

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

RIN 1210-AB23

**Amendments to Civil Penalties Under ERISA Section 502(c)(7)****AGENCY:** Employee Benefits Security Administration, Labor.**ACTION:** Direct final rule.

**SUMMARY:** This document contains a direct final rule amending the civil penalty regulation under section 502(c)(7) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) to reflect recent amendments to this section in the Pension Protection Act of 2006, Public Law 109-280, 120 Stat. 780 (PPA). These amendments authorize the Secretary of Labor to assess civil penalties not to exceed \$100 per day for each violation of section 101(m) of ERISA. Section 101(m) of ERISA requires plan administrators of individual account plans to notify participants and beneficiaries of their right to sell the company stock in their accounts and reinvest the proceeds into other investments available under the plan. The notice must also inform the recipients of the importance of diversifying the investments in their accounts.

**DATES:** The amendments made by this rule are effective October 9, 2007, without further action or notice, unless significant adverse comment is received by September 10, 2007. If significant adverse comment is received, the Employee Benefits Security Administration will publish a timely withdrawal of the rule in the **Federal Register**.

**ADDRESSES:** To facilitate the receipt and processing of comments, the Department encourages interested persons to submit their comments electronically by e-mail to *e-ORI@dol.gov*, or by using the Federal eRulemaking portal at *http://www.regulations.gov* (follow instructions for submission of comments). Persons submitting comments electronically are encouraged not to submit paper copies. Persons interested in submitting comments on paper should send or deliver their comments (at least three copies) to the Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5669, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington,

DC 20210, Attn: 502(c)(7) Civil Penalty. Comments received will be posted without change, including any personal information provided, to *http://www.regulations.gov* and *http://www.dol.gov/ebsa*, and also available for public inspection at the Public Disclosure Room, Employee Benefits Security Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC.

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

**SUPPLEMENTARY INFORMATION:****A. Background***Pension Protection Act of 2006*

On August 17, 2006, the Pension Protection Act (PPA) amended the Internal Revenue Code (the Code) and ERISA to provide diversification rights to plan participants and beneficiaries with respect to investments in company stock in their accounts. Section 401(a)(35) of the Code, as added by section 901 of the PPA, provides that, to remain qualified under section 401(a) of the Code, a defined contribution plan (other than certain employee stock ownership plans) must provide applicable individuals with the right to divest employer securities in their accounts and reinvest those amounts in certain diversified investments. Section 901 of the PPA also added a parallel provision, section 204(j), to ERISA.<sup>1</sup>

Section 507(a) of the PPA amended section 101 of ERISA by adding subsection (m) which requires a plan administrator to provide applicable individuals with a notice of diversification rights under section 204(j) of ERISA. Plan administrators must provide this notice not later than 30 days before the first date on which the individuals are eligible to exercise their rights. The notice must set forth the diversification rights provided under section 401(a)(35) of the Code (and parallel section 204(j) of ERISA) and describe the importance of diversifying the investment of retirement account assets. Section 101(m) of ERISA is effective for plan years beginning after December 31, 2006.

Section 507(b) of the PPA amended section 502(c)(7) of ERISA to provide that the Secretary of Labor may assess

a civil penalty of up to \$100 a day from the date of the plan administrator's failure or refusal to provide notice to an applicable individual in accordance with ERISA section 101(m).

*I.R.S. Notice 2006-107*

Section 507(c) of the PPA directed the Secretary of the Treasury to create a model notice of diversification rights that would satisfy the requirements of section 101(m) of ERISA.<sup>2</sup> On December 18, 2006, the IRS published Notice 2006-107, which provides transitional guidance on section 401(a)(35) of the Code (and parallel section 204(j) of ERISA). Notice 2006-107 describes the notice requirement of section 101(m) of ERISA and provides a model notice for plans to comply with this requirement.<sup>3</sup> The Notice states that, although some plans will be required to comply with section 401(a)(35) as early as January 1, 2007, the Department has advised Treasury and the IRS that section 101(m) of ERISA does not require plans to furnish notices before January 1, 2007. The Notice states that, accordingly, plans with plan years beginning on or after January 1, 2007, but before February 1, 2007, are not required to furnish the model notice (or a notice otherwise meeting the requirements of section 101(m) of ERISA) earlier than January 1, 2007. Notice 2006-107 also states that the Department encourages plans to furnish notice on the earliest possible date.<sup>4</sup> The IRS Notice and model are available at *http://www.irs.gov/irb/2006-51\_IRB/ar09.html*.

