Reporting and Disclosure Act (LMRDA) and regulations thereunder, and

(2) In lieu of a summary plan description, the employee organization constitution or by-laws may be furnished in accordance with § 2520.104b–2 to participants and beneficiaries together with any supplement to such document necessary to meet the requirements of §§ 2520.102–2 and 2520.102–3.

* * * * *

11. In § 2520.104–27, revise paragraph (a) to read as follows:

§ 2520.104–27 Alternative method of compliance for certain unfunded dues financed pension plans maintained by employee organizations.

(a) *Scope.* Under the authority of section 110 of the Act, a pension benefit plan that meets the requirements of paragraph (b) of this section is exempted from the provisions of the Act that require filing with the Secretary an annual report and furnishing a summary annual report to participants and beneficiaries receiving benefits. Such plans may use a simplified method of reporting and disclosure to comply with the requirement to furnish a summary plan description to participants and beneficiaries receiving benefits, as follows:

(1) In lieu of filing an annual report with the Secretary or distributing a summary annual report, a filing is made of Report Form LM–2 or LM–3, pursuant to the Labor-Management Reporting and Disclosure Act (LMRDA) and regulations thereunder, and

(2) In lieu of a summary plan description, the employee organization constitution or bylaws may be furnished in accordance with § 2520.104b–2 to participants and beneficiaries together with any supplement to such document necessary to meet the requirements of §§ 2520.102–2 and 2520.102–3.

* * * * *

§ 2520.104–43 [Amended]

12. Section 2520.104–43 is amended by removing from paragraph (a) the term ''section 104(a)(1)(A)'' and adding, in its place, ''section 104(a)(1)''.

§ 2520.104–44 [Amended]

13. Section 2520.104–44 is amended by removing from paragraph (d) the term ''section 104(a)(1)(A)'' and adding, in its place, ''section 104(a)(1)''.

§ 2520.104a–2 [Removed]

14. Section 2520.104a–2 is removed and reserved.

§ 2520.104a–3 [Removed]

15. Section 2520.104a–3 is removed and reserved.

§ 2520.104a–4 [Removed]

16. Section 2520.104a–4 is removed and reserved.

§ 2520.104a–5 [Amended]

17–18. Section 2520.104a–5 is amended by removing from paragraph (a) the term ''section 104(a)(1)(A)'' and adding, in its place, the term ''section 104(a)(1)''; and by removing and reserving paragraph (a)(1).

§ 2520.104a–7 [Removed]

19. Section 2520.104a–7 is removed and reserved.

§ 2520.104b–1 [Amended]

20. Section 2520.104b–1 is amended by removing from the third sentence of paragraph (b)(3) the term ''plan description''.

21. In § 2520.104b–2, revise paragraph (g)(1) to read as follows:

§ 2520.104b–2 Summary plan description.

* * * * *

(g) *Terminated plans.* (1) If, on or before the date by which a plan is required to furnish a summary plan description or updated summary plan description to participants and pension plan beneficiaries under this section, the plan has terminated within the meaning of paragraph (g)(2) of this section, the administrator of such plan is not required to furnish to participants covered under the plan or to beneficiaries receiving benefits under the plan a summary plan description.

* * * * *

§ 2520.104b–3 [Amended]

22. Section 2520.104b–3 paragraphs (f) and (g) are removed and reserved.

PART 2560—RULES AND REGULATIONS FOR ADMINISTRATION AND ENFORCEMENT

23. The authority citation for part 2560 continues to read as follows:

Authority: Secs. 502, 505 of ERISA, 29 U.S.C. 1132, 1135, and Secretary's Order 1–87, 52 FR 13139 (April 21, 1987).

Section 2560.502–1 also issued under sec. 502(b)(2), 29 U.S.C. 1132(b)(2).

Section 2560.502i–1 also issued under sec. 502(i), 29 U.S.C. 1132(i).

Section 2560.503–1 also issued under sec. 503, 29 U.S.C. 1133.

§ 2560.502c–2 [Amended]

24. Section 2560.502c–2 is amended by removing from paragraph (a)(1) and (a)(2) the term ''section 101(b)(4)'' each time it appears and adding, in its place, the term ''section 101(b)(1)''.

Signed at Washington, DC, this 22nd day of December, 2001.

Ann L. Combs,

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

[FR Doc. 02–140 Filed 1–4–02; 8:45 am]

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Parts 2520, 2560 and 2570

RIN 1210–AA67, RIN 1210–AA68

Furnishing Documents to the Secretary of Labor on Request Under ERISA Section 104(a)(6) and Assessment of Civil Penalties Under ERISA Section 502(c)(6)

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

ACTION: Final rule.

SUMMARY: This document contains a final rulemaking under the Employee Retirement Income Security Act of 1974 (ERISA) that implements certain amendments to ERISA added as part of the Taxpayer Relief Act of 1997 (TRA '97). The final rule implements section 104(a)(6) of ERISA by requiring the administrator of an employee benefit plan subject to Part 1 of Title I of ERISA to furnish to the Department, upon request, certain documents relating to the employee benefit plan. The final rule also establishes procedures relating to the assessment of civil penalties for failures or refusals by administrators to furnish requested documents to the Department and establishes procedures for review of such penalties by the Department. The final rule affects employee pension and welfare benefit plans, plan sponsors, administrators and fiduciaries, and plan participants and beneficiaries.

DATES: This regulation is effective March 8, 2002.

FOR FURTHER INFORMATION CONTACT: Lisa M. Fields, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, (202) 693–8500 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

A. Background

The Taxpayer Relief Act of 1997 (TRA '97) eliminated the requirement under ERISA that employee benefit plan administrators automatically file

summary plan descriptions (SPDs) and summaries of material plan modifications (SMMs) with the Department. TRA '97 added paragraph (6) to section 104(a) of ERISA which provides that the administrator of any employee benefit plan subject to part 1 of Title I of ERISA is required to furnish to the Department, on request, any documents relating to the employee benefit plan, including but not limited to, the latest SPD (including any summaries of plan changes not contained in the SPD), and the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.[1] TRA '97 also added section 502(c)(6) of ERISA providing the Secretary with the authority to assess civil penalties for a plan administrator's failure to furnish material requested under section 104(a)(6) of ERISA. Specifically, section 502(c)(6) provides that, if within 30 days of a request by the Department, the plan administrator fails to furnish materials requested by the Department, the Department may assess a civil penalty against the administrator of up to $100 a day from the date of such failure, but in no event in excess of $1,000 per request. Section 502(c)(6) also provides that no penalty shall be imposed for failures resulting from matters reasonably beyond the control of the plan administrator.

