While the Multiple Employer Welfare Arrangement Act of 1983 significantly enhanced the states' ability to regulate MEWAs, problems in this area continue to exist as the result of the exception for collectively bargained plans contained in the 1983 amendments. This exception is now being exploited by some MEWA operators who, through the use of sham unions and collective bargaining agreements, market fraudulent insurance schemes under the guise of collectively bargained welfare plans exempt from state insurance regulation.[2] Another problem in this area involves the use of collectively bargained arrangements as vehicles for marketing health care coverage nationwide to employees and employers with no relationship to the bargaining process or the underlying agreement.

The Department believes that regulatory guidance in this area is necessary to ensure that (1) state insurance regulators have ascertainable guidelines to help identify and regulate MEWAs operating in their jurisdiction and (2) sponsors of employee health benefit programs will be able to determine independently whether their plans are established or maintained pursuant to collective bargaining agreements for purposes of section 3(40)(A) without imposing the additional burden of having to apply to the Secretary for an individual finding.[3]

The proposed regulation first establishes specific criteria that the Secretary finds must be present in order for an agreement to be a collection bargaining agreement for purposes of section 3(40) and, second, establishes certain criteria applicable to determining when an employee benefit plan or other arrangement is established or maintained under or pursuant to such an agreement for purposes of section 3(40). In this regard, the Department notes that section 3(40) not only requires the existence of a *bona fide* collective bargaining agreement, but also requires that the plan be ''established or maintained'' pursuant to such an agreement. The Department believes that, in establishing the exception under section 3(40)(A)(i) of the Act, Congress intended to accommodate only those plans established or maintained to provide benefits to bargaining unit employees on whose behalf the plans where collectively bargained. For this reason, the Department believes that the exception under section 3(40)(A)(i) should be limited to plans providing coverage primarily to those individuals covered under collective bargaining agreements. Accordingly, the criteria in the proposed regulation relating to whether a plan or other arrangement qualifies as ''established or maintained'' is intended to ensure that the statutory exception is only available to plans whose participant base is predominately comprised of the bargaining unit employees on whose behalf such benefits were negotiated.

The proposed regulation would, upon adoption, constitute the Secretary's finding for purposes of determining whether an agreement is a collective bargaining agreement pursuant to section (3(40) of the Act. The Department does not intend to make individual findings or determinations concerning an entity's compliance with the proposed regulation. The criteria contained in the proposed regulation are designed to enable entities and state insurance regulatory agencies to determine whether the requirements of the statute are met. Under the proposed regulation, entities seeking to comply with these criteria must, upon request, provide documentation of their compliance with the criteria to the state or state agency charged with investigating and enforcing state insurance laws.

B. Description of the Proposal

Proposed § 2510.3–40(a) follows the language of section 3(40)(A) of the Act and states that the term multiple employer welfare arrangement does not include an employee welfare benefit plan which is established or maintained under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements. Proposed § 2510.3–40(b) provides criteria which the Secretary finds to be essential for an agreement to be collectively bargained for purposes of section 3(40)(A) of the Act. Proposed § 2510.3–40(c) sets forth requirements concerning individuals covered by the employee welfare benefit plan that must be satisfied in order for an employee welfare benefit plan to be considered established or maintained under or pursuant to a collective bargaining agreement as defined in § 2510.3–40(b). Proposed § 2510.3–40(d) provides definitions of the terms ''employee labor organization'' and ''supervisors and managers'' for purposes of this section. Proposed § 2510.3–40(e) explains that a plan does not satisfy the requirements of this section if the plan or any entity associated with the plan (such as the employee labor organization or the employer) fails or refuses to comply with the requests of a state or state agency with respect to any documents or other evidence in its possession or control that are necessary to make a determination concerning the extent to which the plan is subject to state insurance law. Proposed § 2510.3–40(f) provides that, in a proceeding brought by a state or state agency to enforce the insurance laws of the state, nothing in the proposed regulation shall be construed to prohibit allocation of the burden of proving the existence of all the criteria required by this section to the entity seeking to be treated as other than a MEWA.

Under the proposed regulation, a plan that fails to meet the applicable criteria would be a MEWA and thus subject to state insurance laws as provided in section 514(b)(6) of ERISA.

Each subsection of the proposed regulation is described in detail below.

1. General Rule and Scope

Proposed regulation 29 CFR 2510.3–40 establishes criteria which must be met for a plan to be established or maintained under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements for purposes of section 3(40) of the Act. The proposed regulation is not intended to apply to or affect any other provision of federal law.[4]

In the Department's view, the exclusion of collectively bargained plans or other arrangements from the definition of a MEWA in section 3(40)(A) is an exception to the general statutory rule. Thus the entity asserting the applicability of the provisions concerning collectively bargained plans

[2] In addition, the Department has received requests to make individual determinations concerning the status of particular plans under section 3(40). *See, e.g., Ocean Breeze Festival Park* v. *Reich,* 853 F. Supp. 906, 910 (1994) (denying motion for mandamus and granting leave to amend complaint), *summary judgement granted sub nom. Virginia Beach Policemen's Benevolent Association, et al.,* v. *Reich,* 881 F. Supp. 1059 (E.D.Va. 1995); *Amalgamated Local Union No. 355* v. *Gallagher,* No. 91 CIV 0193(RR) (E.D.N.Y. April 15, 1991).

[3] It is the Department's position that the language of section 3(40) of ERISA does not require the Secretary to make individual findings that specific agreements are collective bargaining agreements. Moreover, a district court recently found that the Secretary has no ''statutory responsibility'' to make individualized findings. *Virginia Beach Policeman's Benevolent Association* v. *Reich,* 881 F. Supp. 1059, 1069–70 (E.D.Va. 1995).

[4] The Department notes that section 3(40) of ERISA is not the only provision that provides special rules to be applied to agreements that the Secretary finds to be collectively bargained. For example, sections 404(a)(1) (B) and (C) of the Internal Revenue Code (Code) provide special rules to determine the maximum amount of deductible contributions in the case of amendments to plans that the Secretary of Labor finds to be collectively bargained. In addition, Code sections 410(b)(3) and 413(a) exclude from minimum coverage requirements certain employees covered by an agreement that the Secretary finds to be a collective bargaining agreement.