

Section 1.892-3T also issued under 26 U.S.C. 892(c).
Section 1.892-4T also issued under 26 U.S.C. 892(c).
Section 1.892-5 also issued under 26 U.S.C. 892(c).
Section 1.892-5T also issued under 26 U.S.C. 892(c).
Section 1.892-6T also issued under 26 U.S.C. 892(c).
Section 1.892-7T also issued under 26 U.S.C. 892(c). \* \* \*

Par. 2. Section 1.892-5 is added to read as follows:

§ 1.892-5 Controlled commercial entity.

(a) through (a)(2) [Reserved]. For further information, see § 1.892-5T(a) through (a)(2).

(3) For purposes of section 892(a)(2)(B), the term entity means and includes a corporation, a partnership, a trust (including a pension trust described in § 1.892-2T(c)) and an estate.

(4) Effective date. This section applies on or after the earlier of January 14, 2002 or the date these regulations are published as final regulations in the Federal Register.

(b) through (d) [Reserved]. For further information, see §§ 1.892-5T(b) through (d).

Par. 3. Section 1.892-5T is amended by:

- 1. Removing the flush language immediately following paragraph (a)(2).
2. Adding paragraph (a)(3).
The addition reads as follows:

§ 1.892-5T Controlled commercial entity (temporary regulations).

(a) \* \* \*
(3) [Reserved]. For further information, see § 1.892-5(a)(3).
\* \* \* \* \*

PART 301—PROCEDURE AND ADMINISTRATION

Par. 4. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Par. 5. Section 301.7701-2 is amended by:

- 1. Revising paragraphs (b)(6) and (c)(2)(ii).
2. Revising the first sentence of paragraph (e).
The revisions read as follows:

§ 301.7701-2 Business entities; definitions.

\* \* \* \* \*
(b) \* \* \*

(6) A business entity wholly owned by a State or any political subdivision thereof, or a business entity wholly owned by a foreign government (as defined in § 1.892-2T);

\* \* \* \* \*

(c) \* \* \*
(2) \* \* \*

(ii) Special rule for certain business entities. If the single owner of a business entity is a bank (as defined in section 581, or, in the case of a foreign bank, as defined in section 585(a)(2)(B) without regard to the second sentence thereof), then the special rules of the Internal Revenue Code applicable to banks will continue to apply to the single owner as if the wholly owned entity were a separate entity.

\* \* \* \* \*

(e) Effective date. Except as otherwise provided in this paragraph (e), the rules of this section apply as of January 1, 1997, except that paragraph (b)(6) applies on or after the earlier of January 14, 2002 or the date these regulations are published as final regulations in the Federal Register to a business entity wholly owned by a foreign government regardless of any prior entity classification, and paragraph (c)(2)(ii) of this section applies to taxable years beginning after January 12, 2001. \* \* \*

Robert E. Wenzel,
Deputy Commissioner of Internal Revenue.
[FR Doc. 01-251 Filed 1-11-01; 8:45 am]
BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY
Internal Revenue Service

26 CFR Part 7
[LR-230-76]

Requirements Relating to Certain Exchanges Involving a Foreign Corporation

AGENCY: Internal Revenue Service (IRS), Treasury.
ACTION: Withdrawal of notice of proposed regulations.

SUMMARY: This document withdraws proposed regulations under section 367(c). The proposed regulations correspond to temporary regulations that are also being removed in this issue of the Federal Register. The temporary regulations are being removed because they are no longer necessary and, as a result, may be misleading.

FOR FURTHER INFORMATION CONTACT: Mark D. Harris at (202) 622-3860 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On December 30, 1977, the IRS and Treasury published in the Federal Register proposed regulations (42 FR 65204) and temporary regulations (42

FR 65152) under section 367(c) of the Internal Revenue Code. The principal purpose of these regulations, §§ 7.367(c)-1 and 7.367(c)-2, was to distinguish between the treatment of transfers described in section 367(c) before and after the enactment of the Tax Reform Act of 1976 (the Act) (90 Stat. 1634). Before enactment of the Act, transfers described in section 367(c) were subject to a ruling requirement. After enactment of the Act, transfers described in section 367(c) were within the scope of §§ 7.367(b)-1 through 7.367(b)-12. In light of the substantial time that has passed since enactment of the Act and, moreover, in light of the fact that §§ 1.367(b)-1 through 1.367(b)-6 have substantially superceded §§ 7.367(b)-1 through 7.367(b)-12, §§ 7.367(c)-1 and 7.367(c)-2 are no longer necessary and may be misleading.

Accordingly, the IRS and Treasury are removing temporary regulations §§ 7.367(c)-1 and 7.367(c)-2 in this issue of the Federal Register. Correspondingly, this document removes proposed regulations §§ 7.367(c)-1 and 7.367(c)-2.

List of Subjects in 26 CFR Part 7

Income taxes, Reporting and recordkeeping requirements.

Withdrawal of Proposed Amendments to the Regulations

Accordingly, under the authority of 26 U.S.C. 7805, proposed regulations under 26 CFR part 7 relating to §§ 7.367(c)-1 and 7.367(c)-2, published December 30, 1977 (42 FR 65204), are withdrawn.

Robert E. Wenzel,
Deputy Commissioner of Internal Revenue.
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PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4003, 4007, and 4071
RIN 1212-AA95

Assessment of and Relief From Penalties

AGENCY: Pension Benefit Guaranty Corporation.
ACTION: Proposed rule.

SUMMARY: The PBGC has issued a number of policy statements about penalties over the last few years. Some of these policy statements have been incorporated into the PBGC's regulations. For the convenience of the

public, the PBGC is now proposing to codify in its regulations an expanded version of the remaining penalty policy statements. Among other things, this expanded version of the PBGC's penalty policies would explain in general terms the meaning of "reasonable cause" for penalty waivers and the guidelines for assessing penalties under ERISA section 4071.

**DATES:** Comments must be received on or before March 13, 2001.

**ADDRESSES:** Comments may be mailed to the Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005-4026, or delivered to Suite 340 at the above address. Comments also may be sent by Internet e-mail to [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov). Comments will be available for inspection at the PBGC's Communications and Public Affairs Department in Suite 240 at the above address during normal business hours.

**FOR FURTHER INFORMATION CONTACT:** Harold J. Ashner, Assistant General Counsel, or Deborah C. Murphy, Attorney, Pension Benefit Guaranty Corporation, Office of the General Counsel, Suite 340, 1200 K Street, NW., Washington, DC 20005-4026, 202-326-4024. (For TTY/TTD users, call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4024.)

**SUPPLEMENTARY INFORMATION:** The PBGC administers the pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). When a single-employer plan terminates without sufficient assets to provide all benefits, the PBGC steps in to ensure that participants and beneficiaries receive their plan benefits, subject to certain legal limits. The PBGC also provides financial assistance to multiemployer plans that become unable to pay benefits.

ERISA and the PBGC's regulations require the payment of premiums to the PBGC and the providing of certain information to the PBGC and to other persons. To promote the effective operation of the insurance program under Title IV, ERISA authorizes the PBGC to assess penalties if premiums are paid late and if certain notices and other material information are not timely provided. (See ERISA sections 4007 and 4071 and the PBGC's regulations on Payment of Premiums (29 CFR Part 4007) and Penalties for Failure to Provide Certain Notices or Other Material Information (29 CFR Part 4071).) The PBGC has published four notices in the **Federal Register** since

mid-1995 describing its penalty policies under sections 4007 and 4071.

This proposed rule would expand and codify the policies described in two of those notices: those published July 18, 1995 (60 FR 36837), and December 17, 1996 (61 FR 66338). (The 1995 notice in turn replaced an earlier penalty policy notice published March 3, 1992 (at 57 FR 7605).) The policy guidance would be placed in appendices to the premium payment regulation and the regulation on Penalties for Failure to Provide Certain Notices or Other Material Information. In addition, the PBGC's regulation on Rules for Administrative Review of Agency Decisions (29 CFR Part 4003) would be amended to cover penalties assessed under section 4071.

The policies described in the other two notices have already been codified in PBGC regulations.

- The PBGC's regulations on Termination of Single-Employer Plans (29 CFR Part 4041) and Missing Participants (29 CFR Part 4050) reflect the PBGC's Statement of Policy published March 14, 1997 (at 62 FR 12521), announcing penalty relief for late filing of post-distribution certifications in connection with a plan termination.

- Section 4007.8 of the PBGC's premium payment regulation reflects the PBGC's Statement of Policy published December 2, 1996 (at 61 FR 63874), announcing a new policy regarding the rate at which premium penalties accrue (1 percent or 5 percent per month depending on whether the premium underpayment is self-corrected).

