Important Notice Concerning Your Rights

Under The [Enter Name of Individual Account Plan]

[Enter date of notice]

1. This notice is to inform you that the [enter name of plan] will be [enter reasons for blackout period, as appropriate: changing investment options, changing recordkeepers, etc.].

2. As a result of these changes, you temporarily will be unable to [enter as appropriate: direct or diversify investments in your individual accounts (if only specific investments are subject to the blackout, those investments should be specifically identified), obtain a loan from the plan, or obtain a distribution from the plan]. This period, during which you will be unable to exercise these rights otherwise available under the plan, is called a ''blackout period.'' Whether or not you are planning retirement in the near future, we encourage you to carefully consider how this blackout period may affect your retirement planning, as well as your overall financial plan.

3. The blackout period for the plan [enter the following as appropriate: is expected to begin on [enter date] and end [enter date]/is expected to begin during the week of [enter date] and end during the week of [enter date]. During these weeks, you can determine whether the blackout period has started or ended by [enter instructions for use toll-free number or accessing web site].

4. [*In the case of investments affected by the blackout period, add the following:* During blackout period you will be unable to direct or diversify the assets held in your plan account. For this reason, it is very important that you review and consider the appropriateness of your current investments in light of your inability to direct or diversify those investments during the blackout period. For your long-term retirement security, you should give careful consideration to the importance of a well-balanced and diversified investment portfolio, taking into account all your assets, income and investments.] [If the plan permits investments in individual securities, add the following: You should be aware that there is a risk to holding substantial portions of your assets in the securities of any one company, as individual securities tend to have wider price swings, up and down, in short periods of time, than investments in diversified funds. Stocks that have wide price swings might have a large loss during the blackout period, and you would not be able to direct the sale of such stocks from your account during the blackout period.]

5. [*If timely notice cannot be provided (see paragraph (b)(1)(v) of this section) enter:* (A) Federal law generally requires that you be furnished notice of a blackout period at least 30 days in advance of the last date on which you could exercise your affected rights immediately before the commencement of any blackout period in order to provide you with sufficient time to consider the effect of the blackout period on your retirement and financial plans. (B) [Enter explanation of reasons for inability to furnish 30 days advance notice.]]

6. If you have any questions concerning this notice, you should contact [enter name, address and telephone number of the plan administrator or other contact responsible for answering questions about the blackout period].

(f) *Effective date.* This section shall be effective and shall apply to any blackout period commencing on or after January 26, 2003. For the period January 26, 2003 to February 25, 2003, plan administrators shall furnish notice as soon as reasonably possible.

Dated: January 16, 2003.

Ann L. Combs,

Assistant Secretary, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 03–1430 Filed 1–23–03; 8:45 am]

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Parts 2560 and 2570

RIN 1210–AA91, RIN 1210–AA93

Civil Penalties Under ERISA Section 502(c)(7) and Conforming Technical Changes on Civil Penalties Under ERISA Sections 502(c)(2), 502(c)(5) and 502(c)(6)

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Final rules.

SUMMARY: This document contains final rules that implement the civil penalty provision in section 502(c)(7) of the Employee Retirement Income Security Act of 1974 (the Act or ERISA) adopted as part of the Sarbanes-Oxley Act of 2002 (SOA). The final rules establish procedures relating to the assessment of civil penalties by the Department of Labor (Department) under section 502(c)(7) of ERISA for failures or refusals by plan administrators to provide notices of a blackout period as required by section 101(i) of ERISA. This document also contains final rules making conforming and technical changes to the agency's rules of practice and procedure for other civil penalties under section 502(c) of ERISA. The final rules affect employee benefit plans, plan sponsors, administrators and fiduciaries, and plan participants and beneficiaries.

DATES: *Effective date:* These final rules are effective January 26, 2003.

FOR FURTHER INFORMATION CONTACT: Susan Elizabeth Rees, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC 20210, (202) 693–8537 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

A. Background

The Sarbanes-Oxley Act of 2002 (the SOA), Pub. L. 107–204, was enacted on July 30, 2002. Section 306(b)(1) of the SOA amended section 101 of ERISA to add a new subsection (i), requiring that administrators of individual account plans provide notice to affected participants and beneficiaries in advance of the commencement of any blackout period. For purposes of this notice requirement, a blackout period generally includes any period during which the ability of participants or beneficiaries to direct or diversify assets credited to their accounts, to obtain loans from the plan or to obtain distributions from the plan will be temporarily suspended, limited or restricted. Elsewhere in the **Federal Register** today, the Department has published a final rule, to be codified at 29 CFR 2520.101–3, implementing the notice requirements in ERISA section 101(i).

Section 306(b)(3) of SOA amended section 502(c) of ERISA to add a new paragraph (7) establishing a civil penalty for an administrator's failure or refusal to provide timely notice of a blackout period to participants and beneficiaries. Specifically, section 502(c)(7) provides that the Secretary may assess a civil penalty of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to a participant or beneficiary in accordance with ERISA section 101(i).

On October 21, 2002, the Department published interim rules implementing section 502(c)(7) of ERISA in the **Federal Register** (67 FR 64774) for public comment. The interim rules established procedures relating to the assessment and administrative review of civil penalties by the Department under section 502(c)(7) for failures or refusals by plan administrators to provide notice of a blackout period as required by section 101(i) of ERISA and 29 CFR 2520.101–3. The interim rules also made changes to the existing civil penalty rules under ERISA sections 502(c)(2), 502(c)(5), and 502(c)(6) to incorporate certain technical improvements being adopted as part of the section 502(c)(7) implementing regulations.

The Department received 7 comments on the section 502(c)(7) interim rules in response to its request for comments. Set forth below is an overview of the final rules, which adopt the interim

rules with a technical addition to address the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, and a discussion of the public comments.

B. Overview of Final Rules and Public Comments

1. Assessment of Civil Penalties for Violations of Section 101(i) of ERISA—§ 2560.502c–7

Section 2560.502c–7 addresses the general application of section 502(c)(7) of ERISA, under which the administrator of an individual account plan shall be liable for civil penalties assessed by the Secretary in each case in which there is a failure or refusal to provide to an affected participant or beneficiary notice of a blackout period as required under section 101(i) of ERISA and § 2520.101–3. Section 2560.502c–7 defines terms, sets forth how the maximum penalty amounts are computed, and identifies the period for which a penalty is assessed. The section also sets forth the rule that prior to assessing a penalty under ERISA section 502(c)(7), the Department must provide the plan administrator with written notice of intent to assess a penalty, and provide the administrator with the opportunity to request that a penalty not be assessed upon a showing of compliance with ERISA section 101(i), or be waived, in whole or in part, upon a showing that there were mitigating circumstances justifying a waiver or reduction of the penalty for noncompliance. Section 2560.502c–7 also establishes certain procedural rules regarding deadlines and service requirements in connection with penalty assessment proceedings, and the consequences of failure to comply therewith. The section clarifies the personal liability of the plan administrator for penalties assessed. Specifically, the section provides that, if more than one person is responsible as administrator for the failure to provide the required blackout notice, all such persons shall be jointly and severally liable for such failure, and that the liability is a personal liability of the person against whom the penalty is assessed and not a liability of the plan. Finally, the section provides that the plan administrator has the opportunity to contest the assessment in administrative proceedings governed by Part 2570 of Title 29 of the Code of Federal Regulations, described below.

Several commenters requested that § 2560.502c–7(b)(1) be changed to shorten the maximum period for which a civil penalty may be assessed. Under the interim rule, the amount assessed under section 502(c)(7) for each separate violation is to be determined by the Department, taking into consideration the degree and/or willfulness of the failure or refusal to provide a notice of blackout period. The rule further provides that the maximum amount assessed for each violation shall not exceed $100 a day,[1] computed from the date of the administrator's failure or refusal to provide a notice of blackout period up to and including the date that is the final day of the blackout period for which the notice was required. The interim rule defines a failure or refusal to provide a notice of blackout period to mean a failure or refusal to provide notice of a blackout period to an affected plan participant or beneficiary at the time and in the manner prescribed by section 101(i) of the Act and § 2520.101–3. For purposes of calculating the amount to be assessed, a failure or refusal to provide a notice of blackout period with respect to any single participant or beneficiary is treated as a separate violation under section 101(i) of the Act and § 2520.101–3.