**B. Overview of Amendments to § 2560.502c-7**

The direct final rule being published today as part of this notice makes conforming changes to 29 CFR 2560.502c-7, reflecting changes required by ERISA section 502(c)(7), as amended by the PPA. The conforming amendments do not change the existing penalty assessment procedures or the related procedures for contesting penalty assessments. Rather, the changes merely extend the Secretary's existing procedures for assessing civil penalties for violations of section 101(i)

<sup>2</sup> Section 101(m) of ERISA is under the jurisdiction of the Department of Labor.

<sup>3</sup> I.R.S. Notice 2006-107, 2006-51 I.R.B. 1114.

<sup>4</sup> For additional information, see the Employee Benefits Security Administration Field Assistance Bulletin No. 2006-03 (December 20, 2006) at *http://www.dol.gov/ebsa/regs/fabmain.html*.

<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 204(j) of ERISA.

of ERISA, relating to blackout notices, to include violations of the notice requirements in section 101(m) of ERISA, relating to diversification rights. These conforming changes primarily add references to section 101(m) next to existing references to section 101(i) throughout the regulation. For an overview of the provisions of § 2560.502c-7, see the preamble to that regulation published on January 24, 2003, at 68 FR 3729.

### C. Good Cause Finding That Proposed Rulemaking Unnecessary

Rulemaking under section 553 of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), ordinarily involves publication of a notice of proposed rulemaking in the **Federal Register** and the public is given an opportunity to comment on the proposed rule. However, an agency may issue a rule without prior notice and comment procedures if it determines for good cause that public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest for such rule, and incorporates a statement of the finding with the underlying reasons in the final rule issued. For the reasons mentioned in section B of this preamble, the Department finds that publishing a proposed rule and seeking public comment is unnecessary.

Notwithstanding the foregoing, in the "Proposed Rules" section of today's **Federal Register**, the Department is publishing a separate document that will serve as a notice of proposal to amend part 2560 as described in this direct final rule. If the Department receives significant adverse comment during the comment period it will publish, in a timely manner, a document in the **Federal Register** withdrawing this direct final rule. The Department will then address public comments in a subsequent final rule based on the proposed rule. The Department will not institute a second comment period on this rule. Any parties interested in commenting must do so during this comment period.

### D. Regulatory Impact Analysis

#### *Executive Order 12866*

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. 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, it has been determined that this regulatory action is significant under section 3(f)(4) of the Executive Order. Accordingly, OMB has reviewed this regulation.

The principal benefit of the statutory penalty provision and the direct final rule is greater adherence to the new disclosure requirement. The implementation of orderly and consistent processes for the assessment of penalties and the review of such assessments also will be beneficial. The civil penalty provisions of the statute and this direct final rule impose no mandatory requirements or costs, except where a plan administrator has failed to provide the notice as required. Therefore, the Department finds that the benefits of the direct final rule justify its costs. The Department invites comments on this assessment and its conclusion.

#### *Paperwork Reduction Act*

This direct final rule regarding the Secretary's authority to assess civil penalties under ERISA section 502(c)(7) 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 this direct final 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.

#### *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. Because these amendments are being published as a direct final rule, without prior notice and comment, the RFA does not apply. Moreover, compliance with the procedures in this rule is not likely to impose a significant additional cost on a substantial number of small employers or plans. Accordingly, the Department believes that no regulatory flexibility analysis would be required in any case under the RFA.

#### *Congressional Review Act*

The direct final rule being issued here 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 will be transmitted to Congress and the Comptroller General for review. The rule is not a "major rule" as that term is defined in 5 U.S.C. 804, because it does not 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 and export markets.

#### *Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), the direct final rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or 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 Federal agencies to adhere to specific criteria 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 final rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of

power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in the final rule do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would 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.

■ For the reasons set forth in the preamble, the Department amends 29 CFR part 2560 as follows:

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

■ 1. The authority citation for part 2560 is revised 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. Sec. 2560.502(c)(7) also issued under sec. 507(b) of Pub. L. 109-280, 120 Stat. 780.

