

Civil Penalties

1. 502(i) Civil Penalty

a. **Statutory Authority.** ERISA section 502(i)¹ authorizes the Secretary to assess a civil penalty against a party in interest who engages in a prohibited transaction with respect to either an employee welfare benefit plan or a non-qualified pension plan.² This penalty applies to welfare and non-qualified plans, and complements the excise tax imposed on tax-qualified pension plans by section 4975(a) of the Internal Revenue Code.

The Department's regulation identifies the procedures³ for assessing a two-tiered 502(i) civil penalty. It also communicates the circumstances when the party in interest may contest EBSA's findings and assessment.

The first tier of the penalty may not exceed 5% of the "amount involved." The second tier of the penalty, which is not more than 100 % of the amount involved, applies only if the prohibited transaction remains uncorrected within 90 days after a final agency order⁴.

Because the assessment of the civil penalty under section 502(i) is discretionary, the RO should consider the assessment of the 502(i) civil penalty as one of several enforcement options.

b. **Notice.** EBSA must notify a party in interest of its intention to assess the 502(i) penalty. Because OE issues all 502(i) assessments, the RD may wish to discuss situations involving potential 502(i) assessments with OE before issuing a VC notice letter. VC notice letters should include language preserving the Department's ability to assess the penalty.

c. **Request for a 502(i) Assessment.** The RO should send all requests to assess a 502(i) civil penalty to OE for processing. OE will review the request and, if appropriate, prepare the notice of assessment of the 502(i) civil penalty. See **(Figure 1)** for an example of a notice of assessment.

The RO should include documentation sufficient to substantiate the violations alleged in its transmittal to OE. Specifically, the RO should forward a copy of the VC notice letter, if issued, and other correspondence, including any responses to the VC notice letter, the ROI, and exhibits to support a finding of the prohibited transactions along with an accurate calculation of the civil penalty.

Amount involved means the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of property received as of the date the prohibited transaction occurred.

d. **First Level 502(i) Penalty.** The first level penalty under section 502(i) is 5% of the "amount involved."

i. **Amount Involved.** When determining the amount involved, distinguish between situations that involve the prohibited transfer of ownership (generally, a sale or transfer of property) and the prohibited use of property (generally, the lease or loan of property). If there is a transfer of ownership rights, base the penalty on whichever

is greater: the fair market value of the property or the actual amount of money that changes hands. For situations involving the use of property or money, such as a lease or a loan, the amount involved is whichever is greater: the amount paid for such use or the fair market value of such use for the period for which the money or property is used.

For example, in the situation of a prohibited loan, the amount involved will be the interest actually paid or the fair market interest for such loan, whichever is greater. In the instance of a lease transaction, the amount involved will be the greater of the rent actually paid or the fair market rental value. In those situations involving compensation to a party in interest for services provided, the amount involved will be limited to any excess compensation paid.

ii. Discrete and Continuing Transactions. When calculating the civil penalty, distinguish between discrete and continuing prohibited transactions.

A. Discrete Transactions. In the case of discrete transactions, such as sales of property, assess the first level of the civil penalty simply as 5% of the amount involved for each taxable year or portion thereof until the correction of the prohibited transaction or assessment of the penalty.⁵ Calculate the penalty on discrete transactions on an annual basis and do not prorate for a portion of the year. Therefore, a transaction entered into in the middle of one year and/or the correction occurs in the middle of a subsequent year, the amount of the penalty is the full amount for each of the two years.

B. Continuing Transactions. In the case of a continuing prohibited transaction, such as a lease or a loan, a new transaction is deemed to occur on the first day of each year or portion thereof in which the transaction continues. Such characterization of continuing transactions gives rise to the assessment of an additional sanction for each year the transaction remains uncorrected.

In continuing violations, prorate the amount involved in the transaction for the actual period the use takes place. In addition, where there is an uncorrected completed lease or loan, the amount involved is cumulative for each taxable year until correction or assessment of the penalty. Calculate the penalty on a continuing transaction on an annual basis, but prorate for a portion of any year involved.

Final Order means the final decision or action of the Department concerning the assessment of a civil sanction under ERISA section 502(i) against a particular party. Such final order may result from a decision of an administrative law judge or the Secretary, or the failure of a party to invoke the procedures for hearings or appeals under the regulation.

e. **Second Level 502(i) Penalty.** The Department may assess the second tier of the 502(i) civil penalty (100% of the amount involved), in addition to the first level penalty, if the

prohibited transaction is not corrected within 90 days after a “final agency order” is issued.⁶

In general, the correction period begins on the date the prohibited transaction occurs and ends 90 days after a final agency order.

