

**Drafting Information**

The principal author of these proposed regulations is Mary W. Lyons of the Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

**List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

**Proposed Amendments to the Regulations**

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

**PART 1—INCOME TAXES**

**Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*  
Section 1.1502–13 also issued under 26 U.S.C. 1502 \* \* \*

**Par. 2.** Section 1.1502–13 is amended by revising paragraphs (f)(5)(ii)(B) and adding paragraph (f)(5)(ii)(F) to read as follows:

**§ 1.1502–13 Intercompany transactions.**

\* \* \* \* \*

(f) \* \* \*

(5) \* \* \*

(ii) \* \* \*

(B)(1) [The text of the proposed amendments to § 1.1502–13(B)(1) is the same as the text of § 1.1502–13T(B)(1) published elsewhere in this issue of the **Federal Register**.

(2) [The text of the proposed amendments to § 1.1502–13(B)(2) is the same as the text of § 1.1502–13T(B)(2) published elsewhere in this issue of the **Federal Register**.

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(F) [The text of the proposed amendments to § 1.1502–13(F) is the same as the text of § 1.1502–13T(F) published elsewhere in this issue of the **Federal Register**.

\* \* \* \* \*

**Linda E. Stiff,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. E9–21323 Filed 9–3–09; 8:45 am]

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**DEPARTMENT OF LABOR****Employee Benefits Security Administration****29 CFR Part 2560**

**RIN 1210–AB31**

**Civil Penalties Under ERISA Section 502(c)(8)**

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Proposed regulation.

**SUMMARY:** This document contains a proposed regulation that, upon adoption, would establish procedures relating to the assessment of civil penalties by the Department of Labor under section 502(c)(8) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act). Under section 502(c)(8) of ERISA, which was added by the Pension Protection Act of 2006, the Secretary of Labor is granted authority to assess civil penalties not to exceed \$1,100 per day against any plan sponsor of a multiemployer plan for certain violations of section 305 of ERISA. The regulation would affect multiemployer plans that are in either endangered or critical status.

**DATES:** Written comments on the proposed regulation should be received by the Department of Labor no later than November 3, 2009.

**ADDRESSES:** You may submit comments, identified by RIN 1210–AB31, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail:* [e-ORI@dol.gov](mailto:e-ORI@dol.gov). Include RIN 1210–AB31 in the subject line of the message.

- *Mail:* Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N–5655, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Civil Penalties Under 502(c)(8).

**Instructions:** All submissions received must include the agency name and Regulatory Information Number (RIN) for this rulemaking. Comments received will be posted without change to <http://www.regulations.gov> and <http://www.dol.gov/ebsa>, and made available for public inspection at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Washington, DC 20210, including any personal information provided. Persons submitting comments electronically are encouraged not to submit paper copies.

**FOR FURTHER INFORMATION CONTACT:**

Michael Del Conte, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8500. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:****A. Background**

Section 202 and section 212 of the Pension Protection Act of 2006 (PPA), Public Law 109–280, respectively, amended ERISA by adding section 305 and amended the Internal Revenue Code (Code) by adding section 432, to provide additional rules for multiemployer defined benefit pension plans in endangered status or critical status. All references in this document to section 305 of ERISA should be read to include section 432 of the Code.<sup>1</sup>

In general, section 305(b)(3)(A) of ERISA provides that not later than the 90th day of each plan year, the actuary of a multiemployer defined benefit pension plan shall certify to the Secretary of the Treasury and to the plan sponsor—(i) Whether or not the plan is in endangered status for such plan year and whether or not the plan is or will be in critical status for such plan year, and (ii) in the case of a plan which is in a funding improvement or rehabilitation period, whether or not the plan is making the scheduled progress in meeting the requirements of its funding improvement or rehabilitation plan.

Section 305(b)(3)(D)(i) of ERISA provides that, in any case in which it is certified under section 305(b)(3)(A) that a multiemployer plan is or will be in endangered or critical status for a plan year, the plan sponsor shall, not later than 30 days after the date of the certification, provide notification of the endangered or critical status to participants and beneficiaries, the bargaining parties, the Pension Benefit Guaranty Corporation, and the Secretary of Labor.<sup>2</sup>

Section 305(c)(1)(A) and section 305(e)(1)(A) provide that in the first year that a plan is certified to be in endangered or critical status, the plan sponsor generally has a 240-day period

<sup>1</sup> Pursuant to Reorganization Plan No. 4 of 1978, 43 FR 47713 (Oct. 17, 1978), the Department of the Treasury has interpretive authority over the minimum funding rules of Title I of ERISA, including section 305 of ERISA.

