

**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 1**

[REG-113891-07]

RIN 1545-BG72

**Benefit Restrictions for Underfunded Pension Plans; Hearing****AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Notice of public hearing on proposed rulemaking.**SUMMARY:** This document provides a notice of public hearing on proposed rulemaking providing guidance regarding the use of certain funding balances maintained for defined benefit pension plans and regarding benefit restrictions for certain underfunded defined benefit pension plans.**DATES:** The public hearing is being held on Monday, January 28, 2008, at 10 a.m. The IRS must receive outlines of the topics to be discussed at the hearing by January 7, 2008.**ADDRESSES:** The public hearing is being held in the IRS Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue, NW., Washington, DC 20224.

Mail outlines to CC:PA:LPD:PR (REG-113891-07), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-113891-07), Couriers Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS-REG-113891-07).

**FOR FURTHER INFORMATION CONTACT:**

Concerning submissions of comments, the hearing and/or to be placed on the building access list to attend the hearing, Kelly Banks at (202) 622-7180 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:** The subject of the public hearing is the notice of proposed rulemaking (REG-113891-07) that was published in the **Federal Register** on Friday, August 31, 2007 (72 FR 50544).

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons who have submitted written comments and wish to present oral comments at the hearing must submit an outline of the topics to be discussed and

the amount of time to be devoted to each topic by January 7, 2008.

A period of 10 minutes is allotted to each person for presenting oral comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available free of charge at the hearing. Because of access restrictions, the IRS will not admit visitors beyond the immediate entrance area more than 30 minutes before the hearing. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this document.

**LaNita Van Dyke,**

*Branch Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).*

[FR Doc. E7-24670 Filed 12-18-07; 8:45 am]

BILLING CODE 4830-01-P

**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 1**

[REG-209020-86]

RIN 1545-AC09

**Foreign Tax Credit: Notification of Foreign Tax Redeterminations; Correction****AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Correction to notice of proposed rulemaking by cross-reference to temporary regulations.**SUMMARY:** This document contains corrections to a notice of proposed rulemaking by cross-reference to temporary regulations (REG-209020-86) that was published in the **Federal Register** on Wednesday, November 7, 2007 (72 FR 62805) relating to a taxpayer's obligation under section 905(c) of the Internal Revenue Code to notify IRS of a foreign tax redetermination and also relating to the civil penalty under section 6689 for failure to notify the IRS of a foreign tax redetermination as required under section 905(c).**FOR FURTHER INFORMATION CONTACT:** Teresa Burridge Hughes at (202) 622-3850 (not a toll-free number).**SUPPLEMENTARY INFORMATION:****Background**

The correction notice that is the subject of this document is under

section 905(c) of the Internal Revenue Code.

**Need for Correction**

As published, the notice of proposed rulemaking by cross-reference to temporary regulations (REG-209020-86) contain errors that may prove to be misleading and are in need of clarification.

**Correction of Publication**

Accordingly, the publication of the notice of proposed rulemaking by cross-reference to the temporary regulations (REG-209020-86), which was the subject of FR Doc. E7-21727, is corrected as follows:

1. On page 62806, column 1, in the preamble, under the caption “ADDRESSES:”, line 8, the language “CC:PA:LPD:PR (REG-209020-90),” is corrected to read “CC:PA:LPD:PR (REG-209020-86),”.

**§ 1.905-5 [Corrected]**

2. On page 62807, column 2, § 1.905-5, the word (temporary) is removed from the end of the section title.

**LaNita Van Dyke,**

*Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).*

[FR Doc. E7-24673 Filed 12-18-07; 8:45 am]

BILLING CODE 4830-01-P

**DEPARTMENT OF LABOR****Employee Benefits Security Administration****29 CFR Part 2560**

RIN 1210-AB24

**Civil Penalties Under ERISA Section 502(c)(4)****AGENCY:** Employee Benefits Security Administration, Labor.**ACTION:** Proposed regulation.**SUMMARY:** This document contains a proposed regulation that, upon adoption, would establish procedures relating to the assessment of civil penalties by the Department of Labor under section 502(c)(4) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act). The regulation is necessary to reflect recent amendments to section 502(c)(4) by the Pension Protection Act of 2006, under which the Secretary of Labor is granted authority to assess civil penalties not to exceed \$1,000 per day for each violation of section 101(j), (k), or (l), or section 514(e)(3) of ERISA. The regulation would affect employee benefit plans,

plan administrators and sponsors, fiduciaries, as well as participants, beneficiaries, employee representatives, and certain employers.