Amount involved in the transaction, for purposes of the second level of the 502(i) penalty, is the highest fair market value during the correction period.

f. **502(i) Appeals.** A party in interest who elects to contest EBSA's findings and assessment may request a hearing before an administrative law judge (ALJ). In general, the party in interest may file an answer and request for a hearing with the ALJ within 30 days of service of process. Failure to do will be deemed to be a waiver of the right to appeal as well as an admission of the facts alleged.

Unless otherwise waived, the party in interest may file an appeal to the Secretary within 20 days of the issuance of the ALJ's final decision. Upon such appeal, the Secretary may affirm, modify, or set aside, in whole or in part, the decision on appeal. The Secretary's review is not a **de novo** proceeding, but rather a review of the record established before the ALJ. EBSA delegates the Director of the Office of Policy and Research to conduct this review.

2. **502(l) Civil Penalty.**

a. **Statutory Authority.** ERISA section 502(l)⁷ requires the Secretary to assess a civil penalty against:

- i. A fiduciary who breaches a fiduciary responsibility under, or violates, part 4 of Title I of ERISA; or
- ii. Any other person who knowingly participates in such breach or violation.

The Department's regulation⁸ specifies:

- i. The procedures under which a penalty will be assessed;
- ii. When an assessed penalty must be paid; and
- iii. The circumstances under which the Secretary may waive or reduce a penalty.

Note: The Secretary may delegate authority to the Assistant Secretary for EBSA, RDs for EBSA, or Deputy RD for EBSA.

b. **Notice of Assessment.**

Notice shall be any document, which contains a specified assessment in monetary terms of a civil penalty under 502(l).

The Notice will include:

- i. A brief factual description of the violation for which the assessment is being made;
- ii. The identity of the person being assessed;
- iii. The amount of the assessment; and
- iv. The basis for assessing that particular person with that particular penalty amount.

After receiving the applicable recovery amount pursuant to either a settlement agreement (See Voluntary Compliance section paragraph 11) or a court order, the RO shall serve a notice of assessment (Notice) on the person liable for paying the penalty.

If there is an applicable civil penalty pursuant to a voluntary compliance settlement agreement, RDs will assess the penalty as described in the Voluntary Compliance section (see Figures 2 and 3).

If correction is the result of a court order in a judicial proceeding, the order may include language assessing the 502(l) penalty. If not, or if the payment is not to be made immediately (i.e., either a deferred payment or a schedule of payments), the penalty will be assessed by the RD after the legal action (see Figures 3 and 4).

c. **Service of the 502(l) Assessment Letter.** Serve 502(l) assessment letters by:

- i. Delivering a copy to the person⁹ being assessed;
- ii. Leaving a copy at the principal office, place of business, or residence of such person; or
- iii. Mailing a copy to the last known address of such person.

Upon mailing the notice by certified mail, service is complete. Upon receipt by the addressee by regular mail, service is complete.¹⁰

Applicable recovery amount means any amount recovered from a fiduciary or other person with respect to a breach or violation:

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary.

d. **Assessment of the Penalty.** The penalty under section 502(l) is equal to 20 % of the "applicable recovery amount."¹¹

The 502(l) penalty is calculated as a percentage of the amount paid to the plan or to a participant or beneficiary that represents losses incurred by the plan, disgorged profits, and amounts necessary to achieve correction of the ERISA violation.

EBSA may assess the penalty only against fiduciaries and knowing participants in a breach or violation of part 4 of Title I of ERISA. It assesses the civil penalty only against the person who is required by the terms of the judgment or the settlement agreement to pay the applicable recovery amount. For example, if only one of a group of fiduciaries agrees to restore losses to a plan pursuant to a settlement agreement, EBSA only assesses the civil penalty against that fiduciary.

Additionally, in certain circumstances, the penalty may be assessed against fiduciaries or knowing participants when the restitution to the plan is made on their behalf by a third party. Specifically, the EBSA may assess the penalty when such third party does not have an independent obligation under ERISA to correct the violation(s).

e. **Payment of the 502(l) Penalty.** The party assessed a 502(l) civil penalty has 60 days to pay it, unless the party submits a petition for waiver or reduction during the 60-day payment period.

Within the 60-day payment period, the party may submit a written request for a conference with the Secretary to discuss the calculation of the assessed penalty. This request does not toll the payment period.

At the end of the 60-day payment period, if the party does not submit a petition for waiver or reduction of the penalty and there is no penalty payment, the RO should send a copy of the assessment letter and/or court order to OPPEM with a formal memorandum (copy to OE) requesting implementation of debt collection procedures.¹²

f. **Petitions for Waiver or Reduction.** At any time during the 60-day payment period, the party may petition the Secretary to waive or reduce the assessed penalty on the basis that:

i. The petitioner will not be able to restore all losses to the plan or any participant or beneficiary of such plan without severe financial hardship unless such waiver or reduction is granted, and/or

ii. The petitioner acted in good faith in engaging in the breach or violation.

