AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

(A) An employee welfare benefit plan that is, or offers benefits in connection with, a MEWA;

(B) The sponsor of such plan or the employer or employee organization that makes payments for benefits provided by or in connection with a MEWA; or

(C) Plan participants and plan beneficiaries; and

(ii) If it is not reasonable to expect that such effect will be fully repaired or rectified.

Intent to cause injury is not required for this criterion. Examples of such conduct include, but are not limited to, conversion or concealment of property of the MEWA; improper disposal, transfer, or removal of funds or other property of the MEWA, including unreasonable compensation or payments to MEWA operators and service providers (e.g. brokers, marketers, and third party administrators); employment by the MEWA of a person prohibited from such employment pursuant to section 411 of ERISA, and embezzlement from the MEWA. For purposes of section 521 of ERISA, compensation that would be excessive under 26 CFR 1.162–7 will be considered unreasonable compensation or payments for purposes of this regulation. Depending upon the facts and circumstances, compensation may be unreasonable under this regulation even it is not excessive under 26 CFR 1.162–7.

(5) *A MEWA is in a financially hazardous condition if:*

(i) The Secretary has probable cause to believe that a MEWA:

(A) Is, or is in imminent danger of becoming, unable to pay benefit claims as they come due, or

(B) Has sustained, or is in imminent danger of sustaining, a significant loss of assets; or

(ii) A person responsible for management, control, or administration of the MEWA's assets is the subject of a cease and desist order issued by the Secretary.

(6) A *person*, for purposes of this section, is an individual, partnership, corporation, employee welfare benefit plan, association, or other entity or organization.

(c) *Temporary cease and desist order.* (1)(i) The Secretary may issue a temporary cease and desist order when the Secretary finds there is reasonable cause to believe that the conduct of a MEWA, or any person acting as an agent or employee of the MEWA, is –

(A) Fraudulent;

(B) Creates an immediate danger to the public safety or welfare; or

(C) Is causing or can be reasonably expected to cause significant, imminent, and irreparable public injury.

(ii) A single act or omission may be the basis for a temporary cease and desist order.

(2) A temporary cease and desist order, as the Secretary determines is necessary and appropriate to stop the conduct on which the order is based, and to protect the interests of plan participants, plan beneficiaries, employers or employee organizations, or other members of the public, may—

(i) Prohibit specific conduct or prohibit the transaction of any business of the MEWA;

(ii) Prohibit any person from taking specified actions, or exercising authority or control, concerning funds or property of a MEWA or of any employee benefit plan, regardless of whether such funds or property have been commingled with other funds or property; and,

(iii) Bar any person either directly or indirectly, from providing management, administrative, or other services to any MEWA or to an employee benefit plan or trust.

(3) The Secretary may require documentation from the subject of the order verifying compliance.

(d) *Effect of order on other remedies.* The issuance of a temporary or final cease and desist order shall not foreclose the Secretary from seeking additional remedies under ERISA.

(e) *Administrative hearing.* (1) A temporary cease and desist order shall become a final order as to any MEWA or other person named in the order 30 days after such person receives notice of the order unless, within this period, such person requests a hearing in accordance with the requirements of this paragraph (e).

(2) A person requesting a hearing must file a written request and an answer to the order showing cause why the order should be modified or set

aside. The request and the answer must be filed in accordance with 29 CFR part 2571 and § 18.4 of this title.

(3) A hearing shall be held expeditiously following the receipt of the request for a hearing by the Office of the Administrative Law Judges, unless the parties mutually consent, in writing, to a later date.

(4) The decision of the administrative law judge shall be issued expeditiously after the conclusion of the hearing.

(5) The Secretary must offer evidence supporting the findings made in issuing the order that there is reasonable cause to believe that the MEWA (or a person acting as an employee or agent of the MEWA) engaged in conduct specified in paragraph (c)(1) of this section.

(6) The person requesting the hearing has the burden to show that the order should be modified or set aside. To meet this burden such person must show by a preponderance of the evidence that the MEWA (or a person acting as an employee or agent of the MEWA) did not engage in conduct specified in paragraph (c)(1) of this section or must show that the requirements imposed by the order, are, in whole or part, arbitrary and capricious.

(7) Any temporary cease and desist order for which a hearing has been requested shall remain in effect and enforceable, pending completion of the administrative proceedings, unless stayed by the Secretary, an administrative law judge, or by a court.

(8) The Secretary may require that the hearing and all evidence be treated as confidential.

(f) *Summary seizure order.* (1) Subject to paragraphs (f)(2) and (3) of this section, the Secretary may issue a summary seizure order when the Secretary finds there is probable cause to believe that a MEWA is in a financially hazardous condition.

(2) Except as provided in paragraph (f)(3) of this section, the Secretary, before issuing a summary seizure order to remove assets and records from the control and management of the MEWA or any persons having custody or control of such assets or records, shall obtain judicial authorization from a federal court in the form of a warrant or other appropriate form of authorization and may at that time pursue other actions such as those set forth in paragraph (f)(5) of this section.

(3) If the Secretary reasonably believes that any delay in issuing the order is likely to result in the removal, dissipation, or concealment of plan assets or records, the Secretary may issue and serve a summary seizure order before seeking court authorization. Promptly following service of the order, the Secretary shall seek authorization from a federal court and may at that time pursue other actions such as those set forth in paragraph (f)(5) of this section.

(4) A summary seizure order may authorize the Secretary to take possession or control of all or part of the books, records, accounts, and property of the MEWA (including the premises in which the MEWA transacts its business) to protect the benefits of plan participants, plan beneficiaries, employers or employee organizations, or other members of the public, and to safeguard the assets of employee welfare benefit plans. The order may also direct any person having control and custody of the assets that are the subject of the order not to allow any transfer or disposition of such assets except upon the written direction of the Secretary, or of a receiver or independent fiduciary appointed by a court.

(5) In connection with or following the execution of a summary seizure order, the Secretary may—

(i) Secure court appointment of a receiver or independent fiduciary to perform any necessary functions of the MEWA;

(ii) Obtain court authorization for the Secretary, the receiver or independent fiduciary to take any other action to seize, secure, maintain, or preserve the availability of the MEWA's assets; and

(iii) Obtain such other appropriate relief available under ERISA to protect the interest of employee welfare benefit plan participants, plan beneficiaries, employers or employee organizations or other members of the public. Other appropriate equitable relief may include the liquidation and winding up of the MEWA's affairs and, where applicable, the affairs of any person sponsoring the MEWA.

(g) *Effective date of orders.* Cease and desist and summary seizure orders are effective immediately upon issuance by the Secretary and shall remain effective, except to the extent and until any provision is modified or the order is set aside by the Secretary, an administrative law judge, or a court.

(h) *Service of orders.* (1) As soon as practicable after the issuance of a temporary or final cease and desist order and no later than five business days after issuance of a summary seizure order, the Secretary shall serve the order either:

(i) By delivering a copy to the person who is the subject of the order. If the person is a partnership, service may be made to any partner. If the person is a corporation, association, or other entity or organization, service may be made to any officer of such entity or any person designated for service of process under State law or the applicable plan document. If the person is an employee welfare benefit plan, service may be made to a trustee or administrator. A person's attorney may accept service on behalf of such person;

(ii) By leaving a copy at the principal office, place of business, or residence of such person or attorney; or

(iii) By mailing a copy to the last known address of such person or attorney.

(2) If service is accomplished by certified mail, service is complete upon mailing. If service is done by regular mail, service is complete upon receipt by the addressee.

(3) Service of a temporary or final cease and desist order and of a summary seizure order shall include a statement of the Secretary's findings giving rise to the order, and, where applicable, a copy of any warrant or other authorization by a court.

[78 FR 13805, Mar. 1, 2013]

§ 2560.521–2 Disclosure of order and proceedings.

(a) Notwithstanding § 2560.521–1(e)(8), the Secretary shall make available to the public final cease and desist and summary seizure orders or modifications and terminations of such final orders.

(b) Except as prohibited by applicable law, and at his or her discretion, the Secretary may disclose the issuance of a temporary cease and desist order or summary seizure order and information and evidence of any proceedings and hearings related to an order, to any Federal, State, or foreign authorities responsible for enforcing laws that apply to MEWAs and parties associated with, or providing services to, MEWAs.

(c) The sharing of such documents, material, or other information and evidence under this section does not constitute a waiver of any applicable privilege or claim of confidentiality.

[78 FR 13805, Mar. 1, 2013]

§ 2560.521–3 Effect on other enforcement authority.

The Secretary's authority under section 521 shall not be construed to limit the Secretary's ability to exercise his or her enforcement or investigatory authority under any other provision of title I of ERISA. 29 U.S.C. 1001 *et seq.* The Secretary may, in his or her sole discretion, initiate court proceedings without using the procedures in this section.

[78 FR 13805, Mar. 1, 2013]

§ 2560.521–4 Cross-reference.

See 29 CFR 2571.1 through 2571.13 for procedural rules relating to administrative hearings under section 521 of ERISA.

[78 FR 13805, Mar. 1, 2013]

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

Subpart A—Procedures for the Assessment of Civil Sanctions Under ERISA Section 502(i)

Sec.

2570.1 Scope of rules.
2570.2 Definitions.
2570.3 Service: Copies of documents and pleadings.
2570.4 Parties.
2570.5 Consequences of default.
2570.6 Consent order or settlement.
2570.7 Scope of discovery.
2570.8 Summary decision.
2570.9 Decision of the administrative law judge.
2570.10 Review by the Secretary.

2570.11 Scope of review.
2570.12 Procedures for review by the Secretary.

Subpart B—Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications

2570.30 Scope of rules.
2570.31 Definitions.
2570.32 Persons who may apply for exemptions.
2570.33 Applications the Department will not ordinarily consider.
2570.34 Information to be included in every exemption application.
2570.35 Information to be included in applications for individual exemptions only.
2570.36 Where to file an application.
2570.37 Duty to amend and supplement exemption applications.
2570.38 Tentative denial letters.
2570.39 Opportunities to submit additional information.
2570.40 Conferences.
2570.41 Final denial letters.
2570.42 Notice of proposed exemption.
2570.43 Notification of interested persons by applicant.
2570.44 Withdrawal of exemption applications.
2570.45 Requests for reconsideration.
2570.46 Hearings in opposition to exemptions from restrictions on fiduciary self-dealing.
2570.47 Other hearings.
2570.48 Decision to grant exemptions.
2570.49 Limits on the effect of exemptions.
2570.50 Revocation or modification of exemptions.
2570.51 Public inspection and copies.
2570.52 Effective date.

Subpart C—Procedures for the Assessment of Civil Penalties Under ERISA Section 502(c)(2)

2570.60 Scope of rules.
2570.61 Definitions.
2570.62 Service: Copies of documents and pleadings.
2570.63 Parties, how designated.
2570.64 Consequences of default.
2570.65 Consent order or settlement.
2570.66 Scope of discovery.
2570.67 Summary decision.
2570.68 Decision of the administrative law judge.
2570.69 Review by the Secretary.
2570.70 Scope of review.
2570.71 Procedures for review by the Secretary.

Subpart D—Procedure for the Assessment of Civil Penalties Under ERISA Section 502(l)

2570.80 Scope of rules.
2570.81 In general.
2570.82 Definitions.
2570.83 Assessment of civil penalty.
2570.84 Payment of civil penalty.
2570.85 Waiver or reduction of civil penalty.
2570.86 Reduction of penalty by other penalty assessments.
2570.87 Revision of assessment.
2570.88 Effective date.

Subpart E—Procedures for the Assessment of Civil Penalties Under ERISA Section 502(c)(5)

2570.90 Scope of Rules.
2570.91 Definitions.
2570.92 Service: Copies of documents and pleadings.
2570.93 Parties, how designated.
2570.94 Consequences of default.
2570.95 Consent order or settlement.
2570.96 Scope of discovery.
2570.97 Summary decision.
2570.98 Decision of the administrative law judge.
2570.99 Review by the Secretary.
2570.100 Scope of review.
2570.101 Procedures for review by the Secretary.

