requirement to furnish a summary plan description to participants and beneficiaries, 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 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.

* * * * *

14. 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. 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, 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 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.

* * * * *

15. Section 2520.104–41 is amended by removing from paragraph (b) the term ''section 104(a)(1)(A)'' and adding, in its place, the term ''section 104(a)(1)''.

16. 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)''.

17. 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)''.

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

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

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

21. Section 2520.104a–5 is amended by removing the term ''section 104(a)(1)(A)'' and adding, in its place, the term ''section 104(a)(1)''.

22. Section 2520.104a–5 is amended by removing and reserving paragraph (a)(1).

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

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

25. In § 2520.104b–3 paragraphs (f) and (g) are removed and reserved.

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

26. 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–21 [Amended]**

27. 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, D.C., this 28th day of July 1999.

**Richard M. McGahey,**

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

[FR Doc. 99–19860 Filed 8–4–99; 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 and 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:** Notice of proposed rulemaking.

**SUMMARY:** This document contains a proposed rulemaking under the Employee Retirement Income Security Act of 1974 (ERISA) that would implement certain amendments to ERISA added as part of the Taxpayer Relief Act of 1997. Specifically, the proposed rule would implement the requirement that the administrator of any employee benefit plan subject to Part 1 of Title I of ERISA furnish to the Department, on request, any documents relating to the employee benefit plan. The proposed rule also would establish procedures relating to the assessment of civil penalties for failures or refusals by administrators to furnish requested documents and procedures relating to administrative hearings in connection with the assessment of such civil penalties.

**DATES:** Written comments concerning the proposed regulation must be received by October 4, 1999.

**ADDRESSES:** Written comments (preferably three copies) should be sent to the Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Rm. N–5669, 200 Constitution Avenue, NW, Washington DC, 20210, Attention: ''ERISA 502(c)(6) Project.'' All submissions will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5638, 200 Constitution Ave, NW, Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey J. Turner, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, (202) 219–8671, or Paul D. Mannina, Plan Benefits Security Division, Office of the Solicitor, (202) 219–9141 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

### Part I—Background

The Taxpayer Relief Act of 1997 (TRA '97) eliminated the requirement under ERISA that employee benefit plan administrators file with the Department copies of the summary plan descriptions (SPDs) and summaries of material plan modifications (SMMs) that are required to be furnished to plan participants and beneficiaries. 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 which provides that if, within 30 days of a request by the Department to a plan administrator for documents under section 104(a)(6), the plan administrator fails to furnish the material requested to the Department, the Department may assess a civil penalty against the plan 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) of ERISA also provides that no penalty shall be imposed under that paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

Prior to these TRA '97 amendments, Congress provided in ERISA for the filing of SPDs and SMMs with the Department in order to ensure that participants and beneficiaries would have a means by which to obtain a copy of these documents without having to request them from the plan or plan sponsor. The elimination of the SPD/SMM filing requirement taken together with the amendments establishing ERISA section 104(a)(6) and the civil penalty provision in section 502(c)(6) clearly evidence Congress' intent that the Department would exercise its authority under ERISA section 104(a)(6) to obtain a copy of a plan's SPD in response to requests from participants or beneficiaries. Consistent with that intent, the Department will request copies of SPDs from plan administrators on behalf of a requesting participant or beneficiary. The Department generally will not request SPDs on behalf of persons other than participants and beneficiaries of the plan for which the SPD is requested. For this purpose, the Department will treat as a participant or beneficiary any individual who is: a participant or beneficiary within the meaning of ERISA sections 3(7) and 3(8), respectively; 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), a qualified beneficiary under COBRA (see ERISA section 607(3)) or prospective qualified beneficiary (spouse or dependent child); an alternate recipient under a qualified medical child support order (see ERISA section 609(a)(2)(C)) or a prospective alternate recipient; or a representative of any of the foregoing.

The proposed rules described below are intended to implement the substantive requirements in section 104(a)(6) of ERISA as well as the related penalty provisions in section 502(c)(6) of ERISA. They would, if promulgated as a final rules, become effective 60 days after publication as final rules in the **Federal Register**.