In general, the commenters requested that the rule be amended to provide that the penalty would only apply to the extent that a notice is late, *i.e.*, only days prior to the date on which notice is actually given would be counted in determining the penalty, and that the penalty calculation period would run to the end of the blackout period only in cases where no notice is provided. The commenters expressed concern that the interim rule exposes plan administrators who make a good faith effort to comply to potentially substantial penalties even in cases where the blackout notice is only one or two days late. These commenters suggested that their proposed change would give plan administrators an incentive to provide the notice as quickly as possible, even if late.

The blackout notice requirements are intended to ensure that plan participants and beneficiaries are afforded advance notice of plan imposed restrictions on their rights in order that they may take appropriate steps in anticipation of the restriction. The SOA expressly provides in section 502(c)(7) that the beginning date for calculating the penalty is the date of the administrator's failure or refusal to provide a notice of blackout period, but does not, however, specify an ending date for the penalty calculation. In adding section 101(i) to Title I of ERISA, the SOA established a 30-days advance notice requirement and listed exceptions to that general rule where less than 30 days notice was permitted. Failure to provide a timely blackout notice, therefore, serves to deprive affected participants and beneficiaries of the full period of time Congress concluded was the minimum period necessary for those individuals to sufficiently consider effects of the blackout period on their investments and financial plans. Accordingly, providing participants and beneficiaries a late notice does not serve to correct the violation. Moreover, the situations in which penalties are most likely to be assessed in this area are those where it already has been determined that the failure is not due to events that were unforeseeable or beyond the control of the plan administrator, nor due to avoiding a breach of fiduciary responsibility.

In connection with a failure to provide timely notice, when an administrator provides notice would be one factor to be taken into account in determining the degree or willfulness of a violation. In this regard, the Department would, for example, also take into account the feasibility of delaying the blackout period so as to provide the required advance notice, the length of time between the late issuance and the beginning of the blackout period, the effect of the lateness on the ability of affected participants and beneficiaries to take appropriate steps in anticipation of the restriction, actions implemented by the administrator to ameliorate adverse effects on participants and beneficiaries, and the length of the blackout period itself. Further, the Department notes that the ability of administrators to submit statements of reasonable cause (§ 2560.502c–7(e)) and to appeal civil penalty determinations (§ 2560.502c–7(h)) under the final rules ensures that administrators have the opportunity to pursue waivers or reductions of penalty amounts.

Several commenters sought clarification regarding whether the Department would waive penalties under § 2560.502c–7(d) in cases

[1] As discussed in more detail in a following section of this preamble, this document also contains a technical amendment to section § 2560.502c–7(b) designed to reflect the requirements of the Federal Civil Penalties Inflation Adjustment Act of 1990 (the 1990 Act), Pub. L. 101–410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996 (the Act), Pub. L. 104–134, 110 Stat. 1321–373. The Act amended the 1990 Act to require generally that federal agencies adjust certain civil monetary penalties for inflation no later than 180 days after the enactment of the Act, and at least once every four years thereafter, in accordance with the guidelines specified in the 1990 Act. The Act specifies that any such increase in a civil monetary penalty shall apply only to violations that occur after the date the increase takes effect.

involving inadvertent and minor violations. For example, one commenter suggested that the rule be clarified to indicate that civil penalties will not be assessed if a plan administrator, acting reasonably and in good faith, inadvertently fails to furnish a timely blackout notice to a small percentage of those entitled to receive the notice. Another commenter suggested that mistakes, such as misaddressed envelopes, misspelled names, especially occurring as the new blackout notification procedures are implemented, should be dealt with leniently where the errors are inadvertent and/or de minimus. Another commenter suggested that a plan administrator who makes reasonable good faith efforts to provide notices and who promptly corrects any failure that is brought to its attention should not be penalized.

As noted above, decisions regarding a waiver or reduction of penalty assessments will take into account a variety of factors on the facts and circumstances involved in each case. For this reason, it is not feasible to list specific criteria in the regulation that would be treated as mitigating circumstances in every case. Although, as also noted above, the Department will consider whether administrators acted reasonably and in good faith, and whether mistakes were inadvertent and promptly addressed, the provision in the interim rule allowing administrators to make showings regarding the ''degree and/or willfulness'' of the violation gives ample opportunity for extenuating circumstances to be raised and considered in the penalty assessment proceedings.

Another commenter requested clarification regarding how the Department will apply § 2560.502c–7(j), which provides that, ''if more than one person is responsible as administrator for the failure to provide a notice of blackout period * * * all such persons shall be jointly and severally liable for such failure.'' Section 502(c)(7) states that the civil penalty is assessable against a ''plan administrator.'' As the Department stated in the preamble to its parallel final rule, to be codified at 29 CFR 2520.101–3, implementing the notice requirements in ERISA section 101(i), references to plan administrator and administrator mean the ''administrator'' as defined in section 3(16)(A) of ERISA. In that regard, section 2560.502c–7(a)(1) expressly provides that ''the administrator (within the meaning of section 3(16)(A) of the Act) of an individual account plan * * * shall be liable for civil penalties assessed by the Secretary under section 502(c)(7) * * *'' The joint and several liability provision in § 2560.502c–7(j) is intended to make it clear that where the administrator is more than one person, *e.g.*, a committee, joint board, or other group of individuals, each person may be held separately liable for a notice violation under the civil penalty regulation.

One commenter suggested that the regulation be amended to include a one-year limit from the date a blackout period commences on the Department's ability to issue a notice of intent to assess civil penalties under section 502(c)(7). The Department notes that there is nothing in Title I of ERISA that establishes such a time limit on the Department's ability to assess civil penalties under section 502(c)(7), or under any of the other provisions of section 502(c) pursuant to which the Department has the authority to assess civil penalties for violations of Title I of ERISA. Accordingly, the Department does not believe it would be appropriate to adopt such a time limit as part of this rulemaking.

The same commenter also expressed concern that § 2560.502c–7(f) was ''harsh'' in providing that an administrator who fails to respond to a notice of intent to assess a penalty will be deemed to have admitted the facts alleged in the notice and waived the right to appear and contest the penalty assessment. A similar default provision applies in connection with the Department's other civil penalty proceedings under section 502(c) of the Act, and it is designed to ensure the Secretary's ability to effectively enforce section 502(c) of ERISA. Accordingly, the Department is not making any change to this provision in the final rule.

One commenter expressed concern about the assessment of substantial civil penalties for violations of the notice required to be provided by the administrator to the issuer under section 101(i)(2)(E) of ERISA in cases where the plan administrator is the issuer or an affiliate. The Department notes that section 502(c)(7) provides for a penalty to be assessed against a plan administrator for a ''failure or refusal to provide notice to participants and beneficiaries in accordance with section 101(i).'' In the Department's view, the section 502(c)(7) penalty is not applicable for failures to provide the notice to issuers required under section 101(i)(2)(E).

2. Procedures for Administrative Review of Assessment of Civil Penalties Under ERISA Section 502(c)(7)—§ 2570.130 et seq.

The interim rules added to part 2570, Subpart G, section 2570.130 through section 2570.141, to establish procedures for hearings before an Administrative Law Judge (ALJ) with respect to assessment by the Department of a civil penalty under ERISA section 502(c)(7), and for appealing an ALJ decision to the Secretary or his or her delegate. With regard to such procedures, the Secretary has established the Pension and Welfare Benefits Administration (PWBA) within the Department for purposes of carrying out most of the Secretary's responsibilities under ERISA. See Secretary's Order 1–87, 52 FR 13139 (April 27, 1987). The Department received no comments on these procedural rules, and, therefore, the final rules are issued without change from the interim rules.