Subpart F—Procedures for the Assessment of Civil Penalties Under ERISA Section 502(c)(6)

2570.110 Scope of rules.
2570.111 Definitions.
2570.112 Service: Copies of documents and pleadings.
2570.113 Parties, how designated.
2570.114 Consequences of default.
2570.115 Consent order or settlement.
2570.116 Scope of discovery.
2570.117 Summary decision.
2570.118 Decision of the administrative law judge.
2570.119 Review by the Secretary.
2570.120 Scope of review.
2570.121 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.
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 H—Procedures for Issuance of Findings Under ERISA Sec. 3(40)

2570.150 Scope of rules.
2570.151 In general.
2570.152 Definitions.
2570.153 Parties.
2570.154 Filing and contents of petition.
2570.155 Service.
2570.156 Expedited proceedings.
2570.157 Allocation of burden of proof.
2570.158 Decision of the Administrative Law Judge.
2570.159 Review by the Secretary.

Subpart I—Procedures for the Assessment of Civil Penalties Under ERISA Section 502(c)(8)

2570.160 Scope of rules.
2570.161 Definitions.
2570.162 Service: Copies of documents and pleadings.
2570.163 Parties, how designated.
2570.164 Consequences of default.
2570.165 Consent order or settlement.
2570.166 Scope of discovery.
2570.167 Summary decision.
2570.168 Decision of the administrative law judge.
2570.169 Review by the Secretary.
2570.170 Scope of review.
2570.171 Procedures for review by the Secretary.

AUTHORITY: 5 U.S.C. 8477; 29 U.S.C. 1002(40), 1021, 1108, 1132, and 1135; sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App at 672 (2006); Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010)

Subpart I is also issued under 29 U.S.C. 1132(c)(8).

SOURCE: 53 FR 37476, Sept. 26, 1988, unless otherwise noted.

Subpart A—Procedures for the Assessment of Civil Sanctions Under ERISA Section 502(i)

§ 2570.1 Scope of rules.

The rules of practice set forth in this part are applicable to ''prohibited transaction penalty proceedings'' (as defined in § 2570.2(o) of this part) under section 502(i) of the Employee Retirement Income Security Act of 1974. 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(i) except as modified by this section. 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.

§ 2570.2 Definitions.

For prohibited transaction 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 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* is defined for these proceedings as set forth in § 18.5(d)(2) of this title;

(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 sanction under ERISA section 502(i) against a particular party. Such final order may result from a decision of an administrative law judge or the Secretary, or the failure of a party to invoke the procedures for hearings or appeals under this title. 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, either by oral presentation or written submission, to the administrative law judge;

(i) *Notice* means any document, however designated, issued by the Department of Labor which initiates an adjudicatory proceeding under ERISA section 502(i);

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

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

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

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

(n) *Pleading* means the notice, the answer to the notice, any supplement or amendment thereto, and any reply that may be permitted to any answer, supplement or amendment;

(o) *Prohibited transaction penalty proceeding* means a proceeding relating to the assessment of the civil penalty provided for in section 502(i) of ERISA;

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

(q) *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 Employee Benefits Security), administrator, commissioner, appellate body, board, or other official;

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

§ 2570.3 Service: Copies of documents and pleadings.

For prohibited transaction 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 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 proceedings 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(i) 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, except notices, shall be made by regular mail to the last known address.

(d) *Service of notices.* (1) Service of notices shall be made either:

(i) By delivering a copy to the individual, any partner, any officer of a corporation, or any attorney of record;

(ii) By leaving a copy at the principal office, place of business, or residence of such individual, partner, officer or attorney; or

(iii) By mailing a copy to the last known address of such individual, partner, officer or attorney.

(2) If service is accomplished by certified mail, service is complete upon mailing. If done by regular mail, service is complete upon receipt by the addressee.

(e) *Form of pleadings.* (1) Every pleading shall contain information indicating the name of the Employee Benefits Security Administration (EBSA) 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 × 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.

[53 FR 37476, Sept. 26, 1988, as amended at 65 FR 7191, Feb. 11, 2000; 68 FR 17508, Apr. 9, 2003]

§ 2570.4 Parties.

For prohibited transaction penalty proceedings, this section shall apply in lieu of § 18.10 of this title.

(a) The term *party* wherever used in these rules 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 sanction 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 or organization who 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 petitioners have 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 petititioners 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.

§ 2570.5 Consequences of default.

For prohibited transaction penalty proceedings, this section shall apply in lieu of § 18.5(b) of this title. Failure of the respondent to file an answer within the 30 day time period provided in § 18.5 of this title shall be deemed to constitute a waiver of his right to appear and contest the allegations of the notice, and such failure shall be deemed to be an admission of the facts as alleged in the notice for purposes of the prohibited transaction penalty proceeding. Such notice shall then become the final order of the Secretary, except that the administrative law judge may set aside a default entered under this provision where there is proof of defective notice.

§ 2570.6 Consent order or settlement.

For prohibited transaction 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 deferment 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 thirty (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 thirty (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.

§ 2570.7 Scope of discovery.

For prohibited transaction 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 a 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 representative of a party concerning the proceeding.

§ 2570.8 Summary decision.

For prohibited transaction penalty proceedings, this section shall apply in lieu of § 18.41 of this title.

(a) *No genuine issue of material fact.* (1) Where no genuine 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 §§ 2570.10–2570.12 of this part, shall become a final order.

(2) A decision made under this paragraph 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 issue of fact.* Where a genuine question of material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing.

§ 2570.9 Decision of the administrative law judge.

For prohibited transaction 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 brief 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 of 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 prohibited transaction penalty proceedings as set forth in this part, the penalty (if any) which may be included in the decision of the administrative law judge shall be limited to the sanction expressly provided for in section 502(i) 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 §§ 2570.10 through 2570.12.

§ 2570.10 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 a copy of the entire record before the administrative law judge.

§ 2570.11 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.

§ 2570.12 Procedures for review by the Secretary.

(a) Upon receipt of a 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 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.

Subpart B—Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications

SOURCE: 76 FR 66644, Oct. 27, 2011, unless otherwise noted.

§ 2570.30 Scope of rules.

(a) The rules of procedure set forth in this subpart apply to prohibited transaction exemptions issued by the Department under the authority of:

(1) Section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA);

(2) Section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code);[1] or

(3) The Federal Employees' Retirement System Act of 1986 (FERSA) (5 U.S.C. 8477(c)(3)).

(b) Under these rules of procedure, the Department may conditionally or unconditionally exempt any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by section 406 of ERISA and the corresponding restrictions of the Code and FERSA. While administrative exemptions granted under these rules are ordinarily prospective in nature, an applicant may also obtain retroactive relief for past prohibited transactions if certain safeguards described in this subpart were in place at the time the transaction was consummated.

(c) These rules govern the filing and processing of applications for both individual and class exemptions that the Department may propose and grant pursuant to the authorities cited in paragraph (a) of this section. The Department may also propose and grant exemptions on its own motion, in which case the procedures relating to publication of notices, hearings, evaluation and public inspection of the administrative record, and modification

[1] Section 102 of Presidential Reorganization Plan No. 4 of 1978 (3 CFR part 332 (1978), *reprinted in* 5 U.S.C. app. at 672 (2006), *and in* 92 Stat. 3790 (1978)), effective December 31, 1978, generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975(c)(2) of the Code to the Department of Labor.

or revocation of previously granted exemptions will apply.

(d) The issuance of an administrative exemption by the Department under these procedural rules does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from the obligation to comply with certain other provisions of ERISA, the Code, or FERSA, including any prohibited transaction provisions to which the exemption does not apply, and the general fiduciary responsibility provisions of ERISA which require, among other things, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries.

(e) The Department will not propose or issue exemptions upon oral request alone, nor will the Department grant exemptions orally. An applicant for an administrative exemption may request and receive oral advice from Department employees in preparing an exemption application. However, such advice does not constitute part of the administrative record and is not binding on the Department in its processing of an exemption application or in its examination or audit of a plan.

(f) The Department will generally treat any exemption application that is filed solely under section 408(a) of ERISA or solely under section 4975(c)(2) of the Code as an exemption request filed under both section 408(a) and section 4975(c)(2) if it relates to a transaction that would be prohibited both by ERISA and the corresponding provisions of the Code.

§ 2570.31 Definitions.

For purposes of these procedures, the following definitions apply:

(a) An *affiliate* of a person means—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person. For purposes of this paragraph, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(2) Any director of, relative of, or partner in, any such person;

(3) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner; or

(4) Any employee or officer of the person who—

(i) Is highly compensated (as defined in section 4975(e)(2)(H) of the Code), or

(ii) Has direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets involved in the subject exemption transaction.

(b) A *class exemption* is an administrative exemption, granted under section 408(a) of ERISA, section 4975(c)(2) of the Code, and/or 5 U.S.C. 8477(c)(3), which applies to any transaction and party in interest within the class of transactions and parties in interest specified in the exemption when the conditions of the exemption are satisfied.

(c) *Department* means the U.S. Department of Labor and includes the Secretary of Labor or his or her delegate exercising authority with respect to prohibited transaction exemptions to which this subpart applies.

(d) *Exemption transaction* means the transaction or transactions for which an exemption is requested.

(e) An *individual exemption* is an administrative exemption, granted under section 408(a) of ERISA, section 4975(c)(2) of the Code, and/or 5 U.S.C. 8477(c)(3), which applies only to the specific parties in interest and transactions named or otherwise defined in the exemption.

(f) A *party in interest* means a person described in section 3(14) of ERISA or 5 U.S.C. 8477(a)(4) and includes a *disqualified person*, as defined in section 4975(e)(2) of the Code.

(g) *Pooled fund* means an account or fund for the collective investment of the assets of two or more unrelated plans, including (but not limited to) a pooled separate account maintained by an insurance company and a common or collective trust fund maintained by a bank or similar financial institution.

(h) A *qualified appraisal report* is any appraisal report that satisfies all of the requirements set forth in this subpart at § 2570.34(c)(4).

(i) A *qualified independent appraiser* is any individual or entity with appropriate training, experience, and facilities to provide a qualified appraisal report on behalf of the plan regarding the particular asset or property appraised in the report, that is independent of and unrelated to any party in interest engaging in the exemption transaction and its affiliates; in general, the determination as to the independence of the appraiser is made by the Department on the basis of all relevant facts and circumstances. In making this determination, the Department generally will take into account the amount of both the appraiser's revenues and projected revenues for the current federal income tax year (including amounts received for preparing the appraisal report) that will be derived from the party in interest or its affiliates relative to the appraiser's revenues from all sources for the prior federal income tax year. Absent facts and circumstances demonstrating a lack of independence, the Department will operate according to the presumption that such appraiser will be independent if the revenues it receives or is projected to receive, within the current federal income tax year, from parties in interest (and their affiliates) to the transaction are not more than 2% of such appraiser's annual revenues based upon its prior income tax year. Although the presumption does not apply when the aforementioned percentage exceeds 2%, an appraiser nonetheless may be considered independent based upon other facts and circumstances provided that it receives or is projected to receive revenues that are not more than 5% within the current federal income tax year from parties in interest (and their affiliates) to the transaction based upon its prior income tax year.

