

# United States Department of Labor

## Employee Benefits Security Administration

### Civil Penalties

#### 1. 502(i) Civil Penalty

- 3. Statutory Authority.** Section 502(i) of ERISA authorizes the Secretary to assess a civil penalty against a party in interest who engages in a transaction prohibited by section 406 of ERISA with respect to either an employee welfare benefit plan or a non-qualified pension plan.<sup>(1)</sup> The civil penalty at ERISA section 502(i) is intended to complement, in the arena of welfare and non-qualified plans, the excise tax imposed on tax-qualified pension plans by section 4975(a) of the Internal Revenue Code.
- The Department's regulation, at 29 CFR §2570, specifies the procedures to be followed for the assessment of a two-tiered 502(i) civil penalty and the circumstances under which EBSA's findings and assessment may be contested. The first tier of the penalty may not exceed five percent of the "amount involved." The second tier of the penalty, which is not more than 100 percent of the amount involved, applies only if the prohibited transaction is not corrected within 90 days after a final agency order.
- The sanctions under ERISA section 502(i) are designed to achieve correction of the prohibited transaction; therefore, the assessment of the civil penalty under section 502(i) adds a valuable tool for the implementation of EBSA's enforcement program. Because the assessment of the civil penalty under section 502(i) is discretionary, the RO should consider the assessment of the 502(i) civil penalty as one of several enforcement options.
- 3. Notice.** EBSA must notify a party in interest who has engaged in a transaction for which a 502(i) civil penalty is assessed of its intention to assess the 502(i) penalty. Because OE issues all 502(i) assessments, the RD may wish to discuss situations involving potential 502(i) assessments with OE before a VC notice letter is issued. When a VC notice letter is issued, the letter should include language preserving the Department's ability to assess the [Chapter 34](#), paragraph 8.
- 3. Request for a 502(i) Assessment.** All requests for the assessment of a 502(i) civil penalty should be sent to OE/DFO for processing. DFO will review the request and, if appropriate, prepare the notice of assessment of the 502(i) civil penalty. See [\(Figure 1\)](#) for an example of a notice of assessment. The RO should include documentation sufficient to substantiate the violations alleged in its transmittal to OE. Specifically, the RO should forward a copy of the VC notice letter, if issued, and other correspondence, including any responses to the VC notice letter, the ROI, and exhibits to support a finding of the prohibited transactions along with an accurate calculation of the civil penalty.
- 1. First Level 502(i) Penalty.** The first level penalty under section 502(i) is five percent of the amount involved which, in general, means the greater of the amount of money and the fair market value of property given or the greater of the amount of money and the fair market value of property received as of the date the prohibited transaction occurred.
- 1. Amount Involved.** When determining the amount involved, it is important to distinguish between situations which involve the prohibited transfer of ownership (generally, a sale or transfer of property) and the prohibited use of property (generally, the lease or loan of property). In those situations where ownership rights are transferred, the penalty is based on the greater of the fair market value of the property or the actual amount of money that changes hands. For situations involving the use of property or money, such as a lease or a loan, the Department has adopted IRS principles which provide that, when the use of property or money is at issue, the amount involved shall be the greater of the amount paid for such use or the fair market value of such use for the period for which the money or property is used. For example, in the situation of a prohibited loan, the amount involved will be the greater of the interest actually paid or the fair market interest for such loan. In the instance of a lease transaction, the amount involved will be the greater of the rent actually paid or the fair market rental value.
- In those situations involving compensation to a party in interest for services provided, the amount involved will be limited to any excess compensation paid.
- 2. Discrete and Continuing Transactions.** When calculating the civil penalty, a distinction must be made between discrete and continuing prohibited transactions.
- 1. Discrete Transactions.** In the case of discrete transactions, such as sales of property, the first level of the civil penalty is assessed simply as five percent of the amount involved for each taxable year or portion thereof until the prohibited transaction is corrected or the penalty is assessed.<sup>(2)</sup> The penalty on discrete transactions is calculated on an annual basis and is not prorated for a portion of the year; therefore, when a transaction is entered into in the middle of one year and/or the correction is achieved in the middle of a subsequent year, the amount of the penalty is the full amount for each of the two years.
- 2. Continuing Transactions.** In the case of a continuing prohibited transaction, such as a lease or a loan, a new transaction is deemed to occur on the first day of each year or portion thereof in which the transaction continues. Such characterization of continuing transactions gives rise to the assessment of an additional sanction for each year the transaction remains uncorrected.
- In continuing violations, the amount involved in the transaction is prorated for the actual period the use takes place. In addition, where there is an uncorrected completed lease or loan, the amount involved is cumulative for each taxable year until correction or assessment of the penalty. The penalty on a continuing transaction is calculated on an annual basis, but is prorated for a portion of any year involved.
- 3. Second Level 502(i) Penalty.** The second tier of the 502(i) civil penalty (100 percent of the amount involved) may be assessed in addition to the first level penalty if the prohibited transaction is not corrected within 90 days after a final agency order is issued with respect to such transaction.<sup>(3)</sup>
- The "amount involved" in the transaction, for purposes of the second level of the 502(i) penalty, is the highest fair market value during the correction period. In general, the correction period begins on the date the prohibited transaction occurs and ends 90 days after a final agency order.
- f. 502(i) Appeals.** Upon receipt of a notice of assessment, a party in interest who elects to contest EBSA's findings and assessment may request a hearing before an administrative law judge (ALJ). In general, the party in interest may file an answer and request for a hearing with the ALJ within 30 days of service of process. The failure to file a timely answer will be deemed to be a waiver of the right to appeal as well as an admission of the facts alleged.

