

DEPARTMENT OF LABOR**Pension and Welfare Benefits Administration****29 CFR Parts 2560 and 2570**

RIN 1210-AA49

Employee Retirement Income Security Act of 1974; Administration and Enforcement, Delinquent Filer Voluntary Compliance Program**AGENCY:** Pension and Welfare Benefits Administration, Labor.**ACTION:** Rule related notice, reduced civil penalty.

SUMMARY: This Notice announces the implementation of a new Delinquent Filer Voluntary Compliance Program by the Department of Labor's Pension and Welfare Benefits Administration (PWBA). This Program is intended to encourage, through the assessment of reduced civil penalties, delinquent plan administrators to comply with their annual reporting obligations under Title I of the Employee Retirement Income Security Act of 1974, as amended, (ERISA).

EFFECTIVE DATE: April 27, 1995.

FOR FURTHER INFORMATION CONTACT: PWBA's Delinquent Filer Voluntary Compliance Program Hotline, (202) 219-8776 (not a toll-free number).

SUPPLEMENTARY INFORMATION:**Executive Order 12866 Statement**

Under Executive Order 12866 (58 FR 51735, Oct. 4, 1993), the Department must determine whether the regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. Under section 3(f), the order defines a "significant regulatory action" as 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.

Pursuant to the terms of the Executive Order, the Department has determined that this program creates a novel method for statutory compliance that will reduce paperwork and regulatory compliance burdens on businesses, including small businesses and organizations, and make better use of scarce federal resources, in accord with the mandates of the Paperwork Reduction Act, the Regulatory Flexibility Act, and the President's priorities. Therefore, this notice is "significant" and subject to OMB review.

Regulatory Flexibility Act Statement

The Regulatory Flexibility Act of 1980 requires each Federal agency to perform a regulatory flexibility analysis for all rules that are likely to have a significant economic impact on a substantial number of small entities. Small entities include small businesses, organizations, and governmental jurisdictions.

Given the existing requirement on small businesses to file the Form 5500 Series Annual Return/Reports, we believe this delinquency program imposes no significant additional burden on small entities. First, no entity is required to file under this program. Thus, unless a plan sponsor chooses to take advantage of the relief offered by this program, this program would not impose any increased burden on small entities that sponsor pension and welfare benefit plans. Second, the additional documentation that would be required to be submitted under this program is minimal. Third, the program offers a substantial reduction in the penalties that might otherwise be imposed on the entities, including small entities, that participate in the program. A second tier of requirements, in the form of further reduced penalties, has been provided for small plans (those filing Form 5500-C).

Paperwork Reduction Act Statement

Public reporting burden for this collection of information is estimated to average 21 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this estimate or any other aspect of this information collection, including suggestions for reducing this burden, please send them to the Department of Labor, Office of IRM Policy, Room N-1301 (1210-0XXX), 200 Constitution Avenue, NW, Wash., DC 20210, and to Allison Herron Eydt, PWBA Desk Officer, Office of Management and

Budget, Room 10235, New Executive Office Building, Washington, DC 20507.

Section 1—Background

The Secretary of Labor has the authority, under section 502(c)(2) of ERISA, to assess civil penalties of up to \$1,000 a day against plan administrators who fail or refuse to file complete and timely annual reports (Form 5500 Series Annual Return/Reports) as required under section 101(b)(4) of ERISA and the Secretary's regulations codified in 29 CFR Part 2520. Pursuant to 29 CFR 2560.502c-2 and 2570.60 *et seq.*, PWBA has maintained a program for the assessment of civil penalties for noncompliance with the annual reporting requirements. Under this program, plan administrators filing annual reports after the date on which the report was required to be filed may be assessed \$50 per day for each day an annual report is filed after the date on which the annual report(s) was required to be filed, without regard to any extensions for filing. Plan administrators who fail to file an annual report may be assessed a penalty of \$300 per day, up to \$30,000 per year, until a complete annual report is filed. Penalties are applicable to each annual report required to be filed under Title I of ERISA. The Department may, in its discretion, waive all or part of a civil penalty assessed under section 502(c)(2) upon a showing by the administrator that there was reasonable cause for the failure to file a complete and timely annual report.

The Department has determined that the possible assessment of the above described civil penalties may deter certain delinquent filers from voluntarily complying with the annual reporting requirements under Title I of ERISA. In an effort to encourage annual reporting compliance, therefore, the Department has decided to implement the Delinquent Filer Voluntary Compliance (DFVC) Program, described herein, under which administrators otherwise subject to the assessment of higher civil penalties will be permitted to pay reduced civil penalties for voluntarily complying with the annual reporting requirements under Title I of ERISA.