3. Conforming Changes to Existing Civil Penalties Rules Under ERISA Sections 502(c)(2), 502(c)(5) and 502(c)(6)—§§ 2560.502c–2, 2560.502c–5, 2560.502c–6, and Subparts C, E, and F of Part 2570

The interim rules also amended the existing civil penalty assessment regulations under ERISA sections 502(c)(2), 502(c)(5) and 502(c)(6) in part 2560 and in Part 2570 of subchapter G, to conform them to the rules of practice and procedure being adopted for penalty proceedings under ERISA section 502(c)(7) in 29 CFR 2560.502c–7 and part 2570 Subpart G. The amendments affect certain rules for penalty assessment and administrative review in § 2560.502c–2, § 2560.502c–5, § 2560.502c–6, and subparts C, E, and F of Part 2570. The primary amendments were intended to conform the filing and service rules under § 2560.502c–2, § 2560.502c–5 and § 2560.502c–6 to those being adopted for proceedings under § 2560.502c–7. In addition, §§ 2560.502c–2(d) and (e), §§ 2560.502c–5(d) and (e), and §§ 2560.502c–6(d) and (e) were amended to use the clarifying language adopted in §§ 2560.502c–7(d) and (e) that better describes the statement of reasonable cause and penalty waiver procedures.

The Department received no comments in response to its request for comments on the conforming technical amendments to § 2560.502c–2, § 2560.502c–5, § 2560.502c–6, and subparts C, E, and F of Part 2570 which were adopted in the interim rule.

Therefore, except for the technical changes noted below intended to address the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, the interim rules are being adopted as final rules without change.

4. Technical Changes to §§ 2560.502c–2(b), 2560.502c–5(b), 2560.502c–6(b), 2560.502c–7(b), To Reflect the Requirements of the Federal Civil Penalties Inflation Adjustment Act of 1990, as Amended

This document also contains technical amendments to § 2560.502c–2(b), § 2560.502c–5(b), § 2560.502c–6(b), and § 2560.502c–7(b), regarding the maximum penalty amounts that may be assessed. The amendments are designed to reflect the requirements of the Federal Civil Penalties Inflation Adjustment Act of 1990 (the 1990 Act), Pub. L. 101–410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996 (the Act), Pub. L. 104–134, 110 Stat. 1321–373. The Act amended the 1990 Act to require generally that federal agencies adjust certain civil monetary penalties for inflation no later than 180 days after the enactment of the Act, and at least once every four years thereafter, in accordance with the guidelines specified in the 1990 Act, as amended. The Act specifies that any such increase in a civil monetary penalty shall apply only to violations that occur after the date the increase takes effect. The Department's civil monetary penalty inflation adjustment regulations are codified in part 2575 of Title 29 of the Code of Federal Regulations.[2] The technical amendments to § 2560.502c–2(b), § 2560.502c–5(b), § 2560.502c–6(b), and § 2560.502c–7(b) in this document are being made under section 505 of ERISA which authorizes the Department to prescribe such regulations as the Secretary finds necessary or appropriate to carry out the provisions of Title I of ERISA. As a general matter, the Administrative Procedure Act (APA) requires rulemakings to be published in the **Federal Register** and also mandates that an opportunity for comments be provided when an agency promulgates regulations. Section 553(b)(3)(B) of the APA exempts certain rules or agency procedures from the notice and comment requirements when an agency finds for good cause that notice and public comment are impracticable, unnecessary, or contrary to the public interest. The Department finds for good cause that notice and comment on these technical amendments to § 2560.502c–2(b), § 2560.502c–5(b), § 2560.502c–6(b), and § 2560.502c–6(b) is unnecessary. The amendments merely confirm that the maximum amount of the civil penalty assessable by the Department under its implementing regulations is the maximum amount stated in sections 502(c)(2), 502(c)(5), 502(c)(6), and 502(c)(7), or such other maximum amount as may be established by regulation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended. Accordingly, the Secretary determined that these technical changes were appropriate to issue in final form.

5. Effective Date

These final rules are effective January 26, 2003. The final rules establishing procedures relating to the assessment of civil penalties by the Department under section 502(c)(7) of ERISA shall apply to failures or refusals by plan administrators to provide notices of a blackout period as required by section 101(i) of ERISA and 29 CFR 2520.101–3 on or after that date. Pursuant to section 553(c) of the APA, the Department finds good cause for these rules to be effective less than 30 days after publication. The Department believes that having the blackout notice civil penalty rules effective on the effective date of the underlying statutory provisions will avoid confusion for plan administrators, and the amendments to the existing civil penalty rules under ERISA sections 502(c)(2), 502(c)(5), and 502(c)(6) merely incorporate certain technical improvements being adopted as part of the section 502(c)(7) implementing regulations. Moreover, the limited extent of the differences between the instant rule and the interim rules will minimize any difficulties in complying with these rules by the effective date.

C. Regulatory Impact Analysis

Executive Order 12866

Under Executive Order 12866 (58 FR 51735), the Department must determine whether a regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive 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. The Department has determined that these final rules relating to the assessment of civil monetary penalties under section 502(c)(7) of ERISA are significant in that they provide guidance on the administration and enforcement of the notice provisions of section 101(i) of ERISA. Separate guidance on the notice requirements of section 101(i) (Final Rule Relating to Notice of Blackout Periods to Participants and Beneficiaries), also published in today's issue of the **Federal Register**, is also considered significant within the meaning of section 3(f)(4) of the Executive Order. Accordingly, OMB has reviewed the final rules pertaining to both the blackout notice and the related civil penalty pursuant to the terms of the Executive Order.

The principal benefit of the statutory penalty provisions and these final rules will be greater adherence to the requirement of ERISA section 101(i) that plan administrators provide advance written notice to participants and beneficiaries in individual account retirement plans whose existing rights to direct investments in their accounts or to obtain loans or distributions will be suspended or limited. The implementation of orderly and consistent processes for the assessment of penalties and the review of such assessments will also be beneficial for plan administrators. The procedures established in these final rules will also allow facts and circumstances related to a failure or refusal to provide appropriate notice to be presented by a plan administrator and to be taken into consideration by the Department in assessing penalties under ERISA section 502(c)(7).

[2] The Department will be publishing shortly a separate final rule implementing the required inflation adjustment for this adjustment cycle. Application of the required methodology will result in a small increase in only two Title I civil penalty amounts. Specifically, the civil monetary penalty set by ERISA section 502(c)(5) for a failure or refusal on the part of certain administrators to file Form M–1 information with the Department as required by ERISA section 101(g) will be adjusted from $1,000 to $1,100 per day, and the civil monetary penalty set by ERISA section 502(c)(6) for a failure on the part of the plan administrator to furnish certain plan documents to the Secretary on request will be adjusted from $100 to $110 per day with the penalty cap being adjusted from $1,000 to $1,100 per request. No adjustments were required for any other civil penalties under Title I of ERISA.

The rate of failure or refusal to provide blackout notices where required, and the dollar value of penalties to be assessed in those cases cannot be predicted. The civil penalty provisions of the statute and these final rules impose no mandatory requirements or costs, except where a plan administrator has failed to provide the notice required in ERISA section 101(i).

The technical amendments conforming the existing regulatory provisions relating to the assessment of civil penalties under sections 502(c)(2), (c)(5), and (c)(6) of ERISA are procedural in nature, and similarly impose no additional requirements or costs.

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 that are likely to have a significant economic impact on a substantial number of small entities. For purposes of its analyses under the RFA, PWBA continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reporting for pension plans that cover fewer than 100 participants. Because this guidance was originally issued an interim final rule pursuant to the authority and deadlines prescribed in sections 306(b)(2) of SOA, RFA does not apply, and regulatory flexibility analysis is not required. However, in the interim final rule, the Department requested comments regarding any special issues facing small plans, or any alternative approaches that would assist small plans with compliance with respect to the assessment of civil penalties under ERISA section 502(c)(7) and the conforming amendments to existing administrative and procedural regulations relating to the assessment of civil penalties under ERISA sections 502(c)(2), (c)(5), and (c)(6). No such comments were received.