Unless otherwise waived, the party in interest may file an appeal to the Secretary within 20 days of the issuance of the ALJ's final decision. Upon such appeal, the Secretary may affirm, modify, or set aside, in whole or in part, the decision on appeal. The Secretary's review is not a **de novo** proceeding, but rather a review of the record established before the ALJ.

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## 2. 502(l) Civil Penalty

- a. **Statutory Authority.** ERISA was amended effective December 19, 1989, to provide for a mandatory civil penalty under ERISA section 502(l). In general, this section requires the Secretary to assess a civil penalty 1) against a fiduciary who breaches a fiduciary responsibility under, or commits a violation of, part 4 of Title I of ERISA or 2) against any other person who knowingly participates in such breach or violation. The penalty under section 502(l) is equal to 20 percent of the "applicable recovery amount" paid pursuant to any settlement agreement with the Secretary or ordered by a court to be paid in a judicial proceeding instituted by the Secretary.
- The Department's interim regulation, at 29 CFR § 2570.8 *et seq.*, specifies the procedures under which a penalty will be assessed, when an assessed penalty must be paid, and the circumstances under which the Secretary may waive or reduce a penalty. The same regulation, at 29 CFR § 2570.82(e) defines Secretary to include, pursuant to any delegation of authority by the Secretary, the Assistant Secretary for Employee Benefits Security Administration, Regional Directors for Employee Benefits Security Administration, or Deputy Regional Directors for Employee Benefits Security Administration.
- b. **Notice of Assessment.** Subsequent to the payment of the applicable recovery amount pursuant to either a settlement agreement (See [Chapter 34](#), paragraph 11) or a court order, the RO shall serve on the person liable for making such payment a notice of assessment (Notice) of a civil penalty equal to 20 percent of the applicable recovery amount. When the RO achieves the voluntary compliance settlement agreement, the civil penalty will be assessed by the RD as described in Chapter 34. When the correction is effected as a result of an order by a court in a judicial proceeding instituted by the Secretary, the order may include language assessing the 502(l) penalty. If not, or if the payment is not to be made immediately (i.e., either a deferred payment or a schedule of payments), the penalty will be assessed by the RD at the conclusion of the legal action ([Figure 2](#)).
- The Notice shall be any document, which contains a specified assessment in monetary terms of a civil penalty under 502(l). The Notice will contain a brief factual description of the violation for which the assessment is being made, the identity of the person being assessed, the amount of the assessment, and the basis for assessing that particular person that particular penalty amount.
- c. **Service of the 502(l) Assessment Letter.** Service of the 502(l) assessment letter will be made by delivering a copy to the person being assessed, by leaving a copy at the principal office, place of business, or residence of such person, or by mailing a copy to the last known address of such person.<sup>(4)</sup> Service by certified mail is completed upon mailing the notice; service by regular mail is completed upon receipt by the addressee.
- d. **Assessment of the Penalty.** The 502(l) penalty is calculated as a percentage of the amount paid to the plan or to a participant or beneficiary which represents losses incurred by the plan, disgorged profits, and amounts necessary to achieve correction of the ERISA violation. If correction is achieved without actual payment to the plan or to a participant or beneficiary, no penalty may be assessed. An example of such action might involve a fiduciary taking administrative action to prevent future violations.
- In assessing the civil penalty, it is important to remember that the penalty may be assessed only against fiduciaries and knowing participants in a breach or violation of part 4 of Title I of ERISA. Moreover, under the interim procedural regulation at 29 CFR §2570.83(a), the civil penalty may be assessed only against the person who is required by the terms of the judgment or the settlement agreement to pay the applicable recovery amount. For example, if only one of a group of fiduciaries agrees to restore losses to a plan pursuant to a settlement agreement, the civil penalty may be assessed only against that fiduciary.