(j) A *qualified independent fiduciary* is any individual or entity with appropriate training, experience, and facilities to act on behalf of the plan regarding the exemption transaction in accordance with the fiduciary duties and responsibilities prescribed by ERISA, that is independent of and unrelated to any party in interest engaging in the exemption transaction and its affiliates; in general, the determination as to the independence of a fiduciary is made by the Department on the basis of all relevant facts and circumstances. In making this determination, the Department generally will take into account the amount of both the fiduciary's revenues and projected revenues for the current federal income tax year (including amounts received for preparing fiduciary reports) that will be derived from the party in interest or its affiliates relative to the fiduciary's revenues from all sources for the prior federal income tax year. Absent facts and circumstances demonstrating a lack of independence, the Department will operate according to the presumption that such fiduciary will be independent if the revenues it receives or is projected to receive, within the current federal income tax year, from parties in interest (and their affiliates) to the transaction are not more than 2% of such fiduciary's annual revenues based upon its prior income tax year. Although the presumption does not apply when the aforementioned percentage exceeds 2%, a fiduciary nonetheless may be considered independent based upon other facts and circumstances provided that it receives or is projected to receive revenues that are not more than 5% within the current federal income tax year from parties in interest (and their affiliates) to the transaction based upon its prior income tax year.

§ 2570.32 Persons who may apply for exemptions.

(a) The Department will initiate exemption proceedings upon the application of:

(1) Any party in interest to a plan who is or may be a party to the exemption transaction;

(2) Any plan which is a party to the exemption transaction; or

(3) In the case of an application for an exemption covering a class of parties in interest or a class of transactions, in addition to any person described in paragraphs (a)(1) and (2) of this section, an association or organization representing parties in interest who may be parties to the exemption transaction.

(b) An application by or for a person described in paragraph (a) of this section, may be submitted by the applicant or by an authorized representative. An application submitted by a representative of the applicant must include proof of authority in the form of:

(1) A power of attorney; or

(2) A written certification from the applicant that the representative is authorized to file the application.

(c) If the authorized representative of an applicant submits an application for an exemption to the Department together with proof of authority to file the application as required by paragraph (b) of this section, the Department will direct all correspondence and inquiries concerning the application to the representative unless requested to do otherwise by the applicant.

§ 2570.33 Applications the Department will not ordinarily consider.

(a) The Department ordinarily will not consider:

(1) An application that fails to include all the information required by §§ 2570.34 and 2570.35 of this subpart or otherwise fails to conform to the requirements of these procedures; or

(2) An application involving a transaction or transactions which are the subject of an investigation for possible violations of part 1 or 4 of subtitle B of Title I of ERISA or section 8477 or 8478 of FERSA or an application involving a party in interest who is the subject of such an investigation or who is a defendant in an action by the Department or the Internal Revenue Service to enforce the above-mentioned provisions of ERISA or FERSA.

(b) An application for an individual exemption relating to a specific transaction or transactions ordinarily will not be considered if the Department has under consideration a class exemption relating to the same type of transaction or transactions. Notwithstanding the foregoing, the Department may consider such an application if the issuance of the final class exemption may not be imminent, and the Department determines that time constraints necessitate consideration of the transaction on an individual basis.

(c) The administrative record of an exemption application includes the initial exemption application and any supporting information provided by the applicant (as well as any comments and testimony received by the Department in connection with an application). If an applicant designates as confidential any information required by these regulations or requested by the Department, the Department will determine whether the information is material to the exemption determination. If it determines the information to be material, the Department will not process the application unless the applicant withdraws the claim of confidentiality.

(d) If for any reason the Department decides not to consider an exemption application, it will inform the applicant in writing of that decision and of the reasons therefore.

§ 2570.34 Information to be included in every exemption application.

(a) All applications for exemptions must contain the following information:

(1) The name(s) of the applicant(s);

(2) A detailed description of the exemption transaction including identification of all the parties in interest involved, a description of any larger integrated transaction of which the exemption transaction is a part, and a chronology of the events leading up to the transaction;

(3) The identity of any representatives for the affected plan(s) and parties in interest and what individuals or entities they represent;

(4) The reasons a plan would have for entering into the exemption transaction;

(5) The prohibited transaction provisions from which exemptive relief is requested and the reason why the transaction would violate each such provision;

(6) Whether the exemption transaction is customary for the industry or class involved;

(7) Whether the exemption transaction is or has been the subject of an investigation or enforcement action by the Department or by the Internal Revenue Service; and

(8) The hardship or economic loss, if any, which would result to the person or persons on behalf of whom the exemption is sought, to affected plans, and to their participants and beneficiaries from denial of the exemption.

(b) All applications for exemption must also contain the following:

(1) A statement explaining why the requested exemption would be—

(i) Administratively feasible;

(ii) In the interests of affected plans and their participants and beneficiaries; and

(iii) Protective of the rights of participants and beneficiaries of affected plans.

(2) With respect to the notification of interested persons required by § 2570.43:

(i) A description of the interested persons to whom the applicant intends to provide notice;

(ii) The manner in which the applicant will provide such notice; and

(iii) An estimate of the time the applicant will need to furnish notice to all interested persons following publication of a notice of the proposed exemption in the FEDERAL REGISTER.

(3) If an advisory opinion has been requested by any party to the exemption transaction from the Department with respect to any issue relating to the exemption transaction—

(i) A copy of the letter concluding the Department's action on the advisory opinion request; or

(ii) If the Department has not yet concluded its action on the request:

(A) A copy of the request or the date on which it was submitted together with the Department's correspondence control number as indicated in the acknowledgment letter; and

(B) An explanation of the effect of the issuance of an advisory opinion upon the exemption transaction.

(4) If the application is to be signed by anyone other than an individual party in interest seeking exemptive relief on his or her own behalf, a statement which—

(i) Identifies the individual signing the application and his or her position or title; and

(ii) Explains briefly the basis of his or her familiarity with the matters discussed in the application.

(5)(i) A declaration in the following form:

> Under penalty of perjury, I declare that I am familiar with the matters discussed in this application and, to the best of my knowledge and belief, the representations made in this application are true and correct.

(ii) This declaration must be dated and signed by:

(A) The applicant, in its individual capacity, in the case of an individual party in interest seeking exemptive relief on his or her own behalf;

(B) A corporate officer or partner where the applicant is a corporation or partnership;

(C) A designated officer or official where the applicant is an association, organization or other unincorporated enterprise; or

(D) The plan fiduciary that has the authority, responsibility, and control with respect to the exemption transaction where the applicant is a plan.

(c) Specialized statements, as applicable, from a qualified independent appraiser acting solely on behalf of the plan, such as appraisal reports or analyses of market conditions, submitted to support an application for exemption must be accompanied by a statement of consent from such appraiser acknowledging that the statement is being submitted to the Department as part of an application for exemption. Such statements must also contain the following written information:

(1) A copy of the qualified independent appraiser's engagement letter with the plan describing the specific duties the appraiser shall undertake;

(2) A summary of the qualified independent appraiser's qualifications to serve in such capacity;

(3) A detailed description of any relationship that the qualified independent appraiser has had or may have with any party in interest engaging in the transaction with the plan, or its affiliates, that may influence the appraiser;

(4) A written appraisal report prepared by the qualified independent appraiser, acting solely on behalf of the plan, rather than, for example, on behalf of the plan sponsor, which satisfies the following requirements:

(i) The report must describe the method(s) used in determining the fair

market value of the subject asset(s) and an explanation of why such method best reflects the fair market value of the asset(s);

(ii) The report must take into account any special benefit that the party in interest or its affiliate(s) may derive from control of the asset(s), such as from owning an adjacent parcel of real property or gaining voting control over a company; and

(iii) The report must be current and not more than one year old from the date of the transaction, and there must be a written update by the qualified independent appraiser affirming the accuracy of the appraisal as of the date of the transaction. If the appraisal report is a year old or more, a new appraisal shall be submitted to the Department by the applicant.

(5) If the subject of the appraisal report is real property, the qualified independent appraiser shall submit a written representation that he or she is a member of a professional organization of appraisers that can sanction its members for misconduct;

(6) If the subject of the appraisal report is an asset other than real property, the qualified independent appraiser shall submit a written representation describing the appraiser's prior experience in valuing assets of the same type; and

(7) The qualified independent appraiser shall submit a written representation disclosing the percentage of its current revenue that is derived from any party in interest involved in the transaction or its affiliates; in general, such percentage shall be computed by comparing, in fractional form:

(i) The amount of the appraiser's projected revenues from the current federal income tax year (including amounts received from preparing the appraisal report) that will be derived from the party in interest or its affiliates (expressed as a numerator); and

(ii) The appraiser's revenues from all sources for the prior federal income tax year (expressed as a denominator).

(d) For those exemption transactions requiring the retention of a qualified independent fiduciary to represent the interests of the plan, a statement must be submitted by such fiduciary that contains the following written information:

(1) A signed and dated declaration under penalty of perjury that, to the best of the qualified independent fiduciary's knowledge and belief, all of the representations made in such statement are true and correct;

(2) A copy of the qualified independent fiduciary's engagement letter with the plan describing the fiduciary's specific duties;

(3) An explanation for the conclusion that the fiduciary is a qualified independent fiduciary, which also must include a summary of that person's qualifications to serve in such capacity, as well as a description of any prior experience by that person or other demonstrated characteristics of the fiduciary (such as special areas of expertise) that render that person or entity suitable to perform its duties on behalf of the plan with respect to the exemption transaction;

(4) A detailed description of any relationship that the qualified independent fiduciary has had or may have with the party in interest engaging in the transaction with the plan or its affiliates;

(5) An acknowledgement by the qualified independent fiduciary that it understands its duties and responsibilities under ERISA in acting as a fiduciary on behalf of the plan rather than, for example, acting on behalf of the plan sponsor;

(6) The qualified independent fiduciary's opinion on whether the proposed transaction would be in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of such plan, along with a statement of the reasons on which the opinion is based;

(7) Where the proposed transaction is continuing in nature, a declaration by the qualified independent fiduciary that it is authorized to take all appropriate actions to safeguard the interests of the plan, and shall, during the pendency of the transaction:

(i) Monitor the transaction on behalf of the plan on a continuing basis;

(ii) Ensure that the transaction remains in the interests of the plan and, if not, take any appropriate actions

available under the particular circumstances; and

(iii) Enforce compliance with all conditions and obligations imposed on any party dealing with the plan with respect to the transaction; and

(8) The qualified independent fiduciary shall submit a written representation disclosing the percentage of such fiduciary's current revenue that is derived from any party in interest involved in the transaction or its affiliates; in general, such percentage shall be computed by comparing, in fractional form:

(i) The amount of the fiduciary's projected revenues from the current federal income tax year that will be derived from the party in interest or its affiliates (expressed as a numerator); and

(ii) The fiduciary's revenues from all sources (excluding fixed, non-discretionary retirement income) for the prior federal income tax year (expressed as a denominator).

(e) Specialized statements, as applicable, from other third-party experts, including but not limited to economists or market specialists, submitted on behalf of the plan to support an application for exemption must be accompanied by a statement of consent from such expert acknowledging that the statement prepared on behalf of the plan is being submitted to the Department as part of an application for exemption. Such statements must also contain the following written information:

(1) A copy of the expert's engagement letter with the plan describing the specific duties the expert will undertake;

(2) A summary of the expert's qualifications to serve in such capacity; and

(3) A detailed description of any relationship that the expert has had or may have with any party in interest engaging in the transaction with the plan, or its affiliates, that may influence the actions of the expert.

(f) An application for exemption may also include a draft of the requested exemption which describes the transaction and parties in interest for which exemptive relief is sought and the specific conditions under which the exemption would apply.

§ 2570.35 Information to be included in applications for individual exemptions only.