Thus, once the amendments in this rule became effective, all of the PBGC's penalty policies under sections 4007 and 4071 would be in the Code of Federal Regulations. (This rule does not deal with penalties under ERISA section 4302, which applies only to multiemployer plans.)

This rule would not affect the use of any other remedies available to the PBGC and would not address the settlement of legal disputes involving penalties, either alone or in the context of other legal issues.

#### Compliance With Rulemaking Guidelines

The PBGC has determined that this action is not a "significant regulatory action" under the criteria set forth in Executive Order 12866.

Although the PBGC is publishing this rule as a proposed rule, the rule is not subject to notice and comment rulemaking requirements under section 553 of the Administrative Procedure Act because it deals only with general

statements of PBGC policy and with PBGC procedural rules. Because no general notice of proposed rulemaking is required, the Regulatory Flexibility Act does not apply. See 5 U.S.C. 601(2), 603, 604.

#### List of Subjects

##### 29 CFR Part 4003

Administrative practice and procedure, Organization and functions (Government agencies), Pension insurance, Pensions.

##### 29 CFR Part 4007

Penalties, Pension insurance, Pensions, Reporting and recordkeeping requirements.

##### 29 CFR Part 4071

Penalties.

For the reasons given above, the PBGC proposes to amend 29 CFR parts 4003, 4007, and 4071 as follows.

#### PART 4003—RULES FOR ADMINISTRATIVE REVIEW OF AGENCY DECISIONS

1. The authority citation for part 4003 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3).

2. In § 4003.1, paragraph (a) is amended by removing the words "(b)(1) through (b)(4)" and adding in their place the words "(b)(1) through (b)(5)" and by removing the words "(b)(5) through (b)(10)" and adding in their place the words "(b)(6) through (b)(11)"; paragraphs (b)(5) through (b)(10) are redesignated as paragraphs (b)(6) through (b)(11); and a new paragraph (b)(5) is added to read as follows:

##### § 4003.1 Purpose and scope.

\* \* \* \* \*

(b) *Scope.* \* \* \*

\* \* \* \* \*

(5) Determinations with respect to penalties under section 4071 of ERISA.

\* \* \* \* \*

#### PART 4007—PAYMENT OF PREMIUMS

3. The authority citation for part 4007 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1303(a), 1306, 1307.

4. In § 4007.8, the introductory text of paragraph (a) is amended by removing the words "The charge will be based on" and adding in their place the words "The amount determined under this paragraph (a) will be based on"; and paragraphs (c) and (d) are revised to read as follows:

##### § 4007.8 Late payment penalty charges.

\* \* \* \* \*

(c) *Reasonable cause waivers.* The PBGC will waive all or part of a late payment penalty charge if the PBGC determines that there is reasonable cause for the late payment. Policy guidelines for applying the “reasonable cause” standard are in §§ 32 through 35 of the Appendix to this part.

(d) *Other waivers.* The PBGC may waive all or part of a late payment penalty charge in other circumstances without regard to whether there is reasonable cause. Policy guidelines for waivers without reasonable cause are in § 31(b)(1), (b)(3), and (b)(4) of the Appendix to this part.

\* \* \* \* \*

5. An appendix is added to part 4007 to read as follows:

### Appendix to Part 4007—Policy Guidelines on Penalties

Sec.

#### General Provisions

- 1 What is the purpose of this Appendix?
- 2 What defined terms are used in this Appendix?
- 3 What is the purpose of a premium penalty?

#### Procedures

- 11 What are the basic rules for assessing and reviewing premium penalties?
- 12 What should I know about preliminary notices of premium penalties?
- 13 What should I know about premium penalty determinations?
- 14 What should I know about review of premium penalty determinations?

#### Premium Penalty Assessment

- 21 What are the rules for assessing a premium penalty?
- 22 How do premium penalties apply to small plans?

#### Waiver Standards

- 31 What are the standards for waiving a premium penalty?
- 32 What is “reasonable cause”?
- 33 What kinds of facts does the PBGC consider in determining whether there is reasonable cause for a failure to pay a premium?
- 34 What are some situations that might justify a “reasonable cause” waiver?
- 35 What are some situations that might justify a partial “reasonable cause” waiver?

#### General Provisions

##### Section 1 What Is the Purpose of this Appendix?

This appendix sets forth principles and guidelines that we intend to follow in assessing, reviewing, and waiving premium penalties. However, this is only general policy guidance. Our action in each case is guided by the facts and circumstances of the case.

##### Section 2 What Defined Terms Are Used in This Appendix?

The following terms are defined in part 4001 of this chapter: contributing sponsor,

ERISA, PBGC, person, plan, and plan administrator. In addition, in this appendix:

(a) *Premium penalty* means a penalty under ERISA section 4007 and § 4007.8 of this part for failing to pay all or part of a premium on time.

(b) *Waiver* means reduction or elimination of a premium penalty that is being or has been assessed.

(c) *We* means the PBGC.

(d) *You* means (according to the context) —

(1) A plan administrator, contributing sponsor, or other person, if —

(i) The person’s action or inaction may be the basis for a premium penalty assessment,

(ii) The person may be required to pay the premium penalty, or

(iii) The person is requesting review of the premium penalty; or

(2) An employee or agent of, or advisor to, any of these persons.

##### Section 3 What Is the Purpose of a Premium Penalty?

The basic purpose of a premium penalty is to encourage you to pay premiums on time. Premium penalties should be fair, simple, effective, and easy to administer. Therefore,—

(a) We assess a lower (one percent) premium penalty if you correct a premium underpayment yourself before we issue a written notice that there is or may be a premium delinquency;

(b) We assess a higher (five percent) premium penalty if you do not self-correct before we issue a notice; and

(c) We waive premium penalties, in whole or in part, if there is reasonable cause or in other appropriate circumstances.

#### Procedures

##### Section 11 What Are the Basic Steps for Assessing and Reviewing Premium Penalties?

(a) *Overview.* There are typically three steps in the premium penalty assessment and review process:

(1) A preliminary notice (discussed in § 12), which gives you an opportunity to submit information relating to the premium penalty assessment, or to simply pay the amount owed;

(2) A premium penalty determination (discussed in § 13) that assesses the premium penalty; and

(3) A review of the premium penalty determination (discussed in § 14).

(b) *Relationship to premium procedures.*

(1) When we assess a premium penalty for a late premium payment, the late payment often has already been made. However, if the premium has not been paid when we assess a premium penalty, we will generally assess and review the premium (and any related interest) at the same time as we assess and review the penalty. Differences in premium penalty procedures depending on whether the premium has or has not been paid are noted in §§ 12 and 13.

(2) A premium penalty stops accruing when the premium is paid.

(c) *Debt collection.* Our regulation on Debt Collection (29 CFR Part 4903) provides that we may collect amounts that you owe to us (such as premium penalties) by reducing other amounts that the government owes to

you (such as tax refunds). Procedures under our debt collection regulation may run separately or together with the premium penalty assessment and review procedures.

(d) *Decision-making standards and guidelines.* At each stage of the premium penalty assessment and review process, we evaluate the circumstances by the same standards and apply the same guidelines in deciding whether to assess or waive a premium penalty and how much the premium penalty should be. However, we may have more information when we review a premium penalty than we had when we originally assessed it, and that may make our decision on review different from our original premium penalty determination.

(e) *Providing information to the PBGC.* (1) It is your responsibility to raise any facts and issues that you want us to consider in making premium penalty assessment or waiver decisions and to support your contentions with documentation such as correspondence and police, fire, or insurance reports. If you want us to consider information that you believe we already have in connection with another case, you should identify the information specifically enough so that we can determine whether we have the information, locate it in our files, and review it.

(2) Since premium penalties are assessed for paying a premium late, it is important that you bring to our attention any information or arguments that tend to show that you were not required to pay a premium or that you paid the premium on time.

(f) *Terminology.* There is a slight difference between the terminology we use in this appendix and the terminology we use in our regulation on Rules for Administrative Review of Agency Decisions (29 CFR Part 4003), which governs our issuance and review of premium penalty determinations:

(1) “Initial determination” in the administrative review regulation means the same as “premium penalty determination” in this appendix, and

(2) “Reconsideration of an initial determination” in the administrative review regulation means the same as “review of a premium penalty determination” in this appendix.

