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Penalties for Failure to Provide Certain Notices or Other Material Information

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Penalties for Failure to Provide Certain Notices or Other Material Information

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General Comment

The proposal improves transparency over the 1995 Policy it would replace. Stating specific per diem amounts, a proportional-reduction formula with a floor for small plans, and named waiver grounds -- reasonable cause, error of law, PBGC delay, mitigating and aggravating factors -- in codified text gives filers something concrete to plan around. The reportable-event penalty table and the standard-termination caps tied to distributee counts and distributed benefit value are useful, checkable rules rather than open-ended discretion.

1. Sec. 4302.11(c) does not codify the past-due-notice practice the preamble says it codifies.

The preamble states: "Generally, PBGC will continue this practice and is codifying it for filings required under the multiemployer plan insolvency insurance program." But the operative provision, Sec. 4302.11(c), reads: "Daily amount. Information penalties are generally the maximum daily amount specified in Sec. 4302.3 for each day late." No precondition requiring a past-due notice before assessment appears anywhere in the codified text of part 4302.

Fix: Add the past-due-notice precondition to Sec. 4302.11's text.

2. Sec. 4302.21(b) omits the aggravating-factors cross-reference the parallel part 4071 provision includes.

The preamble states "[p]roposed parts 4071 and 4302 mirror each other."

Sec. 4071.21(b) states that "the principles in Sec. 4071.27 make it lesslikely that a penalty will be waived and tend to increase the amount of any penalty."

Sec. 4302.21(b) states only that Sec. Sec. 4302.22-4302.25 "make it more likely that a penalty will be waived," never mentioning Sec. 4302.27, though that section is written out in full later in the same text.

The part 4302 table of contents in Section III likewise stops at "4302.26
Other circumstances."

Fix: Add the missing Sec. 4302.27 cross-reference and TOC entry.

3. The "other circumstances" waiver ground, Sec. Sec. 4071.26 and 4302.26, states no criteria.

Both sections read in full: "PBGC may waive information penalties in other circumstances if PBGC determines that it is appropriate to do so." Reasonable cause requires a two-part showing; error of law requires four sub-elements; PBGC delay is tied to a non-frivolous argument and an identifiable delay period. "Other circumstances" states no comparable standard and no timeframe for PBGC to act.

Fix: State minimum criteria or examples, or a response period.

4. No deadline governs PBGC's own decision on a reconsideration request.

The preamble states a filer may submit a reconsideration request "within 30 days," decided by "a PBGC official with a level of authority higher than that of the person who issued the initial determination." No provision states a deadline for that decision, even though penalties in several categories accrue at $100 to $1,000 per day while a dispute is pending.

Fix: Add a stated deadline for PBGC's decision on reconsideration.

5. The preamble states a harsher advisor-reliance rule than the operative
text codifies.

The preamble states a filer's "exercise of ordinary business care and prudence in selecting and interacting with the outside advisor is not a relevant factor in determining reasonable cause." The operative text states only that "PBGC generally treats outside advisors as part of the filer."

The codified rule does not itself foreclose an argument that a filer's diligence in selecting an advisor bears on reasonable cause; only the preamble narrative does.

Fix: Conform the operative text to the preamble, or narrow the preamble.

6. The preamble's proportionality defense for the part 4302 default penalty compares it to the wrong part 4071 benchmark.

Under Sec. 4302.11(c), the default for multiemployer notice failures is the full statutory ceiling, currently $365 per day. Under Sec. 4071.11(c), the default for comparable single-employer failures is $25 per day for 90 days and $50 per day thereafter -- a fraction of that part's $2,739 ceiling. The preamble defends the part 4302 default as "well below the maximum amount allowed under part 4071," comparing $365 to $2,739 rather than to the $25-50 per day a single-employer filer would typically face. The part 4302 default runs more than seven times the part 4071 post-90-day default ($365 / $50 = 7.3).

Fix: Compare the part 4302 default to part 4071's typical rate, not its ceiling.

The core structure -- fixed per diem tables, a small-plan proportional reduction with a floor, and named waiver and aggravating factors -- is workable, and the issues above are drafting gaps, not objections to it. Each is correctable by conforming the operative text to what the preamble already says PBGC intends.