(a) Except as provided in paragraph (c) of this section, every application for an individual exemption must include, in addition to the information specified in § 2570.34 of this subpart, the following information:

(1) The name, address, telephone number, and type of plan or plans to which the requested exemption applies;

(2) The Employer Identification Number (EIN) and the plan number (PN) used by such plan or plans in all reporting and disclosure required by the Department;

(3) Whether any plan or trust affected by the requested exemption has ever been found by the Department, the Internal Revenue Service, or by a court to have violated the exclusive benefit rule of section 401(a) of the Code, section 4975(c)(1) of the Code, section 406 or 407(a) of ERISA, or 5 U.S.C. 8477(c)(3), including a description of the circumstances surrounding such violation;

(4) Whether any relief under section 408(a) of ERISA, section 4975(c)(2) of the Code, or 5 U.S.C. 8477(c)(3) has been requested by, or provided to, the applicant or any of the parties on behalf of whom the exemption is sought and, if so, the exemption application number or the prohibited transaction exemption number;

(5) Whether the applicant or any of the parties in interest involved in the exemption transaction is currently, or has been within the last five years, a defendant in any lawsuit or criminal action concerning such person's conduct as a fiduciary or party in interest with respect to any plan (other than a lawsuit with respect to a routine claim for benefits), and a description of the circumstances of such lawsuit or criminal action;

(6) Whether the applicant (including any person described in § 2570.34(b)(5)(ii)) or any of the parties in interest involved in the exemption transaction has, within the last 13 years, been either convicted or released from imprisonment, whichever is later, as a result of: any felony involving abuse or misuse of such person's position or employment with an employee

benefit plan or a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime of which any of the foregoing crimes is an element; or any other crime described in section 411 of ERISA, and a description of the circumstances of any such conviction. For purposes of this section, a person shall be deemed to have been ''convicted'' from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal;

(7) Whether, within the last five years, any plan affected by the exemption transaction, or any party in interest involved in the exemption transaction, has been under investigation or examination by, or has been engaged in litigation or a continuing controversy with, the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, or the Federal Retirement Thrift Investment Board involving compliance with provisions of ERISA, provisions of the Code relating to employee benefit plans, or provisions of FERSA relating to the Federal Thrift Savings Fund. If so, the applicant must provide a brief statement describing the investigation, examination, litigation or controversy. The Department reserves the right to require the production of additional information or documentation concerning any of the above matters. In this regard, a denial of the exemption application will result from a failure to provide additional information requested by the Department.

(8) Whether any plan affected by the requested exemption has experienced a reportable event under section 4043 of ERISA, and, if so, a description of the circumstances of any such reportable event;

(9) Whether a notice of intent to terminate has been filed under section 4041 of ERISA respecting any plan affected by the requested exemption, and, if so, a description of the circumstances for the issuance of such notice;

(10) Names, addresses, and taxpayer identifying numbers of all parties in interest involved in the subject transaction;

(11) The estimated number of participants and beneficiaries in each plan affected by the requested exemption as of the date of the application;

(12) The percentage of the fair market value of the total assets of each affected plan that is involved in the exemption transaction;

(13) Whether the exemption transaction has been consummated or will be consummated only if the exemption is granted;

(14) If the exemption transaction has already been consummated:

(i) The circumstances which resulted in plan fiduciaries causing the plan(s) to engage in the transaction before obtaining an exemption from the Department;

(ii) Whether the transaction has been terminated;

(iii) Whether the transaction has been corrected as defined in Code section 4975(f)(5);

(iv) Whether Form 5330, Return of Excise Taxes Related to Employee Benefit Plans, has been filed with the Internal Revenue Service with respect to the transaction; and

(v) Whether any excise taxes due under section 4975(a) and (b) of the Code, or any civil penalties due under section 502(i) or (l) of ERISA by reason of the transaction have been paid. If so, the applicant should submit documentation (e.g., a canceled check) demonstrating that the excise taxes or civil penalties were paid.

(15) The name of every person who has investment discretion over any plan assets involved in the exemption transaction and the relationship of each such person to the parties in interest involved in the exemption transaction and the affiliates of such parties in interest;

(16) Whether or not the assets of the affected plan(s) are invested in loans to any party in interest involved in the exemption transaction, in property leased to any such party in interest, or in securities issued by any such party

in interest, and, if such investments exist, a statement for each of these three types of investments which indicates:

(i) The type of investment to which the statement pertains;

(ii) The aggregate fair market value of all investments of this type as reflected in the plan's most recent annual report;

(iii) The approximate percentage of the fair market value of the plan's total assets as shown in such annual report that is represented by all investments of this type; and

(iv) The statutory or administrative exemption covering these investments, if any.

(17) The approximate aggregate fair market value of the total assets of each affected plan;

(18) The person(s) who will bear the costs of the exemption application and of notifying interested persons; and

(19) Whether an independent fiduciary is or will be involved in the exemption transaction and, if so, the names of the persons who will bear the cost of the fee payable to such fiduciary.

(b) Each application for an individual exemption must also include:

(1) True copies of all contracts, deeds, agreements, and instruments, as well as relevant portions of plan documents, trust agreements, and any other documents bearing on the exemption transaction;

(2) A discussion of the facts relevant to the exemption transaction that are reflected in these documents and an analysis of their bearing on the requested exemption;

(3) A copy of the most recent financial statements of each plan affected by the requested exemption; and

(4) A net worth statement with respect to any party in interest that is providing a personal guarantee with respect to the exemption transaction.

(c) Special rule for applications for individual exemption involving pooled funds:

(1) The information required by paragraphs (a)(8) through (12) of this section is not required to be furnished in an application for individual exemption involving one or more pooled funds;

(2) The information required by paragraphs (a)(1) through (7) and (a)(13) through (19) of this section and by paragraphs (b)(1) through (3) of this section must be furnished in reference to the pooled fund, rather than to the plans participating therein. (For purposes of this paragraph, the information required by paragraph (a)(16) of this section relates solely to other pooled fund transactions with, and investments in, parties in interest involved in the exemption transaction which are also sponsors of plans which invest in the pooled fund.);

(3) The following information must also be furnished—

(i) The estimated number of plans that are participating (or will participate) in the pooled fund; and

(ii) The minimum and maximum limits imposed by the pooled fund (if any) on the portion of the total assets of each plan that may be invested in the pooled fund.

(4) Additional requirements for applications for individual exemption involving pooled funds in which certain plans participate.

(i) This paragraph applies to any application for an individual exemption involving one or more pooled funds in which any plan participating therein—

(A) Invests an amount which exceeds 20% of the total assets of the pooled fund, or

(B) Covers employees of:

(*1*) The party sponsoring or maintaining the pooled fund, or any affiliate of such party, or

(*2*) Any fiduciary with investment discretion over the pooled fund's assets, or any affiliate of such fiduciary.

(ii) The exemption application must include, with respect to each plan described in paragraph (c)(4)(i) of this section, the information required by paragraphs (a)(1) through (3), (a)(5) through (7), (a)(10), (a)(12) through (16), and (a)(18) and (19), of this section. The information required by this paragraph must be furnished in reference to the plan's investment in the pooled fund (e.g., the names, addresses and taxpayer identifying numbers of all fiduciaries responsible for the plan's investment in the pooled fund (§ 2570.35(a)(10)), the percentage of the assets of the plan invested in the pooled fund

(§ 2570.35(a)(12)), whether the plan's investment in the pooled fund has been consummated or will be consummated only if the exemption is granted (§ 2570.35(a)(13)), etc.).

(iii) The information required by paragraph (c)(4) of this section is in addition to the information required by paragraphs (c)(2) and (3) of this section relating to information furnished by reference to the pooled fund.

(5) The special rule and the additional requirements described in paragraphs (c)(1) through (4) of this section do not apply to an individual exemption request solely for the investment by a plan in a pooled fund. Such an application must provide the information required by paragraphs (a) and (b) of this section.

(d) Retroactive exemptions:

(1) Generally, the Department will favorably consider requests for retroactive relief, in all exemption applications, only where the safeguards necessary for the grant of a prospective exemption were in place at the time at which the parties entered into the transaction. An applicant for a retroactive exemption must have acted in good faith by taking reasonable and appropriate steps to protect the plan from abuse and unnecessary risk at the time of the transaction.

(2) Among the factors that the Department would take into account in making a finding that an applicant acted in good faith include the following:

(i) The participation of an independent fiduciary acting on behalf of the plan who is qualified to negotiate, approve and monitor the transaction;

(ii) The existence of a contemporaneous appraisal by a qualified independent appraiser or reference to an objective third party source, such as a stock or bond index;

(iii) The existence of a bidding process or evidence of comparable fair market transactions with unrelated third parties;

(iv) That the applicant has submitted an accurate and complete application for exemption containing documentation of all necessary and relevant facts and representations upon which the applicant relied. In this regard, additional weight will be given to facts and representations which are prepared and certified by a source independent of the applicant;

(v) That the applicant has submitted evidence that the plan fiduciary did not engage in an act or transaction knowing that such act or transaction was prohibited under section 406 of ERISA and/or section 4975 of the Code. In this regard, the Department will accord appropriate weight to the submission of a contemporaneous, reasoned legal opinion of counsel, upon which the plan fiduciary relied in good faith before entering the act or transaction;

(vi) That the applicant has submitted a statement of the circumstances which prompted the submission of the application for exemption and the steps taken by the applicant with regard to the transaction upon discovery of the violation;

(vii) That the applicant has submitted a statement, prepared and certified by an independent person familiar with the types of transactions for which relief is requested, demonstrating that the terms and conditions of the transaction (including, in the case of an investment, the return in fact realized by the plan) were at least as favorable to the plan as that obtainable in a similar transaction with an unrelated party; and

(viii) Such other undertakings and assurances with respect to the plan and its participants that may be offered by the applicant which are relevant to the criteria under section 408(a) of ERISA and section 4975(c)(2) of the Code.

(3) The Department, as a general matter, will not favorably consider requests for retroactive exemptions where transactions or conduct with respect to which an exemption is requested resulted in a loss to the plan. In addition, the Department will not favorably consider requests for exemptions where the transactions are inconsistent with the general fiduciary responsibility provisions of sections 403 or 404 of ERISA or the exclusive benefit requirements of section 401(a) of the Code.

§ 2570.36 Where to file an application.

The Department's prohibited transaction exemption program is administered by the Employee Benefits Security Administration (EBSA). Any exemption application governed by these procedures may be mailed via first-class mail to: Employee Benefits Security Administration, Office of Exemption Determinations, U.S. Department of Labor, Room N–5700, 200 Constitution Avenue NW., Washington, DC 20210. Alternatively, applications may be emailed to the Department at *e-OED@dol.gov* or transmitted via facsimile at (202) 219–0204. Notwithstanding the foregoing methods of transmission, applicants are also required to submit one paper copy of the exemption application for the Department's file.

§ 2570.37 Duty to amend and supplement exemption applications.

(a) While an exemption application is pending final action with the Department, an applicant must promptly notify the Department in writing if he or she discovers that any material fact or representation contained in the application or in any documents or testimony provided in support of the application is inaccurate, if any such fact or representation changes during this period, or if, during the pendency of the application, anything occurs that may affect the continuing accuracy of any such fact or representation. In addition, an applicant must promptly notify the Department in writing if it learns that a material fact or representation has been omitted from the exemption application.

(b) If, at any time during the pendency of an exemption application, the applicant or any other party in interest who would participate in the exemption transaction becomes the subject of an investigation or enforcement action by the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, or the Federal Retirement Thrift Investment Board involving compliance with provisions of ERISA, provisions of the Code relating to employee benefit plans, or provisions of FERSA relating to the Federal Thrift Savings Fund, the applicant must promptly notify the Department.

(c) The Department may require an applicant to provide documentation it considers necessary to verify any statements contained in the application or in supporting materials or documents.

§ 2570.38 Tentative denial letters.

(a) If, after reviewing an exemption file, the Department tentatively concludes that it will not propose or grant the exemption, it will notify the applicant in writing. At the same time, the Department will provide a brief statement of the reasons for its tentative denial.

