

**Subpart A—[Amended]**

■ 2. Add an authority citation to subpart A of part 1631 to read as follows:

Authority: 5 U.S.C. 552.

**Subpart B—[Amended]**

■ 3. Add an authority citation to subpart B of part 1631 to read as follows:

Authority: 5 U.S.C. 552.

■ 4. Add subpart C to subpart 1631 to read as follows:

**Subpart C—Administrative Subpoenas**

Sec.

- 1631.40 Subpoena authority.
- 1631.41 Production of records.
- 1631.42 Service.
- 1631.43 Enforcement.

Authority: 5 U.S.C. 8480.

**Subpart C—Administrative Subpoenas****§ 1631.40 Subpoena authority.**

The Executive Director or General Counsel may issue subpoenas pursuant to 5 U.S.C. 8480. The General Counsel may delegate this authority to a Deputy General Counsel, Associate General Counsel, or Assistant General Counsel.

**§ 1631.41 Production of records.**

A subpoena may require the production of designated books, documents, records, electronically stored information, or tangible materials in the possession or control of the subpoenaed party when the individual signing the subpoena has determined that production is necessary to carry out any of the Agency's functions.

**§ 1631.42 Service.**

(a) *Return of service.* Each subpoena shall be accompanied by a Return of Service certificate stating the date and manner of service and the names of the persons served.

(b) *Methods of service.* Subpoenas shall be served by one of the following methods:

(1) Certified or registered mail, return receipt requested to the principal place of business or the last known residential address of the subpoenaed party.

(2) Fax or electronic transmission to the subpoenaed party or the subpoenaed party's counsel, provided the subpoenaed party gives prior approval.

(3) Personal delivery at the principal place of business or residence of the subpoenaed party during normal business hours.

**§ 1631.43 Enforcement.**

Upon the failure of any party to comply with a subpoena, the General Counsel shall request that the Attorney General seek enforcement of the

subpoena in the appropriate United States district court.

[FR Doc. 2010–3917 Filed 2–25–10; 8:45 am]

BILLING CODE 6760–01–P

**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 1**

[TD 9477]

RIN 1545–BI14

**Use of Controlled Corporations To Avoid the Application of Section 304; Correction**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

**SUMMARY:** This document contains corrections to final and temporary regulations (TD 9477) that were published in the **Federal Register** on Wednesday, December 30, 2009 (74 FR 69021) regarding certain transactions that are subject to section 304 but that are entered into with a principal purpose of avoiding the application of section 304 to a corporation that is controlled by the issuing corporation in the transaction, or with a principal purpose of avoiding the application of section 304 to a corporation that controls the acquiring corporation in the transaction.

**DATES:** These corrections are effective on February 26, 2010 and are applicable on or after December 29, 2009.

**FOR FURTHER INFORMATION CONTACT:** Sean W. Mullaney, (202) 622–3860 (not a toll free number).

**SUPPLEMENTARY INFORMATION:****Background**

The final and temporary regulations (TD 9477) that are the subject of these corrections are under section 304 of the Internal Revenue Code.

**Need for Correction**

As published, the final and temporary regulations (TD 9477) contain an error that may prove to be misleading and are in need of clarification.

**List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

**Correction of Publication**

■ Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

**PART 1—INCOME TAXES**

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

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

■ **Par. 2.** Section 1.304–4T is amended by revising paragraph (e) to read as follows:

**§ 1.304–4T Special rule for the use of related corporations to avoid the application of section 304 (temporary).**

\* \* \* \* \*

(e) *Expiration date.* This section expires on or before December 28, 2012.

Diane Williams,

*Federal Register Liaison, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).*

[FR Doc. 2010–3927 Filed 2–25–10; 8:45 am]

BILLING CODE 4830–01–P

**DEPARTMENT OF LABOR****Employee Benefits Security Administration****29 CFR Parts 2560 and 2570**

RIN 1210–AB31

**Civil Penalties Under ERISA Section 502(c)(8)**

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Final rule.

