on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

Based on the service information, we estimate that this AD would affect about 13 products of U.S. registry. We also estimate that it would take about 6 work-hours per product to comply with this AD. The average labor rate is $80 per work-hour. Required parts would cost about $1,272 per product. Based on these figures, we estimate the cost of the AD on U.S. operators to be $22,776.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a 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.

For the reasons discussed above, I certify this AD:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2010–02–01 Turbomeca S.A.: Amendment 39–16172: Docket No. FAA–2009–0503; Directorate Identifier 2009–NE–12–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective February 18, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Turbomeca Arriel 1B, 1D, and 1D1 turboshaft engines. These engines are installed on, but not limited to, Eurocopter France AS350B, AS350BA, AS350B1, and AS350B2 helicopters.

Reason

(d) This AD results from several events of rupture of the Arriel 1 reduction gear box intermediate pinions. We are issuing this AD to prevent the rupture of the reduction gear box intermediate pinion, which could result in an overspeed of the power turbine, an uncommanded in-flight shutdown of the engine, and an emergency autorotation landing.

Actions and Compliance

(e) Unless already done, do the following actions.

(f) No later than 28 February 2011, replace the Reduction Gear Box Intermediate Pinions (P/N 0 292 70 779 0) with Pinions incorporating Turboméca modification TU 232 in accordance with Turboméca Mandatory Service Bulletin 292 72 0276 Version B dated 06 November 2008.

FAA AD Differences

(g) None.

(h) *Alternative Methods of Compliance (AMOCs):* The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(i) Refer to MCAI EASA Airworthiness Directive 2009–0002, dated January 7, 2009, for related information.

(j) Contact James Lawrence, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *james.lawrence@faa.gov;* telephone (781) 238–7176; fax (781) 238–7199, for more information about this AD.

Material Incorporated by Reference

(k) You must use Turbomeca Mandatory Service Bulletin No. 292 72 0276, Version B, dated November 6, 2008, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Turbomeca, 40220 Tarnos, France; telephone: 33 05 59 74 40 00; fax: 33 05 59 74 45 15, or go to: *http://www.turbomeca-support.com.*

(3) You may review copies at the FAA, New England Region, 12 New England Executive Park, Burlington, MA; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Burlington, Massachusetts, on December 31, 2009.

Peter A. White,

Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2010–337 Filed 1–13–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2510

RIN 1210–AB02

Definition of "Plan Assets"—Participant Contributions

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This document contains a final regulation that establishes a safe harbor period during which amounts that an employer has received from employees or withheld from wages for contribution to certain employee benefit plans will 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 regulation will enhance the clarity and certainty for many employers as to when participant contributions will be treated as contributed in a timely manner to employee benefit plans. This final regulation will 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: This final rule is effective on January 14, 2010.

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]

For these reasons, the Department decided that it was in the interest of plan sponsors and plan participants and beneficiaries to amend the participant contribution regulation to establish a safe harbor that would provide a higher degree of compliance certainty with respect to when an employer has made timely deposits of participant contributions to employee benefit plans with fewer than 100 participants. The Department published a proposed safe harbor in the **Federal Register** (73 FR 11072) on February 29, 2008. Under the proposal, employers with plans with fewer than 100 participants would be considered to have made a timely deposit to their plan under the regulation if participant contributions are deposited within 7 business days. In response to the Department's invitation for comments, the Department received 28 comments from a variety of parties, including plan sponsors and fiduciaries, plan service providers, financial institutions, and employee benefit plan industry representatives. These comment letters are available for review under Public Comments on the Laws & Regulations page of the Department's Employee Benefits Security Administration Web site at *http://www.dol.gov/ebsa.* Set forth below is an overview of the final regulation, along with a discussion of the public comments received on the proposal.

B. Overview of Final Rule and Comments

For the reasons explained below, the Department has decided to adopt a final regulation that, with the exception of a few minor clarifying changes, is the same as the proposal. The following is a paragraph by paragraph review of the regulation and a summary of the comments received with respect to each.

Paragraph (a)(2) of § 2510.3–102, like the proposal, sets forth a safe harbor under which 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 1996 amendments, participant contributions will be

[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. 664. *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.

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.

Paragraphs (b)(1), (b)(2) and (c) of § 2510.3–102 are being revised to incorporate the appropriate cross references to "paragraph (a)(1)" instead of "paragraph (a)".

