unit members, the proposed regulation intends to treat as MEWAs arrangements that permit individuals to participate in an employee welfare benefit plan solely as a result of membership or affiliation with an entity and not as a result of the individuals being legitimately represented in collective bargaining by a *bona fide* employee labor organization.[8] The Department believes that the 85% limitation in the proposed regulation is consistent with the purpose of the statutory exception in section 3(40)(A)(i) of ERISA for employee welfare benefit plans which are established or maintained as the result of collective bargaining on behalf of employees concerning the terms and conditions of their employment. To the extent that the Department's position as indicated in Advisory Opinion 9106A (January 15, 1991) to Gerald Grimes, Oklahoma Insurance Commissioner (concerning a trust that provided health care and other benefits to ''associate members'' of a labor organization who were not represented by the organization in collective bargaining), appears to express a different position, it would be superseded by the adoption of a final regulation that incorporates this requirement.

4. Definition of Employee Labor Organization

Proposed § 2510.3–40(d)(1) defines the term ''employee labor organization'' for purposes of this section. Proposed § 2510.3–40(d)(1)(i) provides that, with respect to a particular collective bargaining agreement, an employee labor organization must represent the employees of each signatory employer in one of two ways. All of a signatory employer's bargaining units covered by the collective bargaining agreement must either be certified by the National Labor Relations Board, or the employee labor organization must be lawfully recognized by the signatory employer as the exclusive representative for the employer's bargaining unit employees covered by the collective bargaining agreement. Such representation must take place without employer interference or domination. For purposes of the proposed regulation, employer interference or domination in the formation, administration, or operation of the employee labor organization includes taking an active part in organizing an employee organization or committee to represent employees; bringing pressure upon employees to join an employee organization; improperly favoring one of two or more employee organizations that are competing to represent employees; or otherwise unlawfully promoting or assisting in the formation or operation of the employee organization.

Under proposed § 2510.3–40(d)(1)(ii), an employee labor organization must operate for a substantial purpose other than that of offering or providing health coverage. Proposed § 2510.3–40(d)(1)(iii) states that an employee labor organization may not pay commissions, fees, or bonuses to individuals other than full-time employees of the employee labor organization in connection with the solicitation of employers or participants with regard to a collectively bargained plan. In addition, under subsection (d)(1)(iv), the term ''employee labor organization'' does not include an organization that utilizes the services of licensed insurance agents or brokers for soliciting employers or participants in connection with a collectively bargained plan. Proposed § 2510.3–40(d)(1)(v) requires an employee labor organization to be a ''labor organization'' as defined in section 3(i) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 402(i). Proposed § 2510.3–40(d)(1)(vi) also requires an employee labor organization to qualify as a tax-exempt labor organization under section 501(c)(5) of the Internal Revenue Code of 1986. It is the view of the Department that these criteria are necessary to distinguish organizations that provide benefits through legitimate employee representation from organizations that are primarily in the business of marketing commercial insurance products.

5. Supervisors and Managers

Proposed § 2510.3–40(d)(2) defines the terms ''supervisors and managers'' for purposes of this section. Proposed § 2510.3–40(d)(2) defines as ''supervisors and managers'' those employees of a signatory employer to a collective bargaining agreement who, acting on behalf of the employer, have the authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or who have responsibility to direct other employees or to adjust their grievances, or who have power to make effective recommendations concerning any of the actions described above. In order to be considered a supervisor or manager, an individual must be able to use independent judgment in the exercise of authority, responsibility, and power, and that exercise must be more than a routine or clerical function.

6. Failure To Provide Documents

The proposed regulation provides that even if a plan meets the requirements of subsections 2510.3–40 (b) and (c) of this section, it will not be considered to be established or maintained pursuant to an agreement that the Secretary finds to be a collective bargaining agreement if an entity, plan, employee labor organization or employer which is a party to the agreement fails or refuses to provide documents or evidence in its possession or control to a state or state agency which reasonably requests documents or evidence in order to determine the status of any entity either under the proposed regulation or under state insurance laws. While the proposed regulation enumerates criteria designed to enable entities to determine whether the requirements of the statute are met, the Department intends that, when requested to do so, entities will provide documentation of their compliance with the criteria to the state or state agency charged with investigating and enforcing state insurance laws. An entity seeking to be treated as other than a MEWA under the provisions of the proposed regulation has the burden of producing sufficient documents and other evidence to prove that it meets the criteria of the proposed regulation and is therefore entitled to application of the statutory exemption from the definition of a MEWA.

The Department anticipates that states or state agencies, including any commission, board or committee charged with investigating and enforcing state insurance laws, will utilize existing jurisdiction under state laws to require the production of documents and other evidence. Where the entity's compliance with the criteria of the proposed regulation is disputed by a state or state agency, the Department expects that the state or state agency will use its existing authority under state law to bring the matter before the appropriate state adjudicatory body to determine the facts. The proposed regulation does not restrict the authority of the state or state agency to reinvestigate the entity at any time if it believes the entity is not in compliance with the proposed regulation or with state laws.

7. Allocation of Burden of Proof

The proposed regulation provides that, in a proceeding brought by a state

[8] A number of instances have been brought to the Department's attention where entities have attempted to utilize purported collective bargaining agreements as a basis for marketing insurance coverage, generally under the guise of ''associate membership,'' to non-bargaining unit individuals and unrelated employers. *See, e.g., Empire Blue Cross and Blue Shield* v. *Consolidated Welfare,* 830 F. Supp. 170 (E.D.N.Y. 1993).