■ 2. Amend § 2560.502c-7 by revising paragraphs (a), (b), (d) and (j)(1) to read as follows:

**§ 2560.502c-7 Civil penalties under section 502(c)(7).**

(a) *In general.* (1) Pursuant to the authority granted the Secretary under section 502(c)(7) of the Employee Retirement Income Security Act of 1974, as amended (the Act), the administrator (within the meaning of section 3(16)(A) of the Act) of an individual account plan (within the meaning of section 101(i)(8) of the Act and § 2520.101-3(d)(2) of this chapter), who fails or refuses to provide notice of a blackout period to affected participants and beneficiaries in accordance with section 101(i) of the Act and § 2520.101-3 of this chapter, or the administrator (within the meaning of section 3(16)(A) of the Act) of an applicable individual account plan (within the meaning of section 101(m) of the Act), who fails or refuses to provide notice of diversification rights to applicable individuals in accordance with section 101(m) of the Act, shall be liable for civil penalties assessed by the Secretary under section 502(c)(7) of the Act.

(2) For purposes of this section, a failure or refusal to provide a notice of blackout period shall mean a failure or refusal, in whole or in part, to provide notice of a blackout period to an affected plan participant or beneficiary at the time and in the manner prescribed by section 101(i) of the Act and § 2520.101-3 of this chapter, and a failure or refusal to provide a notice of diversification rights shall mean a failure or refusal, in whole or in part, to provide notice of diversification rights to an applicable individual at the time and in the manner prescribed by section 101(m) of the Act.

(b) *Amount assessed.* (1) The amount assessed under section 502(c)(7) of the Act for each separate violation shall be determined by the Department of Labor, taking into consideration the degree and/or willfulness of the failure or refusal to provide a notice of blackout period or notice of diversification rights. However, the amount assessed for each violation under section 502(c)(7) of the Act shall not exceed \$100 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, in the case of a notice of blackout period under section 101(i) of the Act, the date of the administrator's failure or refusal to provide a notice of blackout period up to and including the date that is the final day of the blackout period for which the notice was required, or in the case of a notice of diversification rights under section 101(m) of the Act, computed from the date that is 30 days before the first date on which rights are exercisable under section 204(j) of the Act up to the date such a notice is furnished.

(2) For purposes of calculating the amount to be assessed under this section, a failure or refusal to provide a notice of blackout period or a notice of diversification rights with respect to any single participant or beneficiary shall be treated as a separate violation under section 101(i) of the Act and § 2520.101-3 of this chapter or section 101(m) of the Act.

(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 applicable requirements of section 101(i) or section 101(m) of the Act or on a showing by the administrator of mitigating

circumstances regarding the degree or willfulness of the noncompliance.

\* \* \* \* \*

(j) *Liability.* (1) If more than one person is responsible as administrator for the failure to provide a notice of blackout period under section 101(i) of the Act and its implementing regulations (§ 2520.101-3 of this chapter), or the failure to provide a notice of diversification rights under section 101(m) of the Act, all such persons shall be jointly and severally liable for such failure.

\* \* \* \* \*

Signed at Washington, DC, this 3rd day of August, 2007.

**Bradford P. Campbell,**  
*Acting Assistant Secretary, Employee Benefits Security Administration, Department of Labor.*

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**DEPARTMENT OF DEFENSE**

**Department of the Army, Corps of Engineers**

**33 CFR Part 334**

**United States Navy Restricted Area, Key West Harbor, at U.S. Naval Base, Key West, Florida**

**AGENCY:** U.S. Army Corps of Engineers, DoD.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Army Corps of Engineers (Corps) is amending the existing regulations for a restricted area at Naval Air Station Key West (NASKW). Naval Air Station Key West maintains ammunition magazines on Fleming Island that have explosive safety quality-distance (ESQD) requirements in place to ensure reasonable safety from serious injury should there be a magazine fire or explosion. The previous restricted area regulations did not adequately cover the ESQD requirements. This amendment to the existing regulation is necessary to protect the public from potentially hazardous conditions that may exist as a result of military use of the area.

**DATES:** *Effective Date:* September 10, 2007.

**ADDRESSES:** U.S. Army Corps of Engineers, ATTN: CECW-CO, 441 G Street, NW., Washington, DC 20314-1000.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Olson, Headquarters, Operations and Regulatory Community of Practice, Washington, DC at 202-761-4922 or Mr.