A petition submitted either before or during the 60-day payment period tolls the payment period pending Department consideration of the petition. The petitioner is entitled to a conference with the Secretary regarding each petition for waiver or the reduction of the civil penalty.

The petition for waiver or reduction of the penalty must be submitted to the RD. On petition based in whole on financial hardship, RDs will make a written determination of whether to reduce or waive the penalty on this basis within 60 days of receipt.

If the petition is based in part on financial hardship and in part on good faith, the RD will make a written determination of whether to reduce or waive the penalty only on the basis of financial hardship within 60 days of receipt.

If the petitioner remains liable for any portion of the penalty after the written determination, the RO will immediately forward the petition to OED, copying OE, for a determination of whether to reduce or waive the remaining portion of the penalty based on good faith.

RDs will immediately forward petitions based in whole on good faith to OED, copying OE, for a determination of whether to reduce or waive the penalty based on good faith.

Basis for Petition	Regional Director	OED and OE
Financial hardship only	Will make a written determination whether to reduce/waive penalty within 60 days of receipt	n/a
Good faith only	Will forward petition to OED, copying OE	Will determine whether to reduce/waive penalty
Financial hardship and good faith	Will make a written determination whether to reduce/waive financial hardship penalty within 60 days of receipt. Will forward petition to OED, copying OE, if petitioner remains liable for any portion after financial hardship determination.	Will determine whether to reduce/waive good faith penalty

g. Offsets against other penalties. The 502(l) civil penalty assessed on a person with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such person with respect to such transaction under ERISA section 502(i) or section 4975 of the Internal Revenue Code.¹³ Only the identical parties on whom the Department/IRS imposed a penalty/excise tax can offset the excise tax against the 502(l) penalty.¹⁴ The person assessed the penalty must provide proof the offsetting penalty was paid.

h. Compromise of 502(l) Penalty. RDs are delegated authority and responsibility with respect to compromise of 502(l) penalties. RDs may compromise a penalty only when¹⁵:

- i. The case was referred to SOL for litigation,
- ii. The compromise is based on SOL's written recommendation, and,
- iii. The penalty is not a Final Agency Order.

If the RD disagrees with SOL's recommendation, he/she must obtain approval from the National Office, through OE.

i. Write-off of 502(l) Debt. EBSA may consider a debt write-off after a 502(l) penalty assessment is a Final Agency Order, making it a collectable debt to the government. Only the Deputy Assistant Secretary for National Office Operations may write-off a 502(l) penalty debt. Any request for debt write-off will be referred to the RD for a recommendation on whether to reduce the penalty in whole or part. RDs should ask SOL for a written analysis and recommendation and forward all analyses and recommendations for handling the write-off to OE. After consultation with the RD and OPPEM, OE will prepare a proposed recommendation regarding the penalty write-off to the Deputy Assistant Secretary for National Office Operations.

3. **502(c)(2) Civil Penalty.**

a. Statutory Authority. ERISA section 502(c)(2)¹⁶ authorizes the Secretary to assess a civil penalty against any plan administrator who fails or refuses to file an annual report as required under ERISA section 101(b)(1).¹⁷ ERISA provides that an annual report rejected for failure to provide material information shall be treated as not filed with the Secretary.¹⁸

The Department's regulation¹⁹ specifies the procedures for:

- i. Assessing the penalty,
- ii. Paying the penalty, and
- iii. Requesting an administrative hearing.

The Secretary can delegate authority to any assistant secretary, including the Assistant Secretary for Employee Benefits Security,²⁰ administrator, commissioner, appellate body, board, or other official.

b. **Implementing Procedure.** The Office of the Chief Accountant (OCA) will institute penalties assessed under section 502(c) (2).

c. **Voluntary Compliance Upon Discovery of a Reporting Violation.** If the RD decides to resolve an open investigation by means of a VC notice letter rather than a referral for litigation, the deficient report violation should be included in the VC notice letter.

If the plan fails to correct the deficient report violation as requested in the VC notice letter, and no other issues require further enforcement action, the RO refers the deficient reporting issue to OCA. The RD should issue a closing letter notifying the Plan Administrator of the action being taken (See Voluntary Compliance section, [Figure 8](#), [Figure 10](#), and [Figure 11](#)).

