

involving inadvertent and minor violations. For example, one commenter suggested that the rule be clarified to indicate that civil penalties will not be assessed if a plan administrator, acting reasonably and in good faith, inadvertently fails to furnish a timely blackout notice to a small percentage of those entitled to receive the notice. Another commenter suggested that mistakes, such as misaddressed envelopes, misspelled names, especially occurring as the new blackout notification procedures are implemented, should be dealt with leniently where the errors are inadvertent and/or de minimus. Another commenter suggested that a plan administrator who makes reasonable good faith efforts to provide notices and who promptly corrects any failure that is brought to its attention should not be penalized.

As noted above, decisions regarding a waiver or reduction of penalty assessments will take into account a variety of factors on the facts and circumstances involved in each case. For this reason, it is not feasible to list specific criteria in the regulation that would be treated as mitigating circumstances in every case. Although, as also noted above, the Department will consider whether administrators acted reasonably and in good faith, and whether mistakes were inadvertent and promptly addressed, the provision in the interim rule allowing administrators to make showings regarding the "degree and/or willfulness" of the violation gives ample opportunity for extenuating circumstances to be raised and considered in the penalty assessment proceedings.

Another commenter requested clarification regarding how the Department will apply § 2560.502c-7(j), which provides that, "if more than one person is responsible as administrator for the failure to provide a notice of blackout period \* \* \* all such persons shall be jointly and severally liable for such failure." Section 502(c)(7) states that the civil penalty is assessable against a "plan administrator." As the Department stated in the preamble to its parallel final rule, to be codified at 29 CFR 2520.101-3, implementing the notice requirements in ERISA section 101(i), references to plan administrator and administrator mean the "administrator" as defined in section 3(16)(A) of ERISA. In that regard, section 2560.502c-7(a)(1) expressly provides that "the administrator (within the meaning of section 3(16)(A) of the Act) of an individual account plan \* \* \* shall be liable for civil penalties assessed by the Secretary under section

502(c)(7) \* \* \*." The joint and several liability provision in § 2560.502c-7(j) is intended to make it clear that where the administrator is more than one person, e.g., a committee, joint board, or other group of individuals, each person may be held separately liable for a notice violation under the civil penalty regulation.

One commenter suggested that the regulation be amended to include a one-year limit from the date a blackout period commences on the Department's ability to issue a notice of intent to assess civil penalties under section 502(c)(7). The Department notes that there is nothing in Title I of ERISA that establishes such a time limit on the Department's ability to assess civil penalties under section 502(c)(7), or under any of the other provisions of section 502(c) pursuant to which the Department has the authority to assess civil penalties for violations of Title I of ERISA. Accordingly, the Department does not believe it would be appropriate to adopt such a time limit as part of this rulemaking.

The same commenter also expressed concern that § 2560.502c-7(f) was "harsh" in providing that an administrator who fails to respond to a notice of intent to assess a penalty will be deemed to have admitted the facts alleged in the notice and waived the right to appear and contest the penalty assessment. A similar default provision applies in connection with the Department's other civil penalty proceedings under section 502(c) of the Act, and it is designed to ensure the Secretary's ability to effectively enforce section 502(c) of ERISA. Accordingly, the Department is not making any change to this provision in the final rule.

One commenter expressed concern about the assessment of substantial civil penalties for violations of the notice required to be provided by the administrator to the issuer under section 101(i)(2)(E) of ERISA in cases where the plan administrator is the issuer or an affiliate. The Department notes that section 502(c)(7) provides for a penalty to be assessed against a plan administrator for a "failure or refusal to provide notice to participants and beneficiaries in accordance with section 101(i)." In the Department's view, the section 502(c)(7) penalty is not applicable for failures to provide the notice to issuers required under section 101(i)(2)(E).

*2. Procedures for Administrative Review of Assessment of Civil Penalties Under ERISA Section 502(c)(7)—§ 2570.130 et seq.*

The interim rules added to part 2570, Subpart G, section 2570.130 through section 2570.141, to establish 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)(7), and for appealing an ALJ decision to the Secretary or his or her delegate. With regard to such procedures, the Secretary has established the Pension and Welfare Benefits Administration (PWBA) within the Department for purposes of carrying out most of the Secretary's responsibilities under ERISA. See Secretary's Order 1-87, 52 FR 13139 (April 27, 1987). The Department received no comments on these procedural rules, and, therefore, the final rules are issued without change from the interim rules.

*3. Conforming Changes to Existing Civil Penalties Rules Under ERISA Sections 502(c)(2), 502(c)(5) and 502(c)(6)—§§ 2560.502c-2, 2560.502c-5, 2560.502c-6, and Subparts C, E, and F of Part 2570*

The interim rules also amended the existing civil penalty assessment regulations under ERISA sections 502(c)(2), 502(c)(5) and 502(c)(6) in part 2560 and in Part 2570 of subchapter G, to conform them to the rules of practice and procedure being adopted for penalty proceedings under ERISA section 502(c)(7) in 29 CFR 2560.502c-7 and part 2570 Subpart G. The amendments affect certain rules for penalty assessment and administrative review in § 2560.502c-2, § 2560.502c-5, § 2560.502c-6, and subparts C, E, and F of Part 2570. The primary amendments were intended to conform the filing and service rules under § 2560.502c-2, § 2560.502c-5 and § 2560.502c-6 to those being adopted for proceedings under § 2560.502c-7. In addition, §§ 2560.502c-2(d) and (e), §§ 2560.502c-5(d) and (e), and §§ 2560.502c-6(d) and (e) were amended to use the clarifying language adopted in §§ 2560.502c-7(d) and (e) that better describes the statement of reasonable cause and penalty waiver procedures.

The Department received no comments in response to its request for comments on the conforming technical amendments to § 2560.502c-2, § 2560.502c-5, § 2560.502c-6, and subparts C, E, and F of Part 2570 which were adopted in the interim rule.