<sup>2</sup> Pursuant to section 305(b)(3)(D)(iii) of ERISA, the Department of Labor issued proposed 29 CFR 2540.305–1, which includes a model notice for plans in critical status. *See* 73 FR 15688 (Mar. 25, 2008). However, section 102(b)(1)(C) of the Worker, Retiree, and Employer Recovery Act of 2008, Public Law 110–458, signed into law on December 23, 2008, transferred the Secretary of Labor's obligation to prescribe a model notice to the Secretary of the Treasury, in consultation with the Secretary of Labor.

from the required date of the certification to adopt a funding improvement plan (in the case of a plan that is in endangered status) or a rehabilitation plan (in the case of a plan that is in critical status).<sup>3</sup> Section 305(c)(1) also requires multiemployer plans in endangered status to meet “applicable benchmarks” as defined under ERISA section 305(c)(3), as modified by ERISA section 305(c)(5).

Section 202(b)(3) of the PPA added section 502(c)(8)(A) to ERISA which gives the Secretary of Labor the authority to assess a civil penalty of not more than \$1,100 a day against the plan sponsor for each violation by such sponsor of the requirement under section 305 to adopt by the deadline established in that section a funding improvement plan or rehabilitation plan with respect to a multiemployer plan which is in endangered or critical status.<sup>4</sup> Section 502(c)(8)(B) of ERISA provides the Secretary of Labor with the authority to assess a civil penalty of not more than \$1,100 a day against the plan sponsor of a plan in endangered status, which is not in seriously endangered status, that fails to meet the applicable benchmarks under section 305 by the end of the funding improvement period with respect to the plan.<sup>5</sup> These provisions added by the PPA section 202(b)(3) are effective for plan years beginning on or after January 1, 2008.

## B. Overview of Proposed 29 CFR 2560.502c-8

In general, this proposed regulation sets forth how the maximum penalty

<sup>3</sup> The Worker, Retiree, and Employer Recovery Act of 2008, Public Law 110-458 (WRERA), permits multiemployer plans to delay temporarily their endangered or critical status under section 305 of ERISA. Section 204 of WRERA provides that a multiemployer plan may, for its first plan year beginning during the period from October 1, 2008, through September 30, 2009, elect to keep its status for the plan year preceding such plan year for purposes of section 305 of ERISA and section 432 of the Code. For example, a plan that was not in endangered status for 2008 may elect to keep that non-endangered status for 2009 even if it is in fact in endangered status. On March 27, 2009, the Internal Revenue Service issued Notice 2009-31, 2009-16 I.R.B. 856, providing guidance to multiemployer plans relating to such elections, and on April 30, 2009, issued Notice 2009-42, 2009-20 I.R.B. 1011, modifying Notice 2009-31 to provide an extension of the election period and relief for plans needing arbitration on the election.

<sup>4</sup> An excise tax under Code section 4971(g)(4) generally applies, in addition to any penalty under ERISA section 502(c)(8), in the case of a failure to adopt a rehabilitation plan with respect to a multiemployer plan in critical status.

<sup>5</sup> An excise tax under Code section 4971(g)(3) generally applies in the case of a failure by a multiemployer plan in seriously endangered status to meet the applicable benchmarks by the end of the funding improvement period or a failure of a plan in critical status to meet the requirements applicable to such plans under section 432(e) of the Code.

amounts are computed, identifies the circumstances under which a penalty may be assessed, sets forth certain procedural rules for service by the Department and filing by a plan sponsor, and provides a plan sponsor a means to contest an assessment by the Department by requesting an administrative hearing.

Paragraph (a) of the regulation addresses the general application of section 502(c)(8) of ERISA, under which the plan sponsor of an eligible plan shall be liable for civil penalties assessed by the Secretary of Labor in each case in which there are certain violations of section 305 of ERISA.