On August 5, 1999, the Department published a notice in the **Federal Register** (64 FR 42797) inviting public comment on a proposal to add regulations at 29 CFR 2520.104a–8 and 29 CFR 2560.502c–6 that would implement the above TRA '97 amendments. In response to this notice, the Department received four public comment letters. Set forth below is a description of the regulations, and a discussion of public comments received and specific changes from the proposal reflected in the final rule.

B. Description of Regulations, Comments and Changes

Furnishing Documents to the Department on Request Under Section 104(a)(6)

Section 2520.104a–8 implements section 104(a)(6) of ERISA. As proposed, paragraph (a)(1) of § 2520.104a–8 provides that the administrator (within the meaning of section 3(16)(A) of ERISA) of any employee benefit plan subject to Part 1 of Title I of ERISA has an obligation to furnish to the Department, upon request, any document relating to the plan. Paragraph (a)(2) clarifies that multiple requests under ERISA section 104(a)(6) and § 2520.104a–8 for the same or similar document or documents shall be considered separate requests for purposes of penalties under ERISA section 502(c)(6) and § 2560.502c–6(a). Paragraph (b) of the proposal incorporates the service of notice rules in § 2560.502c–6(i), for purposes of serving the plan administrator with a request under ERISA section 104(a)(6); and paragraph (c) of the proposed regulation describes when a document would be deemed to be received by the Secretary.

Most of the commenters focused on two general issues—what documents will be requested by the Department and on whose behalf the Department will request documents. With regard to the first issue, the commenters expressed concern that the regulation, as proposed, would permit the Department to request, on behalf of participants and beneficiaries, any document relating to the plan, including proprietary, confidential and other plan-related information with respect to which participants and beneficiaries generally would not have access. Commenters argued that the Department should limit its authority to requesting only those documents that a participant or beneficiary is otherwise entitled under section 104(b)(4) of ERISA.[2] The second issue related to commenter concerns that plan-related information would be provided to persons who were not plan participants or beneficiaries. In this regard, the commenters suggested that the final regulation should make clear that the Department will only request documents on behalf of participants and beneficiaries and should include a process that the Department will follow in determining whether a given individual is entitled to obtain documents.

In the preamble to the proposed regulation, the Department indicated that, while section 104(a)(6) conferred broad authority on the Secretary to request documents, the Department generally intended to limit the exercise of its authority under § 2520.104a–8 to requesting SPDs on behalf of participants and beneficiaries. The Department also envisioned that it may intervene to assist a participant and beneficiary in obtaining documents or instruments pursuant to which a plan is established or operated where a plan administrator fails or refuses to respond to the request of a participant or beneficiary.

In response to the concerns of the commenters, the Department has modified the final regulation to more specifically comport with the Department's views expressed in the preamble to the proposed regulation. In this regard, the final regulation specifically limits the application of § 2520.104a–8 to requests from the Department for the latest updated summary plan description (including any summaries of material modifications to the plan or changes in the information required to be included in the summary plan description)[3] and any other documents described in section 104(b)(4) of ERISA with respect to which a participant or beneficiary has requested, in writing, a copy from the plan administrator and which the administrator has failed or refused to furnish to the participant or beneficiary. *See* § 2520.104a–8(a)(1)(i) and (ii).

As revised, the final regulation clearly limits the documents to be requested from plan administrators by the Department on behalf of participants and beneficiaries to those documents with respect to which participants and beneficiaries have a statutory right to examine and obtain copies.[4]

Also, by limiting the circumstances under which the Department will request documents and instruments pursuant to which a plan is established or operated to those where a participant or beneficiary has previously made a written request to the plan for such documents or instruments, plan administrators are afforded the opportunity to raise, with both the requesting individual and the Department, issues concerning the status of the requesting individual as a participant or beneficiary.

[1] Prior to TRA '97, this authority was in section 104(a)(1) of ERISA, which stated that ''the administrator shall also furnish to the Secretary, upon request, any documents relating to the employee benefit plan, including but not limited to the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.''

[2] Under section 104(b)(4) of ERISA, the administrator must, upon written request of any participant or beneficiary, ''furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.''

[3] For purposes of a request by the Department under ERISA section 104(a)(6), any separate documents required to be furnished with the SPD, e.g., a plan's claims procedures provided as a separate document under 29 CFR § 2520.102–3(s), would be considered part of the plan's latest updated summary plan description.

[4] *See* sections 104(b)(2) and 104(b)(4) of ERISA. Also, the Department notes that the final rule relates solely to requests by the Department for documents pursuant to section 104(a)(6) and, accordingly, does not serve to limit or otherwise affect the authority of the Department to request documents pursuant to other provisions of ERISA, including the Department's authority under section 504.

The final regulation does not condition requests for updated summary plan descriptions on a participant or beneficiary first seeking the document directly from the plan. As explained in the preamble to the proposed regulation, the Department believes that the elimination of the SPD filing requirements, taken together with the establishment of civil penalties for failures to furnish requested documents, clearly evidences Congress' intent that the Department would exercise its authority to ensure that participants and beneficiaries would have an independent source for SPDs. The value of such access is predicated on the rights of participants and beneficiaries to choose not to go to the plan or plan sponsor for such information.

In addition to the foregoing, the final rule has been modified to clarify the persons who will be considered participants or beneficiaries for purposes of requests pursuant to section 104(a)(6) and the regulation. A new paragraph (b) was added to the final regulation,[5] provides that a participant or beneficiary will include any individual who is: (i) A participant or beneficiary within the meaning of ERISA sections 3(7) and 3(8), respectively; (ii) an alternate payee under a qualified domestic relations order (see ERISA section 206(d)(3)(K)) or prospective alternate payee (spouses, former spouses, children or other dependents); (iii) a qualified beneficiary under COBRA (see ERISA section 607(3)) or prospective qualified beneficiary (spouse or dependent child); (iv) an alternate recipient under a qualified medical child support order (see ERISA section 609(a)(2)(C)) or a prospective alternate recipient; or (v) a representative of any of the foregoing. In the preamble to the proposed regulation, the Department expressed the view that such persons would be treated as participants and beneficiaries for purposes of the regulation. Upon further consideration, and taking into account there were no public comments objecting to the Department's position on this issue, the Department has determined that, in the interest of clarity, the persons to be treated as participants and beneficiaries for purposes of the regulation should be codified in the regulation.

