(2) Except as provided in paragraph (h) of this section, a notice issued pursuant to this paragraph indicating the Department's intention to assess a penalty shall become a final order, within the meaning of § 2570.91(g), 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 § 2570.90 *et seq.*, and files and answer to the notice. The request for hearing and answer shall be filed in accordance with § 2570.92. 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).

(i) *Service of notice*—(1) Service of notice shall be made either:

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

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

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

(2) If service is accomplished by certified mail, service is complete upon mailing. If 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 file the report, all such persons shall be jointly and severally liable with respect to such failure.

(2) Any person against whom a civil penalty has been assessed under section 502(c)(5) pursuant to a final order, within the meaning of § 2570.91(g), shall be personally liable for the payment of such penalty.

(k) Cross-reference. See §§ 2570.90 through 101 of this chapter for procedural rules relating to administrative hearings under section 502(c)(5) of the Act.

(l) *Applicability date*—(1) *In general.* This section applies to administrators of multiple employer welfare arrangements that are not group health plans beginning May 1, 2000.

(2) *Transitional safe harbor period.* No civil penalty will be assessed against an administrator that has made a good faith effort to comply with a § 2520.101–2 filing that is due in the Year 2000.

Signed at Washington DC, this 4th day of February, 2000.

**Leslie B. Kramerich,**

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

[FR Doc. 00–2936 Filed 2–10–00; 8:45 am]

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## DEPARTMENT OF LABOR

## Pension and Welfare Benefits Administration

## 29 CFR Part 2570

**RIN 1210–AA54**

## Interim Rule Governing Procedures for Administrative Hearings Regarding the Assessment of Civil Penalties under Section 502(c)(5) of ERISA

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

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This document contains an interim final rule that describes procedures relating to administrative hearings, in connection with the assessment of civil penalties under section 502(c)(5) of the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Section 502(c)(5) of ERISA authorizes the Secretary of Labor (the Secretary) to assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 101(g){h} of ERISA. Separate documents are also being published today in the **Federal Register** containing interim final rules implementing the reporting requirement under section 101(g){h} of ERISA and interim final rules describing the manner in which the Department will assess civil penalties under ERISA section 502(c)(5).

**DATES:** *Effective date:* This interim final rule is effective April 11, 2000.

*Comment date:* Written comments are invited and must be received by the Department on or before March 13, 2000.

*Applicability Date:* This section applies to administrators of multiple employer welfare arrangements that are not group health plans beginning May 1, 2000.

**ADDRESSES:** Interested persons are invited to submit written comments (preferably with three copies) to: Pension and Welfare Benefits Administration, Room C–5331, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: MEWA reporting. Written comments may also be sent by Internet to the following address: ''MEWAproc@pwba.dol.gov'' (without the quotation marks).

All submissions will be open to public inspection and copying from 8:30 a.m. to 4:30 p.m. in the Public Documents Room, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5638, 200 Constitution Avenue, NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Amy J. Turner, Pension and Welfare Benefits Administration, U.S. Department of Labor, Rm C–5331, 200 Constitution Avenue, NW., Washington, DC 20210 (telephone (202) 219–7006). This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:**

### A. Background

This document contains an interim final rule that provides guidance relating to the procedures for administrative hearings and appeals regarding the assessment of civil penalties under section 502(c)(5) of the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191) (HIPAA), for the failure or refusal to file a completed report pursuant to section 101(g){h} [1] of ERISA, as amended by HIPAA. This regulation is designed to parallel the procedures set forth in § 2570.502c–2 regarding civil penalties under section 502(c)(2) of ERISA relating to reports required to be filed under ERISA section 104(b)(4).

### B. Overview of the Interim Final Rule

Section 502(c)(5) provides that the Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the report required to be filed under section 101(g){h}. In order to implement this provision, the Department is publishing this interim final rule, and in a separate document, an interim final rule describing the manner in which the Department will assess civil penalties under ERISA section 502(c)(5). *See* § 2560.502c–5.

[1] Both the Small Business Job Protection Act of 1996 (Pub. L. 104–188) and the Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191) created a new section 101(g) of ERISA. Accordingly, section 101(g) of ERISA that relates to reporting by certain arrangements is referred to in this document as section 101(g){h} of ERISA.