- Additionally, in certain circumstances, the penalty may be assessed against fiduciaries or knowing participants when the restitution to the plan is made on their behalf by a third party. Specifically, the penalty may be assessed when such third party has no independent obligation under ERISA to correct the violation(s).
- e. **Payment of the 502(l) Penalty.** The party who has been assessed a 502(l) civil penalty has 60 days in which to pay the assessed penalty, unless the party submits a petition for waiver or reduction during the 60-day payment period. If the party does not pay the 502(l) civil penalty within the 60-day payment period, responsibility for the collection of the overdue penalty rests with OPPEM. At any time prior to the expiration of the 60-day payment period, the party may submit a written request for a conference with the Secretary to discuss the calculation of the assessed penalty. This request for a conference does not toll the 60-day period.
- At the end of the 60-day payment period, if no petition for waiver or reduction has been submitted, the RO should send a copy of the assessment letter to OPPEM with a formal memorandum requesting that debt collection procedures be implemented. A copy of the memorandum should also be sent to OE/DFO.
- f. **Petitions for Waiver or Reduction.** At any time prior to the expiration of the 60-day payment period, the party (petitioner) may petition the Secretary to waive or reduce the assessed penalty on the basis that (1) the petitioner will not be able to restore all losses to the plan or any participant or beneficiary of such plan without severe financial hardship unless such waiver or reduction is granted, and/or (2) the petitioner acted in good faith in engaging in the breach or violation. When a petition is submitted either prior to or during the 60-day payment period, the payment period will be tolled pending DOL consideration of the petition. The petitioner is entitled to a conference with the Secretary regarding each petition for waiver or the reduction of the civil penalty.
- The petition for waiver or reduction of the penalty is to be submitted to the RD. If the petition is based in whole on financial hardship, a written determination of whether to reduce or waive the penalty on this basis will be made by the RD within 60 days of receipt.
- If the petition is based in part on financial hardship and in part on good faith, the RD will make a written determination of whether to reduce or waive the penalty only on the basis of financial hardship within 60 days of receipt. Should the petitioner remain liable for any portion of the penalty after the RD's written determination, the RD will immediately forward the petition to OED, and a copy to OE, for a determination of whether to reduce or waive the remaining portion of the penalty based on good faith.
- g. If the petition is based in whole on good faith, the RD will immediately forward the petition to OED, with a copy to OE, for a determination of whether to reduce or waive the penalty based on good faith.
- h. **Offsets against other penalties.** The interim regulation at 29 CFR §2570.86 provides that the 502(l) civil penalty assessed on a fiduciary or other person with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under ERISA section 502(i) or section 4975 of the Internal Revenue Code of 1986. The person on whom the penalty was assessed must provide proof that the offsetting penalty was paid before the Department will reduce the 502(l) civil penalty.
- The entire IRS excise tax imposed on a person with respect to a transaction may offset the section 502(l) civil penalty imposed against the same transaction. The offset may include any part of the Internal Revenue Code section 4975 tax representing taxable years before the effective date of ERISA section 502(l) and any portion of the tax that represents pyramiding. The interest accrued on an excise tax assessment is not allowable as an offset to the section 502(l) penalty. The same reasoning applies in any instance when the Department has assessed an ERISA section 502(i) civil penalty against the same person for the same transaction.
- Section 502(l)(4) permits only the identical parties on whom the IRS has imposed an excise tax to offset the excise tax against the 502(l) penalty.
- i. **Compromise of 502(l) Penalty.** Pursuant to PWBA Order 4-01<sup>(5)</sup> Regional Directors were delegated authority and responsibility with respect to compromise of 502(l) penalties. The standards for compromising a 502(l) penalty are set forth in 31 CFR Part 902 (Federal Claims Collection Standards -Standards for the