In addition to the comments discussed above, one commenter suggested that plans should be required to include a notice in their SPDs informing participants and beneficiaries that they can ask the Department for help in obtaining documents from their plan administrator. The Department, as part of a separate rule amending its regulations governing the content of SPDs, made improvements to the ''ERISA statement of rights'' currently required to be included in each SPD pursuant to 29 CFR 2520.102–3(t) to ensure that participants and beneficiaries understand their right to request certain documents from their plan and the availability of assistance from the Department. *See* 65 FR 70226, 70243 (November 21, 2000).

One commenter argued that inasmuch as the plan may charge participants and beneficiaries for copies of documents available under section 104(b)(4) of ERISA, plans should be able to charge the Department for materials furnished in response to requests by the Department on behalf of participants and beneficiaries. The Department notes that there is no statutory basis for permitting the imposition of charges on the Department attendant to costs incurred in connection with requests under section 104(a)(6) of ERISA. Further, in view of the fact that SPDs have been available to participants through the Department's public disclosure room and that Congress, in enacting the TRA '97 changes, intended to ensure that participants have continued access to SPDs through the Department, the Department does not believe passing such charges back to participants would be consistent with Congressional intent. With respect to other documents described in section 104(b)(4) of ERISA, the Department's involvement in requesting such documents will result from the failure or refusal of a plan administrator to furnish the requested documents under circumstances where a reasonable charge could have been imposed for copies. For these reasons, the Department has not modified the regulation in response to the foregoing comments.

One commenter noted that the proposed regulation did not indicate whether the Department will retain copies of documents submitted in response to requests on behalf of participants and beneficiaries, nor did it indicate whether the Department will discard documents that were filed with the Department prior to the enactment of the TRA '97 amendments. The Department does not intend to retain copies of materials furnished in response to requests under ERISA section 104(a)(6) made on behalf of participants and beneficiaries or other persons. In the case of previously filed SPDs and SMMs, the Department is maintaining the SPDs and SMMs filed prior to the TRA '97 amendments. These documents are currently available for examination and copying through PWBA's public disclosure room.

One commenter expressed the view that proposed § 2520.104a–8(c), which provides that ''a document is not considered furnished to the Secretary until the date on which such document is received by the Department of Labor at the address specified in the request,'' should be modified to provide that documents mailed by certified mail will be considered received when mailed. The Department agrees that such a change is appropriate and would establish consistency with the rules governing ''service,'' as set forth in § 2560.502c–6(i), applicable to the assessment of civil penalties for a failure to comply with a request for documents from the Department. Accordingly, paragraph (d) of the final regulation (which was paragraph (c) of the proposal) has been amended to provide that, in the case of documents furnished to the Secretary by certified mail, the document shall be considered received on the date on which the document is mailed to the Department of Labor at the address specified in the request.

One commenter noted that the proposed regulation did not take into account that many multiemployer plans may not always be able to comply with the Department's requests for documents within 30 days. Due to the often decentralized administrative structure of multiemployer plans, necessitated by the large number of participants and contributing employers, the commenter noted that a multiemployer plan's designated plan administrator might not have possession or control of certain documents that the Department may request and such plan administrator may have to locate the person with control of the requested documents and then request copies of the documents from an unaffiliated third party over whom the plan administrator may not be able to exercise any authority. The commenter suggested that the final regulation include a procedure for plans to obtain an extension of time to respond to the Department's request for documents if good cause for the extension is demonstrated, without the imposition of the penalty prescribed in section 502(c)(6) of ERISA or the need for a penalty appeal. In addition, the commenter noted that, in the event multiple requests for documents are received from the Department one after another, the volume of requests may prevent a plan administrator from filing a response within 30 days, and the

[5] Paragraphs (b) and (c) of the proposal have been redesignated as paragraphs (c) and (d) of the final regulation.

commenter recommended that the final regulation should provide that the Department will waive any fines that may otherwise be assessed under section 502(c)(6) of ERISA if the plan administrator demonstrates to the satisfaction of the Department that a timely response was not practicable. Two commenters suggested that a plan administrator should be allowed to initially decline production of documents and challenge the propriety of requests if the plan administrator believes that such documents do not relate to the plan or that they contain information of a confidential or proprietary nature and that a sanction should be stayed pending review of the claim and production of the documents following a decision adverse to the plan administrator. One of these commenters noted that the proposed regulation would subject plan administrators challenging the Department's requests to substantial fines that may only be reduced or waived by engagement in an adjudicatory process with the Department. This commenter noted that such adjudicatory proceedings to appeal the assessment of the Department's fines would result in expenditures of valuable resources that would be better used for providing benefits to plan participants.

The Department believes that most of the concerns raised by these commenters are adequately addressed by the changes to the final rule that clarify the limited range of documents the Department will request under section 104(a)(6). Moreover, the Department believes that the provisions of § 2520.104a–8 and § 2560.502c–6 provide the Department with sufficient flexibility, prior to the assessment of a civil penalty, to take into account matters reasonably beyond the control of a plan administrator that would affect an administrator's ability to comply with a request from the Department in a timely manner. Furthermore, the Department believes that the processes provided in the regulations are sufficiently flexible to enable plan administrators to raise concerns with the Department regarding the production or disclosure of requested documents. In particular, the Department notes that there is nothing in § 2520.104a–8 that would limit the Department's ability to consider, following the issuance of a request for documents, information provided by a plan administrator concerning the administrator's inability to comply with the request in a timely fashion or an administrator's concerns relating to the disclosure of the requested information. In addition, an administrator may, pursuant to § 2560.502c–6(e), submit a statement setting forth why matters reasonably beyond the control of the administrator precluded timely compliance with the Department's request for documents.