The terms of the statute pertaining to the assessment of civil penalties for failure to provide notices to plan participants and beneficiaries in the event of a blackout do not vary relative to plan or plan administrator size. The operation of the statute will normally result in the assessment of lower penalties where small plans are involved because a violation with respect to a single participant or beneficiary is treated as a separate violation for purposes of calculating the penalty. The opportunity for a plan administrator to present facts and circumstances related to a failure or refusal to provide appropriate notice that may be taken into consideration by the Department in assessing penalties under ERISA section 502(c)(7) may offer some degree of flexibility to small entities subject to penalty assessments. Penalty assessments will have no direct impact on small plans because the plan administrator assessed a civil penalty is personally liable for the payment of that penalty pursuant to section 2560.502c–7(j).

Paperwork Reduction Act

This Final Rule on Assessment of Civil Penalties under ERISA section 502(c)(7) is not subject to the requirements of the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3501 *et seq.*) because it does not contain a collection of information as defined in 44 U.S.C. 3502(3). Information otherwise provided to the Secretary in connection with the administrative and procedural requirements of these final rules is excepted from coverage by PRA 95 pursuant to 44 U.S.C. 3518(c)(1)(B), and related regulations at 5 CFR 1320.4(a)(2) and (c). These provisions generally except information provided as a result of an agency's civil or administrative action, investigation, or audit. This exception also applies to the conforming amendments to administrative and procedural rules pertaining to the civil penalty provisions of ERISA sections 502(c)(2), 502(c)(5), and 502(c)(6).

Congressional Review Act

The rules being issued here are 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 have been transmitted to Congress and the Comptroller General for review. The rule is not a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, these rules do not include any Federal mandate that may result in expenditures by State, local, or tribal governments, and does not impose an annual burden exceeding $100 million on the private sector.

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, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. These final rules do 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 these final rules do not alter the fundamental reporting and disclosure, or administration and enforcement provisions of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects

29 CFR Part 2560

Employee benefit plans, Employee Retirement Income Security Act, Law enforcement, Pensions.

29 CFR Part 2570

Administrative practice and procedure, Employee benefit plans, Employee Retirement Income Security Act, Law enforcement, Pensions.

In view of the foregoing, Parts 2560 and 2570 of Chapter XXV of title 29 of the Code of Federal Regulations are amended as follows:

PART 2560—RULES AND REGULATIONS FOR ADMINISTRATION AND ENFORCEMENT

1. The authority citation for Part 2560 continues to read as follows:

Authority: 29 U.S.C. 1132, 1135, and Secretary's Order 1–87, 52 FR 13139 (April 21, 1987).

Section 2560.503–1 also issued under 29 U.S.C. 1133.

Section 2560.502(c)(7) also issued under sec. 306 (b)(2) of Pub. L. 107–204, 116 Stat. 745.

2. Revise § 2560.502c–2, paragraphs (b)(1), (d), (e), (f), (g), (h), and (i) to read as follows:

§ 2560.502c–2 Civil penalties under section 502(c)(2).

* * * * *

(b) *Amount assessed.* (1) The amount assessed under section 502(c)(2) of the Act shall be determined by the Department of Labor, taking into consideration the degree and/or willfulness of the failure or refusal to file the annual report. However, the amount assessed under section 502(c)(2) of the Act shall not exceed $1,000 a day (or such other maximum amount as may be established by regulation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended), computed from the date of the administrator's failure or refusal to file the annual report and, except as provided in paragraph (b)(2) of this section, continuing up to the date on which an annual report satisfactory to the Secretary is filed.

* * * * *

(d) *Reconsideration or waiver of penalty to be assessed.* The Department may determine that all or part of the penalty amount in the notice of intent to assess a penalty shall not be assessed on a showing that the administrator complied with the requirements of section 101(b)(1) of the Act or on a showing by the administrator of mitigating circumstances regarding the degree or willfulness of the noncompliance.

(e) *Showing of reasonable cause.* Upon issuance by the Department of a notice of intent to assess a penalty, the administrator shall have thirty (30) days from the date of service of the notice, as described in paragraph (i) of this section, to file a statement of reasonable cause explaining why the penalty, as calculated, should be reduced, or not be assessed, for the reasons set forth in paragraph (d) of this section. Such statement must be made in writing and set forth all the facts alleged as reasonable cause for the reduction or nonassessment of the penalty. The statement must contain a declaration by the administrator that the statement is made under the penalties of perjury.

(f) *Failure to file a statement of reasonable cause.* Failure of an administrator to file a statement of reasonable cause within the thirty (30) day period described in paragraph (e) of this section shall be deemed to constitute a waiver of the right to appear and contest the facts alleged in the notice of intent, and such failure shall be deemed an admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(2) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of § 2570.61(g) of this chapter, forty-five (45) days from the date of service of the notice.

(g) *Notice of the determination on statement of reasonable cause.* (1) The Department, following a review of all the facts alleged in support of no assessment or a complete or partial waiver of the penalty, shall notify the administrator, in writing, of its determination to waive the penalty, in whole or in part, and/or assess a penalty. If it is the determination of the Department to assess a penalty, the notice shall indicate the amount of the penalty, not to exceed the amount described in paragraph (c) of this section. This notice is a ''pleading'' for purposes of § 2570.61(m) of this chapter.

(2) Except as provided in paragraph (h) of this section, a notice issued pursuant to paragraph (g)(1) of this section, indicating the Department's intention to assess a penalty, shall become a final order, within the meaning of § 2570.61(g) of this chapter, forty-five (45) days from the date of service of the notice.

(h) *Administrative hearing.* A notice issued pursuant to paragraph (g) of this section will not become a final order, within the meaning of § 2570.61(g) of this chapter, if, within thirty (30) days from the date of the service of the notice, the administrator or a representative thereof files a request for a hearing under §§ 2570.60 through 2570.71 of this chapter, and files an answer to the notice. The request for hearing and answer must be filed in accordance with § 2570.62 of this chapter and § 18.4 of this title. The answer opposing the proposed sanction shall be in writing, and supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to paragraph (g) of this section.

(i) *Service of notices and filing of statements.* (1) Service of a notice for purposes of paragraphs (c) and (g) of this section shall be made:

(i) By delivering a copy to the administrator or representative thereof;

(ii) By leaving a copy at the principal office, place of business, or residence of the administrator or representative thereof; or

(iii) By mailing a copy to the last known address of the administrator or representative thereof.

(2) If service is accomplished by certified mail, service is complete upon mailing. If service is by regular mail, service is complete upon receipt by the addressee. When service of a notice under paragraph (c) or (g) of this section is by certified mail, five (5) days shall be added to the time allowed by these rules for the filing of a statement, or a request for hearing and answer, as applicable.

(3) For purposes of this section, a statement of reasonable cause shall be considered filed:

(i) Upon mailing, if accomplished using United States Postal Service certified mail or Express Mail;

(ii) Upon receipt by the delivery service, if accomplished using a ''designated private delivery service'' within the meaning of 26 U.S.C. 7502(f);

(iii) Upon transmittal, if transmitted in a manner specified in the notice of intent to assess a penalty as a method of transmittal to be accorded such special treatment; or

(iv) In the case of any other method of filing, upon receipt by the Department at the address provided in the notice of intent to assess a penalty.

* * * * *

3. Revise § 2560.502c–5, paragraphs (b)(1), (d), (e), (f), (g), (h), and (i) to read as follows:

§ 2560.502c–5 Civil penalties under section 502(c)(5).

* * * * *

(b) *Amount assessed.* (1) The amount assessed under section 502(c)(5) of the Act shall be determined by the Department of Labor, taking into consideration the degree and/or willfulness of the failure or refusal to file the report. However, the amount assessed under section 502(c)(5) of the Act shall not exceed $1,000 a day (or such other maximum amount as may be established by regulation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended), computed from the date of the administrator's failure or refusal to file the report and, except as provided in paragraph (b)(2) of this section, continuing up to the date on which a report meeting the requirements of

section 101(g) and § 2520.101–2, as determined by the Secretary, is filed.

* * * * *

(d) *Reconsideration or waiver of penalty to be assessed.* The Department may determine that all or part of the penalty amount in the notice of intent to assess a penalty shall not be assessed on a showing that the administrator complied with the requirements of section 101(g) of the Act or on a showing by the administrator of mitigating circumstances regarding the degree or willfulness of the noncompliance.