This document contains an interim final rule that establishes procedures for hearings before an Administrative Law Judge (ALJ) with respect to an assessment by the Department of Labor (the Department) of a civil penalty under section 502(c)(5), and for appeals of an ALJ decision to the Secretary or the Secretary's delegate. In this regard, the Secretary has established the Pension and Welfare Benefits Administration (PWBA) within the Department for the purpose of carrying out most of the Secretary's responsibilities under ERISA. *See* Secretary of Labor's Order 1–87, 52 FR 13139 (April 21, 1987).

The Department has published rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges in Subpart A of 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 Subpart A 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 Subpart A of 29 CFR Part 18 to the assessment of civil penalties under ERISA section 502(c)(5) and has decided to adopt many, though not all, of the provisions of Subpart A of 29 CFR Part 18 for these proceedings. Accordingly, adjudications relating to civil penalties under ERISA section 502(c)(5) will be governed by the following sections [2] of Subpart A of 29 CFR Part 18:

§ 18.4 Time computations.
§ 18.5 (c) through (e) Responsive pleadings—answer and request for hearing.
§ 18.6 Motions and requests.
§ 18.7 Prehearing statements.
§ 18.8 Prehearing 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; entry upon land for inspection and other purposes; and physical and mental examination.
§ 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.
§ 18.26 Conduct of hearings.
§ 18.27 Notice of hearing.
§ 18.28 Continuances.
§ 18.29 Authority of administrative law judge.
§ 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.
§ 18.42 Expedited proceedings.
§ 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 the record.
§ 18.55 Receipt of documents after hearing.
§ 18.56 Restricted access.
§ 18.59 Certification of official record.

This interim final rule relates specifically to procedures for assessing civil penalties under section 502(c)(5) of ERISA and are controlling to the extent they are inconsistent with any portion of Subpart A of 29 CFR Part 18. This interim final rule is designed to maintain the maximum degree of uniformity with the rules set forth in Subpart A of 29 CFR Part 18 consistent with the need for an expedited procedure, while recognizing the special characteristics of proceedings under ERISA section 502(c)(5). For purposes of clarity, where a particular section of the existing procedural rules would be affected by these interim final rules, the entire section of the existing procedural rules (with the appropriate modifications) has been set out in this document. Thus, only a portion of the provisions of the procedural rules set forth below involve changes from, or additions to, the rules in Subpart A of 29 CFR Part 18. The specific modifications to the rules in Subpart A 29 CFR Part 18, and their relationship to the conduct of these proceedings generally, are outlined below.

## C. Discussion of the Interim Final Rules

### *1. In General*

The applicability of these procedural rules under section 502(c)(5) is set forth in § 2570.90. In this regard, it should be noted that the procedural rules contained herein apply only to adjudicatory proceedings before ALJs of the U.S. Department of Labor. The interim rule in § 2560.502c–5, also being published today, sets forth the procedures relating to issuance by PWBA of notices of intent to assess a penalty under ERISA section 502(c)(5), as well as procedures for agency review of statements of reasonable cause filed by persons against whom a penalty is assessed. Under the interim final rule 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)(5) files an answer to a notice of the agency's determination on a statement of reasonable cause. See § 2570.91(c) and (d) below, and § 2560.502c–5(h), published separately in this issue of the **Federal Register**.

The definitional section (§ 2570.91) of these interim final rules incorporates the basic adjudicatory principles set forth in Subpart A of 29 CFR Part 18, but includes terms and concepts of specific relevance to proceedings under ERISA section 502(c)(5). In this respect, it differs from its more general counterpart at § 18.2 of this title. In particular, § 2570.91 states that the term ''Secretary'' means the Secretary of Labor and includes various persons to whom the Secretary may delegate authority. This definition is not intended to suggest any limitation on the authority that the Secretary has delegated to the Assistant Secretary for Pension and Welfare Benefits. As noted above, the Secretary of Labor has delegated most of his or her authority under ERISA to the Assistant Secretary for Pension and Welfare Benefits. Thus, 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 a properly authorized delegate.