Authority To Assess Civil Penalties for Violations of Section 104(a)(6) of ERISA

Section 2560.502c–6(a) addresses the general application of section 502(c)(6) of ERISA. Paragraph (a)(1) provides that the administrator, as defined in ERISA section 3(16)(A), of an employee benefit plan is liable for the civil penalties assessed under section 502(c)(6) in each case in which there is a failure or refusal to furnish to the Department any document requested under section 104(a)(6) of ERISA and § 2520.104a–8. Paragraph (a)(2) defines such a failure or refusal as a failure or refusal, in whole or in part, to furnish documents at the time and in the manner prescribed in the request.

Section 2560.502c–6(b) sets forth the amount of penalties that may be assessed under section 502(c)(6) of ERISA. Consistent with the terms of section 502(c)(6) of ERISA, paragraph (b)(1) provides that the Department may assess a penalty of up to $100 per day, but not in excess of $1,000 per request. Paragraph (b)(2) provides that the date of a failure or refusal to furnish any documents requested under section 104(a)(6) of ERISA and § 2520.104a–8 shall not be earlier than the thirtieth day after service of the request.

Section 2560.502c–6(c) provides that, prior to the assessment of any penalty under section 502(c)(6) of ERISA, the Department shall provide the administrator with written notice indicating the Department's intent to assess a penalty, the amount of the penalty, the period to which the penalty applies, and the reason(s) for the penalty. The notice is to be served in accordance with § 2560.502c–6(i) (service of notice provision). Under § 2560.502c–6(f), the notice would become a final order of the Department, within the meaning of § 2570.111(g) (also published as part of this rulemaking), within 30 days of the service of the notice, unless a statement described in § 2560.502c–6(e) is filed with the Department.

Paragraphs (d), (e), (f), (g), and (h) of section 2560.502c–6 generally relate to the waiver of penalties under section 502(c)(6) of ERISA. Paragraph (d) provides that the Department may waive all or part of the penalty to be assessed under section 502(c)(6) upon a showing by the administrator, under paragraph (e), that the failure or refusal to comply with a request under ERISA section 104(a)(6) and § 2520.104a–8 was due to matters reasonably beyond the control of the plan administrator. Under paragraph (e), the administrator has 30 days from receipt of the notice required under § 2560.502c–6(c) within which to make such a showing or offer other reasons why the penalty, as calculated, should not be assessed.[6]

Paragraph (f) provides that a failure to file a timely statement under paragraph (e) will constitute a waiver of the right to appear and contest the facts alleged in the notice (§ 2560.502c–6(c)) for purposes of any adjudicatory proceeding involving the assessment of a penalty under section 502(c)(6) of ERISA.

Paragraph (g)(1) provides that, following a review of the facts alleged in the statement under paragraph (e), the Department shall notify the administrator of its intention to waive the penalty, in whole or in part, and/or assess a penalty. If it is the intention of the Department to assess a penalty, the notice shall indicate the amount of the penalty. Under paragraph (g)(2), this notice becomes a final order 30 days after the date of service of the notice, except as provided in paragraph (h). Paragraph (h) provides that the notice described in paragraph (g) will become the final order of the Department unless, within 30 days of the date of service of the notice, the administrator or representative files a request for a hearing under § 2570.110 *et seq.* (published as part of this rulemaking) and files an answer, in writing, opposing the proposed sanction.

Section 2560.502c–6(i) describes the rules relating to service of the (1) Department's notice of intent to assess a penalty (§ 2560.502c–6(c)), and (2) Department's notice of determination on the statement of matters reasonably beyond the control of the plan administrator (§ 2560.502c–6(g)).[7] Paragraph (i) provides that service shall be made in one of three ways: (1) by delivering a copy at the principal office, place of business, or residence of the administrator or representative thereof; (2) by leaving a copy at the principal office, place of business, or residence of

[6] In the event another fiduciary of the plan has custody of or control over a document requested under ERISA section 104(a)(6) and § 2520.104a–8, or if the administrator engages a third party to perform services for the plan and, pursuant to the engagement, the third party has custody of or control over such a document, the administrator's lack of custody would not be considered by the Department to be a matter reasonably beyond the administrator's control.

[7] As noted above, under § 2520.104a–8(c) these service rules would also apply to the Department's initial request for documents under ERISA section 104(a)(6) and § 2520.104a–8.

the administrator or representative thereof; or (3) by mailing a copy to the last known address of the administrator or representative thereof.

Section 2560.502c–6(j) clarifies the liability of the parties for penalties assessed under section 502(c)(6) of ERISA. Paragraph (1) provides that, if more than one person is responsible as administrator for the failure to furnish document(s) requested by the Department, all such persons shall be jointly and severally liable for such failure. Paragraph (2) provides that any person against whom a penalty is assessed under section 502(c)(6) of ERISA is personally liable for the payment of such penalty. Paragraph (2) also clarifies that liability for the payment of penalties assessed under section 502(c)(6) of ERISA is a personal liability of the person against whom the penalty is assessed and not a liability of the plan.

The Department's Office of Administrative Law Judges (OALJ) commented that, in its experience, various respondents in ERISA proceedings have found that the method for requesting a hearing is confusing. The OALJ suggested that the situation could be improved by changing proposed regulation § 2560.502c–6(h) to read as follows:

(h) *Administrative hearing.* A notice issued pursuant to paragraph (g) of this section will become the final order of the Department of Labor, unless, within 30 days from the date of the service of the notice, the administrator or representative thereof files a request for a hearing under § 2570.110 *et seq.*, and files an answer to the notice. The request for hearing and answer shall be filed in accordance with § 2570.112. The answer opposing the proposed sanction shall be in writing, and supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to paragraph (g) of § 2560.502c–6.

The OALJ also recommended that proposed § 2570.111(c) be modified to define the term ''Answer'', rather than referencing the definition at § 18.5(d)(1). The term ''Answer'' is defined to mean ''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).'' The Department has incorporated these recommendations into the final regulation sections 2560.502c–6(h) and 2570.111(c).

With regard to paragraph (i) of § 2560.502c–6, one commenter suggested that service should only be effectuated by the Department's mailing or delivering of the respective documents to the plan administrator's regular place of business, or such other location as the plan may specify in its communication with the Department. With respect to a multiemployer plan that designates its board of trustees as the plan administrator, the commenter noted that service of the Department's request for documents and notice of intent to assess a penalty should be made on the fund office, rather than on the individual trustees, as individual trustees should not be responsible for accepting service unless the trustees are acting in an official capacity. This commenter expressed the view that further clarification is needed with regard to service in the context of multiemployer plans.