(b) An applicant will have 20 days from the date of a tentative denial letter to request a conference under § 2570.40 of this subpart and/or to notify the Department of its intent to submit additional information under § 2570.39 of this subpart. If the Department does not receive a request for a conference or a notification of intent to submit additional information within that time, it will issue a final denial letter pursuant to § 2570.41.

(c) The Department need not issue a tentative denial letter to an applicant before issuing a final denial letter where the Department has conducted a hearing on the exemption pursuant to either § 2570.46 or § 2570.47.

§ 2570.39 Opportunities to submit additional information.

(a) An applicant may notify the Department of its intent to submit additional information supporting an exemption application either by telephone or by letter sent to the address furnished in the applicant's tentative denial letter, or electronically to the email address provided in the tentative denial letter. At the same time, the applicant should indicate generally the type of information that will be submitted.

(b) The additional information an applicant intends to provide in support of the application must be in writing and be received by the Department within 40 days from the date of the tentative denial letter. All such information must be accompanied by a declaration under penalty of perjury attesting to

the truth and correctness of the information provided, which is dated and signed by a person qualified under § 2570.34(b)(5) of this subpart to sign such a declaration.

(c) If, for reasons beyond its control, an applicant is unable to submit all the additional information he or she intends to provide in support of his application within the 40-day period described in paragraph (b) of this section, he or she may request an extension of time to furnish the information. Such requests must be made before the expiration of the 40-day period and will be granted only in unusual circumstances and for a limited period as determined, respectively, by the Department in its sole discretion.

(d) If an applicant is unable to submit all of the additional information he or she intends to provide within the 40-day period specified in paragraph (b) of this section, or within any additional period granted pursuant to paragraph (c) of this section, the applicant may withdraw the exemption application before expiration of the applicable time period and reinstate it later pursuant to § 2570.44.

(e) The Department will issue, without further notice, a final denial letter denying the requested exemption pursuant to § 2570.41 where—

(1) The Department has not received the additional information that the applicant stated his or her intention to submit within the 40-day period described in paragraph (b) of this section, or within any additional period granted pursuant to paragraph (c) of this section;

(2) The applicant did not request a conference pursuant to § 2570.38(b) of this subpart; and

(3) The applicant has not withdrawn the application as permitted by paragraph (d) of this section.

§ 2570.40 Conferences.

(a) Any conference between the Department and an applicant pertaining to a requested exemption will be held in Washington, DC, except that a telephone conference will be held at the applicant's request.

(b) An applicant is entitled to only one conference with respect to any exemption application. An applicant will not be entitled to a conference, however, where the Department has held a hearing on the exemption under either § 2570.46 or § 2570.47 of this subpart.

(c) Insofar as possible, conferences will be scheduled as joint conferences with all applicants present where:

(1) More than one applicant has requested an exemption with respect to the same or similar types of transactions;

(2) The Department is considering the applications together as a request for a class exemption;

(3) The Department contemplates not granting the exemption; and

(4) More than one applicant has requested a conference.

(d) In instances where the applicant has requested a conference pursuant to § 2570.38(b) and also has submitted additional information pursuant to § 2570.39, the Department will schedule a conference under this section for a date and time that occurs within 20 days after the date on which the Department has provided either oral or written notification to the applicant that, after reviewing the additional information, it is still not prepared to propose the requested exemption. If, for reasons beyond its control, the applicant cannot attend a conference within the 20-day limit described in this paragraph, the applicant may request an extension of time for the scheduling of a conference, provided that such request is made before the expiration of the 20-day limit. The Department will only grant such an extension in unusual circumstances and for a brief period as determined, respectively, by the Department in its sole discretion.

(e) In instances where the applicant has requested a conference pursuant to § 2570.38(b) but has not expressed an intent to submit additional information in support of the exemption application as provided in § 2570.39, the Department will schedule a conference under this section for a date and time that occurs within 40 days after the date of the issuance of the tentative denial letter described in § 2570.38(a). If, for reasons beyond its control, the applicant cannot attend a conference within the 40-day limit described in this paragraph, the applicant may request an extension

of time for the scheduling of a conference, provided that such request is made before the expiration of the 40-day limit. The Department will only grant such an extension in unusual circumstances and for a brief period as determined, respectively, by the Department in its sole discretion.

(f) In instances where the applicant has requested a conference pursuant to § 2570.38(b) of this subpart, has notified the Department of its intent to submit additional information pursuant to § 2570.39, and has failed to furnish such information within 40 days from the date of the tentative denial letter, the Department will schedule a conference under this section for a date and time that occurs within 60 days after the date of the issuance of the tentative denial letter described in § 2570.38(a). If, for reasons beyond its control, the applicant cannot attend a conference within the 60-day limit described in this paragraph, the applicant may request an extension of time for the scheduling of a conference, provided that such request is made before the expiration of the 60-day limit. The Department will only grant such an extension in unusual circumstances and for a brief period as determined, respectively, by the Department in its sole discretion.

(g) If the applicant fails to either timely schedule or appear for a conference agreed to by the Department pursuant to this section, the applicant will be deemed to have waived its right to a conference.

(h) Within 20 days after the date of any conference held under this section, the applicant may submit to the Department (electronically or in paper form) any additional written data, arguments, or precedents discussed at the conference but not previously or adequately presented in writing. If, for reasons beyond its control, the applicant is unable to submit the additional information within this 20-day limit, the applicant may request an extension of time to furnish the information, provided that such request is made before the expiration of the 20-day limit described in this paragraph. The Department will only grant such an extension in unusual circumstances and for a brief period as determined, respectively, by the Department in its sole discretion.

§ 2570.41 Final denial letters.

The Department will issue a final denial letter denying a requested exemption where:

(a) The conditions for issuing a final denial letter specified in § 2570.38(b) or § 2570.39(e) of this subpart are satisfied;

(b) After issuing a tentative denial letter under § 2570.38 of this subpart and considering the entire record in the case, including all written information submitted pursuant to §§ 2570.39 and 2570.40 of this subpart, the Department decides not to propose an exemption or to withdraw an exemption already proposed; or

(c) After proposing an exemption and conducting a hearing on the exemption under either § 2570.46 or § 2570.47 of this subpart and after considering the entire record in the case, including the record of the hearing, the Department decides to withdraw the proposed exemption.

§ 2570.42 Notice of proposed exemption.

If the Department tentatively decides that an administrative exemption is warranted, it will publish a notice of a proposed exemption in the FEDERAL REGISTER. In addition to providing notice of the pendency of the exemption before the Department, the notice will:

(a) Explain the exemption transaction and summarize the information and reasons in support of proposing the exemption;

(b) Describe the scope of relief and any conditions of the proposed exemption;

(c) Inform interested persons of their right to submit comments to the Department (either electronically or in writing) relating to the proposed exemption and establish a deadline for receipt of such comments; and

(d) Where the proposed exemption includes relief from the prohibitions of section 406(b) of ERISA, section 4975(c)(1)(E) or (F) of the Code, or section 8477(c)(2) of FERSA, inform interested persons of their right to request a hearing under § 2570.46 of this subpart and establish a deadline for receipt of requests for such hearings.

§ 2570.43 Notification of interested persons by applicant.

(a) If a notice of proposed exemption is published in the FEDERAL REGISTER in accordance with § 2570.42 of this subpart, the applicant must notify interested persons of the pendency of the exemption in the manner and within the time period specified in the application. If the Department determines that this notification would be inadequate, the applicant must obtain the Department's consent as to the manner and time period of providing the notice to interested persons. Any such notification must include:

(1) A copy of the notice of proposed exemption as published in the FEDERAL REGISTER; and

(2) A supplemental statement in the following form:

You are hereby notified that the United States Department of Labor is considering granting an exemption from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974, the Internal Revenue Code of 1986, or the Federal Employees' Retirement System Act of 1986. The exemption under consideration is summarized in the enclosed [Summary of Proposed Exemption, and described in greater detail in the accompanying][2] Notice of Proposed Exemption. As a person who may be affected by this exemption, you have the right to comment on the proposed exemption by [date].[3] [If you may be adversely affected by the grant of the exemption, you also have the right to request a hearing on the exemption by [date].][4]

All comments and/or requests for a hearing should be addressed to the Office of Exemption Determinations, Employee Benefits Security Administration, Room _____,[5] U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, ATTENTION: Application No._____.[6] Comments and hearing requests may also be transmitted to the Department electronically at *e-oed@dol.gov* or at *http://www.regulations.gov* (follow instructions for submission), and should prominently reference the application number listed above. In addition, comments and hearing requests may be transmitted to the Department via facsimile at (202) 219–0204. Individuals submitting comments or requests for a hearing on this matter are advised not to disclose sensitive personal data, such as social security numbers.

The Department will make no final decision on the proposed exemption until it reviews the comments received in response to the enclosed notice. If the Department decides to hold a hearing on the exemption request before making its final decision, you will be notified of the time and place of the hearing.

(b) The method used by an applicant to furnish notice to interested persons must be reasonably calculated to ensure that interested persons actually receive the notice. In all cases, personal delivery and delivery by first-class mail will be considered reasonable methods of furnishing notice. If the applicant elects to furnish notice electronically, he or she must provide satisfactory proof of electronic delivery to the entire class of interested persons.

(c) After furnishing the notification described in paragraph (a) of this section, an applicant must provide the Department with a written statement confirming that notice was furnished in accordance with the foregoing requirements of this section. This statement must be accompanied by a declaration under penalty of perjury attesting to the truth of the information provided in the statement and signed by a person qualified under § 2570.34(b)(5) of this subpart to sign such a declaration. No exemption will be granted until such a statement and its accompanying declaration have been furnished to the Department.

(d) In addition to the provision of notification required by paragraph (a) of this section, the Department, in its discretion, may also require an applicant

[2] To be added in instances where the Department requires the applicant to furnish a Summary of Proposed Exemption to interested persons as described in § 2570.43(d).

[3] The applicant will write in this space the date of the last day of the time period specified in the notice of proposed exemption.

[4] To be added in the case of an exemption that provides relief from section 406(b) of ERISA or corresponding sections of the Code or FERSA.

[5] The applicant will fill in the room number of the Office of Exemptions Determinations. As of the date of this final regulation, the room number of the Office of Exemption Determinations is N–5700.

[6] The applicant will fill in the exemption application number, which is stated in the notice of proposed exemption, as well as in all correspondence from the Department to the applicant regarding the application.

to furnish interested persons with a brief summary of the proposed exemption (Summary of Proposed Exemption), written in a manner calculated to be understood by the average recipient, which objectively describes:

(1) The exemption transaction and the parties in interest thereto;

(2) Why such transaction would violate the prohibited transaction provisions of ERISA, the Code, and/or FERSA from which relief is sought;

(3) The reasons why the plan seeks to engage in the transaction; and

(4) The conditions and safeguards proposed to protect the plan and its participants and beneficiaries from potential abuse or unnecessary risk of loss in the event the Department grants the exemption.

(e) Applicants who are required to provide interested persons with the Summary of Proposed Exemption described in paragraph (d) of this section shall furnish the Department with a copy of such summary for review and approval prior to its distribution to interested persons. Such applicants shall also provide confirmation to the Department that the Summary of Proposed Exemption was furnished to interested persons as part of the written statement and declaration required of exemption applicants by paragraph (c) of this section.

§ 2570.44 Withdrawal of exemption applications.

(a) An applicant may withdraw an application for an exemption at any time by oral or written (including electronic) notice to the Department. A withdrawn application generally shall not prejudice any subsequent applications for an exemption submitted by an applicant.

(b) Upon receiving an applicant's notice of withdrawal regarding an application for an individual exemption, the Department will confirm by letter the applicant's withdrawal of the application and will terminate all proceedings relating to the application. If a notice of proposed exemption has been published in the FEDERAL REGISTER, the Department will publish a notice withdrawing the proposed exemption.

