

rules with a technical addition to address the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, and a discussion of the public comments.

B. Overview of Final Rules and Public Comments

1. *Assessment of Civil Penalties for Violations of Section 101(i) of ERISA—§ 2560.502c–7*

Section 2560.502c–7 addresses the general application of section 502(c)(7) of ERISA, under which the administrator of an individual account plan shall be liable for civil penalties assessed by the Secretary in each case in which there is a failure or refusal to provide to an affected participant or beneficiary notice of a blackout period as required under section 101(i) of ERISA and § 2520.101–3. Section 2560.502c–7 defines terms, sets forth how the maximum penalty amounts are computed, and identifies the period for which a penalty is assessed. The section also sets forth the rule that prior to assessing a penalty under ERISA section 502(c)(7), the Department must provide the plan administrator with written notice of intent to assess a penalty, and provide the administrator with the opportunity to request that a penalty not be assessed upon a showing of compliance with ERISA section 101(i), or be waived, in whole or in part, upon a showing that there were mitigating circumstances justifying a waiver or reduction of the penalty for noncompliance. Section 2560.502c–7 also establishes certain procedural rules regarding deadlines and service requirements in connection with penalty assessment proceedings, and the consequences of failure to comply therewith. The section clarifies the personal liability of the plan administrator for penalties assessed. Specifically, the section provides that, if more than one person is responsible as administrator for the failure to provide the required blackout notice, all such persons shall be jointly and severally liable for such failure, and that the liability is a personal liability of the person against whom the penalty is assessed and not a liability of the plan. Finally, the section provides that the plan administrator has the opportunity to contest the assessment in administrative proceedings governed by Part 2570 of Title 29 of the Code of Federal Regulations, described below.

Several commenters requested that § 2560.502c–7(b)(1) be changed to shorten the maximum period for which a civil penalty may be assessed. Under the interim rule, the amount assessed

under section 502(c)(7) for each separate violation is to be determined by the Department, taking into consideration the degree and/or willfulness of the failure or refusal to provide a notice of blackout period. The rule further provides that the maximum amount assessed for each violation shall not exceed \$100 a day,¹ computed from 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. The interim rule defines a failure or refusal to provide a notice of blackout period to mean a failure or refusal 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. For purposes of calculating the amount to be assessed, a failure or refusal to provide a notice of blackout period with respect to any single participant or beneficiary is treated as a separate violation under section 101(i) of the Act and § 2520.101–3.

In general, the commenters requested that the rule be amended to provide that the penalty would only apply to the extent that a notice is late, *i.e.*, only days prior to the date on which notice is actually given would be counted in determining the penalty, and that the penalty calculation period would run to the end of the blackout period only in cases where no notice is provided. The commenters expressed concern that the interim rule exposes plan administrators who make a good faith effort to comply to potentially substantial penalties even in cases where the blackout notice is only one or two days late. These commenters suggested that their proposed change would give plan administrators an incentive to provide the notice as quickly as possible, even if late.

The blackout notice requirements are intended to ensure that plan participants and beneficiaries are

¹ As discussed in more detail in a following section of this preamble, this document also contains a technical amendment to section § 2560.502c–7(b) designed to reflect the requirements of the Federal Civil Penalties Inflation Adjustment Act of 1990 (the 1990 Act), Pub. L. 101–410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996 (the Act), Pub. L. 104–134, 110 Stat. 1321–373. The Act amended the 1990 Act to require generally 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.

afforded advance notice of plan imposed restrictions on their rights in order that they may take appropriate steps in anticipation of the restriction. The SOA expressly provides in section 502(c)(7) that the beginning date for calculating the penalty is the date of the administrator's failure or refusal to provide a notice of blackout period, but does not, however, specify an ending date for the penalty calculation. In adding section 101(i) to Title I of ERISA, the SOA established a 30-days advance notice requirement and listed exceptions to that general rule where less than 30 days notice was permitted. Failure to provide a timely blackout notice, therefore, serves to deprive affected participants and beneficiaries of the full period of time Congress concluded was the minimum period necessary for those individuals to sufficiently consider effects of the blackout period on their investments and financial plans. Accordingly, providing participants and beneficiaries a late notice does not serve to correct the violation. Moreover, the situations in which penalties are most likely to be assessed in this area are those where it already has been determined that the failure is not due to events that were unforeseeable or beyond the control of the plan administrator, nor due to avoiding a breach of fiduciary responsibility.

In connection with a failure to provide timely notice, when an administrator provides notice would be one factor to be taken into account in determining the degree or willfulness of a violation. In this regard, the Department would, for example, also take into account the feasibility of delaying the blackout period so as to provide the required advance notice, the length of time between the late issuance and the beginning of the blackout period, the effect of the lateness on the ability of affected participants and beneficiaries to take appropriate steps in anticipation of the restriction, actions implemented by the administrator to ameliorate adverse effects on participants and beneficiaries, and the length of the blackout period itself. Further, the Department notes that the ability of administrators to submit statements of reasonable cause (§ 2560.502c–7(e)) and to appeal civil penalty determinations (§ 2560.502c–7(h)) under the final rules ensures that administrators have the opportunity to pursue waivers or reductions of penalty amounts.

Several commenters sought clarification regarding whether the Department would waive penalties under § 2560.502c–7(d) in cases