##### Section 12 What Should I Know About Preliminary Notices of Premium Penalties?

Before we make a premium penalty determination, we want you to have an opportunity to give us any information you think we should consider. In most cases, therefore, we send a preliminary notice to tell you that we intend to assess a premium penalty and the reason for the premium penalty. (In some cases, we may skip this preliminary step—for example, if we contact you by telephone to discuss the matter or if we need to make the assessment quickly in order to preserve our right to collect the premium penalty in court.) You may respond to a preliminary notice by submitting any information you want us to consider before we make a premium penalty determination. The preliminary notice will state the time within which you should respond (typically 30 days).

(a) *If premium already paid.* If, by the time we issue a preliminary notice stating that we

intend to assess a premium penalty, you have already paid the late premium, the notice ordinarily tells you the amount of the premium penalty that we intend to assess. (The notice also ordinarily tells you the amount of any interest due on the late premium.) If you pay the amount stated in the preliminary notice without requesting relief, that is the end of the matter.

(b) *If premium not already paid.* If, by the time we issue a preliminary notice stating that we intend to assess a premium penalty, you have not already paid the late premium, the notice ordinarily tells you the amount of premium due and the amount of the premium penalty that has accrued up through the date of the preliminary notice. (The preliminary notice also ordinarily tells you the amount of interest that has accrued on the late premium up through the date of the preliminary notice.) If you pay the amount stated in the preliminary notice within 30 days after the date of the preliminary notice without requesting relief, that is the end of the matter. If you do not pay the amount of unpaid premium within 30 days after the date of the preliminary notice, the premium penalty will continue to accrue (subject to the premium penalty cap).

#### Section 13 What Should I Know About Premium Penalty Determinations?

As the second step in the premium penalty assessment and review process—after a preliminary notice—we make a premium penalty determination (unless, in response to the preliminary notice, you pay the full premium penalty without requesting relief). (If we skip the preliminary notice step, the premium penalty assessment is the first step in the process.) The premium penalty determination notifies you of the reason for the premium penalty (even if we have already issued a preliminary notice stating the reason) and takes into account any information you may have submitted to us in response to a preliminary notice. We also tell you when and where to send your payment, and we tell you about requesting review of the premium penalty determination. (Complete rules for premium penalty determinations and for requesting review are in part 4003 of this chapter.)

(a) *If premium already paid.* If, by the time we issue a premium penalty determination, you have already paid the late premium, the determination tells you the amount of the premium penalty that we are assessing (taking into account any waiver of all or part of the premium penalty) and how we determined the amount of the premium penalty. (The premium penalty determination also ordinarily tells you the amount of any interest due on the late premium.) If you pay the amount stated in the premium penalty determination without requesting review, that is the end of the matter.

(b) *If premium not already paid.* If, by the time we issue a premium penalty determination, you have not already paid the late premium, the premium penalty determination tells you the amount of premium due and the amount of the premium penalty that has accrued up through the date of the premium penalty

determination. (The premium penalty determination also ordinarily tells you the amount of interest that has accrued on the late premium up through the date of the premium penalty determination.) If you pay the amount stated in the premium penalty determination within 30 days after the date of the premium penalty determination without requesting review, that is the end of the matter. If you do not pay the amount of unpaid premium within 30 days after the date of the premium penalty determination, the premium penalty will continue to accrue (subject to the premium penalty cap).

#### Section 14 What Should I Know About Review of Premium Penalty Determinations?

(a) *Timing.* (1) *General rule.* In general, you must request review of a premium penalty determination within 30 days after the date of the determination; if you do not do so, the determination becomes effective, and we may take steps to collect the premium penalty. In addition, you may not be able to raise in court some legal defenses that you might have against collection of the premium penalty, because you have failed to exhaust administrative remedies. (In some cases, the 30-day limitation for requesting review may be extended or waived. See §§ 4003.4 and 4003.5 of the administrative review regulation. If we notify you that we may attempt to collect a debt resulting from a premium penalty determination by referring it for offset against federal payments that may be due you, you will have at least 60 days to request review. See § 4003.32 of the administrative review regulation.)

(2) *Determinations effective immediately.* We may, in our discretion, make a premium penalty determination effective on the date we issue it—for example, if our ability to bring a collection action in court is about to be cut off by the statute of limitations. If we make a premium penalty determination effective immediately, you are not required to request review by us in order to exhaust your administrative remedies. This means that you have the right to raise legal defenses against collection of the premium penalty in court even if you do not request that we review the determination. (See § 4003.22(b) of the administrative review regulation.) If you do request review by the PBGC, we may review the determination.

(b) *Review of determination.* If you request review of a premium penalty determination within the required time, we review the determination and notify you of the results of the review. This review takes into account any information you may have submitted to us in response to a preliminary notice or a premium penalty determination notice or with your request for review.

(c) *Premium penalty accrual during review.* Requesting review of a premium penalty does not make the premium penalty stop accruing. A premium penalty stops accruing on the date when you pay the premium or, if you pay the premium within 30 days after the date of a PBGC bill for the premium, on the date of the bill. In addition, if you request review of a premium penalty, we may waive the portion of the premium penalty that accrues during review if you make a non-frivolous argument that you were not

required to pay the premium, as described in § 31(b)(4) of this Appendix.

#### Premium Penalty Assessment

##### Section 21 What Are the Rules for Assessing a Premium Penalty?

The rules for assessing a premium penalty are in § 4007.8 of this part. A premium penalty is assessed for failure to pay a premium on time. In general, the amount of a premium penalty is based on the number of months from the due date to the date of payment, subject to a floor of \$25 and a ceiling of 100 percent of the unpaid premium. The premium penalty rate is generally—

(a) 1 percent per month (for all months) on any amount of unpaid premium that you pay on or before the date we issue a written notice that there is or may be a premium delinquency (e.g., a premium bill, a letter initiating a premium compliance review, or a letter questioning a failure to make a premium filing), or

(b) 5 percent per month (for all months) on any amount of unpaid premium that you pay after that date.

##### Section 22 How Do Premium Penalties Apply to Small Plans?

Since small plan premiums are generally lower than large plan premiums, premium penalties are also generally lower for small plans than for large plans. This is because premium penalties accrue (each month) as a percentage of your premium underpayment.

#### Waiver Standards

##### Section 31 What Are the Standards for Waiving a Premium Penalty?

(a) *Facts and circumstances.* In deciding whether to waive a premium penalty in whole or in part, we consider the facts and circumstances of each case.

(b) *Waivers.* (1) *Provisions of law.* We waive all or part of a premium penalty if a statute or regulation requires that we do so. For example, ERISA section 4007(b) and § 4007.8(b) of this part provide for a waiver in certain circumstances involving business hardship; § 4007.8(f) and (g) of this part provides for waivers if certain “safe harbor” tests are met; and § 4007.8(e) of this part provides for a waiver of any premium penalty that accrues after the date of a premium bill if you pay the premium within 30 days after the date of the bill.

(2) *Reasonable cause.* We waive a premium penalty if you show reasonable cause for a failure to pay a premium on time. See §§ 32 through 35 for guidelines on “reasonable cause” waivers. If there is reasonable cause for only part of a failure to pay a premium, we waive the premium penalty only for that part. In determining whether “reasonable cause” exists, we do not consider either—

(i) The likelihood or cost of collecting the premium penalty, or

(ii) The costs and risks of enforcing the premium penalty by litigation.

(3) *Erroneous legal interpretations.* We may waive all or part of a premium penalty if the failure to pay a premium on time that gives rise to the premium penalty is based on your reliance on an erroneous interpretation of the law.

(i) *If you disclose the interpretation to us.* If a failure to pay a premium on time results from your reliance on an erroneous interpretation of the law, we will waive a premium penalty that arises from the failure if you promptly and adequately call our attention to the interpretation and the relevant facts, and the erroneous interpretation is not frivolous. If the interpretation affects a filing that you make with us, you should call our attention to the interpretation with the filing. If you rely on the interpretation to justify not making a filing with us, you should call our attention to the interpretation in a notice submitted to us by the time and in the manner prescribed for the filing not made.

(ii) *If you do not disclose the interpretation to us.* If a failure to pay a premium on time results from your reliance on an erroneous interpretation of the law, and you do not promptly and adequately call our attention to the interpretation and the relevant facts, we may nevertheless waive a premium penalty if the weight of authority supporting the interpretation is substantial in relation to the weight of opposing authority and it is reasonable for you to rely on the interpretation.

(4) *Pendency of review.* If you request review of a premium penalty (as described in § 14 of this Appendix), and you make a non-frivolous argument in your request for review that you were not required to pay the premium, we waive the portion of the premium penalty that accrues during the review process. (If you make a non-frivolous argument that you were not required to pay a portion of the premium, we apply this rule to that portion.)