The Department does not believe any further clarification of the service requirement is warranted. The proposal states that service of a request for documents or other notices may be served by delivering a copy to the administrator or representative thereof, by leaving a copy at the principal office, place of business or residence of the administrator or representative thereof, or by mailing a copy to the last known address of the administrator or representative thereof. It is the Department's view that application of the service of notice requirement does not need further clarification and, accordingly, the Department is adopting paragraph (i) of § 2560.502c–6 without change.

One commenter stated that the proposed regulation unfairly and unnecessarily requires that any fines assessed under section 502(c)(6) of ERISA be paid by the plan administrator, rather than the plan. The commenter urged the Department to revise the proposed regulation to permit plans to pay any fines that may be assessed under ERISA section 502(c)(6), unless the Department concludes that the plan administrator's failure to furnish the requested documents within the 30-day period was willful.

It is the view of the Department that, in the absence of statutory language to the contrary, liability for payment of civil penalties is a personal liability of the person against whom the penalty is assessed and not the liability of the plan. Accordingly, as noted in the supplementary information accompanying the proposal, the payment of penalties assessed under ERISA section 502(c)(6) from plan assets would not constitute a reasonable expense of administering a plan for purposes of ERISA sections 403 and 404. In contrast, reasonable expenses attendant to compliance with a request from the Department for documents, such as expenses for copying and mailing the requested documents, would constitute reasonable expenses of administering a plan for purposes of ERISA sections 403 and 404.

Administrative Law Procedures for Assessment of Civil Penalties Under ERISA Section 502(c)(6)

Except as noted above, § 2570.110, *et seq.*, establishing procedures for hearings before an Administrative Law Judge (ALJ) with respect to assessment by the Department of a civil penalty under ERISA section 502(c)(6) and appealing an ALJ decision to the Secretary or her delegate are being adopted as proposed.

With regard to such procedures, the Secretary has established the Pension and Welfare Benefits Administration (PWBA) within the Department for purposes of carrying out most of the Secretary's responsibilities under ERISA. *See* Secretary's Order 1–87, 52 FR 13139 (April 27, 1987). The Department has already published rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges at 29 CFR part 18 (48 FR 32538 (1983)). As explained in 29 CFR 18.1, those provisions generally govern administrative hearings before ALJs assigned to the Department and are intended to provide maximum uniformity in the conduct of administrative hearings. However, in the event of an inconsistency or conflict between the provisions of 29 CFR part 18 and a rule or procedure required by statute, executive order or regulation, the latter controls.

The Department has reviewed the applicability of the provisions of 29 CFR part 18 to the assessment of civil penalties under ERISA section 502(c)(6) and has decided to adopt many, though not all, of the provisions thereunder for ERISA 502(c)(6) proceedings.

The final rule relates specifically to procedures for assessing civil penalties under section 502(c)(6) of ERISA and is controlling to the extent it is inconsistent with any portion of 29 CFR part 18. The final rule is designed to maintain the rules set forth at 29 CFR part 18 consistent with the need for an expedited procedure, while recognizing the special characteristics of proceedings under ERISA section 502(c)(6). For purposes of clarity, where a particular section of the existing procedural rules would be affected by the final rule, the entire section (with appropriate modifications) has been set out in this document. Thus, only a portion of the provisions of the procedural regulations set forth below involves changes from, or additions to, the rules in 29 CFR part 18. The specific

modifications to the rules in 29 CFR part 18, and their relationship to the conduct of these proceedings generally, are outlined below.

The general applicability of the procedural rules under section 502(c)(6) of ERISA is set forth in § 2570.110. The definition section (§ 2570.111) incorporates the basic adjudicatory principles set forth at 29 CFR part 18, but includes terms and concepts of specific relevance to proceedings under ERISA section 502(c)(6). In particular, § 2570.111 states that the term ''Secretary'' means the Secretary of Labor and includes various individuals to whom the Secretary may delegate authority. The Department contemplates that the duties assigned to the Secretary under the procedural regulation will in fact be discharged by the Assistant Secretary for Pension and Welfare Benefits or his or her delegee.

In general, the burden to initiate adjudicatory proceedings before an ALJ will be on the party (respondent) against whom the Department is seeking to assess a civil penalty under ERISA section 502(c)(6). However, a respondent must comply with the procedures relating to agency review set forth in § 2560.502c–6 before initiating adjudicatory proceedings. Section 2570.111(c) and (d), together with § 2560.502c–6(h), contemplate that a notice issued pursuant to § 2560.502c–6(g) will become the final order of the Department, unless, within 30 days from the date of the service of the notice, the administrator or representative thereof files a request for a hearing under § 2570.110 *et seq.*, and files an answer to the notice.

The service of documents by the parties to an adjudicatory proceeding, as well as by the ALJ, are governed by § 2570.112. Section 2570.114 provides that if the respondent fails to request a hearing by filing an answer to the Department's notice of determination (§ 2560.502c–6(g)) within the 30-day period provided by § 2560.502c–6(h), such failure shall be deemed to constitute a waiver of the right to appear and contest the facts alleged in the notice and shall be deemed to constitute an admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(6) of ERISA. Section 2570.114 makes clear that in the event of such failure, the assessment of penalty becomes final.

Section 2570.115 provides that the ALJ's decision shall include the terms and conditions of any consent order or settlement which has been agreed to by the parties. This section also provides that the decision of the ALJ which incorporates such consent order shall become a final agency action within the meaning of 5 U.S.C. 704.

The rules in 29 CFR part 18 concerning the computation of time, pleadings, prehearing conferences and statements, and settlements are adopted in these procedures for adjudications under ERISA section 502(c)(6). The section on the designation of parties (§ 2570.113) differs from its counterpart under § 18.10 of this title in that it specifies that the respondent in these proceedings will, as indicated above, be the party against whom the Department seeks to assess a civil penalty under ERISA section 502(c)(6).

29 CFR 2570.116 states that discovery may be ordered by the ALJ only upon a showing of good cause by the party seeking discovery. This differs from the more liberal standard for discovery contained in 29 CFR 18.14. In cases in which discovery is ordered by the ALJ, the order shall expressly limit the scope and terms of discovery to that for which good cause has been shown. To the extent that the order of the ALJ does not specify rules for the conduct of the discovery permitted by such order, the rules governing the conduct of discovery from 29 CFR part 18 are to be applied in any proceeding under section 502(c)(6) of ERISA. For example, if the order of the ALJ states only that interrogatories on certain subjects may be permitted, the rules under 29 CFR part 18 concerning the service and answering of such interrogatories shall apply. The procedures under 29 CFR part 18 for the submission of facts to the ALJ during the hearing are also to be applied in proceedings under ERISA section 502(c)(6).