Scope of Safe Harbor

The final safe harbor, like the proposal, is available for both participant contributions to pension benefit plans and participant contributions to welfare benefit plans. Several commenters requested that the Department clarify whether the regulation applies to SIMPLE IRAs and salary reduction SEPs. The Department's view is that elective contributions to an employee benefit plan, whether made pursuant to a salary reduction agreement or otherwise, constitute amounts paid to or withheld by an employer (*i.e.,* participant contributions) within the scope of § 2510.3–102, without regard to the treatment of such contributions under the Internal Revenue Code. *See* 61 FR 41220 (Aug. 7, 1996). Both the general rule and the optional safe harbor provisions in paragraphs (a)(1) and (a)(2) of § 2510.3–102, respectively, are applicable to participant contributions to any plan, including SIMPLE IRAs and salary reduction SEPs. However, the Department notes that, pursuant to § 2510.3–102(b)(2), the maximum period during which salary reduction elective contributions under a SIMPLE plan that involves SIMPLE IRAs may be treated as other than plan assets is 30 calendar days, the same number of days as the period within which the employer is required to deposit withheld contributions under a SIMPLE plan that involves SIMPLE IRAs under section 408(p) of the Internal Revenue Code. *See* 62 FR 62934 (Nov. 25, 1997).

One commenter suggested that, under the safe harbor and the general rule, employers be permitted to pre-fund contributions. The commenter indicated that an employer may wish to deposit the participant contributions to the plan in advance of withholding those contributions, and expressed concern that the general rule and the safe harbor require that contributions be made within a certain number of days *after* the amount is withheld from pay. In general, § 2510.3–102 is intended to ensure that an employer deposits participant contributions, withheld by or paid to the employer, to the plan as soon as practicable. As to whether in any given instance "pre-funding" of participant contributions, such as that described by the commenter, will necessarily result in compliance with the regulation or safe harbor will, in the view of the Department, depend on the particular facts and circumstances.[4]

One commenter requested that the Department clarify the application of the safe harbor rule to contributory welfare plans in light of the Department's guidance provided in Technical Release 92–01. 57 FR 23272 (June 2, 1992), 58 FR 45359 (Aug. 27, 1993). ERISA section 403(b) contains a number of exceptions to the trust requirement for certain types of assets, including assets which consist of insurance contracts, and for certain types of plans. In addition, the Department has issued Technical Release 92–01, which provides that, with respect to certain welfare plans (*e.g.,* associated with cafeteria plans), the Department will not assert a violation of the trust or certain other reporting requirements in any enforcement proceeding, or assess a civil penalty for certain reporting violations involving such plans solely because of a failure to hold participant contributions in trust. The Department confirms that Technical Release 92–01 is not affected by the final regulation contained in this document, and remains in effect until further notice.

Length of Safe Harbor Period

A number of commenters requested that the Department increase the length of the safe harbor period. Several commenters requested that the safe harbor period be 10 business days. Several others requested that it be 14 days. One commenter requested that the safe harbor period be 12 business days. One commenter requested that small employers have until the 5th day of the month following the month in which amounts are withheld from pay as a safe harbor period. One commenter requested that small employers have until the 15th business day of the month following the month in which amounts are received or withheld by the employer as a safe harbor period. These commenters represented a variety of reasons that would cause small employers difficulty in meeting a 7-business day safe harbor period. Some commenters represented that small employers will be unable to meet the 7-business day safe harbor period in circumstances of the business owner's or staff person's illness or vacation. Other commenters describe problems that arise for small employers, particularly those using outside payroll firms to process payroll and make contributions, such as Internet problems, loss of power and incorrect reporting by a payroll company to the plan's financial institution. These commenters requested that these types of special circumstances be addressed by providing a longer safe harbor period. Several commenters recommended that the 7-business day safe harbor period be retained, noting that such period is an appropriate safe harbor period for small plans. 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. On the basis of these 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. After careful consideration of all the comments concerning the length of the safe harbor period, the Department has decided to retain the 7-business day safe harbor period for small plans. The Department believes that the special circumstances and problems particular to small employers noted by commenters as described above, will generally be accommodated under the current facts and circumstances general rule. Several commenters requested a longer safe harbor period for small plans due to the current systems of small plans involving manual payroll systems, limited clerical staff, the amount of time needed to reconcile the plan contributions, and the increased cost and workload for more frequent remittances. 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—will also accommodate these other timing issues raised by commenters.