**SUMMARY:** This document contains a final regulation that establishes procedures relating to the assessment of civil penalties by the Department of Labor under section 502(c)(8) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act). Under the provision, which was added by the Pension Protection Act of 2006, the Secretary of Labor is granted authority to assess civil penalties not to exceed \$1,100 per day against any plan sponsor of a multiemployer plan for certain violations of section 305 of ERISA. The regulation will affect multiemployer plans that are in either endangered or critical status.

**DATES:** This final rule is effective on March 29, 2010.

**FOR FURTHER INFORMATION CONTACT:** Michael Del Conte, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8500. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:**

## A. Background

Section 202 and section 212 of the Pension Protection Act of 2006 (PPA), Public Law 109–280, respectively, amended ERISA by adding section 305 and amended the Internal Revenue Code (Code) by adding section 432, to provide additional rules for multiemployer defined benefit pension plans in endangered status or critical status. All references in this document to section 305 of ERISA should be read to include section 432 of the Code.<sup>1</sup>

In general, section 305(b)(3)(A) of ERISA provides that not later than the 90th day of each plan year, the actuary of a multiemployer defined benefit pension plan shall certify to the Secretary of the Treasury and to the plan sponsor—(i) whether or not the plan is in endangered status for such plan year and whether or not the plan is or will be in critical status for such plan year, and (ii) in the case of a plan which is in a funding improvement or rehabilitation period, whether or not the plan is making the scheduled progress in meeting the requirements of its funding improvement or rehabilitation plan.

Section 305(b)(3)(D)(i) of ERISA provides that, in any case in which it is certified under section 305(b)(3)(A) that a multiemployer plan is or will be in endangered or critical status for a plan year, the plan sponsor shall, not later than 30 days after the date of the certification, provide notification of the endangered or critical status to participants and beneficiaries, the bargaining parties, the Pension Benefit Guaranty Corporation, and the Secretary of Labor.<sup>2</sup>

Section 305(c)(1)(A) and section 305(e)(1)(A) provide that in the first year that a plan is certified to be in endangered or critical status, the plan sponsor generally has a 240-day period from the required date of the certification to adopt a funding improvement plan (in the case of a plan that is in endangered status) or a rehabilitation plan (in the case of a plan

that is in critical status).<sup>3</sup> Section 305(c)(1) also requires multiemployer plans in endangered status to meet “applicable benchmarks” as defined under ERISA section 305(c)(3), as modified by ERISA section 305(c)(5).

Section 202(b)(3) of the PPA added section 502(c)(8)(A) to ERISA which gives the Secretary of Labor the authority to assess a civil penalty of not more than \$1,100 a day against the plan sponsor for each violation by such sponsor of the requirement under section 305 to adopt by the deadline established in that section a funding improvement plan or rehabilitation plan with respect to a multiemployer plan which is in endangered or critical status.<sup>4</sup> Section 202(b)(3) of the PPA also added section 502(c)(8)(B) to ERISA which gives the Secretary of Labor the authority to assess a civil penalty of not more than \$1,100 a day against the plan sponsor of a plan in endangered status, which is not in seriously endangered status, that fails to meet the applicable benchmarks under section 305 by the end of the funding improvement period with respect to the plan.<sup>5</sup> These provisions are effective for plan years beginning on or after January 1, 2008.