(5) *Other circumstances.* We may waive all or part of a premium penalty in other circumstances if we determine that it is appropriate to do so. We intend to exercise this waiver authority only in narrow circumstances, primarily if we determine that assessing a premium penalty, or assessing the full amount of a premium penalty, would be inconsistent with the purposes of Title IV of ERISA. For example—

(i) We may waive all or part of a premium penalty if a premium underpayment reflected on a premium form is insignificant and is caused by an inadvertent mathematical error (such as a transposition of digits) on the form. In determining whether and to what extent to grant a waiver in a case of this kind, we consider such factors as how insignificant the underpayment is, whether you have a history of compliance, and whether the underpayment results from an isolated error rather than from a number of errors.

(ii) We may waive all or part of a premium penalty if the law changes shortly before the date a premium payment is due and the premium payment that you make by the due date would have been correct under the law as in effect before the change. In determining whether and to what extent to grant a waiver in a case of this kind, we consider such factors as the length of time between the change in the law and the premium due date, the nature and timing of any publicity given to the change in the law, the complexity of the legal issues, and your general familiarity with those issues.

(c) *Action or inaction of outside parties.* If an accountant, actuary, lawyer, pension consultant, or other individual or firm that is not part of your organization assists you in complying with PBGC requirements, we apply our waiver authority as if the outside individual or firm were part of your organization, as described in § 32(c) of this Appendix.

#### *Section 32 What Is "Reasonable Cause"?*

(a) *General rule.* In general, there is "reasonable cause" for a failure to pay a premium on time to the extent that—

(1) The failure arises from circumstances beyond your control, and  
(2) You could not avoid the failure by the exercise of ordinary business care and prudence.

(b) *Overlooking legal requirements.* Overlooking legal requirements does not constitute reasonable cause.

(c) *Action or inaction of outside parties.* In some cases an accountant, actuary, lawyer, pension consultant, or other individual or firm that is not part of your organization may assist you in complying with PBGC requirements. If the outside individual's or firm's action, inaction, or advice causes or contributes to a failure to pay a premium on time, our analysis is generally the same as if the outside individual or firm were part of your organization. (In the case of an outside individual who is part of a firm, we generally consider both the individual and the firm to be part of your organization.) Thus, if a failure to pay a premium on time arises from circumstances within the control of the outside individual or firm, or could be avoided by the exercise of ordinary business care and prudence by the outside individual or firm, there is generally no reasonable cause for the failure. The fact that you exercised care and prudence in selecting and monitoring the outside individual or firm is not a basis for a reasonable cause waiver. (However, you may have recourse against the outside individual or firm.)

(d) *Size of organization.* If an organization or one or more of its employees is responsible for taking action, the size of the organization may affect what ordinary business care and prudence would require. For example, ordinary business care and prudence would typically require a larger organization to establish more comprehensive backup procedures than a smaller organization for dealing with situations such as computer failure, the loss of important records, and the inability of an individual to carry out assigned responsibilities. Thus, there may be reasonable cause for a small organization's failure to pay a premium on time even though, if the organization were larger, the exercise of ordinary business care and prudence would have avoided the failure.

(e) *Amount of premium underpayment.* In general, the larger a premium, the more care and prudence you should use to make sure that you pay it on time. Thus, there may be reasonable cause for a small underpayment even though, under the same circumstances, we would conclude that a larger underpayment could have been avoided by the exercise of ordinary business care and prudence.

#### *Section 33 What Kinds of Facts Does the PBGC Consider in Determining Whether There is Reasonable Cause for a Failure to Pay a Premium?*

In determining whether a failure to pay a premium on time arose from circumstances beyond your control and whether you could have avoided the failure by the exercise of ordinary business care and prudence—and thus whether waiver of a premium penalty for reasonable cause is appropriate—we consider facts such as the following:

(a) What event or circumstance caused the underpayment and when the event happened or the circumstance arose. The dates you give should clearly correspond with the underpayment upon which the premium penalty is based.

(b) How that event or circumstance kept you from paying the premium on time. The explanation you give should relate directly to the failure to pay a premium that is the subject of the premium penalty.

(c) Whether the event or circumstance was beyond your control.

(d) Whether you could have anticipated the event or circumstance.

(e) How you responded to the event or circumstance, including what steps you took (and how quickly you took them) to pay the premium and how you conducted other business affairs. Knowing how you responded to the event or circumstance may help us determine what degree of business care and prudence you were capable of exercising during that period and thus whether the failure to pay the premium could or could not have been avoided by the exercise of ordinary business care and prudence.

#### *Section 34 What Are Some Situations That Might Justify a "Reasonable Cause" Waiver?*

The following examples illustrate some of the reasons often given for failures to pay premiums for which we may assess penalties. The situation described in each example may constitute reasonable cause, and each example lists factors we consider in determining whether to grant a premium penalty waiver for reasonable cause in a case of that kind.

(a) *An individual with responsibility for taking action was suddenly and unexpectedly absent or unable to act.* We consider such factors as the following: the nature of the event that caused the individual's absence or inability to act (for example, the resignation of the individual or the death or serious illness of the individual or a member of the individual's immediate family); the size of the organization and what kind of backup procedures it had to cope with such events; how close the event was to the deadline that was missed; how abrupt and unanticipated the event was; how the individual's absence or inability to act prevented compliance; how expensive it would have been to comply without the absent individual; whether and how other business operations and obligations were affected; how quickly and prudently a replacement for the absent individual was selected or other arrangements for compliance were made; and how quickly a replacement for the absent individual took appropriate action.

(b) *A fire or other casualty or natural disaster destroyed relevant records or prevented compliance in some other way.* We consider such factors as the following: the nature of the event; how close the event was to the deadline that was missed; how the event caused the failure to pay the premium; whether other efforts were made to get needed information; how expensive it would have been to comply; and how you responded to the event.

(c) *You reasonably relied on erroneous oral or written advice given by a PBGC employee.* We consider such factors as the following: whether there was a clear relationship between your situation and the advice sought; whether you provided the PBGC employee with adequate and accurate information; and whether the surrounding circumstances should have led you to question the correctness of the advice or information provided.

(d) *You were unable to obtain information (including records and calculations) needed to comply.* We consider such factors as the following: what information was needed; why the information was unavailable; when and how you discovered that the information was not available; what attempts you made to get the information or reconstruct it through other means; and how much it would have cost to comply.

#### *Section 35 What Are Some Situations That Might Justify a Partial "Reasonable Cause" Waiver?*

(a) Assume that a fire destroyed the records needed to compute a premium payment. If in the exercise of ordinary business care and prudence it should take you one month to reconstruct the records and pay the premium, but the payment was made two months late, it might be appropriate to waive that part of the premium penalty attributable to the first month the payment was late, but not the part attributable to the second month.

(b) Assume that a plan administrator underpaid the plan's flat-rate premium because of reasonable reliance on erroneous advice from a PBGC employee, and also underpaid the plan's variable-rate premium because the plan actuary used the wrong interest rate. A PBGC audit revealed both errors. The PBGC billed the plan for a premium penalty of \$5,000—\$1,000 for underpayment of the flat-rate premium and \$4,000 for underpayment of the variable-rate premium. The plan administrator requested a waiver of the premium penalty. While the erroneous PBGC advice constituted reasonable cause for underpaying the flat-rate premium, there was no showing of reasonable cause for the error in the variable-rate premium. Therefore, we would waive only the part of the premium penalty based on underpayment of the flat-rate portion of the premium (\$1,000).

### **PART 4071—PENALTIES FOR FAILURE TO PROVIDE CERTAIN NOTICES OR OTHER MATERIAL INFORMATION**

6. The authority citation for part 4071 is revised to read as follows:

**Authority:** 28 U.S.C. 2461 note; 29 U.S.C. 1302(b)(3), 1371.

7. Section 4071.1 is amended by adding at the end of the section the following sentence:

#### **§ 4071.1 Purpose and scope.**

\* \* \* This part also provides policy guidelines for assessing and reviewing penalties under ERISA section 4071.

8. A new § 4071.4 and a new appendix are added to part 4071 to read as follows:

#### **§ 4071.4 Assessment and review of penalties.**

Policy guidelines for assessing, reviewing, and waiving penalties under ERISA section 4071 are in the Appendix to this part.

#### **Appendix to Part 4071—Policy Guidelines on Penalties**

Sec.

##### **General Provisions**

- 1 What is the purpose of this Appendix?
- 2 What defined terms are used in this Appendix?
- 3 What is the purpose of an information penalty?