(e) *Showing of reasonable cause.* Upon issuance by the Department of a notice of intent to assess a penalty, the administrator shall have thirty (30) days from the date of service of the notice, as described in paragraph (i) of this section, to file a statement of reasonable cause explaining why the penalty, as calculated, should be reduced, or not be assessed, for the reasons set forth in paragraph (d) of this section. Such statement must be made in writing and set forth all the facts alleged as reasonable cause for the reduction or nonassessment of the penalty. The statement must contain a declaration by the administrator that the statement is made under the penalties of perjury.

(f) *Failure to file a statement of reasonable cause.* Failure of an administrator to file a statement of reasonable cause within the thirty (30) day period described in paragraph (e) of this section shall be deemed to constitute a waiver of the right to appear and contest the facts alleged in the notice of intent, and such failure shall be deemed an admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(5) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of § 2570.91(g) of this chapter, forty-five (45) days from the date of service of the notice.

(g) *Notice of the determination on statement of reasonable cause.* (1) The Department, following a review of all the facts alleged in support of no assessment or a complete or partial waiver of the penalty, shall notify the administrator, in writing, of its determination to waive the penalty, in whole or in part, and/or assess a penalty. If it is the determination of the Department to assess a penalty, the notice shall indicate the amount of the penalty, not to exceed the amount described in paragraph (c) of this section, and a brief statement of the reasons for assessing the penalty. This notice is a ''pleading'' for purposes of § 2570.91(m) of this chapter.

(2) Except as provided in paragraph (h) of this section, a notice issued pursuant to paragraph (g)(1) of this section, indicating the Department's intention to assess a penalty, shall become a final order, within the meaning of § 2570.91(g) of this chapter, forty-five (45) days from the date of service of the notice.

(h) *Administrative hearing.* A notice issued pursuant to paragraph (g) of this section will not become a final order, within the meaning of § 2570.91(g) of this chapter, if, within thirty (30) days from the date of the service of the notice, the administrator or a representative thereof files a request for a hearing under §§ 2570.90 through 2570.101 of this chapter, and files an answer to the notice. The request for hearing and answer must be filed in accordance with § 2570.92 of this chapter and § 18.4 of this title. The answer opposing the proposed sanction shall be in writing, and supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to paragraph (g) of this section.

(i) *Service of notices and filing of statements.* (1) Service of a notice for purposes of paragraphs (c) and (g) of this section shall be made:

(i) By delivering a copy to the administrator or representative thereof;

(ii) By leaving a copy at the principal office, place of business, or residence of the administrator or representative thereof; or

(iii) By mailing a copy to the last known address of the administrator or representative thereof.

(2) If service is accomplished by certified mail, service is complete upon mailing. If service is by regular mail, service is complete upon receipt by the addressee. When service of a notice under paragraph (c) or (g) of this section is by certified mail, five (5) days shall be added to the time allowed by these rules for the filing of a statement, or a request for hearing and answer, as applicable.

(3) For purposes of this section, a statement of reasonable cause shall be considered filed:

(i) Upon mailing, if accomplished using United States Postal Service certified mail or Express Mail;

(ii) Upon receipt by the delivery service, if accomplished using a ''designated private delivery service'' within the meaning of 26 U.S.C. 7502(f);

(iii) Upon transmittal, if transmitted in a manner specified in the notice of intent to assess a penalty as a method of transmittal to be accorded such special treatment; or

(iv) In the case of any other method of filing, upon receipt by the Department at the address provided in the notice of intent to assess a penalty.

* * * * *

4. Revise § 2560.502c–6, paragraphs (b)(1), (d), (e), (f), (g), (h), and (i) to read as follows:

§ 2560.502c–6 Civil penalties under section 502(c)(6).

* * * * *

(b) *Amount assessed.* (1) The amount assessed under section 502(c)(6) of the Act shall be determined by the Department of Labor, taking into consideration the degree and/or willfulness of the failure or refusal to furnish any document or documents requested by the Department under section 104(a)(6) of the Act. However, the amount assessed under section 502(c)(6) of the Act shall not exceed $100 a day or $1,000 per request (or such other maximum amounts as may be established by regulation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended), computed from the date of the administrator's failure or refusal to furnish any document or documents requested by the Department.

* * * * *

(d) *Reconsideration or waiver of penalty to be assessed.* The Department may determine that all or part of the penalty amount in the notice of intent to assess a penalty shall not be assessed on a showing that the administrator complied with the requirements of section 104(a)(6) of the Act or on a showing by the administrator of mitigating circumstances regarding the degree or willfulness of the noncompliance.

(e) *Showing of reasonable cause.* Upon issuance by the Department of a notice of intent to assess a penalty, the administrator shall have thirty (30) days from the date of service of the notice, as described in paragraph (i) of this section, to file a statement of reasonable cause explaining why the penalty, as calculated, should be reduced or not be assessed, for the reasons set forth in paragraph (d) of this section. Such statement must be made in writing and set forth all the facts alleged as reasonable cause for the reduction or nonassessment of the penalty. The statement must contain a declaration by the administrator that the statement is made under the penalties of perjury.

(f) *Failure to file a statement of reasonable cause.* Failure to file a statement of reasonable cause within the 30 day period described in paragraph (e)

of this section shall be deemed to constitute a waiver of the right to appear and contest the facts alleged in the notice of intent, and such failure shall be deemed an admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(6) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of § 2570.111(g) of this chapter, forty-five (45) days from the date of service of the notice.

(g) *Notice of determination on statement of reasonable cause.* (1) The Department, following a review of all of the facts alleged in support of no assessment or a complete or partial waiver of the penalty, shall notify the administrator, in writing, of its determination not to assess or to waive the penalty, in whole or in part, and/or assess a penalty. If it is the determination of the Department to assess a penalty, the notice shall indicate the amount of the penalty, not to exceed the amount described in paragraph (c) of this section. This notice is a ''pleading'' for purposes of § 2570.111(m) of this chapter.

(2) Except as provided in paragraph (h) of this section, a notice issued pursuant to paragraph (g)(1) of this section, indicating the Department's intention to assess a penalty, shall become a final order, within the meaning of § 2570.111(g) of this chapter, forty-five (45) days from the date of service of the notice.

(h) *Administrative hearing.* A notice issued pursuant to paragraph (g) of this section will not become a final order, within the meaning of § 2570.91(g) of this chapter, if, within thirty (30) days from the date of the service of the notice, the administrator or a representative thereof files a request for a hearing under §§ 2570.110 through 2570.121 of this chapter, and files an answer to the notice. The request for hearing and answer must be filed in accordance with § 2570.112 of this chapter and § 18.4 of this title. The answer opposing the proposed sanction shall be in writing, and supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to paragraph (g) of this section.

(i) *Service of notices and filing of statements.* (1) Service of a notice for purposes of paragraphs (c) and (g) of this section shall be made:

(i) By delivering a copy to the administrator or representative thereof;

(ii) By leaving a copy at the principal office, place of business, or residence of the administrator or representative thereof; or

(iii) By mailing a copy to the last known address of the administrator or representative thereof.

(2) If service is accomplished by certified mail, service is complete upon mailing. If service is by regular mail, service is complete upon receipt by the addressee. When service of a notice under paragraph (c) or (g) of this section is by certified mail, five (5) days shall be added to the time allowed by these rules for the filing of a statement, or a request for hearing and answer, as applicable.

(3) For purposes of this section, a statement of reasonable cause shall be considered filed:

(i) Upon mailing, if accomplished using United States Postal Service certified mail or Express Mail;

(ii) Upon receipt by the delivery service, if accomplished using a ''designated private delivery service'' within the meaning of 26 U.S.C. 7502(f);

(iii) Upon transmittal, if transmitted in a manner specified in the notice of intent to assess a penalty as a method of transmittal to be accorded such special treatment; or

(iv) In the case of any other method of filing, upon receipt by the Department at the address provided in the notice of intent to assess a penalty.

* * * * *

5. Revise § 2560.502c–7 to read as follows:

§ 2560.502c–7 Civil penalties under section 502(c)(7).