Compromise of Claims). The RD may compromise a penalty only when: (1) the case was referred to SOL for litigation; (2) the compromise is based on SOL's written recommendation; and, (3) the penalty has not become a Final Agency Order. If the RD disagrees with SOL's recommendation, the RD must obtain approval from the NO, through OE.

If the Notice of Assessment has become a Final Agency Order, the RD must obtain approval of the compromise from the NO, through OE and OPPEM.

- j. **Write-off of 502(l) Debt.** EBSA may consider a debt write-off after a 502(l) penalty assessment has become a Final Agency Order, and thus a collectable debt to the government. The authority to write-off a debt has not been delegated; only the Deputy Assistant Secretary for Program Operations may write-off a 502(l) penalty debt. Any request for debt write-off will be referred to the RD for a recommendation on whether to reduce the penalty in whole or in part. The RD should ask SOL for a written analysis and recommendation. The RD should then forward all analyses and recommendations for handling the write-off to OE. After consultation with the RD and OPPEM, OE will prepare a proposed recommendation regarding the penalty write-off to DASPO.

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### 3. 502(c)(2) Civil Penalty

- a. **Statutory Authority.** ERISA section 502(c)(2) authorizes the Secretary to assess a civil penalty against any plan administrator who fails or refuses to file an annual report required under section 101(b)(1) of ERISA.<sup>(6)</sup> Section 502(c)(2) also provides that an annual report that has been rejected under section 104(a)(4) for failure to provide material information shall be treated as not filed with the Secretary.<sup>(7)</sup>

The Department's regulation, at 29 CFR § 2570.60 *et seq.*, specifies the procedures under which a penalty will be assessed, when an assessed penalty must be paid, and the procedures for requesting an administrative hearing. The same regulation, at 29 CFR 2570.61(p), defines Secretary to include, pursuant to any delegation of authority by the Secretary, any assistant secretary, including the Assistant Secretary for Pension and Welfare Benefits Administration,<sup>(8)</sup> administrator, commissioner, appellate body, board, or other official.

- b. **Implementing Procedure.** The Office of the Chief Accountant (OCA) will institute penalties assessed under section 502(c)(2).
- c. **Voluntary Compliance When a Reporting Violation is Discovered.** In those cases in which the RD decides to resolve an open investigation by means of a VC notice letter rather than a referral for litigation, the deficient report violation should be included in the VC notice letter. If the plan fails to correct the deficient report violation as requested in the VC notice letter and there are no other unresolved issues involved in the case which mandate a referral for civil litigation, or in situations where there are unresolved issues but a decision has been made not to pursue the case, the deficient reporting issue should be referred to OCA. The RD should issue a closing letter notifying the Plan Administrator of the action being taken (See Chapter 34, [Figure 10](#), [Figure 11](#), and [Figure 12](#)). OCA will make the final determination whether to institute further procedures to assess the civil penalty authorized in ERISA section 502(c)(2).
- d. **Referrals for Litigation.** When, during a Program 48 investigation, the RD decides to refer a case to SOL with a recommendation for civil litigation, the deficient report violation should be included in the Action ROI. The transmittal memorandum, or a separate memorandum if necessary, should also be forwarded to OCA so that the assessment of the civil penalty can be coordinated with OCA and SOL. The transmittal memo, which is copied to OE as described in [Chapter 48](#), Item 22, should discuss the referral to OCA.
- e. **Concurrent Actions.** When the RO wishes to open a case on a plan that is already under investigation by OCA, the RO should coordinate the investigation with OCA. Similarly, OCA will coordinate with the appropriate RO if OCA wishes to open a case on a plan under investigation by the RO.