### *2. Proceedings Before Administrative Law Judges*

In general, the burden to initiate adjudicatory proceedings before an ALJ will be on the party against whom the Department is seeking to assess a civil penalty under ERISA section 502(c)(5) (the respondent). However, a respondent must have complied with the procedures relating to agency review set forth in § 2560.502c–5 before

[2] To the extent that any provision of Subpart A of 29 CFR Part 18 is not incorporated, the provisions detailed in this section are intended to govern the rules of practice and procedure for administrative hearings relating to civil penalties under ERISA section 502(c)(5).

initiating adjudicatory proceedings under this section. In this regard, it should be noted that both the notice of intent to assess a penalty, as described in § 2560.502c–5(c), and the notice of determination on a statement of reasonable cause, as described in § 2560.502c–5(g), will be issued by PWBA, the agency responsible for administration and enforcement of ERISA section 502(c)(5), in accordance with the service of notice provisions described in § 2560.502c–5(i). Paragraph (c) of § 2570.91 (relating to respondent's answer), paragraph (d) of § 2570.91 (relating to commencement of proceedings), and paragraph (h) of § 2570.91 (relating to administrative hearings) contemplate that adjudicatory proceedings will be initiated with the filing by a respondent of an answer to a notice of the agency's determination on a statement of reasonable cause.

The service of documents by the parties to an adjudicatory proceeding, as well as by the ALJ, will be governed by § 2570.92 of these interim final rules.

In general, the rules in Subpart A of 29 CFR Part 18 concerning the computation of time, pleadings and motions, and prehearing conferences and statements, are adopted in these procedures for adjudications under ERISA section 502(c)(5). The section on the designation of parties (§ 2570.93) 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)(5).

Section 2590.94 describes the consequences of default. This section provides that if the respondent fails to file an answer to the Department's notice of determination, described in § 2560.502c–5(g), within the 30-day period provided by § 2560.502c–5(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)(5). Section 2570.94 clarifies that, in the event of such a failure, the assessment of the penalty becomes final.

Section 2590.95 addresses consent orders or settlements. This section permits parties, up to 5 days prior to a scheduled hearing, to request that a hearing be deferred for a reasonable period of time to permit negotiation of a settlement or agreement resolving the whole or any part of the issues relating to assessment of a penalty under ERISA section 502(c)(5). The section also states that the ALJ's decision shall include the terms and conditions of any consent order or settlement that 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. Finally, this section prescribes rules for the content, submission and disposition of any settlement agreement under this section, and a process for settling the whole or any part of the issues where all parties have not consented to the terms of the proposed settlement.

Section 2570.96 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 Subpart A of 29 CFR Part 18 are to be applied in these proceedings under section 502(c)(5). For example, if the order of the ALJ states only that interrogatories on certain subjects may be permitted, the rules under Subpart A of 29 CFR Part 18 concerning the service and answering of such interrogatories shall apply. The procedures under Subpart A of 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)(5).

The section on summary decisions (§ 2570.97) provides the 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)(5). The section concerning the decision of the ALJ (§ 2570.98) differs from its counterpart at § 18.57 of this title in that it states that the decision of the ALJ in a section 502(c)(5) case shall become the final decision of the Secretary unless a timely appeal is filed.

*3. Review by the Secretary*

The procedures for appeals of ALJ decisions under ERISA section 502(c)(5) are governed solely by the rules set forth in §§ 2570.99 through 2570.101, and without any reference to the appellate procedures contained in Subpart A of 29 CFR Part 18. Section 2570.99 establishes a 20-day time limit within which such appeals must be filed, the manner in which the issues for appeal are determined, and the procedures for making the entire record before the ALJ available to the Secretary. Section 2570.100 provides that review by 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 2570.101 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 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)(5) 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.