**Part II—Furnishing Documents to the Department on Request Under Section 104(a)(6)**

Proposed § 2520.104a–8 implements the requirements of section 104(a)(6) of ERISA. Paragraph (a)(1) provides that the administrator (within the meaning of section 3(16)(A) of ERISA) of any employee benefit plan has an obligation to furnish to the Department, upon request, any documents relating to the plan. Paragraph (a)(2) clarifies that multiple requests under section 104(a)(6) and § 2520.104a–8(a) for the same or similar document or documents shall be considered separate requests for purposes of penalties under section 502(c)(6) and § 2560.502c–6(a). For example, if the Department were to receive a series of requests from several participants for a particular plan's SPD, the Department could make separate requests for that document on behalf of each participant to ensure that the participants each receive the latest updated version of the SPD. A failure by the plan administrator to comply with any such requests may result in the assessment of penalties with respect to each such failure. Paragraph (b) adopts the service of notice rules in proposed § 2560.502c–6(i) (which adopts the service of notice rules already in effect under § 2560.502c–2(i)) for purposes of serving the plan administrator with a request under section 104(a)(6). Paragraph (c) provides that a document is not considered furnished to the Department until the date on which such document is received by the Department of Labor at the address specified in the request.

**Part III—Authority to Assess Civil Penalties for Violations of Section 104(a)(6) of ERISA**

In general, proposed regulation § 2560.502c–6 addresses the: circumstances under which a penalty may be assessed for a failure or refusal to provide documents requested under section 104(a)(6) of ERISA (§ 2560.502c–6(a)); amount of the penalty (§ 2560.502c–6(b)); notice required to be given to the plan administrator of the Department's intent to assess a penalty (§ 2560.502c–6(c)); the Department's authority to waive the penalty (§ 2560.502c–6(d)) upon a showing that the failure or refusal was the result of matters reasonably beyond the control of the plan administrator (§ 2560.502c–6(e)); effect of a failure to file a statement under § 2560.502c–6(e) alleging matters reasonably beyond the administrator's control (§ 2560.502c–6(f)); notice required to be given to the administrator which sets forth the Department's findings as to the statement of matters reasonably beyond the control of the plan administrator (§ 2560.503c–6(g)); right to hearings before an administrative law judge (§ 2560.502c–6(h)); service of notices (§ 2560.502c–6(i)); and the liability of the administrator or administrators for assessed penalties (§ 2560.502c–6(j)).

a. *General Rule.* Proposed § 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.

b. *Amount Assessed.* Proposed § 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.

c. *Notice of Intent to Assess a Penalty.* Proposed § 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 would be served in accordance with § 2560.502c–6(i) of this proposed regulation (service of notice provision). Under § 2560.502c–6(f) of this proposed regulation, the notice would become a final order of the Department, within the meaning of proposed regulation § 2570.111(g) (also

[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.''

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.

d. *Waiver of Penalty.* Paragraphs (d), (e), (f), (g), and (h) of this proposal 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 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.[2]

Paragraph (f) provides that a failure to file a timely statement under (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 (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 in general that the notice described in paragraph (g) shall not become a final order if, within 30 days of the date of service of that notice, the administrator initiates an adjudicatory proceeding under part 18 of Title 29, as modified by proposed regulations §§ 2570.110 through 2570.121 (also published as part of this rulemaking). Specifically, the administrator would be required to file, within 30 days of the date of service of the notice under (g), an answer, as defined in proposed § 2570.111(c), in accordance with proposed § 2570.112.

e. *Service of Notices.* Proposed § 2560.502c–6(i) describes the rules on 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)).[3] 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 the administrator or representative thereof, or (3) by mailing a copy to the last known address of the administrator or representative thereof.

f. *Liability.* Proposed § 2560.502c–6(j) is intended to clarify 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) is intended to make clear 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. Accordingly, the payment of penalties assessed under section 502(c)(6) of ERISA from assets of the plan would not constitute a reasonable expense of the plan for purposes of ERISA sections 403 and 404.

## Part IV—Administrative Law Procedures for the Assessment of Civil Penalties Under Section 502(c)(6) of ERISA

The proposed regulation contained in this Notice would establish procedures for hearings before an Administrative Law Judge (ALJ) with respect to an assessment by the Department of a civility penalty under section 502(c)(6) and appealing an ALJ decision to the Secretary or her delegate. In this regard, 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).