OCA will make the final determination whether to institute further procedures to assess the civil penalty authorized in ERISA section 502(c)(2).

d. **Referrals for Litigation.** When the RD decides to refer a case to SOL with a recommendation for civil litigation, the deficient report violation is included in the Action ROI. Forward a copy of the transmittal memorandum, or a separate memorandum if necessary, so that the assessment of the civil penalty can be coordinated with OCA and SOL. The transmittal memo, copied to OE as described in the Fiduciary Investigations Manual section, should discuss the referral to OCA.

e. **Concurrent Actions.** When the RO wishes to open a case on a plan that is already under investigation by OCA, it should coordinate the investigation with OCA. Similarly, OCA will coordinate with the appropriate RO if it wishes to open a case on a plan under investigation by the RO.

4. **502(c)(7) Civil Penalty**

a. **Statutory Authority.** ERISA section 502(c)(7)²¹ authorizes the Secretary to assess a civil penalty against a plan administrator of an individual account plan who fails or refuses to provide notice to affected participants and beneficiaries in accordance with ERISA section 101(i).²²

The failure or refusal to provide notice is a failure or refusal, in whole or part, to provide notice of the blackout period to an affected plan participant or beneficiary at the time and in the manner prescribed by section 101(i) of ERISA.

The RO should treat a failure or refusal to provide a notice of blackout period with respect to any single participant or beneficiary as a separate violation.²³

The Department's regulation²⁴ specifies the procedures for:

- i. Assessing a penalty;
- ii. Paying a penalty; and
- iii. Requesting an administrative hearing.

The Secretary may delegate authority to any assistant secretary, including the Assistant Secretary for Employee Benefits Security Administration, administrator, commissioner, appellate body, board, or other official.²⁵

b. Implementing Procedure. OCA will institute penalties assessed under section 502(c)(7).

c. Voluntary Compliance When there is a Blackout Notice Violation. OCA will make the determination as to whether there is a violation of ERISA section 101(i). A blackout notice violation may not be included in the VC notice letter. [See Figure 5](#) for language to use in the closing letter.

OCA will make the final determination whether to institute further procedures to assess the civil penalty authorized in ERISA section 502(c)(7).

d. Referral for Litigation. When a case is referred to SOL for civil litigation, the potential blackout notice violation should be included in the Action ROI under "Other Findings." However, the transmittal memorandum should mention OCA is responsible for determining whether there is a violation of ERISA section 101(i) and the assessment of the civil penalty should be coordinated with OCA and SOL.

e. Concurrent Actions. When the RO wants to open a case on a plan under investigation by OCA, it should coordinate the investigation with OCA. Similarly, OCA will coordinate with the appropriate RO if it wishes to open a case on a plan under investigation by the RO.

(Figure 1)
ERISA Section 502(i) Assessment Letter

Board of Trustees
Local Union
1234 Main Street
Anytown, USA

RE:Notice of Assessment of ERISA Section 502(i) Civil Penalty in the Matter of
the Local Union
EBSA Case No. XX-XXXXX

Dear Trustees:

We have concluded our investigation of the Fund pursuant to Title I of the Employee Retirement Income Security Act of 1974 (ERISA).¹ Our investigation found that the Union engaged in a transaction with the [Fund], prohibited by ERISA. As a result of this prohibited conduct, we plan to assess a civil penalty against the Union in the amount of \$17,500, pursuant to section 502(i) of ERISA and the regulations thereunder.

On August 24, 2016, the Trustees voted at a special meeting to “donate” \$50,000 to the Union out of the Fund’s tuition account. This contribution was contingent upon the Union’s increasing its membership dues. On the same date, Check No. 9566 for \$50,000, was drawn on the Fund’s account and paid to the Union.

The Union is a party in interest with respect to the Fund under section 3(14)(D) of ERISA, which defines a party in interest to include an employee organization any of whose members are covered by the plan. A fiduciary with respect to an employee benefit plan is prohibited from causing the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect transfer to or use by or for the benefit of, a party in interest, of any assets of the plan (section 406(a)(1)(D)). Accordingly, the transfer of \$50,000 to the Union constitutes a violation of section 406(a)(1)(D).

Section 502(i) of ERISA provides, in relevant part, that:

In the case of a transaction prohibited by section 406 by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved . . . ; except that, if the transaction is not corrected . . . within 90 days after notice from the Secretary . . . such penalty may be in an amount not more than 100 percent of the amount involved.

Therefore, EBSA is assessing a civil penalty of \$17,500 against the Union. The penalty is assessed for the period the prohibited transaction is outstanding until corrective action is taken.² The penalty is computed as shown on the Penalty Computation Sheet enclosed with this letter.

You may contest EBSA's findings and the assessment of the civil penalty by filing an Answer³ with the:

Chief Docket Clerk
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002.

If you file an Answer with the Office of Administrative Law Judges, that filing will initiate an adjudicatory proceeding in accordance with the regulations at 29 CFR Part 2570. Please note that 29 CFR section 2570.5 provides that if you fail to file an Answer with the Office of Administrative Law Judges within thirty (30) days of your receipt of this letter, such failure will constitute a waiver of your rights to contest this matter before an Administrative Law Judge, or to receive any other agency consideration. Failure to file an Answer will also constitute an admission of the facts alleged.