On September 4, 2009, the Department published in the **Federal Register** a proposed rule to implement section 502(c)(8) of ERISA and invited interested parties to comment.<sup>6</sup> In

<sup>3</sup> The Worker, Retiree, and Employer Recovery Act of 2008, Public Law 110–458 (WRERA), permits multiemployer plans to delay temporarily their endangered or critical status under section 305 of ERISA. Section 204 of WRERA provides that a multiemployer plan may, for its first plan year beginning during the period from October 1, 2008, through September 30, 2009, elect to keep its status for the plan year preceding such plan year for purposes of section 305 of ERISA and section 432 of the Code. For example, a plan that was not in endangered status for 2008 may elect to keep that non-endangered status for 2009 even if it is in fact in endangered status. On March 27, 2009, the Internal Revenue Service issued Notice 2009–31, 2009–16 I.R.B. 856, providing guidance to multiemployer plans relating to such elections, on April 30, 2009, issued Notice 2009–42, 2009–20 I.R.B. 1011, modifying Notice 2009–31 to provide an extension of the election period and relief for plans needing arbitration on the election, and on October 5, 2009, issued Revenue Procedure 2009–43, 2009–40 I.R.B. 460, which sets forth additional circumstances in which the Service will automatically approve a request to revoke a section 204 election.

<sup>4</sup> An excise tax under Code section 4971(g)(4) generally applies, in addition to any penalty under ERISA section 502(c)(8), in the case of a failure to adopt a rehabilitation plan with respect to a multiemployer plan in critical status.

<sup>5</sup> An excise tax under Code section 4971(g)(3) generally applies in the case of a failure by a multiemployer plan in seriously endangered status to meet the applicable benchmarks by the end of the funding improvement period or a failure of a plan in critical status to meet the requirements applicable to such plans under section 432(e) of the Code.

<sup>6</sup> 74 FR 45791.

response to the proposal, the Department received one written comment, a copy of which is available under the “public comments” section of the Department’s Web site at <http://www.dol.gov/ebsa>. The commenter requested clarification regarding the joint and several liability provision, at paragraph (j) of the proposal. The commenter’s issue is discussed below, in the next section, in the context of paragraph (j). After careful consideration of the comment, the Department is publishing a final regulation, to be codified at 29 CFR 2560.502c–8, without change.

## B. Overview of Final Rules

### 1. Assessment of Civil Penalties for Certain Violations of Section 305 of ERISA—§ 2560.502c–8

In general, the final regulation sets forth how the maximum penalty amounts are computed, identifies the circumstances under which a penalty may be assessed, sets forth certain procedural rules for service by the Department and filing by a plan sponsor, and provides a plan sponsor a means to contest an assessment by the Department by requesting an administrative hearing.

Paragraph (a) of the regulation addresses the general application of section 502(c)(8) of ERISA, under which the plan sponsor of an eligible plan shall be liable for civil penalties assessed by the Secretary of Labor in each case in which there are certain violations of section 305 of ERISA.

Paragraph (b) of the regulation sets forth the amount of penalties that may be assessed under section 502(c)(8) of ERISA and provides that the penalty assessed under section 502(c)(8) for each separate violation is to be determined by the Department, taking into consideration the degree or willfulness of the violation. Paragraph (b) provides that the maximum amount assessed for each violation shall not exceed \$1,100 a day per violation or such other maximum amount as may be established by regulation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990.<sup>7</sup>

<sup>7</sup> The Federal Civil Penalties Inflation Adjustment Act of 1990 (the 1990 Act), Public Law 101–410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996 (the 1996 Act), Public Law 104–134, 110 Stat. 1321–373, generally provides that federal agencies adjust certain civil monetary penalties for inflation no later than 180 days after the enactment of the 1996 Act, and at least once every four years thereafter, in accordance with the guidelines specified in the 1990 Act. The 1996 Act specifies that any such increase in a civil monetary penalty shall apply only to violations that occur after the date the increase takes effect.

<sup>1</sup> Pursuant to Reorganization Plan No. 4 of 1978, 43 FR 47713 (Oct. 17, 1978), the Department of the Treasury has interpretive authority over the minimum funding rules of Title I of ERISA, including section 305 of ERISA.