(c) Upon receiving an applicant's notice of withdrawal regarding an application for a class exemption or for an individual exemption that is being considered with other applications as a request for a class exemption, the Department will inform any other applicants for the exemption of the withdrawal. The Department will continue to process other applications for the same exemption. If all applicants for a particular class exemption withdraw their applications, the Department may either terminate all proceedings relating to the exemption or propose the exemption on its own motion.

(d) If, following the withdrawal of an exemption application, an applicant decides to reapply for the same exemption, he or she may contact the Department in writing (including electronically) to request that the application be reinstated. The applicant should refer to the application number assigned to the original application. If, at the time the original application was withdrawn, any additional information to be submitted to the Department under § 2570.39 was outstanding, that information must accompany the request for reinstatement of the application. However, the applicant need not resubmit information previously furnished to the Department in connection with a withdrawn application unless reinstatement of the application is requested more than two years after the date of its withdrawal.

(e) Any request for reinstatement of a withdrawn application submitted, in accordance with paragraph (d) of this section, will be granted by the Department, and the Department will take whatever steps remained at the time the application was withdrawn to process the application.

§ 2570.45 Requests for reconsideration.

(a) The Department will entertain one request for reconsideration of an exemption application that has been finally denied pursuant to § 2570.41 if the applicant presents in support of the application significant new facts or arguments, which, for good reason, could not have been submitted for the Department's consideration during its initial review of the exemption application.

(b) A request for reconsideration of a previously denied application must be

made within 180 days after the issuance of the final denial letter and must be accompanied by a copy of the Department's final letter denying the exemption and a statement setting forth the new information and/or arguments that provide the basis for reconsideration.

(c) A request for reconsideration must also be accompanied by a declaration under penalty of perjury attesting to the truth of the new information provided, which is signed by a person qualified under §2570.34(b)(5) to sign such a declaration.

(d) If, after reviewing a request for reconsideration, the Department decides that the facts and arguments presented do not warrant reversal of its original decision to deny the exemption, it will send a letter to the applicant reaffirming that decision.

(e) If, after reviewing a request for reconsideration, the Department decides, based on the new facts and arguments submitted, to reconsider its final denial letter, it will notify the applicant of its intent to reconsider the application in light of the new information presented. The Department will then take whatever steps remained at the time it issued its final denial letter to process the exemption application.

(f) If, at any point during its subsequent processing of the application, the Department decides again that the exemption is unwarranted, it will issue a letter affirming its final denial.

§ 2570.46 Hearings in opposition to exemptions from restrictions on fiduciary self-dealing.

(a) Any interested person who may be adversely affected by an exemption which the Department proposes to grant from the restrictions of section 406(b) of ERISA, section 4975(c)(1)(E) or (F) of the Code, or section 8477(c)(2) of FERSA may request a hearing before the Department within the period of time specified in the FEDERAL REGISTER notice of the proposed exemption. Any such request must state:

(1) The name, address, telephone number, and email address of the person making the request;

(2) The nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption; and

(3) A statement of the issues to be addressed and a general description of the evidence to be presented at the hearing.

(b) The Department will grant a request for a hearing made in accordance with paragraph (a) of this section where a hearing is necessary to fully explore material factual issues identified by the person requesting the hearing. A notice of such hearing shall be published by the Department in the FEDERAL REGISTER. The Department may decline to hold a hearing where:

(1) The request for the hearing does not meet the requirements of paragraph (a) of this section;

(2) The only issues identified for exploration at the hearing are matters of law; or

(3) The factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.

(c) An applicant for an exemption must notify interested persons in the event that the Department schedules a hearing on the exemption. Such notification must be given in the form, time, and manner prescribed by the Department. Ordinarily, however, adequate notification can be given by providing to interested persons a copy of the notice of hearing published by the Department in the FEDERAL REGISTER within 10 days of its publication, using any of the methods approved in §2570.43(b).

(d) After furnishing the notice required by paragraph (c) of this section, an applicant must submit a statement confirming that notice was given in the form, manner, and time prescribed. This statement must be accompanied by a declaration under penalty of perjury attesting to the truth of the information provided in the statement, which is signed by a person qualified under §2570.34(b)(5) to sign such a declaration.

§ 2570.47 Other hearings.

(a) In its discretion, the Department may schedule a hearing on its own motion where it determines that issues relevant to the exemption can be most fully or expeditiously explored at a hearing. A notice of such hearing shall

be published by the Department in the FEDERAL REGISTER.

(b) An applicant for an exemption must notify interested persons of any hearing on an exemption scheduled by the Department in the manner described in § 2570.46(c). In addition, the applicant must submit a statement subscribed as true under penalty of perjury like that required in § 2570.46(d).

§ 2570.48 Decision to grant exemptions.

(a) The Department may not grant an exemption under section 408(a) of ERISA, section 4975(c)(2) of the Code, or 5 U.S.C. 8477(c)(3) unless, following evaluation of the facts and representations comprising the administrative record of the proposed exemption (including any comments received in response to a notice of proposed exemption and the record of any hearing held in connection with the proposed exemption), it finds that the exemption is:

(1) Administratively feasible;

(2) In the interests of the plan (or the Thrift Savings Fund in the case of FERSA) and of its participants and beneficiaries; and

(3) Protective of the rights of participants and beneficiaries of such plan (or the Thrift Savings Fund in the case of FERSA).

(b) In each instance where the Department determines to grant an exemption, it shall publish a notice in the FEDERAL REGISTER which summarizes the transaction or transactions for which exemptive relief has been granted and specifies the conditions under which such exemptive relief is available.

§ 2570.49 Limits on the effect of exemptions.

(a) An exemption does not take effect with respect to the exemption transaction unless the material facts and representations contained in the application and in any materials and documents submitted in support of the application were true and complete.

(b) An exemption is effective only for the period of time specified and only under the conditions set forth in the exemption.

(c) Only the specific parties to whom an exemption grants relief may rely on the exemption. If the notice granting an exemption does not limit exemptive relief to specific parties, all parties to the exemption transaction may rely on the exemption.

(d) For transactions that are continuing in nature, an exemption ceases to be effective if, during the continuation of the transaction, there are material changes to the original facts and representations underlying such exemption or if one or more of the exemption's conditions cease to be met.

(e) The determination as to whether, under the totality of the facts and circumstances, a particular statement contained in (or omitted from) an exemption application constitutes a material fact or representation is made by the Department.

§ 2570.50 Revocation or modification of exemptions.

(a) If, after an exemption takes effect, changes in circumstances, including changes in law or policy, occur which call into question the continuing validity of the Department's original findings concerning the exemption, the Department may take steps to revoke or modify the exemption.

(b) Before revoking or modifying an exemption, the Department will publish a notice of its proposed action in the FEDERAL REGISTER and provide interested persons with an opportunity to comment on the proposed revocation or modification. Prior to the publication of such notice, the applicant will be notified of the Department's proposed action and the reasons therefore. Subsequent to the publication of the notice, the applicant will have the opportunity to comment on the proposed revocation or modification.

(c) Ordinarily the revocation or modification of an exemption will have prospective effect only.

§ 2570.51 Public inspection and copies.

(a) The administrative record of each exemption will be open to public inspection and copying at the EBSA Public Disclosure Room, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

(b) Upon request, the staff of the Public Disclosure Room will furnish photocopies of an administrative record, or any specified portion of that record, for a specified charge per page.

§ 2570.52 Effective date.

This subpart B is effective with respect to all exemptions filed with or initiated by the Department under section 408(a) of ERISA, section 4975(c)(2) of the Code, and/or 5 U.S.C. 8477(c)(3) at any time on or after December 27, 2011. Applications for exemptions under section 408(a) of ERISA, section 4975(c)(2) of the Code, and/or 5 U.S.C. 8477(c)(3) filed on or after September 10, 1990, but before December 27, 2011 are governed by part 2570 of chapter XXV of title 29 of the Code of Federal Regulations (title 29 CFR part 2570 as revised July 1, 1991).

Subpart C—Procedures for the Assessment of Civil Penalties Under ERISA Section 502(c)(2)

SOURCE: 54 FR 26897, June 26, 1989, unless otherwise noted.

§ 2570.60 Scope of rules.

The rules of practice set forth in this subpart are applicable to ''502(c)(2) civil penalty proceedings'' (as defined in § 2570.61(n) of this subpart) under section 502(c)(2) of the Employee Retirement Income Security Act of 1974. The rules of procedure for administrative hearings published by the Department's Office of Law Judges at part 18 of this title will apply to matters arising under ERISA section 502(c)(2) except as modified by this section. 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.

§ 2570.61 Definitions.

For 502(c)(2) 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 ludge* 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–2(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)(2) 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–2(e) 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, either by 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)(2);

(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–2(g), 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)(2) civil penalty proceeding* means an adjudicatory proceeding relating to the assessment of a civil penalty provided for in section 502(c)(2) of ERISA;

(o) *Respondent* means the party against whom the Department is seeking to assess a civil sanction under ERISA section 502(c)(2);

(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 Employee Benefits Security), administrator, commissioner, appellate body, board, or other official; and

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

[54 FR 26897, June 26, 1989, as amended at 68 FR 3737, Jan. 24, 2003]

§ 2570.62 Service: Copies of documents and pleadings.

For 502(c)(2) 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 or 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)(2) 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 Employee Benefits Security Administration (EBSA) 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 $8\frac{1}{2} \times 11$ inch paper.

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

[54 FR 26897, June 26, 1989, as amended at 56 FR 54708, Oct. 22, 1991]

§ 2570.63 Parties, how designated.

For 502(c)(2) civil penalty proceedings, this section shall apply in lieu of § 18.10 of this title.

(a) The term ''party'' wherever used in these rules 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 or organization who 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 petitioners have 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.

§ 2570.64 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.

[68 FR 3737, Jan. 24, 2003]

§ 2570.65 Consent order or settlement.

For 502(c)(2) 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 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 therefore, the administrative law judge shall issue a decision incorporating such findings and agreement within thirty (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 thirty (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.

§ 2570.66 Scope of discovery.

For 502(c)(2) 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.

§ 2570.67 Summary decision.

For 502(c)(2) civil penalty proceedings, this section shall apply in lieu of § 18.41 of this title.

(a) *No genuine issue of material of fact.* (1) Where no issue of a material of fact is found to have been raised, the administrative law judge may issue a decision which, in the absence of an appeal pursuant to §§ 2570.69 through 2570.71 of this subpart, shall become a final order.

(2) A decision made under this paragraph 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 material of fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing.

§ 2570.68 Decision of the administrative law judge.

For 502(c)(2) 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 of 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 administative 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)(2) 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)(2) 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 §§ 2570.69 through 2570.71.

§ 2570.69 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.

§ 2570.70 Scope of review.

The review of the Secretary shall not be *de novo* proceeding but rather a review of the record established before the administrative law judge. There

shall be no opportunity for oral argument.

§ 2570.71 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.

Subpart D—Procedure for the Assessment of Civil Penalties Under ERISA Section 502(l)

SOURCE: 55 FR 25286, June 20, 1990, unless otherwise noted.

§ 2570.80 Scope of rules.

The rules of practice set forth in this subpart are applicable to ''502(l) civil penalty proceedings'' (as defined in § 2570.82 of this subpart) under section 502(l) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act). Refer to 29 CFR 2560.502–1 for the definition of the relevant terms of ERISA section 502(l).

§ 2570.81 In general.

Section 502(l) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) requires the Secretary of Labor to assess a civil penalty against a fiduciary who breaches a fiduciary responsibility under, or commits any other violation of, part 4 of title I of ERISA or any other person who knowingly participates in such breach or violation. The penalty under section 502(l) is equal to 20 percent of the ''applicable recovery amount'' paid pursuant to any settlement agreement with the Secretary or ordered by a court to be paid in a judicial proceeding instituted by the Secretary under section 502 (a)(2) or (a)(5). The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty if the Secretary determines in writing that:

(a) The fiduciary or other person acted reasonably and in good faith, or

(b) It is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan or any participant or beneficiary of such plan without severe financial hardship unless such waiver or reduction is granted.