You should be aware that if you fail to correct the transaction within the correction period as described in 29 CFR 2560.502i-1(c) and (d) (generally 90 days after a final agency or judicial order), a second tier penalty of 100 percent of the amount involved will be assessed.

If you determine not to contest this matter, you should remit a check or money order in the amount of \$17,500 payable to the United States Department of Labor prior to the expiration of the thirty-day period.⁴ The check should be mailed to the following address:

Standard (Regular U.S. Mail) Express or Commercial Overnight Mail
ERISA Civil Penalty U.S. Bank
P.O. Box 6200-36 Attn: ERISA Civil Penalty #6200-36
Portland, OR 97228-6200 17650 NE Sandy Blvd.
PD-OR-C1GL
Portland, OR 97230

If you would like to discuss your options for installment payments towards the debt arising from the penalty assessment, please contact Soroosh Nikouei at (202) 693-8486.

To ensure correct processing of this payment, please include the EBSA Case Number (listed at the top of this letter) on the front of your check or money order, as well as a copy of this letter. You should also notify me that you have paid the civil penalty.

If you would like to discuss correction of the violations and any other related matters, please contact Mr. X in the Office of Enforcement at (202) 693-XXXX.

Sincerely,

Director of Enforcement

Enclosure

cc: Chief Docket Clerk
Office of Administrative Law Judges
800 K Street, NW
Washington, DC 20001-8002

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Office of Administrative Law Judges
800 K Street, NW
Washington, DC 20001-8002

U.S. Department of Labor
Employee Benefits Security Administration,
Complainant
v.
Local Union

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Respondent Respondent's Answer

1. This matter is brought before the Office of Administrative Law Judges pursuant to action 502(i) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132(i), and the regulations issued thereunder.
2. By letter dated _____, the Complainant, the U.S. Department of Labor, the Employee Benefits Security Administration served the Respondent, Local Union, a notice of assessment of the civil penalty.
3. The total amount of the civil penalty assessed by the Complainant is \$17,500.
4. Respondent hereby contests the findings of the Complainant and the assessment of the civil penalty as follows:

I hereby certify that service of the Respondent's Answer was made to the persons listed below by sending a copy by regular mail to the following addresses:

Director of Enforcement
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Room 600
Washington, DC 20210

Plan Benefits Security Division
Office of the Solicitor
ERISA Section 502(i) Proceeding
P.O. Box 1914
Washington, DC 20013

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Penalty Computation Sheet

1. The amount involved for the year ending December 31, 1999: $\$50,000 \times .05 = 2500$
2. The amount involved for the year ending December 31, 2000: $\$50,000 \times .05 = 2500$
3. The amount involved for the year ending December 31, 2001: $\$50,000 \times .05 = 2500$
4. The amount involved for the year ending December 31, 2002: $\$50,000 \times .05 = 2500$
5. The amount involved for the year ending December 31, 2003: $\$50,000 \times .05 = 2500$
6. The amount involved for the year ending December 31, 2004: $\$50,000 \times .05 = 2500$
7. The amount involved for the year ending December 31, 2005: $\$50,000 \times .05 = 2500$

Total Civil Penalty Due \$17,500

(Figure 2)
Sample 502(1) Civil Penalty Assessment Letter
Settlement Agreement

Certified Mail, Return Receipt Requested

Within 60 days of this notice, please pay the ERISA Section 502(1) penalty
or file a petition to waive or reduce the penalty.

Re: Notice of Assessment of ERISA Section 502(1) Civil Penalty in the Matter of
(Name of Plan)
EBSA Case No. _____

Dear Mr./Ms.:

We have concluded our investigation of the Plan and of your activities as
_____ pursuant to Title I of the Employee Retirement Income Security Act of 1974
(ERISA).¹

We have concluded that you violated your fiduciary obligations to the Plan and violated several provisions of ERISA.² My previous letter offered you an opportunity to obtain a release from certain further action, other than the imposition of the civil penalty required by ERISA section 502(1), by correcting the ERISA violation(s) and restoring losses to the plan. Based on your letter-dated _____, [if applicable] we understand that you have taken such action in response to this offer. Specifically, you [detail actions taken].

Since you have taken the agreed-upon corrective action with respect to the specific violations, the Department will take no further action with respect to these matters, except to impose the civil penalty as required by ERISA section 502(1).³

This letter serves as Notice that we are assessing an ERISA section 502(1) civil penalty against you of \$_____.⁴ **This amount is due within 60 days of the date of this Notice.** At any time prior to the due date, you may request a conference to discuss the penalty calculation. The 60-day payment period will not, however be tolled upon such request.