<sup>2</sup> Pursuant to section 305(b)(3)(D)(iii) of ERISA, the Department of Labor issued proposed 29 CFR 2540.305–1, which includes a model notice for plans in critical status. See 73 FR 15688 (Mar. 25, 2008). However, section 102(b)(1)(C) of the Worker, Retiree, and Employer Recovery Act of 2008, Public Law 110–458, signed into law on December 23, 2008, transferred the Secretary of Labor’s obligation to prescribe a model notice to the Secretary of the Treasury, in consultation with the Secretary of Labor.

Paragraph (c) of the regulation provides that, prior to assessing a penalty under ERISA section 502(c)(8), the Department shall provide the plan sponsor with written notice of the Department's intent to assess a penalty, the amount of such penalty, the period to which the penalty applies, and the reason(s) for the penalty. The notice would indicate the specific provision violated. The notice is to be served in accordance with paragraph (i) of the regulation (service of notice provision).

Paragraph (d) of the regulation provides that the Department may decide not to assess a penalty, or to waive all or part of the penalty to be assessed, under ERISA section 502(c)(8), upon a showing by the plan sponsor, under paragraph (e) of the regulation, of compliance with section 305 of ERISA or that there were mitigating circumstances for noncompliance.

Under paragraph (e) of the regulation, the plan sponsor has 30 days<sup>8</sup> from the date of service of the notice issued under paragraph (c) of the regulation within which to file a statement making such a showing. When the Department serves the notice under paragraph (c) by certified mail, service is complete upon mailing but five (5) days are added to the time allowed the plan sponsor for the filing of the statement (see § 2560.502c-8(i)(2) (relating to Service of notices and filing of statements)).

Paragraph (f) of the regulation provides that a failure to file a timely statement under paragraph (e) shall be deemed to be a waiver of the right to appear and contest the facts alleged in the Department's notice of intent to assess a penalty for purposes of any adjudicatory proceeding involving the assessment of the penalty under section 502(c)(8) of ERISA, and to be an admission of the facts alleged in the notice of intent to assess. Such notice then becomes a final order of the Secretary 45 days from the date of service of the notice.

Paragraph (g)(1) of the regulation provides that, following a review of the facts alleged in the statement under paragraph (e), the Department shall notify the plan sponsor of its determination to waive the penalty, in whole or in part, and/or assess a penalty. If it is the determination of the Department to assess a penalty, the notice shall indicate the amount of the penalty. Under paragraph (g)(2) of the regulation, this notice becomes a final order 45 days after the date of service of the notice, except as provided in paragraph (h).

Paragraph (h) of the regulation provides that the notice described in paragraph (g) will become a final order of the Department unless, within 30 days of the date of service of the notice, the plan sponsor or representative files a request for a hearing to contest the assessment in administrative proceedings set forth in regulations issued under part 2570 of title 29 of the Code of Federal Regulations and files an answer, in writing, opposing the sanction. When the Department serves the notice under paragraph (g) by certified mail, service is complete upon mailing but five (5) days are added to the time allowed for the plan sponsor's filing of the request for hearing and answer (see § 2560.502c-8(i)(2)).

Paragraph (i)(1) of the regulation describes the rules relating to service of the Department's notice of penalty assessment (§ 2560.502c-8(c)) and the Department's notice of determination on a statement of reasonable cause (§ 2560.502c-8(g)). Paragraph (i)(1) provides that service by the Department shall be made by delivering a copy to the plan sponsor or representative thereof; by leaving a copy at the principal office, place of business, or residence of the plan sponsor or representative thereof; or by mailing a copy to the last known address of the plan sponsor or representative thereof. As noted above, paragraph (i)(2) of this section provides that when service of a notice under paragraph (c) or (g) is made by certified mail, service is complete upon mailing, but five days are added to the time allowed the plan sponsor for the filing of a statement or a request for hearing and answer, as applicable. Service by regular mail is complete upon receipt by the addressee.