Paragraph (b) of the regulation sets forth the amount of penalties that may be assessed under section 502(c)(8) of ERISA and provides that the penalty assessed under section 502(c)(8) for each separate violation is to be determined by the Department, taking into consideration the degree or willfulness of the violation. Paragraph (b) provides that the maximum amount assessed for each violation shall not exceed \$1,100 a day per violation or such other maximum amount as may be established by regulation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990.<sup>6</sup>

Paragraph (c) of the regulation provides that, prior to assessing a penalty under ERISA section 502(c)(8), the Department shall provide the plan sponsor with written notice of the Department’s intent to assess a penalty, the amount of such penalty, the period to which the penalty applies, and the reason(s) for the penalty. The notice would indicate the specific provision violated. The notice is to be served in accordance with paragraph (i) of the regulation (service of notice provision).

Paragraph (d) of the regulation provides that the Department may decide not to assess a penalty, or to waive all or part of the penalty to be assessed, under ERISA section 502(c)(8), upon a showing by the plan sponsor, under paragraph (e) of the regulation, of compliance with section 305 of ERISA or that there were mitigating circumstances for noncompliance.

<sup>6</sup> The Federal Civil Penalties Inflation Adjustment Act of 1990 (the 1990 Act), Public Law 101-410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996 (the 1996 Act), Public Law 104-134, 110 Stat. 1321-373, generally provides that Federal agencies adjust certain civil monetary penalties for inflation no later than 180 days after the enactment of the 1996 Act, and at least once every four years thereafter, in accordance with the guidelines specified in the 1990 Act. The 1996 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.

Under paragraph (e) of the regulation, the plan sponsor has 30 days from the date of service of the notice issued under paragraph (c) of the regulation within which to file a statement making such a showing. When the Department serves the notice under paragraph (c) by certified mail, service is complete upon mailing but five (5) days are added to the time allowed for the filing of the statement (*see* § 2560.502c-8(i)(2)).

Paragraph (f) of the regulation provides that a failure to file a timely statement under paragraph (e) shall be deemed to be a waiver of the right to appear and contest the facts alleged in the Department’s notice of intent to assess a penalty for purposes of any adjudicatory proceeding involving the assessment of the penalty under section 502(c)(8) of ERISA, and to be an admission of the facts alleged in the notice of intent to assess. Such notice then becomes a final order of the Secretary 45 days from the date of service of the notice.

Paragraph (g)(1) of the regulation provides that, following a review of the facts alleged in the statement under paragraph (e), the Department shall notify the plan sponsor 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. Under paragraph (g)(2) of the regulation, this notice becomes a final order 45 days after the date of service of the notice, except as provided in paragraph (h).

Paragraph (h) of the regulation provides that the notice described in paragraph (g) will become a final order of the Department unless, within 30 days of the date of service of the notice, the plan sponsor or representative files a request for a hearing to contest the assessment in administrative proceedings set forth in regulations issued under part 2570 of title 29 of the Code of Federal Regulations and files an answer, in writing, opposing the sanction. When the Department serves the notice under paragraph (g) by certified mail, service is complete upon mailing but five (5) days are added to the time allowed for the filing of the request for hearing and answer (*see* § 2560.502c-8(i)(2)).

Paragraph (i)(1) of the regulation describes the rules relating to service of the Department’s notice of penalty assessment (§ 2560.502c-8(c)) and the Department’s notice of determination on a statement of reasonable cause (§ 2560.502c-8(g)). Paragraph (i)(1) provides that service by the Department shall be made by delivering a copy to

the plan sponsor or representative thereof; by leaving a copy at the principal office, place of business, or residence of the plan sponsor or representative thereof; or by mailing a copy to the last known address of the plan sponsor or representative thereof. As noted above, paragraph (i)(2) of this section provides that when service of a notice under paragraph (c) or (g) is by certified mail, service is complete upon mailing, but five days are added to the time allowed for the filing of a statement or a request for hearing and answer, as applicable. Service by regular mail is complete upon receipt by the addressee.

Paragraph (i)(3) of the regulation, which relates to the filing of statements of reasonable cause, provides that 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. This provision does not apply to the filing of requests for hearing and answers with the Office of the Administrative Law Judge (OALJ) which are governed by the Department's OALJ rules in 29 CFR 18.4.