As noted above, 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. Accordingly, adjudications relating to civil penalties under ERISA section 502(c)(6) will be governed by the following sections of 29 CFR part 18:

Sec.
18.4 Time Computations.
18.5 (c)–(e) Responsive Pleading; answer and request for hearing.
18.6 Motions and requests.
18.7 Pre-hearing statements.
18.8 Pre-hearing conferences.
18.11 Consolidation of hearings.
18.12 Amicus Curiae.
18.13 Discovery Methods.
18.15 Protective orders.
18.16 Supplementation of responses.
18.17 Stipulations regarding discovery.
18.18 Written interrogatories to parties.
18.19 Production of documents and other evidence.
18.20 Admissions.
18.21 Motion to compel discovery.
18.22 Depositions.
18.23 Use of depositions at hearings.
18.24 Subpoenas.
18.25 Designation of administrative law judge.
18.27 Notice of hearing.
18.28 Continuances.
18.29 Authority of administrative law judges.
18.30 Unavailability of administrative law judge.
18.31 Disqualification.
18.32 Separation of functions.
18.33 Expedition.
18.34 Representation.
18.35 Legal assistance.
18.36 Standards of conduct.
18.37 Hearing room conduct.
18.38 Ex parte communications.
18.39 Waiver of right to appear and failure to participate or to appear.
18.40 Motion for summary decision.

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

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

18.43 Formal hearings.
18.44 Evidence.
18.45 Official notice.
18.46 In camera and protective orders.
18.47 Exhibits.
18.48 Records in other proceedings.
18.49 Designation of parts of documents.
18.50 Authenticity.
18.51 Stipulations.
18.52 Record of hearings.
18.53 Closing of hearings.
18.54 Closing of record.
18.55 Receipt of documents after hearing.
18.56 Restricted access.
18.59 Certification of official record.

The regulations proposed herein relate specifically to procedures for assessing civil penalties under section 502(c)(6) of ERISA and are controlling to the extent they are inconsistent with any portion of 29 CFR part 18. The proposed regulations are 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 proposed rules 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 involve 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 these procedural rules under section 502(c)(6) is set forth in § 2570.110. Proposed § 2560.502c–6, also being published today in this Notice, sets forth the procedures relating to the issuance by PWBA of notices of intent to assess a penalty under ERISA section 502(c)(6) as well as procedures for agency determination on statements of matters reasonably beyond the control of plan administrators filed by persons against whom a penalty would be assessed. Under the proposed procedural rules contained in this Notice, an adjudicatory proceeding before an ALJ is commenced only when a person against whom the Department intends to assess a penalty under section 502(c)(6) files an ''answer'' to a notice of the agency determination on a statement of matters reasonably beyond the control of the plan administrator. *See* § 2570.111(c) and (d) below, and proposed regulation § 2560.502c–6(h).

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 this respect it differs from its more general counterpart at § 18.2 of Title 29 of the CFR. 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.

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 proposed regulation § 2560.502c–6 before initiating adjudicatory proceedings. In this regard, it should be noted that both the notice of intent to assess a penalty, as described in proposed regulation § 2560.502c–6(c) and the notice of determination on a statement of reasonable cause as described in proposed regulation § 2560.502c–6(g), will be issued by PWBA, the agency responsible for administration and enforcement of section 502(c)(6) of ERISA, in accordance with the service of notice provisions described in proposed § 2560.502c–6(i). Proposed regulation § 2570.111(c) and (d), together with proposed regulation § 2560.502c–6(h), contemplate that adjudicatory proceedings will be initiated with the filing of an answer to a notice of the agency's determination on a statement of matters reasonably beyond the control of the plan administrator.

The service of documents by the parties to an adjudicatory proceeding, as well as by the ALJ, will be governed by proposed regulation § 2570.112.

A section on the consequences of default (§ 2570.114) has been included in these proposed rules to indicate that if the respondent fails to file an answer to the Department's notice of determination (§ 2560.502c–6(g)) within the 30-day period provided by proposed § 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 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). Proposed regulation § 2570.114 makes clear that in the event of such failure, the assessment of penalty becomes final.

