

Company *G* signs an agreement with Company *H* under which Division *X* will be transferred to Company *H*, effective September 30, 2005. The change in control of Division *X* therefore occurs on September 30, 2005. Under the terms of the agreement, Company *G* agrees to continue covering all of the employees that formerly worked for Division *X* under its group health plan until Company *H* has established a new group health plan to cover these employees. Under the terms of the agreement, it is anticipated that Company *G* will not be required to cover the employees of Division *X* under its group health plan beyond the end of the 2006 plan year, which is the plan year following the plan year in which the change in control of Division *X* occurs.

(ii) *Conclusion.* In this *Example 7*, the administrator of Company *G*'s group health plan is not required to file the Form M-1 on March 1, 2006 for fiscal year 2005 because it is subject to the exception to the filing requirement in paragraph (c)(2)(ii)(B) of this section for an entity that would not constitute a MEWA but for the fact that it is created by a change in control of businesses that occurs for a purpose other than to avoid filing the Form M-1 and is temporary in nature. Under the exception, "temporary" means the MEWA does not extend beyond the end of the plan year following the plan year in which the change in control occurs. The administrator is not required to file the 2005 Form M-1 because it is anticipated that Company *G* will not be required to cover the employees of Division *X* under its group health plan beyond the end of the 2006 plan year, which is the plan year following the plan year in which the change in control of businesses occurred.

Example 8. (i) Facts. Company *I* maintains a group health plan that provides benefits for medical care for its employees (and their dependents) as well as certain independent contractors who are self-employed individuals. The plan is therefore a MEWA. The administrator of Company *I*'s group health plan uses calendar year data to report for purposes of the Form M-1. The administrator of Company *I*'s group health plan determines that the number of independent contractors covered under the group health plan as of the last day of calendar year 2004 is less than one percent of the total number of employees and former employees covered under the plan determined as of the last day of calendar year 2004.

(ii) *Conclusion.* In this *Example 8*, the administrator of Company *I*'s group health plan is not required to file a Form M-1 for calendar year 2004 (which is otherwise due by March 1, 2005) because it is subject to the exception to the filing requirement provided in paragraph (c)(2)(ii)(C) of this section for entities that cover a very small number of persons who are not employees or former employees of the plan sponsor.

Signed at Washington, DC, this 31st day of March 2003.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration.

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2560

RIN 1210-AA64

Assessment of Civil Penalties Under Section 502(c)(5) of ERISA

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This document contains a final rule that describes procedures relating to the assessment of civil penalties under section 502(c)(5) of the Employee Retirement Income Security Act of 1974, (ERISA) as amended by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Section 502(c)(5) authorizes the Secretary of Labor (the Secretary) to assess a civil monetary penalty against any person from the date of the person's failure or refusal to file the information required to be filed under section 101(g) of ERISA. The final rule clarifies the manner in which the Secretary will assess penalties under ERISA section 502(c)(5) and the procedures for agency review. Separate documents containing a final rule on the reporting requirement under section 101(g) of ERISA and a final rule relating to procedures for administrative hearings and appeals on assessments of penalties under ERISA section 502(c)(5) appear separately in this issue of the **Federal Register**.

EFFECTIVE DATE: This final rule is effective January 1, 2004.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

A. Background and Overview of Changes in the Final Rule

This document contains a final rule that provides guidance relating to the assessment of civil penalties under section 502(c)(5) of ERISA for the failure or refusal to file a report pursuant to section 101(g) of ERISA. This regulation is designed to parallel the procedures set forth in § 2560.502c-2 regarding civil penalties under section 502(c)(2) of ERISA.

An interim final rule relating to the assessment of civil penalties under section 502(c)(5) of ERISA was published in the **Federal Register** on

February 11, 2000 at 65 FR 7181. In the February 11, 2000 interim rule, the Department sought comments from affected parties. No comments were received.

On October 21, 2002, the Department published interim final rules relating to notice of blackout periods to participants and beneficiaries (during which their right to direct or diversify investments, obtain a loan, or obtain a distribution under a pension plan may be suspended) and related civil penalties under ERISA section 502(c)(7). Those rules also made conforming changes to the penalty assessment regulations under this section. Specifically, this section was amended to provide an additional five days in which to file a statement of reasonable cause or a request for hearing and answer, as applicable, when the Department serves a notice of intent to assess a penalty or a notice of penalty determination by certified mail, and to provide that service of a notice by the Department by regular mail is complete upon receipt. In addition, conforming amendments were made to provide that statements of reasonable cause are treated as filed on mailing or on transmittal under certain circumstances. Finally, amendments were made to accommodate those changes in the filing and service rules. No comments were received with respect to these conforming amendments.

This regulation finalizes the interim final regulations published February 20, 2000, as amended by the interim final amendments published October 21, 2002. Only one modification was made, involving applicability dates. Specifically, the interim final rule contained a transition safe harbor period under which no civil penalty was assessed against an administrator that had made a good faith effort to comply with a § 2520.101-2 filing that was due in the Year 2000. This transition rule was created because, during the first year in which a report was required to be filed under section 101(g) in particular, the Department was focused on educating administrators about this filing requirement. Because the dates during which the transition rule was applicable have passed, this rule has been deleted from the final rule.

The Department remains committed to working with administrators to help them comply with the Form M-1 filing requirement. Filers who have questions or who need assistance in completing a filing may call the EBSA Help Desk, at 202-693-8360.