In addition, at any time prior to the expiration of the 60-day period, you may petition the Secretary to waive or reduce the assessed penalty, as explained in the attachment "Procedures under ERISA Section 502(1)". If a petition for waiver or reduction is submitted during the 60-day payment period, the payment period for the penalty will be tolled pending Departmental consideration of the petition.

Please mail the petition to the following address:

Regional Director
Regional Office Address

If you decide not to contest this matter, the \$ ___ payment should be remitted by check or money order payable to the United States Department of Labor. The check should be mailed to the following address:

Standard (Regular U.S. Mail) Express or Commercial Overnight Mail
ERISA Civil Penalty U.S. Bank
P.O. Box 6200-36 Attn: ERISA Civil Penalty #6200-36
Portland, OR 97228-6200 17650 NE Sandy Blvd.
PD-OR-C1GL
Portland, OR 97230

If you would like to discuss your options for installment payments towards the debt arising from the penalty assessment, please contact Soroosh Nikouei at (202) 693-8486.

To ensure correct processing of this payment, please include the EBSA Case Number (listed at the top of this letter) on the front of your check, as well as a copy of this letter. You should also notify me that you have paid the civil penalty.

Finally, I am required to advise the Internal Revenue Service that a prohibited transaction has occurred. As described in the enclosure, the ERISA Section 502(l) penalty amount will be reduced by the tax amount imposed under section 4975 of the Internal Revenue Code.

Sincerely,
Regional Director

Enclosures: Letter dated from Regional Director to _____ (VC letter)
Procedures under ERISA Section 502(l)

bcc: OPPEM

(Figure 3)
Procedures under ERISA Section 502(l)

A. The Civil Penalty under ERISA Section 502(l)

Section 502(l) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1132(l), requires the Secretary of Labor to assess a civil penalty against a fiduciary who breaches a fiduciary responsibility under, or commits any other violation of, part 4 of Title I of ERISA or any other person who knowingly participates in such breach or violation. The penalty under section 502(l) is equal to 20 percent of the applicable recovery amount.

The Secretary of Labor has delegated most of the Secretary's penalties responsibilities under ERISA to EBSA.

B. How to Petition For Waiver or Reduction of The Civil Penalty

1. Your Petition

EBSA will send you a notice of the 502(l) civil penalty assessment in the form of a letter (Notice). You have 60 calendar days from the date of the Notice to pay the assessed penalty. At any time prior to the payment due date, you may petition the Secretary to waive or reduce the assessed penalty. Acceptable reasons may include that: (1) you acted reasonably and in good faith in engaging in the breach or violation; or (2) you will not be able to restore all losses to the plan or any participant or beneficiary of such plan without severe financial hardship unless such waiver or reduction is granted.

A petition to waive or reduce the penalty must be in writing and contain the following information:

1. The name of the petitioner;
2. A detailed description of the breach or violation which is the subject of the penalty;
3. A detailed recitation of the facts which support one, or both, of the bases for waiver or reduction, accompanied by underlying documentation supporting such factual allegations; and,
4. A declaration signed and dated by the petitioner(s), in the following form: Under penalty of perjury, I declare that, to the best of my knowledge and belief, the representations made in this petition are true and correct.

If your petition is based, in whole or in part, on financial hardship, it would be helpful in the consideration of your petition if you would provide financial information such as your Federal income tax returns for the last two years and a notarized financial statement.

As a general matter, in determining whether a fiduciary or knowing participant acted reasonably and in good faith, EBSA will examine the decision making process with respect to the transaction in question to determine whether it was designed to adequately safeguard the interest of the participants and beneficiaries of the plan. In the absence of such decision making

process, actual favorable investment return to the plan will not provide a sufficient showing that a person acted reasonably and in good faith with regard to a particular transaction.¹

2. How Your Petition is Processed

If your petition for waiver or reduction is based on financial hardship, a determination of whether to reduce or waive the penalty on this basis will be made by the EBSA Regional Director who originally assessed the civil penalty. If your petition is based on good faith, the Regional Director will forward your petition to EBSA's Office of Exemption Determinations, where the decision will be made whether to reduce or waive the penalty on the basis of good faith. If your petition is based both on financial hardship and good faith, your petition will first be considered by the Regional Director, and will be forwarded to the Office of Exemption Determination only if the petition is denied on the basis of financial hardship.

Should a decision be made to deny either petition, in whole or part, you are entitled to a conference with the Department to discuss the factual allegations contained in each petition. Any additional conferences, however, are at the discretion of the Department.

You will be served with a written determination informing you of the decision made on your petition. This written determination will briefly state the grounds for the decision. As provided in ERISA section 502(l), this decision is final and neither reviewable nor appealable. In the case of a determination not to waive, the payment period for the penalty will resume as of the date of service of the written determination.