##### **Procedures**

- 11 What are the basic rules for assessing and reviewing information penalties?
  - 12 What should I know about preliminary notices of information penalties?
  - 13 What should I know about information penalty determinations?
  - 14 What should I know about review of information penalty determinations?
- ##### **Information Penalty Assessment**
- 21 Where can I find the general principles that the PBGC follows in assessing information penalties and how the PBGC applies those principles to specific cases?
  - 22 What are the general principles that the PBGC follows in deciding whether to assess an information penalty and, if so, the amount or rate of information penalty to assess?
  - 23 What aggravating factors does the PBGC consider?
  - 24 What mitigating factors does the PBGC consider?
  - 25 What if multiple persons must give a notice?
  - 26 What if multiple persons must get a notice?
  - 27 What if a single event or circumstance leads to multiple failures to provide section 4071 information?
  - 28 What special guidance is there for specific types of cases?

##### **Waiver Standards**

- 31 What are the standards for waiving an information penalty?
- 32 What is "reasonable cause"?
- 33 What kinds of facts does the PBGC consider in determining whether there is reasonable cause for a failure to provide section 4071 information?
- 34 What are some situations that might justify a "reasonable cause" waiver?

35 What is a situation that might justify a partial "reasonable cause" waiver?

#### **General Provisions**

##### *Section 1 What Is the Purpose of This Appendix?*

Section 4071 of ERISA authorizes us to assess a penalty if you do not provide certain notices or other material information within the time limit specified in ERISA or in PBGC regulations. Some of the notices and other material information covered by section 4071 have to be provided to us, and some have to be provided to other parties, such as plan participants. This appendix sets forth principles and guidelines that we intend to follow in assessing, reviewing, and waiving information penalties. However, this is only general policy guidance. Our action in each case is guided by the facts and circumstances of the case.

##### *Section 2 What Defined Terms are Used in This Appendix?*

The following terms are defined in part 4001 of this chapter: contributing sponsor, controlled group, employer, ERISA, PBGC, person, plan, plan administrator, and standard termination. In addition, in this appendix:

(a) *Information penalty* means a penalty under ERISA section 4071 for failing to provide section 4071 information on time.

(b) *Section 4071 information* means any notice or other material information that you are required to provide to us or to another party under subtitles A–D of title IV of ERISA, or under section 302(f)(4) or 307(e) of Title I of ERISA, or under PBGC regulations implementing any of these provisions. Whether a particular item of information is "material" depends on the facts and circumstances.

(c) *Waiver* means reduction or elimination of an information penalty that is being or has been assessed.

(d) *We* means the PBGC.

(e) *You* means (according to the context)—

- (1) A plan administrator, contributing sponsor, or other person, if—

- (i) The person's action or inaction may be the basis for an information penalty assessment,

- (ii) The person may be required to pay the information penalty, or
- (iii) The person is requesting review of the information penalty; or

- (2) An employee or agent of, or advisor to, any of these persons.

##### *Section 3 What Is the Purpose of an Information Penalty?*

The basic purpose of an information penalty is to encourage you to provide section 4071 information on time. Information penalties should be fair, simple, effective, and easy to administer. Therefore—

(a) We assess lower information penalties for plans of small businesses and for failures to provide section 4071 information that are speedily corrected;

(b) We assess higher information penalties if the facts and circumstances warrant it; and

(c) We waive information penalties, in whole or in part, if there is reasonable cause or in other appropriate circumstances.

## Procedures

### Section 11 What Are the Basic Steps for Assessing and Reviewing Information Penalties?

(a) *Overview.* There are typically three steps in the information penalty assessment and review process:

(1) A preliminary notice (discussed in § 12), which gives you an opportunity to submit information bearing on the information penalty assessment;

(2) An information penalty determination (discussed in § 13) that assesses the information penalty; and

(3) A review of the information penalty determination (discussed in § 14).

(b) *Debt collection.* Our regulation on Debt Collection (29 CFR Part 4903) provides that we may collect amounts that you owe to us (such as information penalties) by reducing other amounts that the government owes to you (such as tax refunds). Procedures under our debt collection regulation may run separately or together with the information penalty assessment and review procedures.

(c) *Decision-making standards and guidelines.* At each stage of the information penalty assessment and review process, we evaluate the circumstances by the same standards and apply the same guidelines in deciding whether to assess or waive an information penalty and how much the information penalty should be. However, we may have more information when we review an information penalty than we had when we originally assessed it, and that may make our decision on review different from our original information penalty determination.

(d) *Providing information to the PBGC.* (1) It is your responsibility to raise any facts and issues that you want us to consider in making information penalty assessment or waiver decisions and to support your contentions with documentation such as correspondence and police, fire, or insurance reports. If you want us to consider information that you believe we already have in connection with another case, you should identify the information specifically enough so that we can determine whether we have the information, locate it in our files, and review it.

(2) Since information penalties are assessed for providing section 4071 information late, it is important that you bring to our attention any information or arguments that tend to show that you were not required to provide the section 4071 information or that you provided the section 4071 information on time.

(e) *Terminology.* There is a slight difference between the terminology we use in this appendix and the terminology we use in our regulation on Rules for Administrative Review of Agency Decisions (29 CFR Part 4003), which governs our issuance and review of information penalty determinations:

(1) "Initial determination" in the administrative review regulation means the same as "information penalty determination" in this appendix, and

(2) "Reconsideration of an initial determination" in the administrative review regulation means the same as "review of an

information penalty determination" in this appendix.

### Section 12 What Should I Know About Preliminary Notices of Information Penalties?

Before we make an information penalty determination, we want you to have an opportunity to give us any information you think we should consider. In most cases, therefore, we send a preliminary notice to tell you that we intend to assess an information penalty and the reason for the information penalty. (In some cases, we may skip this preliminary step—for example, if we contact you by telephone to discuss the matter or if we need to make the assessment quickly in order to preserve our right to collect the information penalty in court.) You may respond to a preliminary notice by submitting any information you want us to consider before we make an information penalty determination. The preliminary notice will state the time within which you should respond (typically 30 days).

(a) *If section 4071 information already provided.* If, by the time we issue a preliminary notice stating that we intend to assess an information penalty, you have already provided the late section 4071 information, the notice ordinarily tells you the amount of the information penalty that we intend to assess. If the preliminary notice states an amount of information penalty and you pay the amount stated in the preliminary notice without requesting relief, that is the end of the matter.

(b) *If section 4071 information not already provided.* If, by the time we issue a preliminary notice stating that we intend to assess an information penalty, you have not already provided the late section 4071 information, the notice ordinarily tells you the rate of penalty that we intend to assess. Providing the section 4071 information will cut off further accrual of the information penalty.

### Section 13 What Should I Know About Information Penalty Determinations?

As the second step in the information penalty assessment and review process—after a preliminary notice—we make an information penalty determination (unless, in response to a preliminary notice that states an amount of information penalty, you pay the full information penalty without requesting relief). (If we skip the preliminary notice step, the information penalty assessment is the first step in the process.) The information penalty determination notifies you of the reason for the information penalty (even if we have already issued a preliminary notice stating the reason) and takes into account any information you may have submitted to us in response to a preliminary notice. We also tell you when and where to send your payment, and we tell you about requesting review of the information penalty determination. (Complete rules for information penalty determinations and for requesting review are in part 4003 of this chapter.)

(a) *If section 4071 information already provided.* If, by the time we issue an information penalty determination, you have already provided the late section 4071

information, the determination tells you the amount of the information penalty that we are assessing (taking into account any waiver of all or part of the information penalty) and how we determined the amount of the information penalty. If the information penalty determination states an amount of information penalty and you pay the amount stated in the information penalty determination without requesting review, that is the end of the matter.

(b) *If section 4071 information not already provided.* If, by the time we issue an information penalty determination, you have not already provided the late section 4071 information, the determination ordinarily tells you the rate of penalty we intend to assess. Providing the section 4071 information will cut off further accrual of the information penalty.

### Section 14 What Should I Know About Review of Information Penalty Determinations?

(a) *Timing.* (1) *General rule.* In general, you must request review of an information penalty determination within 30 days after the date of the determination; if you do not do so, the determination becomes effective, and we may take steps to collect the information penalty. In addition, you may not be able to raise in court some legal defenses that you might have against collection of the information penalty, because you have failed to exhaust administrative remedies. (In some cases, the 30-day limitation for requesting review may be extended or waived. See §§ 4003.4 and 4003.5 of the administrative review regulation. If we notify you that we may attempt to collect a debt resulting from an information penalty determination by referring it for offset against federal payments that may be due you, you will have at least 60 days to request review. See § 4003.32 of the administrative review regulation.)