A section on consent orders or settlements (§ 2570.115) states 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. That 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 it 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 the proposed rules set forth in

§§ 2570.119 through 2570.121, and without any reference to the appellate procedures contained in 29 CFR part 18. Proposed § 2570.119 would establish the time limit within which such appeals must be filed and 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. Proposed § 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. Proposed § 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. 714. As noted above, the authority of the Secretary with respect to the appellate procedures has been delegated to the Assistant Secretary for Pension and Welfare Benefits. 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 Documents Room of the Pension and Welfare Benefits Administration, Room N–5638, 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 proposed regulation would be borne by the plan when responding to requests from the Department for copies of the latest SPD (including any summaries of plan changes not contained in the SPD) as well as other documents relating to the plan. It is expected that most of the costs will be attendant to furnishing SPDs to the Department to enable the Department to respond to requests from participants.[4] The individual cost of each such request is estimated to be minimal because each administrator of an employee pension or welfare benefit plan covered under Title I of ERISA is required by section 101(a)(1) to furnish a 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, many documents other than SPDs that may be requested are required to 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 proposed regulation is expected to benefit plan participants and beneficiaries who may have been unable to obtain a current SPD or other document relating to the plan, and who might otherwise not have an alternative 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**

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Pension and Welfare Benefits Administration is soliciting comments concerning the proposed information collection request (ICR) included in the proposal with respect to 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). A copy of the ICR may be obtained by contacting the office listed in the addressee section of this proposed regulation. This proposed regulation would implement the provisions of ERISA section 104(a)(6), which requires plan administrators to provide certain documents to the Department on request, and section 502(c)(6) of ERISA, which implements procedures for assessment of civil penalties for failure to provide the documents requested pursuant to section 104(a)(6).

The Department has submitted a copy of the proposed information collection to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Pension and Welfare Benefits Administration. Although comments may be submitted through October 4, 1999, OMB requests that comments be received within 30

[4] The Department's authority to request documents under section 104(a)(6) of ERISA was, prior to TRA '97, codified in section 104(a)(1) of ERISA. TRA '97 re-codified this authority in section 104(a)(6) of ERISA and simultaneously eliminated the requirement to file SPDs/SMMs. It is anticipated that the vast majority of requests under section 104(a)(6) will stem from responding to participants' requests for SPDs/SMMs that, in the absence of TRA '97, would have been filed with Department and available to the public.

days of publication of the Notice of Proposed Rulemaking to ensure their consideration.

**ADDRESSEE (PRA 95):** Gerald B. Lindrew, Office of Policy and Research, U.S. Department of Labor, Pension and Welfare Benefits Administration, 200 Constitution Avenue, NW, Room N–5647, Washington, DC 20210. Telephone: (202) 219–4782; Fax: (202) 219–4745. These are not toll-free numbers.

The ICR included in the proposal involves the gathering and mailing of plan documents requested by the Department to an address specified in the request. These requests are expected to be made of plan administrators as needed to satisfy requests for SPDs and other documents received from plan participants and beneficiaries. These requests may be received by the Public Disclosure Room of the Pension and Welfare Benefits Administration or by the national office and field offices in the course of providing technical assistance to the public. The estimate of the number of requests by participants and beneficiaries is 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.

It is assumed that approximately 5 minutes of time at non-professional hourly rates will be required to respond to the Department's document request within 30 days. Some administrators may be expected to respond only after receiving notice of the Department's intent to assess a penalty, and/or to provide additional information concerning matters reasonably beyond their control which would prevent or delay the satisfaction of the request. Each of these events would increase the anticipated burden of providing documents requested by the Department. The burden estimated here has been adjusted to account for a portion of plans which by choice or for reasons beyond their control will satisfy the request in a more burdensome fashion. Mailing costs are assumed to total $1.00 per request.

The penalty assessment provisions of § 2560.502c–6, and the procedures for hearings before ALJs and appeals to the Secretary or her delegate of §§ 2570.110 through 2570.121, do not contain an ''information collection request'' as defined in 44 U.S.C. 3502(3).

*Type of Review:* New.

*Agency:* Pension and Welfare Benefits Administration.

*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–NEW.

*Affected Public:* Individuals or households; Business or other for-profit; 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):* $1,000.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection request; they will also become a matter of public record.

**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. If an agency determines that a proposed rule is likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities, and seeking public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions.