(a) *In general.* (1) Pursuant to the authority granted the Secretary under section 502(c)(7) of the Employee Retirement Income Security Act of 1974, as amended (the Act), the administrator (within the meaning of section 3(16)(A) of the Act) of an individual account plan (within the meaning of section 101(i)(8) of the Act and § 2520.101–3(d)(2) of this chapter), shall be liable for civil penalties assessed by the Secretary under section 502(c)(7) of the Act for failure or refusal to provide notice of a blackout period to affected participants and beneficiaries in accordance with section 101(i) of the Act and § 2520.101–3 of this chapter.

(2) For purposes of this section, a failure or refusal to provide a notice of blackout period shall mean a failure or refusal, in whole or in part, to provide notice of a blackout period to an affected plan participant or beneficiary at the time and in the manner prescribed by section 101(i) of the Act and § 2520.101–3 of this chapter.

(b) *Amount assessed.* (1) The amount assessed under section 502(c)(7) of the Act for each separate violation shall be determined by the Department of Labor, taking into consideration the degree and/or willfulness of the failure or refusal to provide a notice of blackout period. However, the amount assessed for each violation under section 502(c)(7) of the Act shall not exceed $100 a day (or such other maximum amount as may be established by regulation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended), computed from the date of the administrator's failure or refusal to provide a notice of blackout period up to and including the date that is the final day of the blackout period for which the notice was required.

(2) For purposes of calculating the amount to be assessed under this section, a failure or refusal to provide a notice of blackout period with respect to any single participant or beneficiary shall be treated as a separate violation under section 101(i) of the Act and § 2520.101–3 of this chapter.

(c) *Notice of intent to assess a penalty.* Prior to the assessment of any penalty under section 502(c)(7) of the Act, the Department shall provide to the administrator of the plan a written notice indicating the Department's intent to assess a penalty under section 502(c)(7) of the Act, the amount of such penalty, the number of participants and beneficiaries on which the penalty is based, the period to which the penalty applies, and the reason(s) for the penalty.

(d) *Reconsideration or waiver of penalty to be assessed.* The Department may determine that all or part of the penalty amount in the notice of intent to assess a penalty shall not be assessed on a showing that the administrator complied with the requirements of section 101(i) of the Act or on a showing by the administrator of mitigating circumstances regarding the degree or willfulness of the noncompliance.

(e) *Showing of reasonable cause.* Upon issuance by the Department of a notice of intent to assess a penalty, the administrator shall have thirty (30) days from the date of service of the notice, as described in paragraph (i) of this section, to file a statement of reasonable cause explaining why the penalty, as calculated, should be reduced, or not be assessed, for the reasons set forth in paragraph (d) of this section. Such statement must be made in writing and set forth all the facts alleged as reasonable cause for the reduction or nonassessment of the penalty. The statement must contain a declaration by the administrator that the statement is made under the penalties of perjury.

(f) *Failure to file a statement of reasonable cause.* Failure to file a statement of reasonable cause within the

30 day period described in paragraph (e) of this section shall be deemed to constitute a waiver of the right to appear and contest the facts alleged in the notice of intent, and such failure shall be deemed an admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(7) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of § 2570.131(g) of this chapter, forty-five (45) days from the date of service of the notice.

(g) *Notice of determination on statement of reasonable cause.* (1) The Department, following a review of all of the facts in a statement of reasonable cause alleged in support of no assessment or a complete or partial waiver of the penalty, shall notify the administrator, in writing, of its determination on the statement of reasonable cause and its determination whether to waive the penalty in whole or in part, and/or assess a penalty. If it is the determination of the Department to assess a penalty, the notice shall indicate the amount of the penalty assessment, not to exceed the amount described in paragraph (c) of this section. This notice is a ''pleading'' for purposes of § 2570.131(m) of this chapter.

(2) Except as provided in paragraph (h) of this section, a notice issued pursuant to paragraph (g)(1) of this section, indicating the Department's determination to assess a penalty, shall become a final order, within the meaning of § 2570.131(g) of this chapter, forty-five (45) days from the date of service of the notice.

(h) *Administrative hearing.* A notice issued pursuant to paragraph (g) of this section will not become a final order, within the meaning of § 2570.131(g) of this chapter, if, within thirty (30) days from the date of the service of the notice, the administrator or a representative thereof files a request for a hearing under §§ 2570.130 through 2570.141 of this chapter, and files an answer to the notice. The request for hearing and answer must be filed in accordance with § 2570.132 of this chapter and § 18.4 of this title. The answer opposing the proposed sanction shall be in writing, and supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to paragraph (g) of this section.

(i) *Service of notices and filing of statements.* (1) Service of a notice for purposes of paragraphs (c) and (g) of this section shall be made:

(i) By delivering a copy to the administrator or representative thereof;

(ii) By leaving a copy at the principal office, place of business, or residence of the administrator or representative thereof; or

(iii) By mailing a copy to the last known address of the administrator or representative thereof.

(2) If service is accomplished by certified mail, service is complete upon mailing. If service is by regular mail, service is complete upon receipt by the addressee. When service of a notice under paragraph (c) or (g) of this section is by certified mail, five (5) days shall be added to the time allowed by these rules for the filing of a statement or a request for hearing and answer, as applicable.

(3) For purposes of this section, a statement of reasonable cause shall be considered filed:

(i) Upon mailing, if accomplished using United States Postal Service certified mail or Express Mail;

(ii) Upon receipt by the delivery service, if accomplished using a ''designated private delivery service'' within the meaning of 26 U.S.C. 7502(f);

(iii) Upon transmittal, if transmitted in a manner specified in the notice of intent to assess a penalty as a method of transmittal to be accorded such special treatment; or

(iv) In the case of any other method of filing, upon receipt by the Department at the address provided in the notice of intent to assess a penalty.

(j) *Liability.* (1) If more than one person is responsible as administrator for the failure to provide a notice of blackout period under section 101(i) of the Act and its implementing regulations (§ 2520.101–3 of this chapter), all such persons shall be jointly and severally liable for such failure.

(2) Any person, or persons under paragraph (j)(1) of this section, against whom a civil penalty has been assessed under section 502(c)(7) of the Act, pursuant to a final order, within the meaning of § 2570.131(g) of this chapter, shall be personally liable for the payment of such penalty.

(k) *Cross-reference.* See §§ 2570.130 through 2570.141 of this chapter for procedural rules relating to administrative hearings under section 502(c)(7) of the Act.

PART 2570—PROCEDURAL REGULATIONS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

6. The authority citation for Part 2570 continues to read as follows:

Authority: 29 U.S.C. 1021, 1108, 1132, 1135, 5 U.S.C. 8477; Reorganization Plan No. 4 of 1978; Secretary of Labor's Order 1–87.

Subpart G is also issued under sec. 306(b)(2) of Pub.L. 107–204, 116 Stat. 745.

7. Revise § 2570.61(c) to read as follows:

§ 2570.61 Definitions.

* * * * *

(c) *Answer* means a written statement that is supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to § 2560.502c–2(g) of this chapter.

* * * * *

8. Revise § 2570.64 to read as follows:

§ 2570.64 Consequences of default.

For 502(c)(2) civil penalty proceedings, this section shall apply in lieu of § 18.5(a) and (b) of this title. Failure of the respondent to file an answer to the notice of determination described in § 2560.502c–2(g) of this chapter within the 30 day period provided by § 2560.502c–2(h) of this chapter shall be deemed to constitute a waiver of his or her right to appear and contest the allegations of the notice of determination, and such failure shall be deemed to be an admission of the facts as alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(2) of the Act. Such notice shall then become the final order of the Secretary, within the meaning of § 2570.61(g) of this subpart, forty-five (45) days from the date of service of the notice.

9. Revise § 2570.94 to read as follows:

§ 2570.94 Consequences of default.

For 502(c)(5) civil penalty proceedings, this section shall apply in lieu of § 18.5(a) and (b) of this title. Failure of the respondent to file an answer to the notice of determination described in § 2560.502c–5(g) of this chapter within the 30 day period provided by § 2560.502c–5(h) of this chapter shall be deemed to constitute a waiver of his or her right to appear and contest the allegations of the notice of determination, and such failure shall be deemed to be an admission of the facts as alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(5) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of § 2570.91(g) of this subpart, forty-five (45) days from the date of the service of the notice.