**D. Interim Rule With Request for Comments**

Section 734 of ERISA (formerly section 707) authorizes the Secretary of Labor, consistent with section 104 of HIPAA, to promulgate any such regulations as may be necessary or appropriate to carry out the provisions of Part 7 of ERISA. In addition, this section authorizes the Secretary to promulgate any interim final rules as the Secretary determines are appropriate to carry out Part 7 of ERISA. In addition, section 505 of ERISA authorizes the Secretary to prescribe such regulations as the Secretary finds necessary or appropriate to carry out the provisions of Title I of ERISA. The report required to be filed under section 101(g)(h) is for the purpose of determining the extent to which the requirements of Part 7 are being carried out. Accordingly, the Department has determined that issuing this regulation in interim final form is necessary in order for the Secretary to enforce the reporting requirements of section 101(g)(h) of ERISA and the implementing regulations under § 2520.101–2. Written comments on these interim rules are invited.

**E. Executive Order 12866 Statement**

Under Executive Order 12866, the Department must determine whether a 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) of the Executive Order, a ''significant

regulatory action'' is 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. On the basis of these criteria, the Department has determined that this regulatory action is not significant within the meaning of the Executive Order.

**F. Paperwork Reduction Act**

The rule being issued here is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) because it does not contain an ''information collection request'' as defined in 44 U.S.C. 3502(3).

**G. Regulatory Flexibility Act**

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, (RFA) requires each Federal agency to perform an initial regulatory flexibility analysis for all rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C 551 *et seq.*) unless the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Small entities include small businesses, organizations, and governmental jurisdictions.

Because these rules are being issued as interim final rules and not as a notice of proposed rulemaking, the RFA does not apply and the Department is not required to either certify that the rule will not have a significant impact on a substantial number of small entities or conduct a regulatory flexibility analysis. The Department does not anticipate that this interim final rule will impose a significant impact on a substantial number of small entities, however, regardless of whether one uses the definition of small entity found in regulations issued by the Small Business Administration (13 CFR § 121.201) or one defines small entity, on the basis of section 104(a)(2) of ERISA, as an employee benefit plan with fewer than 100 participants. The Department invites comments on the effect of this interim final rule on small entities.

**H. Small Business Regulatory Enforcement Fairness Act**

The interim final rule being issued here 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.

**I. 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, and will not impose an annual burden of $100 million or more on the private sector.

**Statutory Authority**

The interim final rules set forth herein are issued pursuant to the authority contained in section 502(c)(5) of ERISA (Pub. L. 104–191, 110 Stat. 1936, 1952, 29 U.S.C. 1132(c)(5)), section 505 of ERISA (Pub. L. 93–406, 88 Stat. 892, 894, 29 U.S.C. 1135), and section 734 of ERISA (Pub. L. 104–204, 110 Stat. 2874, 2935, 29 U.S.C. 1194), and under Secretary of Labor's Order 1–87, 52 FR 13139, April 21, 1987.

**List of Subjects in 29 CFR Part 2570**

Administrative practice and procedure, Claims, Employee benefit plans, Employee Retirement Income Security Act, Law enforcement, Pension and Welfare Benefits Administration, Reporting and disclosure.

For the reasons set out in the preamble, Part 2570 of Chapter XXV of Title 29 of the Code of Federal Regulations is amended as follows:

## PART 2570—[AMENDED]

1. The authority for Part 2570 is revised to read:

**Authority:** 29 U.S.C. 1132(c)(2), 1132(c)(5), 1132(i), 1135, 1194, and Secretary's Order 1–87, 52 FR 13139 (April 21, 1987).

2. By adding in the appropriate place in Part 2570 the following new Subpart E:

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

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

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

### § 2570.90 Scope of rules.

The rules of practice set forth in this subpart are applicable to ''502(c)(5) civil penalty proceedings'' (as defined in § 2570.91(n) of this subpart) under section 502(c)(5) of the Employee Retirement Income Security Act of 1974 (Pub. L. 93–406, 88 Stat. 840–52, as amended by Pub. L. 104–191, 101 Stat. 1936). The rules of procedure for administrative hearings published by the Department's Office of Administrative Law Judges in Subpart A of Part 18 of this title will apply to matters arising under ERISA section 502(c)(5) 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.

### § 2570.91 Definitions.

For 502(c)(5) civil penalty proceedings, this section shall apply in lieu of the definitions in § 18.2 of this title.