For purposes of analysis under the RFA, PWBA proposes to continue 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 which is 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 therefore requests comments on the appropriateness of the size standard used in evaluating the impact of this proposed rule on small entities.

On this basis, however, PWBA has preliminarily determined that this proposed regulation will not have a significant economic impact on a substantial number of small entities. In support of this determination, and in an effort to provide a sound basis for this conclusion, PWBA has considered the elements of an initial regulatory flexibility analysis in the discussion which follows.

This proposed regulation would apply to all small employee benefit plans covered by Title I of ERISA. Employee benefit plans with fewer than 100 participants include 631,000 pension plans, 2.6 million health plans, and 3.4 million non-health welfare plans (mainly life and disability insurance plans).

The Department believes that responding to a request for a SPD or other plan document 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.

The Department does not have information concerning whether the participants and beneficiaries who request its assistance in obtaining plan documents are participants in small plans. However, even if it is assumed that all plans which 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 mailing cost per request satisfied, or per letter exchanged in providing reasonable cause, is expected to amount to approximately $1.00, and accumulating the documents is expected to require about 5 minutes. If it is assumed that a cost is incurred for this time at a rate of $11 per hour, the

total cost per request is estimated at about $2.00. This is not expected to constitute a significant impact for any plan.

Further, the proposed regulation is intended to provide sufficient information to small entities such that they may understand the request, provide information as to a reasonable cause for failure to comply if necessary, and receive notice before assessment of a penalty is initiated.

The Department invites interested persons to submit comments regarding its preliminary determination that the proposal will not have a significant economic impact on a substantial number of small entities. The Department also requests comments from small entities regarding what, if any, special problems they might encounter if the proposal were to be adopted, and what changes, if any, could be made to minimize those problems.

**Small Business Regulatory Enforcement Fairness Act**

The proposed rule is subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and, if finalized, will be 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 proposed 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.

**Statutory Authority**

These regulations are proposed 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, Employee Retirement Income Security Act, Pension plans, and Reporting and recordkeeping requirements.

*29 CFR Part 2560*

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

*29 CFR Part 2570*

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

**Proposed Regulations**

In view of the foregoing, the Department proposes to amend parts 2520, 2560, and 2570 of Chapter XXV of title 29 of the Code of Federal Regulations 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. By adding a new § 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 any employee benefit plan subject to the provisions of Part 1 of Title I of the Act shall furnish to the Secretary, upon service of a written request, any documents relating to the employee benefit plan.

(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) of this chapter.

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

(c) *Furnishing documents.* 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.

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

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

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.

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

4. By adding a new § 2560.502c–6 in the appropriate place 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 an employee benefit plan (within the meaning of section 3(3) 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) 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), 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 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 30th 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), 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), 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) 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). 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 (c) of this section. This notice is a ''pleading'' for purposes of § 2570.111(m) of this chapter.

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

(h) *Administrative hearings.* A notice issued pursuant to paragraph (g)(1) of this section will not become a final order, within the meaning of § 2570.111(g) of this chapter, if, within 30 days from the date of service of the notice, an answer, as defined in § 2570.111(c) of this chapter, is filed in accordance with § 2570.112 of this chapter.

(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) 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), against whom a civil penalty has been assessed under section 502(c)(6) 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 follow:

**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. Part 2570 is amended by adding new subpart F 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* is defined for these proceedings as set forth in § 18.5(d)(1) 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 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 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)(6) 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 by regular mail to the last known address.

(d) *Form of pleadings.* (1) Every pleading shall contain information indicating the name of the Pension and Welfare Benefits Administration (PWBA) as the agency under which the proceeding is instituted, the title of the proceeding, the docket number (if any) assigned by the Office of Administrative Law Judges and a designation of the type of pleading or paper (*e.g.*, notice, motion to dismiss, etc.). The pleading or paper shall be signed and shall contain the address and telephone number of the party or person representing the party. Although there are no formal specifications for documents, they should be typewritten when possible on standard size 8½ x 11 inch paper.

(2) Illegible documents, whether handwritten, typewritten, photocopies, 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 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.

**§ 2570.114 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 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.

**§ 2570.116 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 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 section 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 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)(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 *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 28th day of July 1999.

**Richard M. McGahey,**

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

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