**DATES:** Written comments on the proposed regulation should be received by the Department of Labor no later than February 19, 2008.

**ADDRESSES:** You may submit comments, identified by RIN 1210-AB24, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail:* [e-ORI@dol.gov](mailto:e-ORI@dol.gov). Include RIN 1210-AB24 in the subject line of the message.

- *Mail:* Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5669, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Civil Penalties Under 502(c)(4).

*Instructions:* All submissions received must include the agency name and Regulatory Information Number (RIN) for this rulemaking. Comments received will be posted without change to [www.regulations.gov](http://www.regulations.gov) and <http://www.dol.gov/ebsa>, and available for public inspection at the Public Disclosure Room, N-1513, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Washington, DC 20210, including any personal information provided. Persons submitting comments electronically are encouraged not to submit paper copies.

**FOR FURTHER INFORMATION CONTACT:** Melissa R. Spurgeon, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8500. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

On August 17, 2006, the Pension Protection Act of 2006 (PPA), Public Law 109-280, 120 Stat. 780, amended title I of ERISA by adding or revising a substantial number of substantive provisions. In conjunction with many of these new or revised provisions, the PPA also amended the civil enforcement provisions in ERISA to provide the Secretary of Labor with authority to assess civil monetary penalties for violations of the substantive provisions.

Specifically, section 103(b)(1) of the PPA amended section 101 of ERISA by adding a new disclosure requirement under subsection (j), under which the plan administrator of a single-employer defined benefit pension plan must provide written notice of limitations on benefits and benefit accruals to

participants and beneficiaries pursuant to section 206(g) of ERISA (or the parallel Internal Revenue Code provision at section 436(b)).<sup>1</sup> A notice of benefit limitations must be furnished within 30 days after a plan becomes subject to an ERISA section 206(g) funding-based restriction and at such other time as may be determined by the Secretary of the Treasury. Section 103(b)(2) of the PPA amended section 502(c)(4) of ERISA to provide the Secretary of Labor with the authority to assess a civil penalty of not more than \$1,000 a day for each violation of ERISA section 101(j). The effective date of the provisions added by PPA section 103(b) is for plan years beginning on or after January 1, 2008.

Section 502(a)(1) of the PPA amended section 101 of ERISA by adding subsection (k), under which the plan administrator of a multiemployer pension plan must, upon written request, furnish certain documents to any plan participant, beneficiary, employee representative, or any employer that has an obligation to contribute to the plan. Section 502(a)(2) of the PPA amended section 502(c)(4) of ERISA to provide the Secretary of Labor with the authority to assess a civil penalty of not more than \$1,000 a day for each violation of ERISA section 101(k). The effective date of the provisions added by PPA section 502(a) is for plan years beginning on or after January 1, 2008.

Section 502(b)(1) of the PPA amended section 101 of ERISA by adding subsection (l), under which a plan sponsor or plan administrator of a multiemployer employee benefit plan must, upon written request, furnish to any employer with an obligation to contribute to such plan, notice of potential withdrawal liability. Section 502(b)(2) of the PPA amended section 502(c)(4) of ERISA to provide the Secretary of Labor with the authority to assess a civil penalty of not more than \$1,000 a day for each violation of ERISA section 101(l). The effective date of the provisions added by PPA section 502(b) is for plan years beginning on or after January 1, 2008.

Section 902(f)(1) of the PPA amended section 514 of ERISA by adding subsection (e)(3), under which the plan administrator of a plan with an automatic contribution arrangement shall provide to each participant to whom the arrangement applies, notice of the participant's rights and

obligations under such arrangement. Notice under section 514(e)(3) of ERISA must be furnished within such time period prescribed in section 2550.404c-5(c)(3), generally at least 30 days in advance of a participant's date of plan eligibility and within a reasonable period of time of at least 30 days in advance of each subsequent plan year. Section 902(f)(2) of the PPA amended section 502(c)(4) of ERISA to provide the Secretary of Labor with the authority to assess a civil penalty of not more than \$1,000 a day for each violation of ERISA section 514(e)(3). The effective date of the provisions added by PPA section 902(f) is August 17, 2006.

