; responses to suspension inquiries or letters of suspension; petitions to revive abandoned applications under 37 CFR 2.66; requests for express abandonment of applications; affidavits or declarations of incontestability under section 15 of the Act; requests for amendment of registrations under section 7(e) of the Act; requests for correction of applicants' mistakes under section 7(h) of the Act; Madrid-related correspondence filed under § 7.11, § 7.14, § 7.21, § 7.28 or § 7.31; appointments or revocations of attorney or domestic representative; and notices of withdrawal of attorney.

The Office further proposes to amend § 7.4 to provide that international applications under § 7.11 and subsequent designations under § 7.21, when filed by mail, will be accorded a filing date as of the date of receipt in the Office (Eastern time) rather than the date of deposit as Express Mail.

Certificate of Mailing or Transmission Procedure

Under 37 CFR 2.197, a ''certificate of mailing or transmission'' procedure exists to avoid lateness due to mail delay. Correspondence is given a filing date as of the date of receipt in the Office, but is considered to be timely even if received after the due date, if the correspondence was: (1) Deposited with the USPS as first class mail or transmitted to the Office by facsimile transmission on or before the due date; and (2) accompanied by a certificate attesting to the date of deposit or transmission. Currently, this procedure may be used for all trademark correspondence except applications for