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### 4. 502(c)(7) Civil Penalty

- a. **Statutory Authority.** ERISA section 502(c)(7) authorizes the Secretary to assess a civil penalty against a plan administrator of an individual account plan who fails or refuses to provide notice to affected participants and beneficiaries in accordance with ERISA section 101(i). The Department's regulations at 29 CFR § 2560.502c-7 define a "failure or refusal to provide a notice" as a failure or refusal, in whole or in part, to provide notice of the blackout period to an affected plan participant or beneficiary at the time and in the manner prescribed by section 101(i) of ERISA. Pursuant to section 502(c)(7) of ERISA, a failure or refusal to provide a notice of blackout period with respect to any single participant or beneficiary shall be treated as a separate violation. The Department's regulation at 29 CFR § 2570.130 *et seq.*, specifies the procedures under which a penalty will be assessed, when an assessed penalty must be paid, and the procedures for requesting an administrative hearing. The same regulation, at 29 CFR § 2570.131(p), defines Secretary to include, pursuant to any delegation of authority by the Secretary, any assistant secretary, including the Assistant Secretary for Employee Benefits Security Administration, administrator, commissioner, appellate body, board, or other official.
- b. **Implementing Procedure.** The Office of the Chief Accountant (OCA) will institute penalties assessed under section 502(c)(7).
- c. **Voluntary Compliance When a Blackout Notice Violation is Discovered.** The Office of the Chief Accountant, and not the field offices, will make the determination as to whether there is a violation of ERISA section 101(i). Therefore, a blackout notice violation may not be included in the VC notice letter. ([Figure 3](#)) for language to use in the closing letter. OCA will make the final determination whether to institute further procedures to assess the civil penalty authorized in ERISA section 502(c)(7).
- d. **Referral for litigation.** When, during a Program 48 investigation, the RD decides to refer a case to SOL with a recommendation for civil litigation, the possible blackout notice violation should be included in the Action ROI under "Other Findings." However, the transmittal memorandum should mention that the Office of the Chief Accountant is responsible for determining whether there is a violation of ERISA section 101(i) and the assessment of the civil penalty should be coordinated with OCA and SOL.
- e. **Concurrent Actions.** When the RO wishes to open a case on a plan that is already under investigation by OCA, the RO should coordinate the investigation with OCA. Similarly, OCA will coordinate with the appropriate RO if OCA wishes to open a case on a plan under investigation by the RO.

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(Figure 1)

Board of Trustees  
Local Union  
1234 Main Street  
Anytown, USA

RE: Notice of Assessment of ERISA Section 502(i) Civil Penalty in the Matter of the Local Union

EBSA Case No. XX-XXXXX

Dear Trustees: The Department of Labor's Employee Benefits Security Administration (EBSA) has responsibility for the administration and enforcement of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Title I establishes standards governing the operations of employee benefit plans such as the Trust Fund (Fund) which was established to train qualified apprentices of the Local Union (Union). EBSA's \_\_\_\_\_ Regional Office has concluded its investigation of the Fund. Based on the facts gathered in this investigation we have concluded that the Union engaged in a transaction with the Fund, which is prohibited by ERISA. As a result of this prohibited conduct, EBSA intends to assess a civil penalty against the Union in the amount of \$17,500, pursuant to section 502(i) of ERISA and the regulations thereunder. On August 24, 1999, the Trustees voted at a special meeting to "donate" \$50,000 to the Union out of the Fund's tuition account. This contribution was contingent upon the Union's increasing its membership dues. On the same date, Check No. 9566, in the amount of \$50,000 was drawn on the Fund's account and paid to the Union. The Union is a party in interest with respect to the Fund under section 3(14)(D) of ERISA, which defines a party in interest to include an employee organization any of whose members are covered by the plan. A fiduciary with respect to an employee benefit plan is prohibited from causing the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect transfer to or use by or for the benefit of, a party in interest, of any assets of the plan (section 406(a)(1)(D)). Accordingly, the transfer of \$50,000 to the Union constitutes a violation of section 406(a)(1)(D). Section 502(i) of ERISA provides, in relevant part, that:

In the case of a transaction prohibited by section 406 by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved . . . ; except that, if the transaction is not corrected . . . within 90 days after notice from the Secretary . . . such penalty may be in an amount not more than 100 percent of the amount involved.<sup>(9)</sup>

Therefore, based on the authority granted the Secretary under section 502(i) of ERISA and the regulations thereunder (see enclosed copy of 29 CFR 2560.502i), EBSA is assessing a civil penalty of \$17,500 against the Union. The penalty is assessed for the period the prohibited transaction is outstanding until corrective action is taken (see 29 CFR 2560.502i-1(c) et seq.). The penalty is computed as shown on the Penalty Computation Sheet enclosed with this letter. You may contest EBSA's findings and the assessment of the civil penalty by filing an Answer with the Chief Docket Clerk, Office of Administrative Law Judges, 800 K Street, N.W., Washington, D.C. 20001-8002. Duplicate filings should also be sent to EBSA and the Office of the Solicitor at the addresses listed below.<sup>(10)</sup> Your Answer should be prepared in accordance with the sample format enclosed with this letter. If you file an Answer with the Office of Administrative Law Judges, that filing will initiate an adjudicatory proceeding in accordance with the regulations at 29 CFR Part 2570. Please note that 29 CFR section 2570.5 provides that if you fail to file an Answer with the Office of Administrative Law Judges within thirty (30) days of your receipt of this letter, such failure will constitute a waiver of your rights to contest this matter before an Administrative Law Judge, or to receive any other agency consideration. Failure to file an Answer will also constitute an admission of the facts alleged. You should be aware that if you fail to correct the transaction within the correction period as described in 29 CFR 2560.502i-1(c) and (d) (generally 90 days after a final agency or judicial order), a second tier penalty of 100 percent of the amount involved will be assessed.<sup>(11)</sup> If you determine not to contest this matter, you should remit a check or money order in the amount of \$17,500 payable to the United States Department of Labor prior to the expiration of the thirty- (30) day period. The payment of this penalty is not tax-deductible. The check or money order should be mailed to the following address:

**U.S. Department of Labor**  
**ERISA Civil Penalty**  
**P.O. Box 71360**  
**Philadelphia, PA 19176-1360**

To ensure correct processing of this payment, please include the EBSA Case Number (listed at the top of this letter) on the front of your check or money order, as well as a copy of this letter. You should also notify me that you have paid the civil penalty so that we may close our case. If you need to send your payment by overnight courier, please contact Soroosh Nikouei at 202-693-8486. In order to discuss correction of the violations and any other related matters, please contact Mr. X in the Office of Enforcement at 202.693.8486. Sincerely, Director of Enforcement Enclosure cc: Chief Docket Clerk  
Office of Administrative Law Judges  
800 K Street, NW  
Washington, DC 20001-8002

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**Office Of Administrative Law Judges**  
**800 K Street, NW**  
**Washington, DC 20001-8002**

U.S. Department Of Labor )  
Employee Benefits Security Administration, )  
Complainant )  
 )  
v. ) Docket No.  
 )  
Local Union )



)  
)

Respondent Respondent's Answer

1. This matter is brought before the Office of Administrative Law Judges pursuant to action 502(i) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132(i), and the regulations issued thereunder.
2. By letter dated \_\_\_\_\_, the Complainant, the U.S. Department of Labor, the Employee Benefits Security Administration served the Respondent, Local Union, a notice of assessment of the civil penalty.
3. The total amount of the civil penalty assessed by the Complainant is \$17,500.
4. Respondent hereby contests the findings of the Complainant and the assessment of the civil penalty as follows:  
I hereby certify that service of the Respondent's Answer was made to the persons listed below by sending a copy by regular mail to the following addressees:

Director of Enforcement  
 Employee Benefits Security Administration  
 U.S. Department of Labor  
 200 Constitution Avenue, NW, Room 600  
 Washington, DC 20210 Counsel for Decentralized and Special Litigation  
 Plan Benefits Security Division  
 Office of the Solicitor  
 ERISA Section 502(i) Proceeding  
 PO Box 1914  
 Washington, DC 20013

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**Penalty Computation Sheet**

1. The amount involved for the year ending December 31, 1999: \$50,000 x .05= 2500
2. The amount involved for the year ending December 31, 2000: \$50,000 x .05= 2500
3. The amount involved for the year ending December 31, 2001: \$50,000 x .05= 2500
4. The amount involved for the year ending December 31, 2002: \$50,000 x .05= 2500
5. The amount involved for the year ending December 31, 2003: \$50,000 x .05= 2500
5. The amount involved for the year ending December 31, 2004: \$50,000 x .05= 2500
7. The amount involved for the year ending December 31, 2005: \$50,000 x .05= 2500

Total Civil Penalty Due \$17,500

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**(Figure 2)**

Certified Mail, Return Receipt Requested Mr. X, Trustee  
 Profit Sharing Plan  
 Main Street  
 Anytown, USA

RE: Notice of Assessment of ERISA Section 502(l) Civil Penalty in the Matter of (the Plan)

EBSA Case No. XX-XXXXX

Dear Mr. X: The Department of Labor (the Department) has responsibility for the enforcement of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Title I establishes standards governing the operation of employee benefit plans such as the Plan (the Plan). This office has concluded its investigation of the Plan and of your activities as Trustee. Based on the facts gathered during that investigation we concluded that, as Trustee, you violated your fiduciary obligations to the Plan and violated several provisions of ERISA. The specific actions taken by you that violated ERISA were detailed in the Complaint filed January 31, 2000 against you and the Board of Directors in Federal District Court (1st Circuit), **Secretary v. \_\_\_\_\_, et al.**, Docket # \_\_\_\_\_ together with a Consent Judgment between the parties entered into by the Court on \_\_\_\_\_, 2000. The terms of the Consent Judgment require that you correct the ERISA violations and restore losses to the plan exclusive of the mandatory section 502(l) civil penalty to be assessed by the Secretary of Labor. Based upon the report of Mr. Y, the court approved independent party, we understand that you have complied with the above requirements. Among other things, you . . . (list corrective actions taken). Since you have taken the Court-ordered corrective action with respect to the specific violations detailed in the Consent Judgment, the Department will take no further action with respect to these matters except the imposition of the civil penalty, as required by ERISA section 502(l), in accordance with the Agreement signed by you on \_\_\_\_\_. We have determined that the applicable recovery amount is \$14,452.06, paid on \_\_\_\_\_, representing the loss to current participants. Therefore, based on the authority granted to the Secretary under section 502(l) of ERISA and the regulations thereunder, EBSA is assessing a civil penalty of \$2,890.41 against you. The payment should be remitted by check or money order in the amount of \$2,890.41 payable to the United States Department of Labor. The payment of this penalty is not tax-deductible. The check should be mailed to the following address:

**U.S. Department of Labor**  
**ERISA Civil Penalty**  
**P.O. Box 71360**  
**Philadelphia, PA 19176-1360**

To ensure correct processing of this payment and final disposition of this case, please include the EBSA Case Number (listed at the top of this letter) on the front of your check, as well as a copy of this letter. You should also provide me with copies of the canceled check and this letter in order to document that you have paid the civil penalty so that we may close our case. If you need to send your payment by overnight courier, please contact Soroosh Nikouei at 202-693-8486. [Please also be advised that pursuant to section 3003(c) of ERISA, the Secretary of Labor is required to transmit to the Secretary of the Treasury information indicating that a prohibited transaction has occurred. Accordingly, this matter will also be referred to the Internal Revenue Service. The penalty assessed under ERISA section 502(i) will be reduced by the amount of any tax imposed with respect to such transaction under section 4975 of the Internal Revenue Code.]<sup>(12)</sup>  
 Sincerely, Regional Director