The section on summary decisions (§ 2570.117) provides for requisite authorization for an ALJ to issue a summary decision which may become final when there are no genuine issues of material fact in a case arising under ERISA section 502(c)(6). The section concerning the decision of the ALJ (§ 2570.118) differs from its counterpart at § 18.57 of this title in that § 2570.118 states that the decision of the ALJ in an ERISA section 502(c)(6) case shall become the final decision of the Secretary unless a timely appeal is filed.

The procedures for appeals of ALJ decisions under ERISA section 502(c)(6) of ERISA would be governed solely by §§ 2570.119 through 2570.121, and without any reference to the appellate procedures contained in 29 CFR part 18. Section 2570.119 establishes the time limit within which such appeals must be filed, the manner in which the issues for appeal are determined and the procedure for making the entire record before the ALJ available to the Secretary. Section 2570.120 provides that review of the Secretary shall not be on a *de novo* basis, but rather on the basis of the record before the ALJ and without an opportunity for oral argument. Section 2570.121 sets forth the procedure for establishing a briefing schedule for such appeals and states that the decision of the Secretary on such an appeal shall be a final agency action within the meaning of 5 U.S.C. 704. As required by the Administrative Procedure Act (5 U.S.C. 552(a)(2)(A)) all final decisions of the Department under section 502(c)(6) of ERISA shall be compiled in the Public Disclosure Room of the Pension and Welfare Benefits Administration, Room N–1513, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210.

Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether the regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, the Department has determined that this regulatory action is not significant within the meaning of the Executive Order.

The costs of the regulation will be borne by the plan when responding to requests from the Department for copies of the latest SPD and other documents described in section 104(b)(4) of ERISA that a participant or beneficiary has requested, in writing, from the plan administrator and which the administrator has failed or refused to furnish in a timely fashion. The individual cost of each such request is estimated to be minimal because only a participant or beneficiary may make a

request and each administrator of an employee pension or welfare benefit plan covered under Title I of ERISA already is required by section 101(a)(1) to furnish an SPD to each participant covered under the plan and each beneficiary who is receiving benefits under the plan, and to update the SPD on a regular basis in accordance with section 104(b)(1). Moreover, other documents under which the plan is established or operated and that may be requested must be made available to participants and beneficiaries pursuant to section 104(b)(2). Thus, administrators are not expected to incur costs in preparing or obtaining these documents in response to a request from the Department.

The regulation is expected to benefit plan participants and beneficiaries who may have been unable to obtain a current SPD or other document described in ERISA section 104(b)(4), and who might otherwise not have an effective means of obtaining such documents in the absence of the requirement for the plan administrator to file such documents with the Department. The provisions implementing the penalty for failure to furnish such documents on request may serve to ensure timely compliance with such requests.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA '95), the Department submitted the information collection request (ICR) included in this regulation to the Office of Management and Budget (OMB) for review and clearance at the time the Notice of Proposed Rulemaking (NPRM) was published in the **Federal Register** (August 5, 1999, 64 FR 42797). OMB approved the ICR under OMB control number 1210–0112. The approval will expire on October 31, 2002. The public is not required to respond to an information collection request unless it displays a currently valid OMB control number.

The estimated burden cost has been adjusted in response to a revision in the terms of the proposal. In this final rule, the Department has adopted a commenter's suggestion that documents delivered by certified mail be considered received on the date the document is mailed instead of the date the document is actually received. Although the use of certified mail is not required, both the comment and the provisions of this final rule suggest that plan administrators do find it reasonable from time to time to use certified mail for important communications. To account for this in burden estimates, the mailing cost assumption has been increased to $4 per request from the $1 used for the proposal's estimate.

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

Title: Furnishing Documents to the Secretary of Labor on Request under ERISA Section 104(a)(6) and Assessment of Civil Penalties Under ERISA Section 502(c)(6).

OMB Number: 1210–0112.

Affected Public: Individuals or households, Business or other for-profit institutions; Not-for-profit institutions.

Frequency of Response: On occasion.

Total Respondents: 1,000.

Total Responses: 1,000.

Estimated Burden Hours: 95.

Estimated Annual Costs (Operating and Maintenance): $4,000.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires that the agency present a final regulatory flexibility analysis at the time of the publication of the notice of final rulemaking describing the impact of the rule on small entities. Small entities include small businesses, organizations, and governmental jurisdictions.

For purposes of analysis under the RFA, PWBA continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans which cover fewer than 100 participants. Under section 104(a)(3), the Secretary may also provide for simplified annual reporting and disclosure if the statutory requirements of Part 1 of Title I of ERISA would otherwise be inappropriate for welfare benefit plans. Pursuant to the authority of section 104(a)(3), the Department has previously issued at §§ 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46 and 2520.104b–10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans covering fewer than 100 participants and which satisfy certain other requirements.

Further, while some large employers may have small plans, in general, most small plans are maintained by small employers. Thus, PWBA believes that assessing the impact of this proposed rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (5 U.S.C. 631 *et seq.*). PWBA solicited comments on the use of this standard for evaluating the effects of the proposal on small entities. No comments were received with respect to the standard. Therefore, a summary of the final regulatory flexibility analysis based on the 100 participant size standard is presented below. This final regulation is not expected to have a significant impact on small plans.

This regulation applies to all small employee benefit plans covered by Title I of ERISA. Employee benefit plans with fewer than 100 participants include 655,000 pension plans, 2.6 million health plans, and 3.4 million non-health welfare plans (mainly life and disability insurance plans). Nonetheless, the Department estimates few of these small plans will be affected by the regulation because plans will receive relatively few requests for SPDs and other documents described under section 104(b)(4) that a participant or beneficiary has requested, in writing, from the plan administrator and which the administrator has failed or refused to furnish in a timely fashion. The Department estimates about 1,000 requests for assistance by participants and beneficiaries in obtaining SPDs and other such documents per year, based on the actual rate of requests to the Public Disclosure Room during the last two years, adjusted for requests expected to be made with other offices. The percentage of these requests that pertain to small plans is unknown. However, even if it is assumed that all plans that receive requests for documents pursuant to section 104(a)(6) are small plans, the number affected in any year is very small (i.e., 1,000 of approximately 6.6 million plans).