(2) *Determinations effective immediately.* We may, in our discretion, make an information penalty determination effective on the date we issue it—for example, if our ability to bring a collection action in court is about to be cut off by the statute of limitations. If we make an information penalty determination effective immediately, you are not required to request review by us in order to exhaust your administrative remedies. This means that you have the right to raise legal defenses against collection of the information penalty in court even if you do not request that we review the determination. (See § 4003.22(b) of the administrative review regulation.) If you do request review by the PBGC, we may review the determination.

(b) *Review of determination.* If you request review of an information penalty determination within the required time, we review the determination and notify you of the results of the review. This review takes into account any information you may have submitted to us in response to a preliminary notice or an information penalty determination notice or with your request for review.

(c) *Information penalty accrual during review.* Requesting review of an information

penalty does not make the information penalty stop accruing. An information penalty stops accruing when you provide the section 4071 information. In addition, if you request review of an information penalty, we may waive the portion of the information penalty that accrues during review if you make a non-frivolous argument that you were not required to provide the section 4071 information or that you were (and still are) unable to provide it, as described in Sec. 31(b)(4) of this Appendix.

**Information Penalty Assessment**

*Section 21 Where Can I Find the General Principles That the PBGC Follows in Assessing Information Penalties and how the PBGC Applies Those Principles to Specific Cases?*

The general principles that we follow in deciding whether to assess an information penalty and, if so, the amount or rate of information penalty to assess are explained in the following sections of this Appendix:

- (1) Section 22 contains basic guidance.
- (2) Sections 23 and 24 describe some aggravating and mitigating factors.
- (3) Sections 25 through 27 describe how we generally treat situations involving multiple persons and multiple failures to provide section 4071 information.
- (4) Section 28 contains special guidance for specific types of cases.

*Section 22 What Are the General Principles That the PBGC Follows in Deciding Whether To Assess an Information Penalty and, if so, the Amount or Rate of Information Penalty to Assess?*

(a) *Facts and circumstances.* In deciding whether to assess an information penalty for a failure to provide section 4071 information on time and, if so, what rate or amount of information penalty to assess, we consider the facts and circumstances of the failure.

(b) *Aggravating and mitigating factors.* Among the facts and circumstances we consider are aggravating and mitigating factors such as those described in §§ 23 and 24 of this Appendix. Aggravating factors tend to make it more likely that we will assess an information penalty, and mitigating factors tend to make it less likely. If we do assess an information penalty, aggravating factors tend to increase the rate or amount of the information penalty we assess, and

mitigating factors tend to decrease the rate or amount. An aggravating or mitigating factor may apply to all or only some of the section 4071 information that is not provided and to all or only some days of a delinquency.

(c) *Effect of plan size.*  
 (1) *Likelihood of assessment.* In general, the likelihood that we will assess an information penalty is strongly influenced by the number of participants in your plan (as determined under paragraph (e)(2) of this section). Thus, for example, we are much less likely to assess an information penalty if your plan has fewer than 100 participants (especially for a first violation) than if your plan has more than 1,000 participants (whether or not it is a first violation). This reflects differences in the ordinary business care and prudence standard for large and small plans (see § 32(c)) and in their access to professional help in monitoring their activities and meeting PBGC requirements.

(2) *Amount or rate of information penalty.* The effect of plan size on the amount or rate of an information penalty is explained in paragraphs (e)(1)(ii) and (e)(1)(iii) of this section.

(d) *Waivers.* We may also reduce or eliminate an information penalty if we have information showing that a partial or complete waiver of the information penalty is appropriate. Waivers are explained in §§ 31 through 35 of this Appendix.

(e) *Basic amount or rate of information penalty.* If we assess an information penalty, the starting point for determining the rate or amount of the information penalty is the rate or amount determined under this section. The amount or rate may be higher or lower based on considerations such as those described in paragraphs (a) through (c) of this section and §§ 23 through 28 of this Appendix.

(1) *Basic guidelines.* Although ERISA section 4071 allows us to assess an information penalty up to \$1,100 per day for each failure to provide section 4071 information, the information penalties we assess are generally much lower under the following guidelines.

(i) *Daily amount.* The information penalty is generally \$25 a day for the first 90 days that the section 4071 information is late, and \$50 for each day thereafter.

(ii) *Limit on total information penalty.* The total information penalty generally does not

exceed \$100 times the number of participants.

(iii) *Reduction for small plans.* If there are fewer than 100 participants in your plan, we generally reduce the daily information penalty based on the ratio of the number of participants to 100, subject to a floor of \$5 a day.

(2) *How we count the number of participants.* For purposes of the per-participant cap and the small plan reduction described in paragraphs (e)(1)(ii) and (e)(1)(iii) of this section, we generally count participants in the following ways:

(i) *In plan terminations.* For a failure to provide section 4071 information under part 4041 of this chapter (dealing with standard and distress plan terminations), we generally use the number of persons entitled to distributions of benefits in the plan termination. For example, if you are a plan administrator, and you are late in certifying to us that all benefits were properly distributed in a plan termination, the information penalty generally should not exceed \$100 times the number of persons entitled to distributions of benefits in the plan termination.

(ii) *In other cases.* For any other failure to provide section 4071 information, we generally use the number of participants reported on the PBGC Form 1 premium declaration that you most recently filed before the date of the failure, unless the number of participants has changed significantly since the Form 1 was filed. However, if clearly appropriate in a particular case, we may use a different method of determining the number of participants (e.g., adding up the number of participants in two or more plans).

(3) *Examples.* The following examples illustrate the basic guidelines for assessing information penalties under this section. In these examples, assume that you are the plan administrator of a terminating plan and that you file your post-distribution certification late.

(i) *General rule.* If your plan has 112 participants, and you file 306 days after the last day on which you could have made an information-penalty-free filing, the total information penalty should ordinarily be \$11,200, as shown in the following table. (Note that in this example, the cap of \$100 times the number of participants applies.)

	Daily rate	Total information penalty
Days 1–90 .....	\$25	\$2,250 (\$25 x 90 days).
Days 91–306 .....	\$50	\$10,800 (\$50 x 216 days).
Total for all days (uncapped) .....		\$13,050 (\$2,250 + \$10,800).
Total capped information penalty .....		\$11,200 (\$100 x 112 participants).

(ii) *Small plan rule.* If your plan has 15 participants, and you file 100 days after the last day on which you could have made an information-penalty-free filing, the total information penalty should ordinarily be \$525, as shown in the following table. (Note that in this example, the total information penalty is less than the cap of \$100 times the number of participants, i.e., \$1,500 (\$100 x 15).)

	Daily rate	Total information penalty
Days 1–90 .....	\$5 (minimum daily information penalty, since 15/100 x \$25 = \$3.75).	\$450 (\$5 x 90 days).
Days 91–100 .....	\$7.50 (15/100 x \$50) .....	\$75 (\$7.50 x 10 days).
Total for all days .....		\$525 (\$450 + \$75).



### Section 23 *What Aggravating Factors Does the PBGC Consider?*

The aggravating factors that we consider are the following. (We do not consider the absence of mitigating factors to be an aggravating factor.)

(a) *Harmfulness.* Failure to provide section 4071 information on time where the failure is—or has the potential of being—particularly harmful to participants or the PBGC is an aggravating factor. (This may be true even though, by the time we receive the information, any possible harm has been avoided.) Harmfulness may depend on the importance, time-sensitivity, and quantity of section 4071 information you fail to provide on time and on the size of your plan.

(b) *Pattern or practice.* A pattern or practice of failure to provide section 4071 information is an aggravating factor.

(c) *Willfulness.* Willful failure to comply is an aggravating factor.

### Section 24 *What Mitigating Factors Does the PBGC Consider?*

(a) The mitigating factors that we consider are the following (We do not consider the absence of aggravating factors to be a mitigating factor.):

(1) *First-time requirement.* It is a mitigating factor if your failure to provide section 4071 information is a violation of a requirement that applies to you for the first time.

(2) *Self-correction.* It is a mitigating factor if you—

(i) Correct your failure to provide section 4071 information promptly after you discover the failure, and

(ii) Notify us on your own initiative of your failure to provide the section 4071 information before we notify you that you have or may have failed to provide the section 4071 information.

(3) *Corrective action.* It is a mitigating factor if you cooperate with us by taking appropriate corrective action and establishing procedures designed to ensure future compliance.

(b) *Example.* A mid-size company with a pension plan covering 750 participants mistakenly made a quarterly contribution that was too low. The company did not immediately realize that the contribution was too low and did not make a reportable event report to the PBGC. As soon as the company discovered its error, it made a corrective contribution, telephoned the PBGC to alert us to the problem, and promptly filed the required reportable event notice. The company had never before failed to make all required contributions, and both the plan and the company were financially healthy. At the PBGC's request, the plan administrator put in place new procedures to avoid future reporting failures. Under the circumstances, the PBGC might assess no information penalty or might assess an information penalty of less than the amount that would be called for under § 22.