The penalty imposed on a fiduciary or other person with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under section 502(i) or section 4975 of the Internal Revenue Code of 1986 (the Code).

§ 2570.82 Definitions.

For purposes of this section:

(a) *502(l) civil penalty proceedings* means an adjudicatory proceeding relating to the assessment of a civil penalty provided in section 502(l) of ERISA;

(b) *Notice of assessment* means any document, however designated, issued by the Secretary which contains a specified assessment, in monetary terms, of a civil penalty under ERISA section 502(l). A ''notice of assessment'' will contain a brief factual description of the violation for which the assessment is being made, the identity of the person being assessed, and the amount of the assessment and the basis for assessing that particular person that particular penalty amount;

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

(d) *Petition* means a written request, made by a person, for a waiver or reduction of the civil penalty described herein; and

(e) *Secretary* means the Secretary of Labor and includes, pursuant to any

delegation of authority by the Secretary, the Assistant Secretary for Employee Benefits Security, Regional Directors for Employee Benefits Security, or Deputy Regional Directors for Employee Benefits Security.

[55 FR 25286, June 20, 1990, as amended at 68 FR 16400, Apr. 3, 2003]

§ 2570.83 Assessment of civil penalty.

(a) Except as described in §§ 2570.85 and 2570.86 of this part, subsequent to the payment of the applicable recovery amount pursuant to either a settlement agreement or a court order, the Secretary shall serve on the person liable for making such payment a notice of assessment of civil penalty equal to 20 percent of the applicable recovery amount.

(b) Service of such notice shall be made either:

(1) By delivering a copy to the person being assessed; if the person is an individual, to the individual; if the person is a partnership, to any partner; if the person is a corporation, association, exchange, or other entity or organization, to any officer of such entity; if the person is an employee benefit plan, to a trustee of such plan; or to any attorney representing any such person;

(2) By leaving a copy at the principal office, place of business, or residence of such individual, partner, officer, trustee, or attorney; or

(3) By mailing a copy to the last known address of such individual, partner, officer, trustee, or attorney.

If service is accomplished by certified mail, service is complete upon mailing. If done by regular mail, service is complete upon receipt by the addressee.

§ 2570.84 Payment of civil penalty.

(a) The civil penalty must be paid within 60 days of service of the notice of assessment.

(b) At any time prior to the expiration of the payment period for the assessed penalty, any person who has committed, or knowingly participated in, a breach or violation, or has been alleged by the Secretary to have so committed or participated, may submit a written request for a conference with the Secretary to discuss the calculation of the assessed penalty. A person will be entitled under this section to one such conference per assessment. If such written request is submitted during the 60 day payment period described in subparagraph (a), such a request will not toll the running of that payment period.

(c) The notice of assessment will become a final order (within the meaning of 5 U.S.C. 704) on the first day following the 60 day payment period, subject to any tolling caused by a petition to waive or reduce described in § 2570.85.

§ 2570.85 Waiver or reduction of civil penalty.

(a) At any time prior to the expiration of the payment period for the assessed penalty, any person who has committed, or knowingly participated in, a breach or violation, or has been alleged by the Secretary to have so committed or participated, may petition the Secretary to waive or reduce the penalty under this section on the basis that:

(1) The person acted reasonably and in good faith in engaging in the breach or violation; or

(2) The person will not be able to restore all losses to the plan or participant or beneficiary of such plan without severe financial hardship unless such waiver or reduction is granted.

(b) All petitions for waiver or reduction shall be in writing and contain the following information:

(1) The name of the petitioner(s);

(2) A detailed description of the breach or violation which is the subject of the penalty;

(3) A detailed recitation of the facts which support one, or both, of the bases for waiver or reduction described in § 2570.85(a) of this part, accompanied by underlying documentation supporting such factual allegations;

(4) A declaration, signed and dated by the petitioner(s), in the following form:

> Under penalty of perjury, I declare that, to the best of my knowledge and belief, the representations made in this petition are true and correct.

(c) If a petition for waiver or reduction is submitted during the 60 day payment period described in § 2570.84(a) of this part, the payment period for the penalty in question will be tolled pending Departmental consideration of the

petition. During such consideration, the applicant is entitled to one conference with the Secretary, but the Secretary, in his or her sole discretion, may schedule or hold additional conferences with the petitioner concerning the factual allegations contained in the petition.

(d) Based solely on his or her discretion, the Secretary will determine whether to grant such a waiver or reduction. Pursuant to the procedure described in § 2570.83(b), the petitioner will be served with a written determination informing him or her of the Secretary's decision. Such written determination shall briefly state the grounds for the Secretary's decision, and shall be final and non-reviewable. In the case of a determination not to waive, the payment period for the penalty in question, if previously initiated, will resume as of the date of service of the Secretary's written determination.

§ 2570.86 Reduction of penalty by other penalty assessments.

The penalty assessed on a person pursuant to this section with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such person with respect to such transaction under ERISA section 502(i) and section 4975 of the Code. Prior to a reduction of penalty under this paragraph, the person being assessed must provide proof to the Department of the payment of the penalty or tax and the amount of that payment. Submissions of proof of other penalty or tax assessments will not toll the 60 day payment period, if previously initiated.

§ 2570.87 Revision of assessment.

If, based on the procedures described in § 2570.84, 2570.85, or 2570.86, the assessed penalty amount is revised, the person being assessed will receive a revised notice of assessment and will be obligated to pay the revised assessed penalty within the relevant 60 day payment period (as determined by the applicable procedure in § 2570.84, 2570.85, or 2570.86), and, if necessary, any excess penalty payment will be refunded as soon as administratively feasible. The revised notice of assessment will revoke any previously issued notice of assessment with regard to the transaction in question and will become a final order (within the meaning of 5 U.S.C. 704) the later of the first day following the 60 day payment period or the date of its service on the person being assessed, pursuant to the service procedures described in § 2570.83(b).

§ 2570.88 Effective date.

This section is effective June 20, 1990, and shall apply to assessments under section 502(l) made by the Secretary after June 20, 1990, based on any breach or violation occurring on or after December 19, 1989.

Subpart E—Procedures for the Assessment of Civil Penalties Under ERISA Section 502(c)(5)

SOURCE: 68 FR 17508, Apr. 9, 2003, unless otherwise noted.

§ 2570.90 Scope of rules.

The rules of practice set forth in this subpart are applicable to ''502(c)(5) civil penalty proceedings'' (as defined in 2570.91(n)) under section 502(c)(5) of the Employee Retirement Income Security Act of 1974. The rules of procedure for administrative hearings published by the Department's Office of Administrative Law Judges in subpart A of 29 CFR part 18 will apply to matters arising under ERISA section 502(c)(5) except as described by this section. 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.

§ 2570.91 Definitions.

For 502(c)(5) 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 29 CFR 2560.502c–5(g);

(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)(5) 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 29 CFR 2560.502c–5(e) 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, either by 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)(5);

(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 29 CFR 2560.502c–5(g), 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)(5) civil penalty proceeding* means an adjudicatory proceeding relating to the assessment of a civil penalty provided for in section 502(c)(5) of ERISA;

(o) *Respondent* means the party against whom the Department is seeking to assess a civil sanction under ERISA section 502(c)(5);

(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 Employee Benefits Security), administrator, commissioner, appellate body, board, or other official of the Department of Labor; and

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

§ 2570.92 Service: Copies of documents and pleadings.

For 502(c)(5) penalty proceedings, this section shall apply in lieu of 29 CFR 18.3.

(a) *In 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 (OALJ), 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)(5) 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 Employee Benefits Security Administration (EBSA) 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 × 11 inch paper.

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

§ 2570.93 Parties, how designated.

For 502(c)(5) civil penalty proceedings, this section shall apply in lieu of 29 CFR 18.10.

(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 or organization who 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 petitioners have 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.

§ 2570.94 Consequences of default.

For 502(c)(5) civil penalty proceedings, this section shall apply in lieu of 29 CFR 18.5(a) and (b). Failure of the respondent to file an answer to the notice of determination described in 29 CFR 2560.502c–5(g) within the 30 day period provided by 29 CFR 2560.502c–5(h) 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), forty-five (45) days from the date of the service of the notice.

§ 2570.95 Consent order or settlement.

For 502(c)(5) civil penalty proceedings, the following shall apply in lieu of 29 CFR 18.9.

(a) *In 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 deferment 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;

(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 that 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 thirty (30) days of 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 a 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 thirty (30) days after receipt of such objections whether to 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.

§ 2570.96 Scope of discovery.

For 502(c)(5) civil penalty proceedings, this section shall apply in lieu of 29 CFR 18.14.

(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 representative of a party concerning the proceeding.

§ 2570.97 Summary decision.

For 502(c)(5) civil penalty proceedings, this section shall apply in lieu of 29 CFR 18.41.

(a) *No genuine issue of material fact.* (1) Where no issue of 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 §§ 2570.99 through 2570.101, shall become a final order.

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

(i) Findings of fact and conclusions of law, and the reasons therefore, 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 material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing.

§ 2570.98 Decision of the administrative law judge.

For 502(c)(5) civil penalty proceedings, this section shall apply in lieu of 29 CFR 18.57.

(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 an 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 an 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)(5) 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)(5) of ERISA. It shall be supported by reliable and probative evidence. The decision of the administrative law judge shall become a final agency action within the meaning of 5 U.S.C. 704 unless an appeal is made pursuant to the procedures set forth in §§ 2570.99 through 2570.101.

§ 2570.99 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.

§ 2570.100 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.

§ 2570.101 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.

Subpart F—Procedures for the Assessment of Civil Penalties Under ERISA Section 502(c)(6)

SOURCE: 67 FR 786, Jan. 7, 2002, unless otherwise noted.

§ 2570.110 Scope of rules.

The rules of practice set forth in this subpart are applicable to ''502(c)(6) civil penalty proceedings'' (as defined in § 2570.111(n) of this subpart) under section 502(c)(6) of the Employee Retirement Income Security Act of 1974. The rules of procedure for administrative hearings published by the Department's Office of Law Judges at Part 18 of this title will apply to matters arising under ERISA section 502(c)(6) except as modified by this section. 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.

§ 2570.111 Definitions.

For section 502(c)(6) 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–6(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)(6) 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 matters reasonably beyond the control of the plan administrator described in § 2560.502c–6(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, either by 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)(6);

(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–6(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)(6) civil penalty proceeding* means an adjudicatory proceeding relating to the assessment of a civil penalty provided for in section 502(c)(6) of ERISA;

(o) *Respondent* means the party against whom the Department is seeking to assess a civil sanction under ERISA section 502(c)(6);

(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 Employee Benefits Security), administrator, commissioner, appellate body, board, or other official; and

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

§ 2570.112 Service: Copies of documents and pleadings.

For 502(c)(6) 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)(6) 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 Employee Benefits Security Administration (EBSA) 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 × 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.

§ 2570.113 Parties, how designated.

For 502(c)(6) 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 or organization who 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.

§ 2570.114 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.

[68 FR 3738, Jan. 24, 2003]

§ 2570.115 Consent order or settlement.

For 502(c)(6) 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.

§ 2570.116 Scope of discovery.

For 502(c)(6) 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.

§ 2570.117 Summary decision.

For 502(c)(6) 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 §§ 2570.119 through 2570.121 of this subpart, shall become a final order.

(2) A decision made under this paragraph (a) 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.

§ 2570.118 Decision of the administrative law judge.

For 502(c)(6) 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 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)(6) 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)(6) 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 §§ 2570.119 through 2570.121.

§ 2570.119 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.

§ 2570.120 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.