Section 2—The Delinquent Filer Voluntary Compliance (DFVC) Program

.01 *General.* The DFVC Program is intended to afford eligible plan administrators (described in subsection .02 of this Section) the opportunity to avoid the assessment of civil penalties otherwise applicable to administrators who fail to file timely annual reports for plan years beginning on or after January

1, 1988. Eligible administrators may avail themselves of the DFVC Program by complying with the filing requirements and paying the civil penalties specified in Section 3 or Section 4, as appropriate, of this Notice.

.02 Eligibility for DFVC Program.

The DFVC Program is available only to a plan administrator who complies with each of the requirements of Section 3 or Section 4, as appropriate, of this Notice prior to the date on which the administrator:

(a) is notified in writing, pursuant to 29 CFR 2560.502c-2, of the Department's intention to assess a civil penalty under section 502(c)(2) of ERISA for failure to file a timely annual report; or

(b) is otherwise notified in writing by the Department of a failure to file a timely annual report under Title I of ERISA.

.03 Effective date. The DFVC Program described herein shall be effective April 27, 1995. The Department of Labor intends the DFVC Program to be of indefinite duration; however, the Program may be modified from time to time or terminated in the sole discretion of the Department upon publication of notice in the **Federal Register**.

Section 3—Administrators Filing Annual Reports

.01 Plan administrators electing to file a late Form 5500 Series Annual Report under the DFVC Program shall:

(a) *File with the Internal Revenue Service.* Except as provided in Section 3.02, file a complete Form 5500 or Form 5500-C (but not the Form 5500-R), as appropriate, with all required schedules and attachments, by entering at the top center of the first page of the Form, in red, bold print "DFVC Program" and mailing the complete Form, along with all required schedules and attachments, to the Internal Revenue Service Center designated in the Form 5500 Series instructions. Do *not* send checks paying penalties under the DFVC Program to the Internal Revenue Service Center.

Note: If a joint employer-union board of trustees or committee is the administrator, at least one employer representative and one union representative must sign the Form.

Current forms and instructions can be obtained by dialing 1-800-TAX-FORM (this is a toll-free number). For prior years, obtain the most current form available. If necessary, mark through the year at the top of the first page and enter the appropriate prior year in red bold print.

(b) *File with the U.S. Department of Labor and Pay Applicable Penalty*

Amount. Send a signed and dated copy of the first page of the Form 5500 Series Annual Report filed with the Internal Revenue Service and a check payable to the "U.S. Department of Labor" in the amount of the applicable penalty, as determined under Section 3.03, to: DFVC Program, Pension and Welfare Benefits Administration, P.O. Box 277025, Atlanta, GA 30384-7025.

The items that are required to be sent to the Department pursuant to this Section 3.01(b) (i.e., the completed first page of the Form 5500 Series annual report as well as the check made payable to the U.S. Department of Labor) also should contain the notation, in red, bold print "DFVC Program". The notation should be located at the top center of each item.

.02 A plan administrator who filed a complete Form 5500 Series Annual Report, including all required schedules and attachments, with appropriate Internal Revenue Service Center prior to the effective date of this DFVC Program, but after the due date for the report, shall only be required to comply with the provision of paragraph (b) of Section 3.01 and, therefore, shall not be required to refile the Form 5500 Series Annual Report with the Internal Revenue Service Center solely for purposes of the DFVC Program.

.03 For each annual report filed under this Section 3, the applicable penalty amount shall be determined as follows:

(a) In the case of an annual report which is filed on or before twelve (12) months after the date on which the annual report was due (without regard to any extensions), \$50 per day for each day the annual report is filed after the date on which the annual report was due (without regard to any extensions), up to a maximum of \$2,500 for Form 5500 filers and \$1,000 for Form 5500-C filers; or

(b) In the case of an annual report which is filed more than twelve (12) months after the date on which the annual report was due (without regard to any extensions), \$5,000 for Form 5500 filers and \$2,000 for Form 5500-C filers.

Note: The plan administrator is personally liable for the payment of civil penalties assessed under section 502(c)(2) of ERISA. Therefore, civil penalties, including penalties paid under this DFVC Program, may not be paid from the assets of an employee benefit plan.

.04 Annual reports that are filed with the IRS pursuant to the DFVC Program may be subject to the usual edit checks. Plan administrators will have an opportunity to correct deficiencies, in accordance with the procedures

described in 29 CFR 2560.502c-2. The failure to correct deficiencies in accordance with these procedures may result in the assessment of further penalties.

PWBA has prepared a booklet, "The Trouble-Shooter's Guide To Filing ERISA Annual Reports," to assist in preparing the Form 5500 Series. The booklet explains how forms are processed and how to avoid potential filing errors. Copies are available by written request to: U.S. Department of Labor, Pension and Welfare Benefits Administration, Room N-5656, 200 Constitution Ave. N.W., Washington, D.C. 20210.