### Section 25 *What if Multiple Persons Must Give a Notice?*

If each of two or more persons is responsible for providing substantially identical section 4071 information to us or to another person or persons, and the

information is not provided as required, we may—

(a) Assess an information penalty against any one or more of the persons without regard to whether we assess an information penalty against any other of the persons; and

(b) Determine the amount of information penalty assessed against any person without regard to the amount assessed against any other person.

### Section 26 *What if Multiple Persons Must Get a Notice?*

In general, if you have to give substantially identical notices to multiple persons, we generally assess only a single information penalty for failure to provide the notices as required, regardless of how many persons did not receive a notice as required. However:

(a) The number of persons you did not provide notice to as required may affect the amount of daily information penalty we assess. For example, if you are a plan administrator and you fail to give a Participant Notice under Part 4011 of this chapter as required, we generally assess only one information penalty. But if your plan is quite large, the information penalty we assess is likely to be greater than if the plan were small.

(b) If there are aggravating factors, we may, in addition to assessing a higher information penalty under § 22(b), assess a separate information penalty for each person to whom you failed to give a notice.

### Section 27 *What if a Single Event or Circumstance Leads to Multiple Failures to Provide Section 4071 Information?*

If there are multiple failures to provide section 4071 information relating to a single event or circumstance, we generally assess a separate information penalty for each failure. For example, suppose you are a contributing sponsor of a plan and you fail to make several required contributions to the plan because of a single failure to determine that contributions are necessary for the year. The failure to notify us of each missed contribution is a separate failure for which we generally assess a separate information penalty.

### Section 28 *What Special Guidance is There for Specific Types of Cases?*

The following is special guidance for applying the general assessment principles in specific types of cases:

(a) *Premium information requirements.* If you file a complete, correct premium form (Form 1, Schedule A, Form 1-ES) late, with the full premium payment, we do not assess an information penalty except in unusual cases. The premium penalty for late payment is usually an adequate penalty.

(b) *Plan termination information requirements.* If you fail to file or issue a notice required for a plan termination under Part 4041 of this chapter on time, and we issue a notice of noncompliance nullifying the termination, we do not also assess an information penalty for your failure to file or issue the required notice on time.

(c) *Reportable event post-event notice requirements.* If we assess an information penalty for a failure by a large plan or employer to file a notice of a reportable event

under ERISA section 4043, other than an advance notice under ERISA section 4043(b) (which is discussed in paragraph (d) of this section), the amount or rate may be much higher than the basic amount or rate that would be determined under § 22(e) of this Appendix. Such failures usually are—or have the potential of being—particularly harmful to participants or the PBGC if they involve large plans or employers. For example, if you do not give us a required notice of a controlled group member's bankruptcy filing, the controlled group member's assets may be distributed to other creditors before we can file our claims for plan underfunding, and we may therefore be unable to recover on our claims or otherwise participate in the bankruptcy proceedings.

(d) *Reportable event advance notice requirements.* We virtually always assess an information penalty if you fail to file an advance notice of a reportable event under ERISA section 4043(b), and we generally assess the full \$1,100-per-day information penalty. This information is generally so time-sensitive and significant that the maximum information penalty is warranted in virtually every case, without regard to whether there are aggravating circumstances in the particular case, because of the need for strong deterrence of violations of this kind.

(e) *Missed contribution notice requirements.* We virtually always assess an information penalty if you fail to file a missed contribution notice (Form 200) under ERISA section 302(f)(4), and we generally assess the full \$1,100-per-day information penalty. This information is very time-sensitive because it is the basis for filing a lien under section 302(f) for the protection of the plan. Thus, the maximum information penalty is warranted in virtually every case, without regard to whether there are aggravating circumstances in the particular case, because of the need for strong deterrence of violations of this kind. The fact that the contribution is ultimately made does not undo the potential for harm that exists while the contribution is outstanding. However, we may reduce the information penalty rate for any period during which the notice remains unfiled after the missed contribution is made—for example, from \$1,100 per day to \$100 per day.

(f) *Employer reporting requirements.* We virtually always assess an information penalty if you fail to file a financial and actuarial information report under ERISA section 4010, covering plans with very high underfunding, and we generally assess the full \$1,100-per-day information penalty. Failures to file financial and actuarial information reports generally are—or have the potential of being—so harmful to participants or the PBGC that the maximum information penalty is warranted in virtually every case, without regard to whether there are aggravating circumstances in the particular case, because of the need for strong deterrence of violations of this kind.

### Waiver Standards

#### Section 31 *What are the Standards for Waiving an Information Penalty?*

(a) *Facts and circumstances.* In deciding whether to waive an information penalty in

whole or in part, we consider the facts and circumstances of each case.

(b) *Waivers.* (1) *Provisions of law.* We waive all or part of an information penalty if a statute or regulation requires that we do so. For example, § 4041.29(b) of this chapter provides that we do not assess an information penalty for a late post-distribution certification except to the extent that you file it more than 90 days after the distribution deadline under § 4041.28(a) of this chapter; and 4050.6(b)(2) of this chapter contains a similar provision for the late filing of information and certifications regarding missing participants in a terminating plan.

(2) *Reasonable cause.* We waive an information penalty if you show reasonable cause for a failure to provide section 4071 information on time. See §§ 32 through 35 for guidelines on “reasonable cause” waivers. If there is reasonable cause for only part of a failure to provide section 4071 information, we waive the information penalty only for that part. In determining whether “reasonable cause” exists, we do not consider either —

(i) The likelihood or cost of collecting the information penalty, or

(ii) The costs and risks of enforcing the information penalty by litigation.

(3) *Erroneous legal interpretations.* We may waive all or part of an information penalty if the failure to provide section 4071 information on time that gives rise to the information penalty is based on your reliance on an erroneous interpretation of the law.

(i) *If you disclose the interpretation to us.* If a failure to provide section 4071 information on time results from your reliance on an erroneous interpretation of the law, we will waive an information penalty that arises from the failure if you promptly and adequately call our attention to the interpretation and the relevant facts, and the erroneous interpretation is not frivolous. If the interpretation affects a filing that you make with us, you should call our attention to the interpretation with the filing. If you rely on the interpretation to justify not making a filing with us, you should call our attention to the interpretation in a notice submitted to us by the time and in the manner prescribed for the filing not made. If the interpretation affects information that you provide to persons other than us, you should call our attention to the interpretation when you provide the information by sending us a notice addressed to Technical Assistance Branch, Insurance Operations Department, PBGC, 1200 K Street, NW., Washington, DC 20005–4026. If you rely on the interpretation to justify not providing information to persons other than us, you should call our attention to the interpretation by sending a notice to the above address by the time prescribed for providing the information that is not provided.

(ii) *If you do not disclose the interpretation to us.* If a failure to provide section 4071 information on time results from your reliance on an erroneous interpretation of the law, and you do not promptly and adequately call our attention to the interpretation and the relevant facts, we may waive an information penalty that arises from the failure if the weight of authority supporting

the interpretation is substantial in relation to the weight of opposing authority and it is reasonable for you to rely on the interpretation.

(4) *Pendency of review.* If you request review of an information penalty (as described in § 14 of this Appendix), and you make a non-frivolous argument that you were not required to provide the section 4071 information or that you were (and still are) unable to provide it, we waive the portion of the information penalty that accrues during the review process. (If you make a non-frivolous argument that you were not required (or were unable) to provide a portion of the section 4071 information, we apply this rule to that portion.) The waiver also applies to the post-review period (the period after we complete our review) if you pay the information penalty within 30 days after the date of our decision and provide the section 4071 information by the time specified in the notice of our decision, which is normally also 30 days after the date of the decision, but may be less depending on the importance of the information. Otherwise, the waiver does not apply to the period from the date of our decision until you provide the section 4071 information.

(5) *Other circumstances.* We may waive all or part of an information penalty in other circumstances if we determine that it is appropriate to do so. We intend to exercise this waiver authority only in narrow circumstances, primarily if we determine that assessing an information penalty, or assessing the full amount of information penalty that might otherwise be appropriate under the guidelines in this appendix, would be inconsistent with the purposes of Title IV of ERISA. For example, we may waive all or part of an information penalty if the law changes shortly before the date when section 4071 information must be provided and the information you provide by that date would have been correct under the law as in effect before the change. In determining whether and to what extent to grant a waiver in a case of this kind, we consider such factors as the length of time between the change in the law and the date by which the section 4071 information must be provided, the nature and timing of any publicity given to the change in the law, the complexity of the legal issues, and your general familiarity with those issues.