§ 2570.121 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.

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

SOURCE: 68 FR 3738, Jan. 24, 2003, unless otherwise noted.

§ 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 Employee Benefits Security), 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 Employee Benefits Security Administration (EBSA) 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 × 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.

Subpart H—Procedures for Issuance of Findings Under ERISA Sec. 3(40)

SOURCE: 68 FR 17489, Apr. 9, 2003, unless otherwise noted.

§ 2570.150 Scope of rules.

The rules of practice set forth in this subpart H apply to ''section 3(40) Finding Proceedings'' (as defined in § 2570.152(g)), under section 3(40) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act). Refer to 29 CFR 2510.3–40 for the definition of relevant terms of section 3(40) of ERISA, 29 U.S.C. 1002(40). To the extent that the regulations in this subpart differ from the regulations in subpart A of 29 CFR part 18, the regulations in this subpart apply to matters arising under section 3(40) of ERISA rather than the rules of procedure for administrative hearings published by the Department's Office of Administrative Law Judges in subpart A of 29 CFR part 18. 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.

§ 2570.151 In general.

If there is an attempt to assert state jurisdiction or the application of state law, either by the issuance of a state administrative or court subpoena to, or

the initiation of administrative or judicial proceedings against, a plan or other arrangement that alleges it is covered by title I of ERISA, 29 U.S.C. 1003, the plan or other arrangement may petition the Secretary to make a finding under section 3(40)(A)(i) of ERISA that it is a plan established or maintained under or pursuant to an agreement or agreements that the Secretary finds to be collective bargaining agreements for purposes of section 3(40) of ERISA.

§ 2570.152 Definitions.

For section 3(40) Finding Proceedings, this section shall apply instead of the definitions in 29 CFR 18.2.

(a) *ERISA* means the Employee Retirement Income Security Act of 1974, *et seq.*, 29 U.S.C. 1001, *et seq.*, as amended.

(b) *Order* means the whole or part of a final procedural or substantive disposition by the administrative law judge of a matter under section 3(40) of ERISA. No order will be appealable to the Secretary except as provided in this subpart.

(c) *Petition* means a written request under the procedures in this subpart for a finding by the Secretary under section 3(40) of ERISA that a plan is established or maintained under or pursuant to one or more collective bargaining agreements.

(d) *Petitioner* means the plan or arrangement filing a petition.

(e) *Respondent* means:

(1) A state government instrumentality charged with enforcing the law that is alleged to apply or which has been identified as asserting jurisdiction over a plan or other arrangement, including any agency, commission, board, or committee charged with investigating and enforcing state insurance laws, including parties joined under § 2570.153;

(2) The person or entity asserting that state law or state jurisdiction applies to the petitioner;

(3) The Secretary of Labor; and

(4) A state not named in the petition that has intervened under § 2570.153(b).

(f) *Secretary* means the Secretary of Labor, and includes, pursuant to any delegation or sub-delegation of authority, the Assistant Secretary for Employee Benefits Security or other employee of the Employee Benefits Security Administration.

(g) *Section 3(40) Finding Proceeding* means a proceeding before the Office of Administrative Law Judges (OALJ) relating to whether the Secretary finds an entity to be a plan to be established or maintained under or pursuant to one or more collective bargaining agreements within the meaning of section 3(40) of ERISA.

§ 2570.153 Parties.

For section 3(40) Finding Proceedings, this section shall apply instead of 29 CFR 18.10.

(a) The term ''party'' with respect to a Section 3(40) Finding Proceeding means the petitioner and the respondents.

(b) States not named in the petition may participate as parties in a Section 3(40) Finding Proceeding by notifying the OALJ and the other parties in writing prior to the date for filing a response to the petition. After the date for service of responses to the petition, a state not named in the petition may intervene as a party only with the consent of all parties or as otherwise ordered by the ALJ.

(c) The Secretary of Labor shall be named as a ''respondent'' to all actions.

(d) The failure of any party to comply with any order of the ALJ may, at the discretion of the ALJ, result in the denial of the opportunity to present evidence in the proceeding.

§ 2570.154 Filing and contents of petition.

(a) A person seeking a finding under section 3(40) of ERISA must file a written petition by delivering or mailing it to the Chief Docket Clerk, Office of Administrative Law Judges (OALJ), 800 K Street, NW., Suite 400, Washington, DC 20001–8002, or by making a filing by any electronic means permitted under procedures established by the OALJ.

(b) The petition shall—

(1) Provide the name and address of the entity for which the petition is filed;

(2) Provide the names and addresses of the plan administrator and plan

sponsor(s) of the plan or other arrangement for which the finding is sought;

(3) Identify the state or states whose law or jurisdiction the petitioner claims has been asserted over the petitioner, and provide the addresses and names of responsible officials;

(4) Include affidavits or other written evidence showing that:

(i) State jurisdiction has been asserted over or legal process commenced against the petitioner pursuant to state law;

(ii) The petitioner is an employee welfare benefit plan as defined at section 3(1) of ERISA (29 U.S.C. 1002(1)) and 29 CFR 2510.3–1 and is covered by title I of ERISA (*see* 29 U.S.C. 1003);

(iii) The petitioner is established or maintained for the purpose of offering or providing benefits described in section 3(1) of ERISA (29 U.S.C. 1002(1)) to employees of two or more employers (including one or more self-employed individuals) or their beneficiaries;

(iv) The petitioner satisfies the criteria in 29 CFR 2510.3–40(b); and

(v) Service has been made as provided in § 2570.155.

(5) The affidavits shall set forth such facts as would be admissible in evidence in a proceeding under 29 CFR part 18 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The affidavit or other written evidence must set forth specific facts showing the factors required under paragraph (b)(4) of this section.

§ 2570.155 Service.

For section 3(40) proceedings, this section shall apply instead of 29 CFR 18.3.

(a) *In 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 (OALJ), 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 by first class, prepaid U.S. mail, a copy to the last known address. The Secretary shall be served by delivery to the Associate Solicitor, Plan Benefits Security Division, ERISA Section 3(40) Proceeding, PO 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 to all parties of record by regular mail to their last known address.

(d) *Form of pleadings* (1) Every pleading shall contain information indicating the name of the Employee Benefits Security Administration (EBSA) as the agency under which the proceeding is instituted, the title of the proceeding, the docket number (if any) assigned by the OALJ 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 × 11 inch paper.

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

§ 2570.156 Expedited proceedings.

For section 3(40) Finding Proceedings, this section shall apply instead of 29 CFR 18.42.

(a) At any time after commencement of a proceeding, any party may move to advance the scheduling of a proceeding, including the time for conducting discovery.

(b) Except when such proceedings are directed by the Chief Administrative Law Judge or the administrative law

judge assigned, any party filing a motion under this section shall:

(1) Make the motion in writing;

(2) Describe the circumstances justifying advancement;

(3) Describe the irreparable harm that would result if the motion is not granted; and

(4) Incorporate in the motion affidavits to support any representations of fact.

(c) Service of a motion under this section shall be accomplished by personal delivery, or by facsimile, followed by first class, prepaid, U.S. mail. Service is complete upon personal delivery or mailing.

(d) Except when such proceedings are required, or unless otherwise directed by the Chief Administrative Law Judge or the administrative law judge assigned, all parties to the proceeding in which the motion is filed shall have ten (10) days from the date of service of the motion to file an opposition in response to the motion.

(e) Following the timely receipt by the administrative law judge of statements in response to the motion, the administrative law judge may advance pleading schedules, discovery schedules, prehearing conferences, and the hearing, as deemed appropriate; provided, however, that a hearing on the merits shall not be scheduled with less than five (5) working days notice to the parties, unless all parties consent to an earlier hearing.

(f) When an expedited hearing is held, the decision of the administrative law judge shall be issued within twenty (20) days after receipt of the transcript of any oral hearing or within twenty (20) days after the filing of all documentary evidence if no oral hearing is conducted.

§ 2570.157 Allocation of burden of proof.

For purposes of a final decision under § 2570.158 (Decision of the Administrative Law Judge) or § 2570.159 (Review by the Secretary), the petitioner shall have the burden of proof as to whether it meets 29 CFR 2510.3–40.

§ 2570.158 Decision of the Administrative Law Judge.

For section 3(40) finding proceedings, this section shall apply instead of 29 CFR 18.57.

(a) *Proposed findings of fact, conclusions of law, and order.* Within twenty (20) days of filing 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 under 29 CFR 18.55, proposed findings of fact, conclusions of law, and order together with the supporting brief expressing the reasons for such proposals. Such proposals and brief 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 based on oral argument in lieu of briefs.* In any case in which the administrative law judge believes that written briefs or proposed findings of fact and conclusions of law may not be necessary, the administrative law judge shall notify the parties at the opening of the hearing or as soon thereafter as is practicable that he or she may wish to hear oral argument in lieu of briefs. The administrative law judge shall issue his or her decision at the close of oral argument, or within 30 days thereafter.

(c) *Decision of the administrative law judge.* Within 30 days, or as soon as possible thereafter, 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 therefore, 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. It shall be supported by reliable and probative evidence. Such decision shall be in accordance with the regulations found at 29 CFR 2510.3–40 and shall be limited to whether the petitioner, based on the facts presented at the time of the proceeding, is a plan

established or maintained under or pursuant to collective bargaining for the purposes of section 3(40) of ERISA.

§ 2570.159 Review by the Secretary.

(a) A request for review by the Secretary of an appealable decision of the administrative law judge may be made by any party. Such a request must be filed within 20 days of the issuance of the final decision or the final decision of the administrative law judge will become the final agency order for purposes of 5 U.S.C. 701 *et seq*.

(b) A request for review by the Secretary shall state with specificity the issue(s) in the administrative law judge's final decision upon which review is sought. The request shall be served on all parties to the proceeding.

(c) The review by the Secretary shall not be a de novo proceeding but rather a review of the record established by the administrative law judge.

(d) The Secretary may, in his or her discretion, allow the submission of supplemental briefs by the parties to the proceeding.

(e) The Secretary shall issue a decision as promptly as possible, affirming, modifying, or setting aside, in whole or in part, the decision under review, and shall set forth a brief statement of reasons therefor. Such decision by the Secretary shall be the final agency action within the meaning of 5 U.S.C. 704.

Subpart I—Procedures for the Assessment of Civil Penalties Under ERISA Section 502(c)(8)

SOURCE: 75 FR 8801, Feb. 26, 2010, unless otherwise noted.

§ 2570.160 Scope of rules.

The rules of practice set forth in this subpart are applicable to ''502(c)(8) civil penalty proceedings'' (as defined in §2570.161(n) of this subpart) under section 502(c)(8) 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)(8) 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.

§ 2570.161 Definitions.

For 502(c)(8) 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–8(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)(8) 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–8(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)(8);

(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–8(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)(8) civil penalty proceeding* means an adjudicatory proceeding relating to the assessment of a civil penalty provided for in section 502(c)(8) of ERISA;

(o) *Respondent* means the party against whom the Department is seeking to assess a civil sanction under ERISA section 502(c)(8);

(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 Employee Benefits Security), administrator, commissioner, appellate body, board, or other official; and

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

§ 2570.162 Service: Copies of documents and pleadings.

For 502(c)(8) 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)(8) 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 Employee Benefits Security Administration (EBSA) 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 × 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.

§ 2570.163 Parties, how designated.

For 502(c)(8) 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*.

§ 2570.164 Consequences of default.

For 502(c)(8) 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–8(g) of this chapter within the 30 day period provided by §2560.502c–8(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)(8) of the Act. Such notice shall then become the final order of the Secretary, within the meaning of §2570.161(g) of this subpart, forty-five (45) days from the date of service of the notice.

§ 2570.165 Consent order or settlement.

For 502(c)(8) 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.

§ 2570.166 Scope of discovery.

For 502(c)(8) 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