Section 4—Administrators Electing To File Statements for Apprenticeship and Training Plans or "Top Hat" Plans

.01 Administrators of apprenticeship and training plans, described in 29 CFR 2520.104-22, and administrators of pension plans for a select group of management or highly compensated employees, described in 29 CFR 2520.104-23(a) ("top hat plans"), who elect to file the applicable statement(s), described in §§ 2520.104-22, and 2520.104-23, respectively, as a condition of relief from the annual reporting requirements may, in lieu of filing any past due annual report and paying otherwise applicable civil penalties, comply with the following filing requirements:

(a) *Send Form and Pay Applicable Penalty Amount to the U.S. Department of Labor.* For purposes of this requirement, plan administrators must complete items 1a-1c, 2a-2c, 5a-5c, 6a or 6b (as applicable) of the first page of the Form 5500 Annual Report and enter at the top center of the Form, in red, bold print, either "Apprenticeship and Training Plan/DFVC Program" or "Top Hat Plan/DFVC Program", as appropriate. For purposes of completing item 5c, the plan number for all top hat plans should be 888, and the plan number for all apprenticeship and training plans should be 999. The plan administrator must sign and date the Form.

Note: If a joint employer-union board of trustees or committee is the administrator, at least one employer representative and one union representative must sign the Form.

Send the first page of the completed Form 5500 Annual Report, and a check payable to the "U.S. Department of Labor" for the applicable penalty amount, as determined under section 4.01(c), to: DFV Program, Pension and Welfare Benefits Administration, P.O. Box 277025, Atlanta, GA 30384-7025.

The check that is made payable to the U.S. Department of Labor also should contain the notation, in red, bold print "DFVC Program." The notation should be located at the top center of the check.

(b) *File Applicable Statement with the U.S. Department of Labor.* Prepare and file a statement meeting the requirements of §§ 2520.104-22, or 2520.104-23, as appropriate.

The apprenticeship and training plan statement described in § 2520.104-22 must be sent to: Apprenticeship and Training Plan Exemption, Pension and Welfare Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

The "top hat" statement described in § 2520.104-23 must be sent to: Top Hat Plan Exemption, Pension and Welfare Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

Note: A plan sponsor maintaining more than one "top hat" plan is not required to file a separate statement for each such plan. See § 2520.104-23(b).

(c) *Applicable penalty amount.* For purposes of the statements filed under this Section 4, the applicable penalty amount is \$2,500, without regard to the number of plans maintained by the same plan sponsor for which statements are filed pursuant to Section 4.01(b) and without regard to the number of plan participants covered under such plan or plans.

Note: The plan administrator is personally liable for the payment of civil penalties

assessed under section 502(c)(2) of ERISA, therefore, civil penalties, including penalties paid under this DFVC Program, may not be paid from the assets of an employee benefit plan.

(d) *Multiple "top hat" plans.* In the case of plan sponsors maintaining more than one pension plan for a select group of management or highly compensated employees described in § 2520.104-23, the plan administrator shall, for purposes of the DFVC Program, be required to send a copy of the first page of the Form 5500, completed in accordance with Section 4.01(a), without regard to the number of such plans maintained by the plan sponsor, provided that each plan maintained by the sponsor is clearly identified on the first page of the Form 5500 or attachment thereto filed with the Department of Labor.

.02 Administrators who have complied with the requirements of this Section 4 shall be considered as having elected compliance with the exemption(s) and/or alternative method of compliance prescribed in §§ 2520.104-22, or 2520.104-23, as appropriate, for all subsequent plan years.

.03 Acceptance by the Department of a filing and penalty payment made pursuant to this Section 4 does not represent a determination by the Department of Labor as to the status of the arrangement as a plan or particular type of plan under Title I or ERISA or a determination by the Department of Labor that the provisions of §§ 2520.104-22, or 2520.104-23 have been satisfied.

Section 5—Waiver of Right to Notice and Abatement of Assessment

.01 Payment of a penalty under the terms of this DFVC Program constitutes a waiver of an administrator's right both to receive notice of assessment under 29 CFR 2560.502c-2 from the Department and to contest the Department's Assessment of the penalty amount. It should also be noted that payment of a penalty under the DFVC Program does not preclude the assessment of non-filing or late-filing penalties by other Federal agencies, including the Internal Revenue Service and the Pension Benefit Guaranty Corporation.

.02 The Internal Revenue Code (Code) and regulations thereunder require information to be filed on the Form 5500 Series Annual Return/Report and provides penalties for failing to timely file. Under the Code, these penalties apply unless it is shown that the failure to timely file is due to reasonable cause. If the late filing of a Form 5500 Series Annual Return/Report required by the Code may be due to reasonable cause, a cover letter, demonstrating that the failure to timely file was due to reasonable cause, should be attached to the completed Form 5500 Series Annual Return/Report that is filed with the IRS.

Signed at Washington, DC, this 24th day of April, 1995.

Olena Berg,

Assistant Secretary, Pension and Welfare Benefits Administration.

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BILLING CODE 4510-29-M