in section 3(40) has the burden of providing evidence of compliance with the conditions of the statutory exception and the criteria set forth in the proposed regulation.[5] Accordingly, if an entity's status as established or maintained pursuant to one or more agreements which satisfy the criteria of the proposed regulation is challenged by a state or state agency, the entity seeking to be treated as other than a MEWA must produce sufficient evidence to establish that all of the requirements of the proposed regulation have been met.[6]

2. Definition of a Collective Bargaining Agreement

Proposed § 2510.3–40(b) establishes criteria that an agreement must meet in order to be a collective bargaining agreement for purposes of this section. An agreement constitutes a collective bargaining agreement only if the agreement is in writing and is executed by or on behalf of an employer of employees described in § 2510.3–40(c)(1) and by representatives of an employee labor organization meeting the requirements of § 2510.3–40(d)(1). In addition, the agreement must also be the result of good faith, arms-length bargaining binding signatory employers and the employee labor organization to the terms of the agreement for a specified project or period of time, and the agreement must be one which cannot be unilaterally amended or terminated. The Department notes that agreements in which an employer adopts all provisions of an existing agreement binding an employer and an employee labor organization to the terms and conditions of a collective bargaining agreement, such as a pattern agreement, will not fail to satisfy the requirements of proposed § 2510.3–40(b) if the original agreement as initially adopted satisfied the requirements of this section. The Department has also determined that collective bargaining agreements containing an agreement not to strike and providing that the collective bargaining agreement will terminate upon the initiation of a strike, often called ''no strike'' provisions, will not fail to satisfy the proposed regulation solely by reason of such provisions.

Proposed § 2510.3–40(b)(6) requires that a collective bargaining agreement may not provide for termination of the agreement solely as a result of the failure to make contributions to the plan. Proposed § 2510.3–40(b)(7) provides that an agreement will not constitute a collective bargaining agreement under this section if, in addition to the provision of health coverage, the agreement encompasses only the minimum requirements mandated by law with respect to the terms and conditions of employment (*e.g.*, minimum wage and workers' compensation). The phrase ''terms and conditions of employment'' as used in the proposed regulation is intended to have the same meaning and application as in case law decided under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (NLRA), and would include wages, hours of work and other matters of employment such as grievance procedures and seniority rights. For purposes of this section, the expiration of a collective bargaining agreement will not in and of itself prevent the agreement from satisfying the requirements under the proposed regulation if the agreement, although expired, continues in force.

3. Plans Established or Maintained

The proposed regulation also establishes certain criteria to determine when a plan is established or maintained under or pursuant to one or more collective bargaining agreements for purposes of section 3(40). Proposed § 2510.3–40(c) provides that in situations where a plan covers both individuals who are members of a group or bargaining unit represented by an employee labor organization as defined in proposed § 2510.3–40(d)(1) as well as other individuals, the plan will not be considered to be established or maintained pursuant to one or more collective bargaining agreements unless no less than 85% of the individuals covered by the plan are present or certain former employees and their beneficiaries, excluding supervisors and managers as defined in paragraph (d)(2), who are currently or who were previously covered by a collective bargaining agreement.[7] In addition, three groups of individuals may participate in the plan but are not counted in determining the total number of individuals covered by the plan for purposes of calculating the 85% limitation: (1) Present or former employees of the plan or of a related plan established or maintained pursuant to the same collective bargaining agreement; (2) present or former employees of the employee labor organization as defined in paragraph (d)(1) that is a signatory to the collective bargaining agreement pursuant to which the plan is maintained, and (3) beneficiaries of individuals in groups (1) and (2).

For purposes of the proposed regulation, the term ''former employee'' is limited to individuals who are receiving workers' compensation or disability benefits, continuation coverage pursuant to the Consolidated Omnibus Budget Reconciliation Act (COBRA) (Part 6 of title I of ERISA, 29 U.S.C. §§ 1161–1168), or who have retired or separated from employment after working for more than 1000 hours a year for at least three years for a signatory employer or employee organization, or the plan or related plan. For purposes of paragraph (c)(4), to be considered an employee of the plan, a related plan, or the signatory employee labor organization, an individual must work a least (A) 15 hours a week or 60 hours a month during the period of coverage under the plan, or (B) have worked at least 1000 hours in the last year and currently be on *bona fide* leave based on sickness or disability of the individual or the individual's family or on earned vacation time.

The proposed regulation requires that the plan satisfy the 85% limitation on the last day of each of the previous five calendar quarters unless the plan has not been in existence for five calendar quarters. If the plan or other arrangement has been in existence for a shorter period of time, it must satisfy the 85% limitation on the last day of each calendar quarter during which it has been in existence.

Through the requirement that no less than 85% of individuals covered by the plan be present or former bargaining

[5] 2A Sutherland Statutory Construction § 47.11 (Norman J. Singer ed. 5th ed. 1992); *United States* v. *First City National Bank of Houston*, 386 U.S. 361, 366 (1967) (burden of establishing applicability of statutory exception is on entity that asserts it); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 44–45 (1948) (''First, the general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits * * *.'')

[6] See *Donovan* v. *Cunningham*, 716 F. 2d 1455, 1467–68 n.27 (5th Cir. 1983) (citing *Securities and Exchange Commission* v. *Ralston Purina Co.*, 346 U.S. 119, 126 (1953), ''As the Supreme Court has observed in a different context, it seems 'fair and reasonable' to place the burden of proof upon a party who seeks to bring his conduct within a statutory exception to a broad remedial scheme.'')

[7] Although the proposed regulation itself does not impose any specific restrictions concerning individuals who may be included in the 15%, the entity as a whole must comply with the requirements of section 3(1) of ERISA in order to be an employee welfare benefit plan covered by the Act. Section 3(1) provides that status as an ERISA covered plan is dependent on the composition and attributes of the participant base as well as the characteristics of the employer and employee organization. *See, e.g., Bell* v. *Employee Security Benefits Association*, 437 F. Supp. 382 (1977); Advisory Opinion 93–32 (letter to Mr. Kevin Long, December 16, 1993); Advisory Opinion 85–03A (letter to Mr. James Ray, January 15, 1985); Advisory Opinion 77–59 (letter to Mr. William Hager, August 26, 1977).