Deposit-by-Deposit Basis

One commenter asked whether a failure to meet the safe harbor during one payroll period will result in application of the general rule for determining when participant contributions are plan assets for an entire plan year. The safe harbor is available on a deposit-by-deposit basis, such that a failure to satisfy the safe harbor for any deposit of participant contribution amounts to a plan will not

[4] To the extent any instance of pre-funding might be an extension of credit to the plan, PTE 80–26 would apply if its terms and conditions are satisfied.

result in the unavailability of the safe harbor for any other deposit to the plan.

Optional Safe Harbor

One commenter requested that the safe harbor nature of the proposal be confirmed. Several commenters misunderstood the optional safe harbor nature of the proposal and objected to a mandatory requirement of 7 business days for the deposit of participant contributions into small plans. In response to these concerns, the Department has added new paragraph 2510.3–102(a)(2)(ii), clarifying that the final safe harbor regulation is not the exclusive means by which employers can discharge their obligation to deposit participant contributions or loan repayments on the earliest date on which such contributions and payments can reasonably be segregated from the employer's general assets. The Department notes that, when an employer fails to deposit participant contributions or loan repayments in accordance with the general rule (*i.e.,* as soon as such contributions or payments can reasonably be segregated from the employer's general assets), losses and interest on such late contributions must be calculated from the actual date on which such contributions and/or payments could reasonably have been segregated from the employer's general assets, not the end of the safe harbor period.

Large Plans

The Department specifically invited comment on whether the proposed safe harbor should extend to contributions to plans with 100 or more participants. In this regard, the Department requested that commenters provide information and data sufficient to evaluate the current contribution practices of such employers and to conclude that it is a net benefit to such employers and participants to have a safe harbor. The Department also requested 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. Several commenters requested that the safe harbor rule be made available to larger plans, explaining that larger plans have issues of reconciliation and multiple geographic sites with different payroll periods. Some of these commenters argued that large employers would not slow down remittances as a result of a safe harbor provision. After careful consideration of the comments, the Department does not believe that it has a sufficient record on which to evaluate current practices and assess the costs, benefits, risks to participants associated with extending the safe harbor or any variation thereof to large plans at this time. As a result, the Department has determined not to change the safe harbor provision to cover participant contributions to a pension or welfare benefit plan with 100 or more participants.

Multiemployer and Multiple Employer Plans

Several commenters argued that, in the case of multiemployer and multiple employer plans, the regulation should base the safe harbor's availability on the size of the employer, instead of the size of the plan. These commenters argued that small employers maintaining multiemployer and multiple employer plans should have the same certainty as an employer sponsoring its own plan. These commenters explained that small employers that participate in large multiemployer and multiple employer plans face the same challenges as small employers sponsoring single employer plans, representing that these small employers also have payrolls that are independent, less sophisticated and many are manual. Several commenters also argued that the safe harbor should be expanded to cover all participating employers in multiemployer and multiple employer plans. These commenters argued that having a safe harbor only for small employers participating in large multiemployer and multiple employer plans would create undue administrative burden and cost. As described by these commenters, employers remit participant contributions to multiemployer plans in accordance with the collective bargaining agreements and other plan documents. With regard to the foregoing, the Department notes that it addressed the application of participant contribution requirements to multiemployer defined contribution plans in Field Assistance Bulletin (FAB) 2003–2 (May 7, 2003). As described in the FAB, the provisions of the participant contribution regulation apply in the same way to multiemployer plans that the provisions apply to single employer plans and that, as is the case with single employer plans, if a multiemployer plan maintains a reasonable process for the expeditious and cost-effective receipt of contributions, this process may be taken into account in determining when participant contributions can reasonably be segregated from the employer's general assets. To the extent that a collective bargaining describes such a process, the collective bargaining agreement should be considered in determining when participant contributions become plan assets. To be reasonable, a plan's process for receiving participant contributions should take into account how quickly the participating employers can reasonably segregate and forward contributions. The plan fiduciaries should also consider how costly to the plan a more expeditious process would be. These costs should be balanced against any additional income and security the plan and plan participants would realize from a faster system. Thus, the FAB describes the Department's view that, in determining when participant contributions can reasonably be segregated from the general assets of any given contributing employer to a multiemployer defined contribution plan, the time frames established in collective bargaining, employer participation and similar agreements must be taken into account to the extent such agreements represent the considered judgment of the plan's trustees that such time frames reflect the appropriate balancing of the costs of transmitting, receiving and processing such contributions relative to the protections provided to participants, provided that any such time frames do not extend beyond the maximum period prescribed in § 2510.3–102(b). The Department believes that the guidance in this FAB provides clarity and flexibility for contributing employers to multiemployer plans regarding the application of the participant contribution requirements. For this reason, the Department has decided to retain the safe harbor rule for small plans without modification from the proposal for contributing employers to multiemployer or multiple employer plans.