Paragraph (j) of the regulation clarifies the liability of the parties for penalties assessed under section 502(c)(8) of ERISA. Paragraph (j)(1) provides that, if more than one person is responsible as plan sponsor for the failure to adopt a funding improvement or rehabilitation plan, or to meet the applicable benchmarks, as required by section 305 of ERISA, all such persons shall be jointly and severally liable for such failure. Thus, the entire joint board of trustees would be jointly and severally liable for any such failure. Paragraph (j)(2) provides that any person against whom a penalty is assessed under section 502(c)(8) of ERISA, pursuant to a final order, is personally liable for the payment of such penalty, and that such liability is not a liability of the plan. It is the Department's view that payment of penalties assessed under ERISA section 502(c) from plan assets would not constitute a reasonable expense of administering a plan for purposes of sections 403 and 404 of ERISA.

Paragraph (k) of the regulation establishes 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)(8), and for appealing an ALJ decision to the Secretary or her delegate. The procedures are the same procedures as would apply in the case of a civil penalty assessment under section 502(c)(7) of ERISA.

### C. Effective Date

The Department proposes to make this regulation effective 60 days after the date of publication of the final rule in the **Federal Register**.

### D. 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. It has been determined that this proposed rule relating to the assessment of civil monetary penalties under section 502(c)(8) of the Act is not significant under section 3(f)(4) of the Executive Order; and, therefore, it is not subject to OMB review.

#### *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. Unless an agency certifies that a rule is not likely to have a significant economic impact on a substantial number of small

entities, section 603 of RFA requires that the agency present a regulatory flexibility analysis at the time of the publication of the final rule describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations and governmental jurisdictions.

For purposes of its analyses under the RFA, EBSA 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. By this standard, data from the EBSA Private Pension Bulletin for 2006 show that only 46 multiemployer defined benefit pension plans or 3% of all multiemployer defined benefit pension plans are small entities. This number represents .1% of all small defined benefit pension plans. The Department does not consider this to be a substantial number of small entities. Therefore, pursuant to section 605(b) of RFA, the Department hereby certifies that the rule is not likely to have a significant economic impact on a substantial number of small entities.

The terms of the statute pertaining to the assessment of civil penalties under section 502(c)(8) of ERISA do not vary relative to plan or plan sponsor size. The opportunity for a plan sponsor to present facts and circumstances related to a failure or refusal to comply with section 305 of the Act that may be taken into consideration by the Department in reducing or not assessing penalties under ERISA section 502(c)(8) 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 sponsor assessed a civil penalty is personally liable for the payment of that penalty pursuant to § 2560.502c-8(j)(2).

The Department invites interested persons to submit comments on the impact of this proposed rule on small entities and on any alternative approaches that may serve to minimize the impact on small plans or other entities while accomplishing the objectives of the statutory provisions.

#### *Paperwork Reduction Act*

The proposal 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 this proposed rule 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.

#### *Congressional Review Act*

This proposed rule is 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, upon finalization, will be transmitted to the Congress and the Comptroller General for review.

#### *Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Order 12875, this rule does 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, as adjusted for inflation, 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. This proposed rule does 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 this proposed rule 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 in 29 CFR 2560**

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

Accordingly, 29 CFR part 2560 is proposed to be amended as follows:

#### **PART 2560—RULES AND REGULATIONS FOR ADMINISTRATION AND ENFORCEMENT**

1. The authority citation for part 2560 is revised to read as follows:

**Authority:** 29 U.S.C. 1132, 1135, and Secretary of Labor's Order 1-2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2560.503-1 also issued under 29 U.S.C. 1133. Sec. 2560.502c-7 also issued under 29 U.S.C. 1132(c)(7). Sec. 2560.502c-4 also issued under 29 U.S.C. 1132(c)(4). Sec. 2560.502c-8 also issued under 29 U.S.C. 1132(c)(8).

2. Add § 2560.502c-8 to read as follows:

#### **§ 2560.502c-8 Civil penalties under section 502(c)(8).**

(a) *In general.* (1) Pursuant to the authority granted the Secretary under section 502(c)(8) of the Employee Retirement Income Security Act of 1974, as amended (the Act), the plan sponsor (within the meaning of section 3(16)(B)(iii) of the Act) shall be liable for civil penalties assessed by the Secretary under section 502(c)(8) of the Act, for:

(i) Each violation by such sponsor of the requirement under section 305 of the Act to adopt by the deadline established in that section a funding improvement plan or rehabilitation plan with respect to a multiemployer plan which is in endangered or critical status; or

(ii) In the case of a plan in endangered status which is not in seriously endangered status, a failure by the plan to meet the applicable benchmarks under section 305 by the end of the funding improvement period with respect to the plan.