**B. Overview of § 2560.502c-4**

In general, the proposed regulation sets forth how the maximum penalty amounts are computed, identifies the circumstances under which a penalty may be assessed, sets forth certain procedural rules for service and filing, and provides a plan administrator a means to contest an assessment by the Department by requesting an administrative hearing.

Paragraph (a) of the regulation addresses the general application of section 502(c)(4) of ERISA, under which the plan administrator of an eligible plan shall be liable for civil penalties assessed by the Secretary of Labor in each case in which there is a failure or refusal, in whole or in part, to furnish the item(s) to each person entitled under the requirements of section 101(j), (k), or (l), or section 514(e)(3) of ERISA, as applicable.

Paragraph (b) of the regulation sets forth the amount of penalties that may be assessed under section 502(c)(4) of ERISA and provides that the penalty assessed under section 502(c)(4) for each separate violation is to be determined by the Department, taking into consideration the degree or willfulness of the failure or refusal. Paragraph (b) provides that the maximum amount assessed for each violation shall not exceed \$1,000 a day per violation.<sup>2</sup>

Paragraph (c) of the regulation provides that, prior to assessing a penalty under ERISA section 502(c)(4),

<sup>2</sup> The Federal Civil Penalties Inflation Adjustment Act of 1990 (the 1990 Act), Public Law 101-410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996 (the Act), Public Law 104-134, 110 Stat. 1321-373, generally provides that federal agencies adjust certain civil monetary penalties for inflation no later than 180 days after the enactment of the Act, and at least once every four years thereafter, in accordance with the guidelines specified in the 1990 Act. The Act specifies that any such increase in a civil monetary penalty shall apply only to violations that occur after the date the increase takes effect.

<sup>1</sup> Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of the Treasury has interpretive jurisdiction over section 206(g) of ERISA.

the Department shall provide the plan administrator with written notice of the Department's intent to assess a penalty, the amount of such penalty, the number of individuals (e.g., participants and beneficiaries) on which the penalty is based, the period to which the penalty applies, and the reason(s) for the penalty. The notice would indicate the specific provision violated (i.e., section 101(j), (k), or (l), or section 514(e)(3) of ERISA). The notice is to be served in accordance with paragraph (i) of the regulation (service of notice provision).

Paragraph (d) of the regulation provides that the Department may determine not to assess a penalty, or to waive all or part of the penalty to be assessed, under ERISA 502(c)(4), upon a showing by the administrator, under paragraph (e) of the regulation, of compliance with section 101(j), (k), or (l), or section 514(e)(3) of ERISA or that there were mitigating circumstances for noncompliance. Under paragraph (e) of the regulation, the administrator has 30 days from the date of the service of the notice issued under paragraph (c) of the regulation within which to file a statement making such a showing. When the Department serves the notice under paragraph (c) by certified mail, service is complete upon mailing but five (5) days are added to the time allowed for the filing of the statement (see § 2560.502c-4(i)(2)).

Paragraph (f) of the regulation provides that a failure to file a timely statement under paragraph (e) shall be deemed to be a waiver of the right to appear and contest the facts alleged in the Department's notice of intent to assess a penalty for purposes of any adjudicatory proceeding involving the assessment of the penalty under section 502(c)(4) of ERISA, and to be an admission of the facts alleged in the notice of intent to assess. Such notice then becomes a final order of the Secretary 45 days from the date of service of the notice.

Paragraph (g)(1) of the regulation provides that, following a review of the facts alleged in the statement under paragraph (e), the Department shall notify the administrator of its intention to waive the penalty, in whole or in part, and/or assess a penalty. If it is the intention of the Department to assess a penalty, the notice shall indicate the amount of the penalty. Under paragraph (g)(2) of the regulation, this notice becomes a final order 45 days after the date of service of the notice, except as provided in paragraph (h).

Paragraph (h) of the regulation provides that the notice described in paragraph (g) will become a final order of the Department unless, within 30

days of the date of service of the notice, the plan administrator or representative files a request for a hearing to contest the assessment in administrative proceedings set forth in regulations issued under part 2570 of title 29 of the Code of Federal Regulations and files an answer, in writing, opposing the sanction. When the Department serves the notice under paragraph (g) by mail, service is complete upon mailing, but five days are added to the time allowed for the filing of a request for hearing and answer if the notice was served by certified mail (see 2560.502c-4(i)(2)).