Examples

One commenter requested that the Department include an example in the regulation regarding a situation involving participant contributions made to a plan outside the safe harbor period. Under the final safe harbor rule, like the proposal, 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. Given the facts and circumstances general rule, the Department has determined not to add an example concerning circumstances that require an employer to deposit participant contributions beyond the safe harbor period. Another commenter requested that the Department retain an example from the 1996 amendments in which an employer deposits

contributions into a pension plan after the 15th business day maximum period limit. The Department believes that the examples in the proposal effectively illustrate the general rule and the application of the safe harbor. As a result, the Department has decided to retain the examples in the proposal without modification.

Participant Loan Repayments

The Department proposed 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). *See* Advisory Opinion 2002–02A (May 17, 2002) [5]. The proposal also served to extend the availability of the 7-business day safe harbor to loan repayments to plans with fewer than 100 participants. The Department received no comments on these provisions and is adopting the provisions without change.

Effective Date

Under the proposal, the Department contemplated 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.** Two commenters suggested that the effective date of the regulation should be delayed for at least 6 months following its publication to provide sufficient time for plan sponsors to evaluate additional responsibilities and options. Since the regulation provides an optional safe harbor rule as discussed above, the Department has determined not to change the effective date of the safe harbor provision. 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. Thus, the Department retained the effective date of the final regulation.

C. Regulatory Impact Analysis

Summary

The 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 $43.7 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 $19 million annually even if all eligible employers were to delay remittances to the full duration of the safe harbor.

Costs attendant to the 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.[6]

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, 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). Exec. Order No. 12866, 58 FR 51735 (Oct. 4, 1993). Under section 3(f) of the Executive Order, a "significant regulatory action" ' is an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. It has been 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 final regulation. OMB has reviewed this regulatory action.

This final rule will establish a safe harbor rule for employers' timely remittance of participant contributions to employee benefit plans. The safe harbor is available only to employer remittances of participant contributions to plans with fewer than 100 participants. Under the final 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

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

[6] 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.

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.

In order to analyze the potential economic impact of this rule, the Department examined data on the remittance of participant contributions to a representative sample of contributory single employer defined contribution pension plans collected from EBSA's Employee Contributions Project 2004 Baseline Project ("ECP").[7] Based on data from this project and from Form 5500 filings for the 2004 plan year, which is the year of this one-time project, the Department estimates that the safe harbor will be available to an estimated 311,000 single employer defined contribution plans with fewer than 100 participants.[8] These plans receive approximately 18% of participant contributions made to all contributory single employer defined contribution plans.[9]

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 safe harbor.[10] 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 these data, the Department has concluded that a large majority of contributory plans could comply with a 7-business day safe harbor. Moreover, a substantial portion of contributory plans would reduce the time taken to make at least some deposits. The Department recognizes that to take advantage of the safe harbor for all remittances, 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 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.[11] 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 ECP,[12] 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 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. The remaining 69% of the eligible plans in the ECP Universe defined in footnote 6 above (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 for all participant contributions.

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

[7] This project 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. Plans having these characteristics will be referred to as the "ECP Universe." 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.

[8] While the safe harbor is available to contributory defined benefit plans, contributory multiemployer defined contribution plans, and contributory welfare benefit plans, the Department expects that a small number of such plans will take advantage of the safe harbor. SIMPLE IRAs and SARSEPs ("SIMPLE/SARSEPs") are the major type of plans eligible for the safe harbor that are not included in the ECP Universe, because they are exempt from the Form 5500 filing requirement. Although complete and reliable data on the number of SIMPLE/SARSEPs and the amount of participant contributions to them is not available, based on data from sources including the IRS (*http://www.irs.gov/pub/irs-soi/04inretirebul.pdf*) and the Investment Company Institute (Table A14 from *http://www.ici.org/stats/res/retmrkt_update.pdf*), the Department estimates that plans included in the ECP Universe may comprise about half of all plans eligible for the safe harbor and hold about 79% of all participant contributions to eligible plans. The Department, therefore, believes that the ECP provides highly meaningful data for estimating potential impacts.