Enclosures:            Consent Judgment dated by the Court  
                              Agreement dated

bcc:                      OE, OPPEM

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**(Figure 3)**

The Department of Labor (the Department) recently conducted an investigation pursuant to the Employee Retirement Income Security Act of 1974 involving the [Plan], and of [Plan Sponsor and Plan Administrator], as the Plan Sponsor and Plan Administrator, and the [Named Fiduciary], as named fiduciary to the plan. This is to advise you that our investigation is now concluded and, with the exception of possible violations of the blackout period notice requirements of ERISA section 101(i), no further action by the Department is contemplated at this time. [Insert additional closing language as appropriate.] The issuance of the blackout period notice by the [Plan Sponsor] on [Date of Notice], does not appear to comply with the 30-day advance notice requirements of ERISA section 101(i) or the conditions of any of the exceptions in the Department's regulation at 29 C.F.R. § 2520.101-3(b)(2)(ii). ERISA section 502(c)(7) provides that the Department may assess a civil penalty against a plan administrator of up to \$100 a day from the date of the plan administrator's failure or refusal to provide notice to participants or beneficiaries in accordance with ERISA section 101(i), and further provides that each violation with respect to any single participant or beneficiary shall be treated as a separate violation. This matter will be referred to the Department's Office of the Chief Accountant to determine what further action, if any, should be taken under the civil penalty provisions in section 502(c)(7) of ERISA and the Department's regulation at 29 C.F.R. § 2560.502c-7.

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**Footnotes**

1. Accordingly, the 502(i) penalty is only assessed on prohibited transactions and would not, for example, be assessed on acts of imprudence or lack of diversification.
2. The taxable year used for purposes of the civil penalty calculation is that of the party in interest.
3. The Department's regulation, at 29 CFR §2570.2(g), states that "final order" means the final decision or action of the Department concerning the assessment of a civil sanction under ERISA section 502(i) against a particular party. Such final order may result from a decision of an administrative law judge or the Secretary, or the failure of a party to invoke the procedures for hearings or appeals under the regulation.
4. The Department's interim regulation 29 CFR §2570.82(c) defines a person as an individual, partnership, corporation, employee benefit plan, association, exchange or other entity or organization.
5. Dated 4/23/01
5. Section 502(c)(2) actually refers to section 101(b)(4). However, in 1997, Pub. L. 105-34 redesignated pars. (4) and (5) as (1) and (2), respectively, and struck out former pars. (1) to (3).
7. Section 104(a)(4) provides, in relevant part, that the Secretary may reject any filing upon determining that such filing is incomplete.
3. Secretary's Order 01-2003 re-designated the title of Assistant Secretary for Pension and Welfare Benefits as Assistant Secretary for Employee Benefits Security Administration.
9. By Order 1-87, 52 FR 13139 (April 21, 1987), the Secretary has delegated most of her authority under ERISA, including authority to make final decisions to assess the penalty provided under section 502(i), to the Assistant Secretary for Pension and Welfare Benefits. In addition, Secretary's Order 01-2003 re-designated the title of Assistant Secretary for Pension and Welfare Benefits as Assistant Secretary for Employee Benefits Security Administration.
- ]. U.S. Department of Labor, Employee Benefits Security Administration, Office of Enforcement, 200 Constitution Avenue, N.W., Room 600, Washington, D.C. 20210, Attn: ERISA Section 502(i) Proceeding; and Counsel for Decentralized and Special Litigation, Plan Benefits Security Division, Office of the Solicitor, Attn: ERISA Section 502(i) Proceeding, P.O. Box 1914, Washington, D.C. 20013.
1. In cases where corrective action is required, add the following: "Correction will currently require" and then state appropriate corrective action.
2. Include language in brackets when addressee is or represents the disqualified person involved in the prohibited transaction.