(2) For purposes of this section, violations or failures referred to in paragraph (a)(1) of this section shall mean a failure or refusal, in whole or in part, to adopt a funding improvement or rehabilitation plan, or to meet the applicable benchmarks, at the relevant times and manners prescribed in section 305 of the Act.

(b) *Amount assessed.* The amount assessed under section 502(c)(8) of the Act for each separate violation shall be determined by the Department of Labor, taking into consideration the degree or willfulness of the failure or refusal to comply with the specific requirements referred to in paragraph (a) of this section. However, the amount assessed for each violation under section

502(c)(8) of the Act shall not exceed \$1,100 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 plan sponsor's failure or refusal to comply with the specific requirements referred to in paragraph (a) of this section.

(c) *Notice of intent to assess a penalty.* Prior to the assessment of any penalty under section 502(c)(8) of the Act, the Department shall provide to the plan sponsor of the plan a written notice indicating the Department's intent to assess a penalty under section 502(c)(8) of the Act, the amount of such penalty, 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 plan sponsor complied with the requirements of section 305 of the Act, or on a showing by the plan sponsor 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 plan sponsor 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 plan sponsor 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 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)(8) 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 nonassessment or a complete or partial waiver of the penalty, shall notify the plan sponsor, 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 plan sponsor 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 plan sponsor or representative thereof;

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

(iii) By mailing a copy to the last known address of the plan sponsor 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 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 plan sponsor for violations referred to in paragraph (a) of this section, all such persons shall be jointly and severally liable for such violations.

(2) Any person, or persons under paragraph (j)(1) of this section, against whom a civil penalty has been assessed under section 502(c)(8) 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-references.* (1) The procedural rules in §§ 2570.130 through 2570.141 of this chapter apply to administrative hearings under section 502(c)(8) of the Act.

(2) When applying procedural rules in §§ 2570.130 through 2570.140:

(i) Wherever the term "502(c)(7)" appears, such term shall mean "502(c)(8)";

(ii) Reference to § 2560.502c-7(g) in 2570.131(c) shall be construed as reference to § 2560.502c-8(g) of this chapter;

(iii) Reference to § 2560.502c-7(e) in § 2570.131(g) shall be construed as reference to § 2560.502c-8(e) of this chapter;

(iv) Reference to § 2560.502c-7(g) in § 2570.131(m) shall be construed as reference to § 2560.502c-8(g); and

(v) Reference to §§ 2560.502c-7(g) and 2560.502c-7(h) in § 2570.134 shall be construed as reference to §§ 2560.502c-8(g) and 2560.502c-8(h), respectively.

Signed at Washington, DC, this 28th day of August 2009.

**Phyllis C. Borzi,**

*Assistant Secretary, Employee Benefits Security Administration, Department of Labor.*

[FR Doc. E9-21343 Filed 9-3-09; 8:45 am]

**BILLING CODE 4510-29-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R03-OAR-2009-0520; FRL-8953-2]

#### Approval and Promulgation of Air Quality Implementation Plans; Virginia; Opacity Variance for Rocket Testing Operations Atlantic Research Corporation's Orange County Facility

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia for the purpose of adding 9 VAC 5 Chapter 220, "Variance for Rocket Motor Test Operations at Atlantic Research Corporation Orange County Facility" which includes an opacity variance for the rocket motor test operations at Aerojet Corporation's Orange County Facility, in lieu of opacity limits established in the Virginia SIP. In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A more detailed description of the Commonwealth's submittal and EPA's evaluation are included in a Technical Support Document (TSD) prepared in support of this rulemaking action. A copy of the TSD is available, upon request, from the EPA Regional Office listed in the **ADDRESSES** section of this document. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

**DATES:** Comments must be received in writing by October 5, 2009.

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA-R03-OAR-2009-0520 by one of the following methods:

A. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-mail:* [fernandez.cristina@epa.gov](mailto:fernandez.cristina@epa.gov).

C. *Mail:* EPA-R03-OAR-2009-0520, Cristina Fernandez, Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S.