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

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

[11] The employers having the most to gain from delaying remittances to the full extent allowed under 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.

[12] *See* fn.6, supra.

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.[13] Because conformance to the safe harbor is voluntary, the Department believes that the transition cost for employers electing to conform will be offset by the elimination of the current cost attributable to existing uncertainty about how to meet the "earliest date" standard of 29 CFR 2510.3–102. Those employers that already conform will not incur any costs, but will benefit from the safe harbor.

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 sooner. The Department has calculated these potential investment gains, but 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 earnings [14] for participants in the ECP Universe each year and $43.7 million for participants in all eligible plans.[15] 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.[16] 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 income transfer resulting from retaining contributions for the full safe harbor period.[17]

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 than 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 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 (an estimated $40.5 million for plans in the ECP Universe) and lower potential losses (an estimated $12.2 million for plans in the ECP Universe) 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

[13] While several commenters questioned the Department's assumption that employers currently meeting the safe harbor in some, but not all, pay periods would have to make only minor modifications in order to come fully within the safe harbor time limit, no commenter provided any information or data with which to estimate such costs in response to the Department's request for information and comments on this issue in the proposed rule. For this reason, and because no employer is under any obligation to change its remittance practices as a result of the final rule, the Department did not modify its assumption.

[14] 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. One commenter expressed concern that the Department's use of a long-term rate of return on defined contribution plan assets was inappropriate, because it overestimates the short-term rates at which firms would actually invest participant contributions before their remittance to the plan. The Department chose a long-term rate to the value the gains or losses that participants would experience, because an acceleration or delay of plan remittances affects participants' and beneficiaries' long-term investments, and, therefore, has not modified its assumption.

[15] The estimate of $43.7 million is derived by dividing $34.5 million by 79%, the percentage of total contributions to eligible plans estimated to be made to plans in the ECP Universe. In this absence of data on remittance practices for plans not in the ECP Universe, the calculation assumes that their practices are similar to those for eligible plans in the ECP Universe.

[16] As described above in footnote 7, SIMPLE/SARSEPs were not included in the ECP Universe because such plans are exempt from the Form 5500 filing requirement. In the absence of data on the remittance practices of sponsors of such plans, the Department examined what is known about these plans to make assumptions regarding their remittance practices. SIMPLE/SARSEPs average 4–5 participants compared to 30 participants for plans in the ECP Universe. The data collected through the ECP showed a strong tendency for smaller plans to receive employee contributions more slowly than larger plans. Although factors other than plan size clearly influence remittance behavior, based solely on this factor, the Department expects that SIMPLE/SARSEPs would receive employee contributions, on average, more slowly than plans included in the ECP Universe. Therefore, a higher percentage of these plans would have an incentive to accelerate remittances to qualify for the safe harbor and lower percentages of these plans would have an incentive to delay remittances to capture float gains than plans in the ECP Universe. As a result, the Department believes that the risk that participants in SIMPLE/SARSEPs would suffer net investment losses as a direct result of changes in remittance practices made in response to this regulation is even less than for plans in the ECP Universe. Moreover, if the expected difference in remittance behavior does exist, then sponsors of SIMPLE/SARSEPs would have to implement greater changes to qualify for the safe harbor, on average, than plans in the ECP Universe. The Department, therefore, expects that smaller percentages of these employers would opt to change their remittance practices in order to qualify for the safe harbor due to prohibitive costs.

[17] If all employers that currently remit contributions in fewer than 7 days were to slow down their remittance times to 7 days, participants in plans in the ECP Universe might experience transfer losses of as much as $19.5 million annually, but would nonetheless likely experience an aggregate net gain of $14 million. Assuming that remittance patterns for eligible plans not in the ECP Universe resemble patterns for those in the ECP Universe, the Department estimates potential transfer losses for participants in all eligible plans of $24.7 million and aggregate net gains of $19 million.

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 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.[18]

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 chosen 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.[19]

Taking into account the potential costs and benefits presented by the various alternative safe harbors, the Department believes that the 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** an amendment to the Regulation Relating to a Definition of "Plan Assets"—Participant Contributions (29 CFR 2510.3–102). 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 paperwork requirements arising from the amendment under OMB control number 1210–0100. The current amendment of 29 CFR 2510.3–102 contained in this final rule does not change the extension procedure or add any additional information collection requirements, and, accordingly, the Department does not intend to submit this final rule 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 final rule is not likely to have a significant economic impact on a substantial number of small entities, 5 U.S.C. 604 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, the Employee Benefits Security Administration (EBSA) continues to consider a small entity to be an employee benefit plan with fewer than 100 participants.[20] 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 rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition

[18] 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.