Paragraph (i)(1) of the regulation describes the rules relating to service of the Department's notice of penalty assessment (Sec. 2560.502c-4(c)) and the Department's notice of determination on a statement of reasonable cause (Sec. 2560.502c-4(g)). Paragraph (i)(1) provides that service by the Department shall be made by delivering a copy to the administrator or representative thereof; by leaving a copy at the principal office, place of business, or residence of the administrator or representative thereof; or by mailing a copy to the last known address of the administrator or representative thereof. As noted above, paragraph (i)(2) of this section provides that when service of a notice under paragraph (c) or (g) is by certified mail, service is complete upon mailing, but five days are added to the time allowed for the filing of a statement or a request for hearing and answer, as applicable. Service by regular mail is complete upon receipt by the addressee.

Paragraph (i)(3) of the regulation, which relates to the filing of statements of reasonable cause, provides that a statement of reasonable cause shall be considered filed (i) upon mailing if accomplished using United States Postal Service certified mail or express mail, (ii) upon receipt by the delivery service if accomplished using a "designated private delivery service" within the meaning of 26 U.S.C. 7502(f), (iii) upon transmittal if transmitted in a manner specified in the notice of intent to assess a penalty as a method of transmittal to be accorded such special treatment, or (iv) in the case of any other method of filing, upon receipt by the Department at the address provided in the notice. This provision does not apply to the filing of requests for hearing and answers with the Office of the Administrative Law Judge (OALJ) which are governed by the Department's OALJ rules in 29 CFR 18.4.

Paragraph (j) of the regulation clarifies the liability of the parties for penalties assessed under section 502(c)(4) of ERISA. Paragraph (j)(1) provides that, if more than one person is responsible as

administrator for the failure to provide the required item(s), all such persons shall be jointly and severally liable for such failure. Paragraph (j)(2) provides that any person against whom a penalty is assessed under section 502(c)(4) of ERISA, pursuant to a final order, is personally liable for the payment of such penalty. Paragraph (j)(2) provides that liability for the payment of penalties assessed under section 502(c)(4) of ERISA is a personal liability of the person against whom the penalty is assessed and not a liability of the plan. It is the Department's view that payment of penalties assessed under ERISA section 502(c) from plan assets would not constitute a reasonable expense of administering a plan for purposes of sections 403 and 404 of ERISA. Consistent with section 101(l) of ERISA, for purposes of any civil penalty imposed under section 502(c)(4) of ERISA pursuant to the requirements of section 101(l) of ERISA, the term "administrator" shall include plan sponsor (within the meaning of section 3(16)(B) of the Act).

Paragraph (k) of the regulation establishes procedures for hearings before an Administrative Law Judge (ALJ) with respect to assessment by the Department of a civil penalty under ERISA section 502(c)(4), and for appealing an ALJ decision to the Secretary or her delegate. The procedures are the same procedures that would apply in the case of a civil penalty assessment under 502(c)(7) of ERISA.

### C. Effective Date

The Department proposes to make this regulation effective 60 days after the date of publication of the final rule in the **Federal Register**.

### D. Regulatory Impact Analysis

#### *Executive Order 12866*

Under Executive Order 12866 (58 FR 51735), the Department must determine whether a regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering

with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. The Department has determined that these proposed rules relating to the assessment of civil monetary penalties under section 502(c)(4) of ERISA are significant in that they provide guidance on the enforcement of the disclosure provisions of section 101(j), (k), and (l) and section 514(e)(3) of ERISA.

The principal benefit of the statutory penalty provisions and this proposed rule will be greater adherence to the new disclosure requirements. The implementation of orderly and consistent processes for the assessment of penalties and the review of such assessments will also be beneficial for plan administrators. The procedures established in this proposed rule also will allow facts and circumstances related to a failure or refusal to provide appropriate disclosure to be presented by a plan administrator and to be taken into consideration by the Department in assessing penalties under ERISA section 502(c)(4).