(c) *Action or inaction of outside parties.* If an accountant, actuary, lawyer, pension consultant, or other individual or firm that is not part of your organization assists you in complying with PBGC requirements, we apply our waiver authority as if the outside individual or firm were part of your organization, as described in § 32(c) of this Appendix.

#### Section 32 What Is “Reasonable Cause”?

(a) *General rule.* In general, there is “reasonable cause” for a failure to provide section 4071 information on time to the extent that—

(1) The failure arises from circumstances beyond your control, and

(2) You could not avoid the failure by the exercise of ordinary business care and prudence.

(b) *Overlooking legal requirements.* Overlooking legal requirements does not constitute reasonable cause.

(c) *Action or inaction of outside parties.* In some cases an accountant, actuary, lawyer, pension consultant, or other individual or firm that is not part of your organization may assist you in complying with PBGC requirements. If the outside individual’s or firm’s action, inaction, or advice causes or contributes to a failure to provide section 4071 information on time, our analysis is generally the same as if the outside individual or firm were part of your organization. (In the case of an outside individual who is part of a firm, we generally consider both the individual and the firm to be part of your organization.) Thus, if a failure to provide section 4071 information on time arises from circumstances within the control of the outside individual or firm, or could be avoided by the exercise of ordinary business care and prudence by the outside individual or firm, there is generally no reasonable cause for the failure. The fact that you exercised care and prudence in selecting and monitoring the outside individual or firm is not a basis for a reasonable cause waiver. (However, you may have recourse against the outside individual or firm.)

(d) *Size of organization.* If an organization or one or more of its employees is responsible for taking action, the size of the organization may affect what ordinary business care and prudence would require. For example, ordinary business care and prudence would typically require a larger organization to establish more comprehensive backup procedures than a smaller organization for dealing with situations such as computer failure, the loss of important records, and the inability of an individual to carry out assigned responsibilities. Thus, there may be reasonable cause for a small organization’s failure to provide section 4071 information on time even though, if the organization were larger, the exercise of ordinary business care and prudence would have avoided the failure.

(e) *Potential seriousness of failure to provide section 4071 information on time.* In general, the more potentially serious or harmful a failure to provide section 4071 information on time would be, the more care and prudence you should use to make sure that you provide it on time. Thus, there may be reasonable cause for a minor failure even though, under the same circumstances, we would conclude that a more serious failure could have been avoided by the exercise of ordinary business care and prudence.

#### Section 33 What Kinds of Facts Does the PBGC Consider in Determining Whether There is Reasonable Cause for a Failure to Provide Section 4071 Information?

In determining whether a failure to provide section 4071 information on time arose from circumstances beyond your control and whether you could have avoided the failure by the exercise of ordinary business care and prudence—and thus whether waiver of an information penalty for reasonable cause is appropriate—we consider facts such as the following:

(a) What event or circumstance caused the failure and when the event happened or the circumstance arose. The dates you give should clearly correspond with the failure upon which the information penalty is based.

(b) How that event or circumstance kept you from providing the section 4071 information on time. The explanation you give should relate directly to the failure to provide section 4071 information that is the subject of the information penalty.

(c) Whether the event or circumstance was beyond your control.

(d) Whether you could have anticipated the event or circumstance.

(e) How you responded to the event or circumstance, including what steps you took (and how quickly you took them) to provide the section 4071 information and how you conducted other business affairs. Knowing how you responded to the event or circumstance may help us determine what degree of business care and prudence you were capable of exercising during that period and thus whether the failure to provide section 4071 information could or could not have been avoided by the exercise of ordinary business care and prudence.

#### Section 34 What Are Some Situations That Might Justify a "Reasonable Cause" Waiver?

The following examples illustrate some of the reasons often given for failures to provide section 4071 information for which we may assess penalties. The situation described in each example may constitute reasonable cause, and each example lists factors we consider in determining whether we should grant an information penalty waiver for reasonable cause in a case of that kind.

(a) *An individual with responsibility for taking action was suddenly and unexpectedly absent or unable to act.* We consider such factors as the following: the nature of the event that caused the individual's absence or inability to act (for example, the resignation of the individual or the death or serious illness of the individual or a member of the individual's immediate family); the size of the organization and what kind of backup procedures it had to cope with such events; how close the event was to the deadline that was missed; how abrupt and unanticipated the event was; how the individual's absence or inability to act prevented compliance; how expensive it would have been to comply without the absent individual; whether and how other business operations and obligations were affected; how quickly and prudently a replacement for the absent individual was selected or other arrangements for compliance were made; and how quickly a replacement for the absent individual took appropriate action.

(b) *A fire or other casualty or natural disaster destroyed relevant records or prevented compliance in some other way.* We consider such factors as the following: the nature of the event; how close the event was to the deadline that was missed; how the event caused the failure to provide section 4071 information; whether other efforts were made to get needed information; how expensive it would have been to comply; and how you responded to the event.

(c) *You reasonably relied on erroneous oral or written advice given by a PBGC employee.*

We consider such factors as the following: whether there was a clear relationship between your situation and the advice sought; whether you provided the PBGC employee with adequate and accurate information; and whether the surrounding circumstances should have led you to question the correctness of the advice or information provided.

(d) *You were unable to obtain information (including records and calculations) needed to comply.* We consider such factors as the following: what information was needed; why the information was unavailable; when and how you discovered that the information was not available; what attempts you made to get the information or reconstruct it through other means; and how much it would have cost to comply.

#### Section 35 What Is a Situation That Might Justify a Partial "Reasonable Cause" Waiver?

Assume that a fire destroyed the records needed for a required filing of section 4071 information. If in the exercise of ordinary business care and prudence it should take you one month to reconstruct the records and prepare the filing, but the filing was made two months late, it might be appropriate to waive that part of the information penalty attributable to the first month the filing was late, but not the part attributable to the second month.

Issued in Washington, D.C., this 5th day of January, 2001.

**David M. Strauss,**

*Executive Director, Pension Benefit Guaranty Corporation.*

[FR Doc. 01-686 Filed 1-11-01; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 948

[WV-089-FOR]

#### West Virginia Regulatory Program

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

**ACTION:** Proposed rule; public comment period and opportunity for public hearing.

**SUMMARY:** OSM is announcing receipt of a proposed amendment to the West Virginia regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The program amendment consists of a written response to letters sent to the State by OSM, in accordance with the Federal regulations at 30 CFR 732.17(d), which identify changes to SMCRA and the Federal regulations that require the

State program to be amended. The amendment submitted by the State is intended to render the West Virginia program no less effective than the Federal requirements.

**DATES:** If you submit written comments, they must be received on or before 4:00 p.m. (local time), on February 12, 2001. If requested, a public hearing on the proposed amendments will be held at 1:00 p.m. (local time), on February 6, 2001. Requests to speak at the hearing must be received by 4:00 p.m. (local time), on January 29, 2001.

**ADDRESSES:** Mail or hand-deliver your written comments and requests to speak at the hearing to Mr. Roger W. Calhoun, Director, Charleston Field Office at the address listed below.

You may review copies of the West Virginia program, the proposed amendment, a listing of any scheduled hearings, and all written comments received in response to this document at the addresses below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the proposed amendment by contacting OSM's Charleston Field Office.

Mr. Roger W. Calhoun, Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street, East, Charleston, West Virginia 25301, Telephone: (304) 347-7158. E-mail: [chfo@osmre.gov](mailto:chfo@osmre.gov).

West Virginia Division of Environmental Protection, 10 McJunkin Road, Nitro, West Virginia 25143, Telephone: (304) 759-0515. The proposed amendment will be posted at the Division's Internet page: <http://www.dep.state.wv.us>.

In addition, you may review copies of the proposed amendment during regular business hours at the following locations:

Office of Surface Mining Reclamation and Enforcement, Morgantown Area Office, 75 High Street, Room 229, P.O. Box 886, Morgantown, West Virginia 26507, Telephone: (304) 291-4004.

Office of Surface Mining Reclamation and Enforcement, Beckley Area Office, 323 Harper Park Drive, Suite 3, Beckley, West Virginia 25801, Telephone: (304) 255-5265.

**FOR FURTHER INFORMATION CONTACT:** Mr. Roger W. Calhoun, Director, Charleston Field Office; Telephone: (304) 347-7158.

#### SUPPLEMENTARY INFORMATION:

#### I. Background on the West Virginia Program

On January 21, 1981, the Secretary of the Interior conditionally approved the