Paragraph (i)(3) of the regulation, which relates to the plan sponsor's filing of statements of reasonable cause, provides that a statement of reasonable cause shall be considered filed (i) upon mailing if accomplished using United States Postal Service certified mail or express mail, (ii) upon receipt by the delivery service if accomplished using a "designated private delivery service" within the meaning of 26 U.S.C. 7502(f), (iii) upon transmittal if transmitted in a manner specified in the notice of intent to assess a penalty as a method of transmittal to be accorded such special treatment, or (iv) in the case of any other method of filing, upon receipt by the Department at the address provided in the notice. This provision does not apply to the filing of requests for hearing and answers with the Office of the Administrative Law Judge (OALJ) which are governed by the Department's OALJ rules in 29 CFR 18.4.

Paragraph (j) of the regulation clarifies the liability of the parties for penalties assessed under section 502(c)(8) of ERISA. Paragraph (j)(1) provides that, if more than one person is responsible as plan sponsor for the failure to adopt a funding improvement or rehabilitation plan, or to meet the applicable benchmarks, as required by section 305 of ERISA, all such persons shall be jointly and severally liable for such failure. Thus, as noted in the preamble to the proposed regulation, the entire joint board of trustees would be jointly and severally liable for any such failure. Paragraph (j)(2) provides that any person against whom a penalty is assessed under section 502(c)(8) of ERISA, pursuant to a final order, is personally liable for the payment of such penalty, and that such liability is not a liability of the plan. It is the Department's view that payment of penalties assessed under ERISA section 502(c)(8) from plan assets would not constitute a reasonable expense of administering a plan for purposes of sections 403 and 404 of ERISA.

One commenter requested clarification on whether it is the Department's intention that the joint and several liability provision in paragraph (j)(1) is to apply to all trustees for a specified failure without regard to the relative degree of fault attributable to each trustee. Paragraph (j) of the final regulation is not intended to address fault allocations. As is ordinarily the case with joint and several liability provisions, each member of the board of trustees would be jointly and severally liable for any penalty assessment where the board of trustees, for whatever reason, failed to meet its statutory obligation under section 305 of ERISA to adopt an improvement or rehabilitation plan, or to meet an applicable benchmark. This is true whether a particular trustee or trustees voted for or against a rehabilitation or improvement plan, for example.

Paragraph (k) of the regulation cross-references section 2570.160 through section 2570.171 of this chapter for procedural rules relating to administrative hearings under section 502(c)(8) of the Act.

## *2. Procedures for Administrative Review of Assessment of Civil Penalties Under ERISA Section 502(c)(8)—§ 2570.160 et seq.*

This final regulation adds subpart I to part 2570 (section 2570.160 through section 2570.171) to establish procedures for hearings before an Administrative Law Judge (ALJ) with respect to assessment by the Department of a civil penalty under ERISA section

<sup>8</sup> Unless otherwise specified the word "days" refers to calendar days.

502(c)(8), and for appealing an ALJ decision to the Secretary or her delegate. The rules in subpart I are essentially the same as the rules that were contained in paragraph (k) of proposed § 2560.502c-8. These rules were removed from paragraph (k) and relocated in subpart I of part 2570 of the CFR to avoid confusion and for conformity with other civil penalty regulations under ERISA.

### C. Regulatory Impact Analysis

#### *Executive Order 12866*

Under Executive Order 12866 (58 FR 51735), the Department must determine whether a regulatory action is “significant” and therefore subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a “significant regulatory action” as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as “economically significant”); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. It has been determined that this rule relating to the assessment of civil monetary penalties under section 502(c)(8) of the Act is not “significant” under section 3(f)(4) of the Executive Order; and, therefore, it is not subject to OMB review.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA), imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of RFA requires that the agency present a regulatory flexibility analysis at the time of the publication of the final rule describing the impact of the rule on small entities

and seeking public comment on such impact. Small entities include small businesses, organizations and governmental jurisdictions.