The rate of failure or refusal to provide required disclosure, and the dollar value of penalties to be assessed in those cases cannot be predicted. The civil penalty provisions of the statute and this proposed rule impose no mandatory requirements or costs, except where a plan administrator has failed to provide the required disclosure.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) (RFA), imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551, *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. For purposes of its analyses under the RFA, EBSA continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reporting for pension plans that cover fewer than 100 participants.

The terms of the statute pertaining to the assessment of civil penalties under section 502(c)(4) of ERISA do not vary relative to plan or plan administrator size. The operation of the statute will

normally result in the assessment of lower penalties where small plans are involved because penalty assessments are based, in part, on the number of plan participants. The opportunity for a plan administrator to present facts and circumstances related to a failure or refusal to provide appropriate disclosure that may be taken into consideration by the Department in assessing penalties under ERISA section 502(c)(4) may offer some degree of flexibility to small entities subject to penalty assessments. Penalty assessments will have no direct impact on small plans because the plan administrator assessed a civil penalty is personally liable for the payment of that penalty pursuant to section 2560.502c-4(j).

The Department invites interested persons to submit comments on the impact of this notice of proposed rulemaking on small entities, and on any alternative approaches that may serve to minimize the impact on small plans or other entities while accomplishing the objectives of the statutory provisions.

#### *Paperwork Reduction Act*

The proposal is not subject to the requirements of the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3501, *et seq.*) because it does not contain a collection of information as defined in 44 U.S.C. 3502(3). Information otherwise provided to the Secretary in connection with the administrative and procedural requirements of the proposed rule is excepted from coverage by PRA 95 pursuant to 44 U.S.C. 3518(c)(1)(B), and related regulations at 5 CFR 1320.4(a)(2) and (c). These provisions generally except information provided as a result of an agency's civil or administrative action, investigation, or audit.

#### *Congressional Review Act*

This notice of proposed rulemaking is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801, *et seq.*) and, upon finalization, will be transmitted to the Congress and the Comptroller General for review.

#### *Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Order 12875, this rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, and does not impose an annual burden exceeding \$100 million on the private sector.

#### *Federalism Statement*

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This proposed rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in this proposed rule does not alter the fundamental reporting and disclosure, or administration and enforcement provisions of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

#### **List of Subjects in 29 CFR Part 2560**

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

Accordingly, 29 CFR part 2560 is proposed to be amended as follows:

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

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

**Authority:** 29 U.S.C. 1132, 1135, and Secretary of Labor's Order 1-2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2560.503-1 also issued under 29 U.S.C. 1133. Section 2560.502c-7 also issued under Pub. L. 109-280, 120 Stat. 780. Sec. 2560.502c-4 also issued under Pub. L. 109-280, 120 Stat. 780.

2. Add § 2560.502c-4 to read as follows:

#### **§ 2560.502c-4 Civil penalties under section 502(c)(4).**

(a) *In general.* (1) Pursuant to the authority granted the Secretary under section 502(c)(4) of the Employee Retirement Income Security Act of 1974, as amended (the Act), the administrator (within the meaning of section 3(16)(A)

of the Act) shall be liable for civil penalties assessed by the Secretary under section 502(c)(4) of the Act, for failure or refusal to furnish:

(i) Notice of funding-based limits in accordance with section 101(j) of the Act;

(ii) Actuarial, financial or funding information in accordance with section 101(k) of the Act;

(iii) Notice of potential withdrawal liability in accordance with section 101(l) of the Act; or

(iv) Notice of rights and obligations under an automatic contribution arrangement in accordance with section 514(e)(3) of the Act.

(2) For purposes of this section, a failure or refusal to furnish the items referred to in paragraph (a)(1) of this section shall mean a failure or refusal to furnish, in whole or in part, the items required under section 101(j), (k), or (l), or section 514(e)(3) of the Act at the relevant times and manners prescribed in such sections.

(b) *Amount assessed.* (1) The amount assessed under section 502(c)(4) of the Act for each separate violation shall be determined by the Department of Labor, taking into consideration the degree or willfulness of the failure or refusal to furnish the items referred to in paragraph (a) of this section. However, the amount assessed for each violation under section 502(c)(4) of the Act shall not exceed \$1,000 a day (or such other maximum amount as may be established by regulation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended), computed from the date of the administrator's failure or refusal to furnish the items referred to in paragraph (a) of this section.