10. Revise § 2570.114 to read as follows:

§ 2570.114 Consequences of default.

For 502(c)(6) civil penalty proceedings, this section shall apply in lieu of § 18.5(a) and (b) of this title. Failure of the respondent to file an answer to the notice of determination described in § 2560.502c–6(g) of this chapter within the 30 day period provided by § 2560.502c–6(h) of this chapter shall be deemed to constitute a waiver of his or her right to appear and contest the allegations of the notice of determination, and such failure shall be deemed to be an admission of the facts as alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(6) of the Act. Such notice shall then become the final order of the Secretary, within the meaning of § 2570.111(g) of this subpart, forty-five (45) days from the date of service of the notice.

11. Revise Subpart G to Part 2570 to read as follows:

Subpart G—Procedures for the Assessment of Civil Penalties under ERISA Section 502(c)(7)

Sec.

2570.130 Scope of rules.
2570.131 Definitions.
2570.132 Service: Copies of documents and pleadings.
2570.133 Parties, how designated.
2570.134 Consequences of default.
2570.135 Consent order or settlement.
2570.136 Scope of discovery.
2570.137 Summary decision.
2570.138 Decision of the administrative law judge.
2570.139 Review by the Secretary.
2570.140 Scope of review.
2570.141 Procedures for review by the Secretary.

Subpart G—Procedures for the Assessment of Civil Penalties Under ERISA Section 502(c)(7)

§ 2570.130 Scope of rules.

The rules of practice set forth in this subpart are applicable to ''502(c)(7) civil penalty proceedings'' (as defined in § 2570.131(n) of this subpart) under section 502(c)(7) of the Employee Retirement Income Security Act of 1974, as amended (the Act). The rules of procedure for administrative hearings published by the Department's Office of Administrative Law Judges at Part 18 of this title will apply to matters arising under ERISA section 502(c)(7) except as modified by this subpart. These proceedings shall be conducted as expeditiously as possible, and the parties shall make every effort to avoid delay at each stage of the proceedings.

§ 2570.131 Definitions.

For 502(c)(7) civil penalty proceedings, this section shall apply in lieu of the definitions in § 18.2 of this title:

(a) *Adjudicatory proceeding* means a judicial-type proceeding before an administrative law judge leading to the formulation of a final order;

(b) *Administrative law judge* means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105;

(c) *Answer* means a written statement that is supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to § 2560.502c–7(g) of this chapter;

(d) *Commencement of proceeding* is the filing of an answer by the respondent;

(e) *Consent agreement* means any written document containing a specified proposed remedy or other relief acceptable to the Department and consenting parties;

(f) *ERISA* means the Employee Retirement Income Security Act of 1974, as amended;

(g) *Final order* means the final decision or action of the Department of Labor concerning the assessment of a civil penalty under ERISA section 502(c)(7) against a particular party. Such final order may result from a decision of an administrative law judge or the Secretary, the failure of a party to file a statement of reasonable cause described in § 2560.502c–7(e) of this chapter within the prescribed time limits, or the failure of a party to invoke the procedures for hearings or appeals under this title within the prescribed time limits. Such a final order shall constitute final agency action within the meaning of 5 U.S.C. 704;

(h) *Hearing* means that part of a proceeding which involves the submission of evidence, by either oral presentation or written submission, to the administrative law judge;

(i) *Order* means the whole or any part of a final procedural or substantive disposition of a matter under ERISA section 502(c)(7);

(j) *Party* includes a person or agency named or admitted as a party to a proceeding;

(k) *Person* includes an individual, partnership, corporation, employee benefit plan, association, exchange or other entity or organization;

(l) *Petition* means a written request, made by a person or party, for some affirmative action;

(m) *Pleading* means the notice as defined in § 2560.502c–7(g) of this chapter, the answer to the notice, any supplement or amendment thereto, and any reply that may be permitted to any answer, supplement or amendment;

(n) *502(c)(7) civil penalty proceeding* means an adjudicatory proceeding relating to the assessment of a civil penalty provided for in section 502(c)(7) of ERISA;

(o) *Respondent* means the party against whom the Department is seeking to assess a civil sanction under ERISA section 502(c)(7);

(p) *Secretary* means the Secretary of Labor and includes, pursuant to any delegation of authority by the Secretary, any assistant secretary (including the Assistant Secretary for Pension and Welfare Benefits), administrator, commissioner, appellate body, board, or other official; and

(q) *Solicitor* means the Solicitor of Labor or his or her delegate.

§ 2570.132 Service: Copies of documents and pleadings.

For 502(c)(7) penalty proceedings, this section shall apply in lieu of § 18.3 of this title.

(a) *General.* Copies of all documents shall be served on all parties of record. All documents should clearly designate the docket number, if any, and short title of all matters. All documents to be filed shall be delivered or mailed to the Chief Docket Clerk, Office of Administrative Law Judges, 800 K Street, NW., Suite 400, Washington, DC 20001–8002, or to the OALJ Regional Office to which the proceeding may have been transferred for hearing. Each document filed shall be clear and legible.

(b) *By parties.* All motions, petitions, pleadings, briefs, or other documents shall be filed with the Office of Administrative Law Judges with a copy, including any attachments, to all other parties of record. When a party is represented by an attorney, service shall be made upon the attorney. Service of any document upon any party may be made by personal delivery or by mailing a copy to the last known address. The Department shall be served by delivery to the Associate Solicitor, Plan Benefits Security Division, ERISA section 502(c)(7) Proceeding, P.O. Box 1914, Washington, DC 20013. The person serving the document shall certify to the manner and date of service.

(c) *By the Office of Administrative Law Judges.* Service of orders, decisions and all other documents shall be made by regular mail to the last known address.

(d) *Form of pleadings.* (1) Every pleading shall contain information indicating the name of the Pension and

Welfare Benefits Administration (PWBA) as the agency under which the proceeding is instituted, the title of the proceeding, the docket number (if any) assigned by the Office of Administrative Law Judges and a designation of the type of pleading or paper (*e.g.*, notice, motion to dismiss, etc.). The pleading or paper shall be signed and shall contain the address and telephone number of the party or person representing the party. Although there are no formal specifications for documents, they should be typewritten when possible on standard size 8½ x 11 inch paper.

(2) Illegible documents, whether handwritten, typewritten, photocopied, or otherwise, will not be accepted. Papers may be reproduced by any duplicating process provided all copies are clear and legible.

§ 2570.133 Parties, how designated.

For 502(c)(7) civil penalty proceedings, this section shall apply in lieu of § 18.10 of this title.

(a) The term ''party'' wherever used in this subpart shall include any natural person, corporation, employee benefit plan, association, firm, partnership, trustee, receiver, agency, public or private organization, or government agency. A party against whom a civil penalty is sought shall be designated as ''respondent.'' The Department shall be designated as the ''complainant.''

(b) Other persons or organizations shall be permitted to participate as parties only if the administrative law judge finds that the final decision could directly and adversely affect them or the class they represent, that they may contribute materially to the disposition of the proceedings and their interest is not adequately represented by existing parties, and that in the discretion of the administrative law judge the participation of such persons or organizations would be appropriate.

(c) A person or organization not named as a respondent wishing to participate as a party under this section shall submit a petition to the administrative law judge within fifteen (15) days after the person or organization has knowledge of or should have known about the proceeding. The petition shall be filed with the administrative law judge and served on each person who or organization that has been made a party at the time of filing. Such petition shall concisely state:

(1) Petitioner's interest in the proceeding;

(2) How his or her participation as a party will contribute materially to the disposition of the proceeding;

(3) Who will appear for petitioner;

(4) The issues on which petitioner wishes to participate; and

(5) Whether petitioner intends to present witnesses.