[19] 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. Some commenters expressed the opinion that employers will not delay remittances in response to the safe harbor, and that the Department could therefore safely establish a safe harbor period with a duration of longer than seven days without risking net investment losses for participants. The Department has acknowledged uncertainty regarding the extent to which employers will accelerate or delay remittances in response to the safe harbor, and assumes neither that remittances will be maximally delayed as assumed in the loss calculation, nor maximally accelerated as assumed in the gain calculation, but recognizes that selection of a safe harbor period for which potential gains exceed potential losses at least provides assurance that participants will not experience net losses as long as the extent to which employers delay remittances in response to the safe harbor does not exceed the extent to which they accelerate remittances.

[20] The Department consulted with the Small Business Administration in making this determination as required by 5 U.S.C. 601(3) and 13 CFR 121.903(c).

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 requested comments on the appropriateness of the size standard used in evaluating the impact of the proposed rule on small entities in the proposal, but no comments were received.

EBSA hereby certifies that the final rule will not have a significant economic impact on a substantial number of small 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 rule creates 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 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.

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.

Congressional Review Act

This notice of final rulemaking 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 therefore has been transmitted to the Congress and the Comptroller General for review.

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 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 final 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.

List of Subjects in 29 CFR Part 2510

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

■ For the reasons set forth in the preamble, the Department amends Chapter XXV of Title 29 of the Code of Federal Regulations 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. Sec. 2510.3–38 is also issued under sec. 1, Pub. L. 105–72, 111 Stat. 1457.

■ 2. In § 2510.3–102, revise paragraphs (a), (b), (c) 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 I 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.* (i) 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.

(ii) This paragraph (a)(2) sets forth an optional alternative method of compliance with the rule set forth in paragraph (a)(1) of this section. This paragraph (a)(2) does not establish the exclusive means by which participant contribution or participant loan repayment amounts shall be considered to be contributed or repaid to a plan by the earliest date on which such contributions or repayments can reasonably be segregated from the employer's general assets.

(b) *Maximum time period for pension benefit plans.* (1) Except as provided in paragraph (b)(2) of this section, with respect to an employee pension benefit plan as defined in section 3(2) of ERISA, in no event shall the date determined pursuant to paragraph (a)(1) of this section occur later than the 15th business day of the month following the month in which the participant contribution or participant loan repayment amounts 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).

(2) With respect to a SIMPLE plan that involves SIMPLE IRAs (*i.e.,* Simple Retirement Accounts, as described in section 408(p) of the Internal Revenue Code), in no event shall the date determined pursuant to paragraph (a)(1) of this section occur later than the 30th calendar day following the month in which the participant contribution

amounts would otherwise have been payable to the participant in cash.

(c) *Maximum time period for welfare benefit plans.* With respect to an employee welfare benefit plan as defined in section 3(1) of ERISA, in no event shall the date determined pursuant to paragraph (a)(1) of this section occur later than 90 days from the date on which the participant contribution amounts are received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the date on 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).

* * * * *

(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 (c) 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 7th day of January 2010.

Phyllis C. Borzi,

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

[FR Doc. 2010–430 Filed 1–13–10; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–1073]

RIN 1625–AA00

Safety Zone; Todd Pacific Shipyards Vessel Launch, West Duwamish Waterway, Seattle, WA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the West Duwamish Waterway, Seattle, Washington. Entry into, transit through, mooring or anchoring within this zone is prohibited unless authorized by the Captain of the Port Puget Sound or her Designated Representative. This safety zone is necessary to ensure the safety of recreational and commercial traffic in the area during a vessel launch operation at Todd Pacific Shipyards, located at the entrance to the West Duwamish Waterway.

DATES: This rule is effective from 1 a.m. to 10:30 a.m. on January 16, 2010 unless cancelled sooner by the Captain of the Port.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2009–1073 and are available online by going to *http://www.regulations.gov,* inserting USCG–2009–1073 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail ENS Rebecca E. McCann, Waterways Management Division, Sector Seattle, Coast Guard; telephone 206–217–6088, e-mail *Rebecca.E.McCann@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act