(2) For purposes of calculating the amount to be assessed under this section, a failure or refusal to furnish the item with respect to any person entitled to receive such item, shall be treated as a separate violation under section 101(j), (k), or (l), or section 514(e)(3) of the Act, as applicable.

(c) *Notice of intent to assess a penalty.* Prior to the assessment of any penalty under section 502(c)(4) of the Act, the Department shall provide to the administrator of the plan a written notice indicating the Department's intent to assess a penalty under section 502(c)(4) of the Act, the amount of such penalty, the number of individuals on which the penalty is based, the period to which the penalty applies, and the reason(s) for the penalty.

(d) *Reconsideration or waiver of penalty to be assessed.* The Department may determine that all or part of the penalty amount in the notice of intent to assess a penalty shall not be assessed

on a showing that the administrator complied with the requirements of section 101(j), (k), or (l), or section 514(e)(3) of the Act, as applicable, or on a showing by such person of mitigating circumstances regarding the degree or willfulness of the noncompliance.

(e) *Showing of reasonable cause.* Upon issuance by the Department of a notice of intent to assess a penalty, the administrator shall have thirty (30) days from the date of service of the notice, as described in paragraph (i) of this section, to file a statement of reasonable cause explaining why the penalty, as calculated, should be reduced, or not be assessed, for the reasons set forth in paragraph (d) of this section. Such statement must be made in writing and set forth all the facts alleged as reasonable cause for the reduction or nonassessment of the penalty. The statement must contain a declaration by the administrator that the statement is made under the penalties of perjury.

(f) *Failure to file a statement of reasonable cause.* Failure to file a statement of reasonable cause within the thirty (30) day period described in paragraph (e) of this section shall be deemed to constitute a waiver of the right to appear and contest the facts alleged in the notice of intent, and such failure shall be deemed an admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(4) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of § 2570.131(g) of this chapter, forty-five (45) days from the date of service of the notice.

(g) *Notice of determination on statement of reasonable cause.* (1) The Department, following a review of all of the facts in a statement of reasonable cause alleged in support of nonassessment or a complete or partial waiver of the penalty, shall notify the administrator, in writing, of its determination on the statement of reasonable cause and its determination whether to waive the penalty in whole or in part, and/or assess a penalty. If it is the determination of the Department to assess a penalty, the notice shall indicate the amount of the penalty assessment, not to exceed the amount described in paragraph (c) of this section. This notice is a "pleading" for purposes of § 2570.131(m) of this chapter.

(2) Except as provided in paragraph (h) of this section, a notice issued pursuant to paragraph (g)(1) of this section, indicating the Department's determination to assess a penalty, shall become a final order, within the

meaning of § 2570.131(g) of this chapter, forty-five (45) days from the date of service of the notice.

(h) *Administrative hearing.* A notice issued pursuant to paragraph (g) of this section will not become a final order, within the meaning of § 2570.131(g) of this chapter, if, within thirty (30) days from the date of the service of the notice, the administrator or a representative thereof files a request for a hearing under §§ 2570.130 through 2570.141 of this chapter, and files an answer to the notice. The request for hearing and answer must be filed in accordance with § 2570.132 of this chapter and § 18.4 of this title. The answer opposing the proposed sanction shall be in writing, and supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to paragraph (g) of this section.

(i) *Service of notices and filing of statements.* (1) Service of a notice for purposes of paragraphs (c) and (g) of this section shall be made:

- (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 service is by regular mail, service is complete upon receipt by the addressee. When service of a notice under paragraph (c) or (g) of this section is by certified mail, five days shall be added to the time allowed by these rules for the filing of a statement or a request for hearing and answer, as applicable.

(3) For purposes of this section, a statement of reasonable cause shall be considered filed:

- (i) Upon mailing, if accomplished using United States Postal Service certified mail or express mail;
- (ii) Upon receipt by the delivery service, if accomplished using a "designated private delivery service" within the meaning of 26 U.S.C. 7502(f);
- (iii) Upon transmittal, if transmitted in a manner specified in the notice of intent to assess a penalty as a method of transmittal to be accorded such special treatment; or
- (iv) In the case of any other method of filing, upon receipt by the Department at the address provided in the notice of intent to assess a penalty.