The Department also believes that the time required to respond to a request under the regulation for an SPD or other document under which a plan was established or operated will be minimal. Responding to a request primarily requires clerical skills, although a professional may read the request and

direct others to respond. The documents to be mailed in response to the request are expected to be readily available, so accumulating and mailing the documents is expected to take about 5 minutes. If it is assumed that a cost is incurred for this time at a rate of $20 per hour and that the maximum mailing cost per request is $4, the total cost per request is estimated at less than $6. This total cost is not expected to constitute a significant impact for any plan. For the purposes of this final RFA analysis, PWBA has increased the assumed labor rate from $11 to $20 to account for inflation, and the estimated mailing cost from $1 to $4, to account for the fact that some plans may make use of certified mail in responding to requests from the Department.

Further, the regulation is intended to assist small plan administrators by providing sufficient information for them to understand the request and the process they may use to offer a reasonable cause for failure to comply if they are unable to do so within the initial deadline, by ensuring that they receive notice before the assessment of a penalty is initiated.

Small Business Regulatory Enforcement Fairness Act

The rule is subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been transmitted to Congress and the Comptroller General for review. The rule is not a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, this rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, nor does it include mandates which may impose an annual burden of $100 million or more on the private sector.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This final rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. This final rule implements the requirement that administrators of an employee benefit plan furnish the Department, on request, the latest SPD and any other documents described under section 104(b)(4) that a participant or beneficiary has requested, in writing, from the plan administrator and which the administrator has failed or refused to furnish in a timely fashion. The final rule also establishes procedures relating to the assessments of civil penalties for failure to furnish such requested SPDs and documents and procedures for review of such penalties by the Department. The requirements implemented in this final rule do not alter the fundamental reporting and disclosure requirements or penalty provisions of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

Statutory Authority

These final regulations set forth herein are issued pursuant to the authority contained in sections 505, 104(a), and 502(c)(6) of ERISA (Pub. L. 93–406, 88 Stat. 894, 29 U.S.C. 1024, 1132, and 1135).

List of Subjects

29 CFR Part 2520

Accountants, Disclosure requirements, Employee benefit plans, Pension plans, and Reporting and recordkeeping requirements.

29 CFR Part 2560

Claims, Employee benefit plans, Law enforcement, Pensions.

29 CFR Part 2570

Administrative practice and procedure, Employee benefit plans, Party in interest, Law enforcement, Pensions, Prohibited transactions.

In view of the foregoing, Parts 2520, 2560, and 2570 of Chapter XXV of title 29 of the Code of Federal Regulations are amended as follows:

PART 2520—RULES AND REGULATIONS FOR REPORTING AND DISCLOSURE

1. The authority citation for part 2520 continues to read as follows:

Authority: Secs. 101, 102, 103, 104, 105, 109, 110, 111 (b)(2), 111 (c), and 505, Pub. L. 93–406, 88 Stat. 840–52 and 894 (29 U.S.C. 1021–1025, 1029–31, and 1135); Secretary of Labor's Order No. 27–74, 13–76, 1–87, and Labor Management Services Administration Order 2–6.

Sections 2520.102–3, 2520.104b–1, and 2520.104b–3 also are issued under sec. 101(a), (c), and (g)(4) of Pub. L. 104–191, 110 Stat. 1936, 1939, 1951 and 1955 and, sec. 603 of Pub. L. 104–204, 110 Stat. 2935 (29 U.S.C. 1185 and 1191c).

2. Add § 2520.104a–8 to read as follows:

§ 2520.104a–8 Requirement to furnish documents to the Secretary of Labor on request.

(a) *In general.* (1) Under section 104(a)(6) of the Act, the administrator of an employee benefit plan subject to the provisions of part 1 of title I of the Act is required to furnish to the Secretary, upon request, any documents relating to the employee benefit plan. For purposes of section 104(a)(6) of the Act, the administrator of an employee benefit plan shall furnish to the Secretary, upon service of a written request, a copy of:

(i) The latest updated summary plan description (including any summaries of material modifications to the plan or changes in the information required to be included in the summary plan description); and

(ii) Any other document described in section 104(b)(4) of the Act with respect to which a participant or beneficiary has requested, in writing, a copy from the plan administrator and which the administrator has failed or refused to furnish to the participant or beneficiary.

(2) *Multiple requests for document(s).* Multiple requests under this section for the same or similar document or documents shall be considered separate requests for purposes of § 2560.502c–6(a).

(b) For purposes of this section, a participant or beneficiary will include any individual who is:

(1) A participant or beneficiary within the meaning of ERISA sections 3(7) and 3(8), respectively;

(2) An alternate payee under a qualified domestic relations order (see ERISA section 206(d)(3)(K)) or prospective alternate payee (spouses, former spouses, children or other dependents);

(3) A qualified beneficiary under COBRA (see ERISA section 607(3)) or prospective qualified beneficiary (spouse or dependent child);

(4) An alternate recipient under a qualified medical child support order (see ERISA section 609(a)(2)(C)) or a prospective alternate recipient; or

(5) A representative of any of the foregoing.

(c) *Service of request.* Requests under this section shall be served in accordance with § 2560.502c–6(i).

(d) *Furnishing documents.* A document shall be deemed to be furnished to the Secretary on the date the document is received by the Department of Labor at the address specified in the request; or, if a document is delivered by certified mail, the date on which the document is mailed to the Department of Labor at the address specified in the request.

PART 2560—RULES AND REGULATIONS FOR ADMINISTRATION AND ENFORCEMENT

3. The authority citation for part 2560 continues to read as follows:

Authority: Secs. 502, 505 of ERISA, 29 U.S.C. 1132, 1135, and Secretary's Order 1–87, 52 FR 13139 (April 21, 1987).

Section 2560.502–1 also issued under sec. 502(b)(2), 29 U.S.C. 1132(b)(2)

Section 2560.502i–1 also issued under sec. 502(i), 29 U.S.C. 1132(i).

Section 2560.503–1 also issued under sec. 503, 29 U.S.C. 1133.