C. Excise Tax under Internal Revenue Code 4975

1. What is the Excise Tax?

When Congress enacted ERISA, it added section 4975 to the Internal Revenue Code of 1954, which imposes an excise tax on disqualified persons (generally, the same as parties in interest under Title I of ERISA) who engage in prohibited transactions with employee retirement benefit plans. In general, this excise tax, which is administered and enforced by the Internal Revenue Service, is applicable in two steps--a first level tax equal to fifteen percent of the amount involved in the transaction for each taxable year during which the transaction is outstanding and a second level tax, equal to 100 percent of the amount involved if the transaction is not corrected. The excise tax is paid concurrently with the filing of a Form 5330. The [form](#) and [instructions](#) can be found on the IRS' website. Any questions on completing the IRS Form 5330 should be directed to IRS TE/GE Tax Services at 1 (877) 829-5500.

2. Offset Procedures

Any penalty assessed under ERISA section 502(l) with regard to any particular transaction will be reduced by the amount of any excise tax paid by you with respect to such transaction under section 4975 of the Internal Revenue Code, exclusive of any interest or penalties paid thereon. Prior to such a reduction, you must provide proof to EBSA of your payment of the excise tax and the amount of such payment. The offset applies only to payments actually made, and does not

apply to mere assessments; thus, submissions of proof of your tax assessment will not toll the 60-day payment period for ERISA section 502(l).

If, based on information gained through submission of proof of excise tax payment, EBSA determines that a previously issued notice of assessment should be revised, EBSA will issue a revised notice of assessment, and you will be obligated to pay the revised assessed penalty within the relevant 60 day period and, where necessary, any excess penalty payment will be refunded as soon as administratively feasible.

D. The Civil Penalty Under ERISA Section 502(i)

1. What is the Civil Penalty Under ERISA Section 502(i)?

Section 502(i) of ERISA authorizes the Secretary of Labor to impose upon a party in interest a civil penalty of 5 percent of the amount involved in connection with a prohibited transaction with a health and welfare plan or a non-qualified pension plan. If the prohibited transaction is not corrected within 90 days, a penalty of 100 percent may be imposed.

2. Offset Procedures

Any penalty assessed under ERISA section 502(l) with regard to any particular transaction will be reduced by the amount of any penalty paid by you with respect to such transaction under ERISA section 502(i). Prior to such a reduction, you must provide proof to EBSA of your payment of the penalty and the amount of such payment. The offset applies only to payments actually made, and does not apply to mere assessments; thus, submissions of proof of your penalty assessment will not toll the 60-day payment period for ERISA section 502(l).

If, based on information gained through submission of proof of penalty payment, EBSA determines that a previously issued notice of assessment should be revised, EBSA will issue a revised notice of assessment, and you will be obligated to pay the revised assessed penalty within the relevant 60 day period and, where necessary, any excess penalty payment will be refunded as soon as administratively feasible.

(Figure 4)
Sample 502(1) Civil Penalty Assessment Letter
Consent Judgment

Certified Mail, Return Receipt Requested

Mr. X, Trustee
Profit Sharing Plan
Main Street
Anytown, USA

Within 60 days of this Notice, please pay the ERISA Section 502(1) penalty
or file a petition to waive or reduce the penalty.

RE: Notice of Assessment of ERISA Section 502(1) Civil Penalty in the Matter of
(the Plan)
EBSA Case No. XX-XXXXX

Dear Mr. X:

We have concluded our investigation of the Plan and of your activities as Trustee. Our investigation found that you violated your fiduciary obligations to the Plan and violated several provisions of ERISA.¹ The actions taken by you that violated ERISA were detailed in the Complaint filed on [date], [**Secretary v. _____, et al.**, Docket # _____].

On [date], a Consent Order and Judgment (Order) was filed in the United States District Court, which required you to pay [\$X] to the Plan.² The terms of the Order require that you correct the ERISA violations and restore losses to the plan. Based upon the report of Mr. Y, the court approved independent party, we understand that you have complied with the above requirements. Among other things, you paid \$X. . . (list corrective actions taken).

This letter serves as Notice that we are assessing an ERISA section 502(1) civil penalty against you of \$_____.^{3,4} This amount is due within 60 days of the date of this Notice.

At any time prior to the due date, you may request a conference to discuss the penalty calculation. The 60 day payment period will not be tolled for such request.