(j) *Liability.* (1) If more than one person is responsible as administrator for the failure to furnish the items required under section 101(j), (k), or (l),

or section 514(e)(3) of the Act, as applicable, all such persons shall be jointly and severally liable for such failure. For purposes of paragraph (a)(1)(iii) of this section, the term "administrator" shall include plan sponsor (within the meaning of section 3(16)(B) of the Act).

(2) Any person, or persons under paragraph (j)(1) of this section, against whom a civil penalty has been assessed under section 502(c)(4) of the Act, pursuant to a final order within the meaning of § 2570.131(g) of this chapter shall be personally liable for the payment of such penalty.

(k) *Cross-references.* (1) The procedural rules in §§ 2570.130 through 2570.141 of this chapter apply to administrative hearings under section 502(c)(4) of the Act.

(2) When applying procedural rules in §§ 2570.130 through 2570.140:

(i) Wherever the term "502(c)(7)" appears, such term shall mean "502(c)(4)";

(ii) Reference to § 2560.502c-7(g) in 2570.131(c) shall be construed as reference to § 2560.502c-4(g) of this chapter;

(iii) Reference to § 2560.502c-7(e) in § 2570.131(g) shall be construed as reference to § 2560.502c-4(e) of this chapter;

(iv) Reference to § 2560.502c-7(g) in § 2570.131(m) shall be construed as reference to § 2560.502c-4(g); and

(v) Reference to §§ 2560.502c-7(g) and 2560.502c-7(h) in § 2570.134 shall be construed as reference to §§ 2560.502c-4(g) and 2560.502c-4(h), respectively.

Signed at Washington, DC, this 11th day of December, 2007.

**Bradford P. Campbell,**

*Assistant Secretary, Employee Benefits Security Administration, Department of Labor.*

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

[DoD-2007-OS-0086; 0790-AI24]

### 32 CFR Part 286

### DoD Freedom of Information Act (FOIA) Program Regulation

**AGENCY:** Department of Defense.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Defense is proposing to update current policies and procedures to reflect the DoD FOIA Program as prescribed by Executive Order 13392. The proposed changes will

ensure appropriate agency disclosure of information, and offer consistency with the goals of section 552 of title 5, United States Code.

**DATES:** Comments must be received by February 19, 2008.

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301-1160.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://regulations.gov> as they are received without change, including any personal identifiers or contact information.

#### FOR FURTHER INFORMATION CONTACT:

James Hogan (703) 696-4495.

#### SUPPLEMENTARY INFORMATION:

#### Executive Order 13132, "Federalism"

It has been certified that 32 CFR part 286 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

- (1) The States;
- (2) The relationship between the National Government and the States; or
- (3) The distribution of power and responsibilities among the various levels of Government.

#### Executive Order 12866, "Regulatory Planning and Review"

It has been certified that 32 CFR part 286 does not:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

#### Section 202, Public Law 104-4, "Unfunded Mandates Reform Act"

It has been certified that 32 CFR part 286 does not contain a Federal mandate that may result in expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

#### Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)

It has been certified that 32 CFR part 286 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

#### Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 286 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

#### List of Subjects in 32 CFR Part 286

Freedom of information.

Accordingly, 32 CFR part 286 is proposed to be revised to read as follows:

### PART 286—DOD FREEDOM OF INFORMATION ACT (FOIA) PROGRAM REGULATION

#### Subpart A—General Provisions

Sec.

- 286.1 Purpose.
- 286.2 Definitions.
- 286.3 Public access to DoD information.
- 286.4 Procedures.

#### Subpart B—FOIA Reading Rooms

- 286.7 Requirements.
- 286.8 Record availability.
- 286.9 Indexes.
- 286.10 "(a)(1)" records.

#### Subpart C—Exemptions

- 286.13 General provisions.
- 286.14 Applying the FOIA exemptions.

#### Subpart D—FOIA Request Processing

- 286.17 General provisions.
- 286.18 Processing procedures.
- 286.19 Initial determinations.
- 286.20 Appeals.
- 286.21 Judicial actions.

#### Subpart E—Fee Schedule

- 286.24 General provisions.
- 286.25 Collection of fees and fee rates.
- 286.26 Fees for technical data.
- 286.27 Fees for research data.

#### Subpart F—Education and Training

- 286.30 Purpose and responsibility.
- 286.31 Implementation.