4. Add § 2560.502c–6 to read as follows:

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

(a) *In general.* (1) Pursuant to the authority granted the Secretary under section 502(c)(6) of the Employee Retirement Income Security Act of 1974, as amended (the Act), the administrator (within the meaning of section 3(16)(A) of the Act) of an employee benefit plan (within the meaning of section 3(3) of the Act and § 2510.3–1 of this chapter) shall be liable for civil penalties assessed by the Secretary under section 502(c)(6) of the Act in each case in which there is a failure or refusal to furnish to the Secretary documents requested under section 104(a)(6) of the Act and § 2520.104a–8 of this chapter.

(2) For purposes of this section, a failure or refusal to furnish documents shall mean a failure or refusal to furnish, in whole or in part, the documents requested under section 104(a)(6) of the Act and § 2520.104a–8 of this chapter at the time and in the manner prescribed in the request.

(b) *Amount assessed.* (1) The amount assessed under section 502(c)(6) of the Act shall be an amount up to $100 a day determined by the Department of Labor, taking into consideration the amount of willfulness of the failure or refusal to furnish the documents requested under section 104(a)(6) of the Act, but in no event in excess of $1,000 per request. Subject to paragraph (b)(2) of this section, the amount shall be computed from the date of the administrator's failure or refusal to furnish any document or documents requested by the Department.

(2) For purposes of calculating the amount to be assessed under this section, the date of a failure or refusal to furnish documents shall not be earlier than the thirtieth day after service of the request under section 104(a)(6) of ERISA and § 2520.104a–8 of this chapter.

(c) *Notice of intent to assess a penalty.* Prior to the assessment of any penalty under section 502(c)(6) of the Act, the Department shall provide to the administrator of the plan a written notice that indicates the Department's intent to assess a penalty under section 502(c)(6) of the Act, the amount of the penalty, the period to which the penalty applies, and the reason(s) for the penalty.

(d) *Waiver of assessed penalty.* The Department may waive all or part of the penalty to be assessed under section 502(c)(6) of the Act on a showing by the administrator that the failure or refusal to furnish a document or documents requested by the Secretary was the result of matters reasonably beyond the administrator's control.

(e) *Statement showing matters reasonably beyond the control of the plan administrator.* Upon issuance by the Department of a notice of intent to assess a penalty, the administrator shall have 30 days from the date of the service of the notice, as described in paragraph (i) of this section, to file a statement that the failure resulted from matters reasonably beyond the control of the administrator or that the penalty, as calculated, should not be assessed. The statement must be in writing and set forth all the facts alleged as matters reasonably beyond the control of the administrator. The statement must contain a declaration by the administrator that the statement is made under the penalties of perjury.

(f) *Failure to file a statement of matters reasonably beyond the control of the plan administrator.* Failure to file a statement of matters reasonably beyond the control of the administrator within the 30-day period described in paragraph (e) of this section shall be deemed to constitute a waiver of the right to appear and contest the facts alleged in the notice, and such failure shall be deemed an admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(6) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of § 2570.111(g) of this chapter.

(g) *Notice of determination on statement of matters reasonably beyond the control of the plan administrator.* (1) The Department, following a review of all of the facts alleged in support of a complete or partial waiver of the penalty, shall notify the administrator, in writing, of its intention to waive the penalty, in whole or in part, and/or assess a penalty. If it is the intention of the Department to assess a penalty, the notice shall indicate the amount of the penalty, not to exceed the amount described in paragraph (b) of this section. This notice is a ''pleading'' for purposes of § 2570.111(m) of this chapter.

(2) Except as provided in paragraph (h) of this section, a notice issued pursuant to paragraph (g)(1) indicating the Department's intention to assess a penalty shall become a final order, within the meaning of § 2570.111(g) of this chapter, 30 days after the date of service of the notice.

(h) *Administrative hearing.* A notice issued pursuant to paragraph (g) of this section will become the final order of the Department of Labor, unless, within 30 days from the date of the service of the notice, the administrator or representative thereof files a request for a hearing under § 2570.110 through 2570.121 of this chapter, and files an answer to the notice. The request for hearing and answer shall be filed in accordance with § 2570.112 of this chapter. The answer opposing the proposed sanction shall be in writing, and supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to paragraph (g) of this section.

(i) *Service of notice.* (1) Service of notice under this section shall be made by:

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

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

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

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

(j) *Liability.* (1) If more than one person is responsible as administrator for the failure to furnish the document or documents requested under section 104(a)(6) of the Act and its implementing regulations (§ 2520.104a–8 of this chapter), all such persons shall be jointly and severally liable with respect to such failure.

(2) Any person, or persons under paragraph (j)(1) of this section, against whom a civil penalty has been assessed under section 502(c)(6) of the Act pursuant to a final order, within the meaning of § 2570.111(g) of this chapter, shall be personally liable for the payment of such penalty.

(k) *Cross-reference.* See §§ 2570.110 through 2570.121 of this chapter for procedural rules relating to administrative hearings under section 502(c)(6) of the Act.

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

5. Revise the authority citation for Part 2570 to read as set forth below:

Authority: 29 U.S.C. 1108 (a), 1132 (c), 1132 (i), 1135; 5 U.S.C. 8477(c)(3); Reorganization Plan no. 4 of 1978; Secretary of Labor's Order 1–87.

Subpart A is also issued under 29 U.S.C. 1132(c)(1).

Subpart F is also issued under sec. 4, Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note), as amended by sec. 31001(s)(1), Pub. L. 104–134, 110 Stat. 1321–373.

6. Add new Subpart F to part 2570 to read as follows:

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

Sec.

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

§ 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 Pension and Welfare Benefits), administrator, commissioner, appellate body, board, or other official; and

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

§ 2570.112 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 Pension and Welfare Benefits Administration (PWBA) as the agency under which the proceeding is instituted, the title of the proceeding, the docket number (if any) assigned by the Office of Administrative Law Judges and a designation of the type of pleading or paper (e.g., notice, motion to dismiss, etc.). The pleading or paper shall be signed and shall contain the address and telephone number of the party or person representing the party. Although there are no formal specifications for documents, they should be typewritten when possible on standard size 8½ × 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.

§ 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.

Signed at Washington, DC, this 22nd day of December, 2001.

Ann L. Combs,

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

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