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

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

(c) *Answer* means a written statement that is supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to § 2560.502c–5(g);

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

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

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

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

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

(i) *Order* means the whole or any part of a final procedural or substantive disposition of a matter under ERISA section 502(c)(5);

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

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

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

(m) *Pleading* means the notice as defined in § 2560.502c–5(g), the answer to the notice, any supplement or amendment thereto, and any reply that may be permitted to any answer, supplement or amendment;

(n) 502(c)(5) civil penalty proceeding means an adjudicatory proceeding relating to the assessment of a civil penalty provided for in section 502(c)(5) of ERISA;

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

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

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

**§ 2570.92 Service: Copies of documents and pleadings.**

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

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

(b) *By parties.* All motions, petitions, pleadings, briefs, or other documents shall be filed with the Office of Administrative Law Judges with a copy, including any attachments, to all other parties of record. When a party is represented by an attorney, service shall be made upon the attorney. Service of any document upon any party may be made by personal delivery or by mailing a copy to the last known address. The Department shall be served by delivery to the Associate Solicitor, Plan Benefits Security Division, ERISA section 502(c)(5) Proceeding, P.O. Box 1914, Washington, DC 20013. The person serving the document shall certify to the manner and date of service.

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

(d) *Form of pleadings*— (1) Every pleading shall contain information indicating the name of the 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, photocopies, or otherwise, will not be accepted. Papers may be reproduced by any duplicating process provided all copies are clear and legible.

**§ 2570.93 Parties, how designated.**

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

**§ 2570.94 Consequences of default.**

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

**§ 2570.95 Consent order or settlement.**

For 502(c)(5) civil penalty proceedings, the following shall apply in lieu of § 18.9 of this title.

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

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

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

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

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

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

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

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

(1) Submit the proposed agreement containing consent findings and an order to the administrative law judge; 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 that 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 receipt of such document. The decision of the administrative law judge shall incorporate all of the findings, terms, and conditions of the settlement agreement and consent order of the parties. Such decision shall become a final agency action within the meaning of 5 U.S.C. 704.

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

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

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

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

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

**§ 2570.96 Scope of discovery.**

For 502(c)(5) civil penalty proceedings, this section shall apply in lieu of § 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 representative of a party concerning the proceeding.

**§ 2570.97 Summary decision.**

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

(a) *No genuine issue of material fact.* (1) Where no issue of material fact is found to have been raised, the administrative law judge may issue a decision which, in the absence of an appeal pursuant to 2570.99 through

2570.101 of this subpart, shall become a final order.

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

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

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

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

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

**§ 2570.98 Decision of the administrative law judge.**

For 502(c)(5) civil penalty proceedings, this section shall apply in lieu of § 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 an order together with a supporting brief expressing the reasons for such proposals. Such proposals and briefs shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision of the administrative law judge.* Within a reasonable time after the time allowed for the filing of the proposed findings of fact, conclusions of law, and order, or within thirty (30) days after receipt of an agreement containing consent findings and an order disposing of the disputed matter in whole, the administrative law judge shall make his or her decision. The decision of the administrative law judge shall include findings of fact and conclusions of law with reasons therefor upon each material issue of fact or law presented on the record. The decision of the administrative law judge shall be based upon the whole record. In a contested case in which the Department and the Respondent have presented their positions to the administrative law judge pursuant to the procedures for 502(c)(5) civil penalty proceedings as set forth in this subpart, the penalty (if any) which may be included in the decision of the administrative law judge shall be limited to the penalty expressly provided for in section 502(c)(5) of ERISA. It shall be supported by reliable and probative evidence. The decision of the administrative law judge shall become a final agency action within the meaning of 5 U.S.C. 704 unless an appeal is made pursuant to the procedures set forth in §§ 2570.99 through 2570.101.

**§ 2570.99 Review by the Secretary**

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

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

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

**§ 2570.100 Scope of review.**

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

**§ 2570.101 Procedures for review by the Secretary.**

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

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

3. By revising paragraph (a) of § 2570.3 as follows:

**§ 2570.3 Service: Copies of documents and pleadings.**

* * * * *

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

* * * * *

Signed at Washington DC, this 4th day of February, 2000.

**Leslie B. Kramerich,**

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

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