In addition, at any time prior to the due date, you may petition to waive or reduce the penalty.⁵ If a petition is submitted during the 60 day payment period, the payment period for the penalty will be tolled pending consideration of the petition. The petition should be mailed to the following address:

Regional Director

Regional Office Address

If you decide not to contest this matter, the payment should be remitted by check or money order payable to the United States Department of Labor. The check should be mailed to the following address:

Standard (Regular U.S. Mail) Express or Commercial Overnight Mail

ERISA Civil Penalty U.S. Bank

P.O. Box 6200-36 Attn: ERISA Civil Penalty #6200-36

Portland, OR 97228-6200 17650 NE Sandy Blvd.

PD-OR-C1GL

Portland, OR 97230

If you would like to discuss your options for installment payments towards the debt arising from the penalty assessment, please contact Soroosh Nikouei at (202) 693-8486.

To ensure correct processing of this payment, please include the EBSA Case Number (listed at the top of this letter) on the front of your check, as well as a copy of this letter. You should also notify me that you have paid the civil penalty.

Finally, we are required to advise the Internal Revenue Service that a prohibited transaction has occurred. As described in the enclosure, the ERISA Section 502(l) penalty amount will be reduced by the tax amount imposed under section 4975 of the Internal Revenue Code.

Sincerely,

Regional Director

Enclosures: Consent Judgment
Procedures Under ERISA Section 502(l)

bcc:OPPEM

(Figure 5) Blackout Notice

We recently conducted an investigation pursuant to the Employee Retirement Income Security Act of 1974 involving the [Plan], and of [Plan Sponsor and Plan Administrator], as the Plan Sponsor and Plan Administrator, and the [Named Fiduciary], as named fiduciary to the plan. We have concluded our investigation and, with the exception of possible violations of the ERISA section 101(i) of the blackout period notice, we have no plans for further action at this time. [Insert additional closing language as appropriate.]

The issuance of the blackout period notice by the [Plan Sponsor] on [Date of Notice], does not appear to comply with the 30-day advance notice requirements of ERISA section 101(i) or the conditions of any of the exceptions in the Department's regulation at 29 C.F.R. § 2520.101-3(b)(2)(ii). ERISA section 502(c)(7) provides that the Department may assess a civil penalty against a plan administrator of up to \$100 a day from the date of the plan administrator's failure or refusal to provide notice to participants or beneficiaries in accordance with ERISA section 101(i), and further provides that each violation with respect to any single participant or beneficiary shall be treated as a separate violation. This matter will be referred to the Department's Office of the Chief Accountant to determine what further action, if any, should be taken under the civil penalty provisions in section 502(c)(7) of ERISA and the Department's regulation at 29 C.F.R. § 2560.502c-7.

Footnotes

1. Accordingly, the 502(i) penalty is only assessed on prohibited transactions and would not, for example, be assessed on acts of imprudence or lack of diversification.
2. The taxable year used for purposes of the civil penalty calculation is that of the party in interest.
3. The Department's regulation, at 29 CFR §2570.2(g), states that "final order" means the final decision or action of the Department concerning the assessment of a civil sanction under ERISA section 502(i) against a particular party. Such final order may result from a decision of an administrative law judge or the Secretary, or the failure of a party to invoke the procedures for hearings or appeals under the regulation.
4. The Department's interim regulation 29 CFR §2570.82(c) defines a person as an individual, partnership, corporation, employee benefit plan, association, exchange or other entity or organization.
5. Dated 4/23/01
6. Section 502(c)(2) actually refers to section 101(b)(4). However, in 1997, Pub. L. 105-34 redesignated pars. (4) and (5) as (1) and (2), respectively, and struck out former pars. (1) to (3).
7. Section 104(a)(4) provides, in relevant part, that the Secretary may reject any filing upon determining that such filing is incomplete.
8. Secretary's Order 01-2003 re-designated the title of Assistant Secretary for Pension and Welfare Benefits as Assistant Secretary for Employee Benefits Security Administration.
9. By Order 1-87, 52 FR 13139 (April 21, 1987), the Secretary has delegated most of her authority under ERISA, including authority to make final decisions to assess the penalty provided under section 502(i), to the Assistant Secretary for Pension and Welfare Benefits. In addition, Secretary's Order 01-2003 re-designated the title of Assistant Secretary for Pension and Welfare Benefits as Assistant Secretary for Employee Benefits Security Administration.
10. U.S. Department of Labor, Employee Benefits Security Administration, Office of Enforcement, 200 Constitution Avenue, N.W., Room 600, Washington, D.C. 20210, Attn: ERISA Section 502(i) Proceeding; and Counsel for Decentralized and Special Litigation, Plan Benefits Security Division, Office of the Solicitor, Attn: ERISA Section 502(i) Proceeding, P.O. Box 1914, Washington, D.C. 20013.
11. In cases where corrective action is required, add the following: "Correction will currently require" and then state appropriate corrective action.
12. Include language in brackets when addressee is or represents the disqualified person involved in the prohibited transaction.