(d) Objections to the petition may be filed by a party within fifteen (15) days of the filing of the petition. If objections to the petition are filed, the administrative law judge shall then determine whether petitioner has the requisite interest to be a party in the proceedings, as defined in paragraph (b) of this section, and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interests, the administrative law judge may request all such petitioners to designate a single representative, or he or she may recognize one or more of such petitioners. The administrative law judge shall give each such petitioner, as well as the parties, written notice of the decision on his or her petition. For each petition granted, the administrative law judge shall provide a brief statement of the basis of the decision. If the petition is denied, he or she shall briefly state the grounds for denial and shall then treat the petition as a request for participation as *amicus curiae.*

§ 2570.134 Consequences of default.

For 502(c)(7) civil penalty proceedings, this section shall apply in lieu of § 18.5(a) and (b) of this title. Failure of the respondent to file an answer to the notice of determination described in § 2560.502c–7(g) of this chapter within the 30 day period provided by § 2560.502c–7(h) of this chapter shall be deemed to constitute a waiver of his or her right to appear and contest the allegations of the notice of determination, and such failure shall be deemed to be an admission of the facts as alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(7) of the Act. Such notice shall then become the final order of the Secretary, within the meaning of § 2570.131(g) of this subpart, forty-five (45) days from the date of service of the notice.

§ 2570.135 Consent order or settlement.

For 502(c)(7) civil penalty proceedings, the following shall apply in lieu of § 18.9 of this title.

(a) *General.* At any time after the commencement of a proceeding, but at least five (5) days prior to the date set for hearing, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding. The allowance of such a deferral and the duration thereof shall be in the discretion of the administrative law judge, after consideration of such factors as the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of reaching an agreement which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice and the agreement;

(3) A waiver of any further procedural steps before the administrative law judge;

(4) A waiver of any right to challenge or contest the validity of the order and decision entered into in accordance with the agreement; and

(5) That the order and decision of the administrative law judge shall be final agency action.

(c) *Submission.* On or before the expiration of the time granted for negotiations, but, in any case, at least five (5) days prior to the date set for hearing, the parties or their authorized representative or their counsel may:

(1) Submit the proposed agreement containing consent findings and an order to the administrative law judge; or

(2) Notify the administrative law judge that the parties have reached a full settlement and have agreed to dismissal of the action subject to compliance with the terms of the settlement; or

(3) Inform the administrative law judge that agreement cannot be reached.

(d) *Disposition.* In the event a settlement agreement containing consent findings and an order is submitted within the time allowed therefor, the administrative law judge shall issue a decision incorporating such findings and agreement within 30 days of his receipt of such document. The decision of the administrative law judge shall incorporate all of the findings, terms, and conditions of the settlement agreement and consent order of the parties. Such decision shall become final agency action within the meaning of 5 U.S.C. 704.

(e) *Settlement without consent of all parties.* In cases in which some, but not all, of the parties to a proceeding submit a consent agreement to the administrative law judge, the following procedure shall apply:

(1) If all of the parties have not consented to the proposed settlement submitted to the administrative law judge, then such non-consenting parties must receive notice, and a copy, of the proposed settlement at the time it is submitted to the administrative law judge;

(2) Any non-consenting party shall have fifteen (15) days to file any objections to the proposed settlement with the administrative law judge and all other parties;

(3) If any party submits an objection to the proposed settlement, the administrative law judge shall decide within 30 days after receipt of such objections whether he shall sign or reject the proposed settlement. Where the record lacks substantial evidence upon which to base a decision or there is a genuine issue of material fact, then the administrative law judge may establish procedures for the purpose of receiving additional evidence upon which a decision on the contested issues may reasonably be based;

(4) If there are no objections to the proposed settlement, or if the administrative law judge decides to sign the proposed settlement after reviewing any such objections, the administrative law judge shall incorporate the consent agreement into a decision meeting the requirements of paragraph (d) of this section.

§ 2570.136 Scope of discovery.

For 502(c)(7) civil penalty proceedings, this section shall apply in lieu of § 18.14 of this title.

(a) A party may file a motion to conduct discovery with the administrative law judge. The motion for discovery shall be granted by the administrative law judge only upon a showing of good cause. In order to establish ''good cause'' for the purposes of this section, a party must show that the discovery requested relates to a genuine issue as to a material fact that is relevant to the proceeding. The order of the administrative law judge shall expressly limit the scope and terms of discovery to that for which ''good cause'' has been shown, as provided in this paragraph.

(b) A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (a) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon showing that the party seeking discovery has substantial need of the materials or information in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials or information by other means. In ordering discovery of such materials when the required showing has been made, the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representatives of a party concerning the proceeding.

§ 2570.137 Summary decision.

For 502(c)(7) civil penalty proceedings, this section shall apply in lieu of § 18.41 of this title.

(a) *No genuine issue of material fact.* (1) Where no issue of a material fact is found to have been raised, the administrative law judge may issue a decision which, in the absence of an appeal pursuant to §§ 2570.139 through 2570.141 of this subpart, shall become a final order.

(2) A decision made under paragraph (a) of this section shall include a statement of:

(i) Findings of fact and conclusions of law, and the reasons therefor, on all issues presented; and

(ii) Any terms and conditions of the rule or order.

(3) A copy of any decision under this paragraph shall be served on each party.

(b) *Hearings on issues of fact.* Where a genuine question of a material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing.

§ 2570.138 Decision of the administrative law judge.

For 502(c)(7) civil penalty proceedings, this section shall apply in lieu of § 18.57 of this title.

(a) *Proposed findings of fact, conclusions, and order.* Within twenty (20) days of the filing of the transcript of the testimony, or such additional time as the administrative law judge may allow, each party may file with the administrative law judge, subject to the judge's discretion, proposed findings of fact, conclusions of law, and order together with a supporting brief expressing the reasons for such proposals. Such proposals and briefs shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision of the administrative law judge.* Within a reasonable time after the time allowed for the filing of the proposed findings of fact, conclusions of law, and order, or within thirty (30) days after receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the administrative law judge shall make his or her decision. The decision of the administrative law judge shall include findings of fact and conclusions of law with reasons therefor upon each material issue of fact or law presented on the record. The decision of the administrative law judge shall be based upon the whole record. In a contested case in which the Department and the Respondent have presented their positions to the administrative law judge pursuant to the procedures for 502(c)(7) civil penalty proceedings as set forth in this subpart, the penalty (if any) which may be included in the decision of the administrative law judge shall be limited to the penalty expressly provided for in section 502(c)(7) of ERISA. It shall be supported by reliable and probative evidence. The decision of the administrative law judge shall become final agency action within the meaning of 5 U.S.C. 704 unless an appeal is made pursuant to the procedures set forth in §§ 2570.139 through 2570.141 of this subpart.

§ 2570.139 Review by the Secretary.

(a) The Secretary may review a decision of an administrative law judge. Such a review may occur only when a party files a notice of appeal from a decision of an administrative law judge within twenty (20) days of the issuance of such decision. In all other cases, the decision of the administrative law judge shall become final agency action within the meaning of 5 U.S.C. 704.

(b) A notice of appeal to the Secretary shall state with specificity the issue(s) in the decision of the administrative law judge on which the party is seeking review. Such notice of appeal must be served on all parties of record.

(c) Upon receipt of a notice of appeal, the Secretary shall request the Chief Administrative Law Judge to submit to him or her a copy of the entire record before the administrative law judge.

§ 2570.140 Scope of review.

The review of the Secretary shall not be a de novo proceeding but rather a review of the record established before the administrative law judge. There shall be no opportunity for oral argument.

§ 2570.141 Procedures for review by the Secretary.

(a) Upon receipt of the notice of appeal, the Secretary shall establish a briefing schedule which shall be served on all parties of record. Upon motion of one or more of the parties, the Secretary may, in his or her discretion, permit the submission of reply briefs.

(b) The Secretary shall issue a decision as promptly as possible after receipt of the briefs of the parties. The Secretary may affirm, modify, or set aside, in whole or in part, the decision on appeal and shall issue a statement of reasons and bases for the action(s) taken. Such decision by the Secretary shall be final agency action within the meaning of 5 U.S.C. 704.

Signed at Washington, DC this 16th day of January, 2003.

Ann L. Combs,

Assistant Secretary, Pension and Welfare Benefits Administration, U.S. Department of Labor.

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