For purposes of its analyses under the RFA, EBSA continues to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reporting for pension plans that cover fewer than 100 participants. By this standard, data from the EBSA Private Pension Bulletin for 2006 show that only 46 multiemployer defined benefit pension plans or 3% of all multiemployer defined benefit pension plans are small entities. This number represents .1% of all small defined benefit pension plans. The Department does not consider this to be a substantial number of small entities. Therefore, pursuant to section 605(b) of RFA, the Department hereby certifies that the rule is not likely to have a significant economic impact on a substantial number of small entities.

The terms of the statute pertaining to the assessment of civil penalties under section 502(c)(8) of ERISA do not vary relative to plan or plan sponsor size. The opportunity for a plan sponsor to present facts and circumstances related to a failure or refusal to comply with section 305 of the Act that may be taken into consideration by the Department in reducing or not assessing penalties under ERISA section 502(c)(8) may offer some degree of flexibility to small entities subject to penalty assessments. Penalty assessments will have no direct impact on small plans, because the plan sponsor assessed a civil penalty is personally liable for the payment of that penalty pursuant to § 2560.502c-8(j)(2) of this final rule.

The Department invited interested persons to submit comments on the impact of this rule on small entities and on any alternative approaches that may serve to minimize the impact on small plans or other entities while accomplishing the objectives of the statutory provisions when the notice of proposed rulemaking was published; however, no comments on these issues were received.

#### *Paperwork Reduction Act*

The final regulation is not subject to the requirements of the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3501 *et seq.*), because it does not contain a collection of information as defined in 44 U.S.C. 3502(3). Information otherwise provided to the Secretary in connection with the administrative and procedural

requirements of this final rule is excepted from coverage by PRA 95 pursuant to 44 U.S.C. 3518(c)(1)(B), and related regulations at 5 CFR 1320.4(a)(2) and (c). These provisions generally except information provided as a result of an agency’s civil or administrative action, investigation, or audit.

#### *Congressional Review Act*

This final rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to the Congress and the Comptroller General for review.

#### *Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Order 12875, this rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, and does not impose an annual burden exceeding \$100 million, as adjusted for inflation, on the private sector.

#### *Federalism Statement*

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This final rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in this final rule do not alter the fundamental reporting and disclosure, or administration and enforcement provisions of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

## List of Subjects

### 29 CFR Part 2560

Employee benefit plans, Employee Retirement Income Security Act, Law enforcement, Pensions.

### 29 CFR Part 2570

Administrative practice and procedure, Employee benefit plans, Employee Retirement Income Security Act, Law enforcement, Pensions.

■ Accordingly, 29 CFR Parts 2560 and 2570 are amended as follows:

## PART 2560—RULES AND REGULATIONS FOR ADMINISTRATION AND ENFORCEMENT

■ 1. The authority citation for Part 2560 is revised to read as follows:

**Authority:** 29 U.S.C. 1132, 1135, and Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2560.503–1 also issued under 29 U.S.C. 1133. Sec. 2560.502c–7 also issued under 29 U.S.C. 1132(c)(7). Sec. 2560.502c–4 also issued under 29 U.S.C. 1132(c)(4). Sec. 2560.502c–8 also issued under 29 U.S.C. 1132(c)(8).

■ 2. Add § 2560.502c–8 to read as follows:

### § 2560.502c–8 Civil penalties under section 502(c)(8).

(a) *In general.* (1) Pursuant to the authority granted the Secretary under section 502(c)(8) of the Employee Retirement Income Security Act of 1974, as amended (the Act), the plan sponsor (within the meaning of section 3(16)(B)(iii) of the Act) shall be liable for civil penalties assessed by the Secretary under section 502(c)(8) of the Act, for:

(i) Each violation by such sponsor of the requirement under section 305 of the Act to adopt by the deadline established in that section a funding improvement plan or rehabilitation plan with respect to a multiemployer plan which is in endangered or critical status; or

(ii) In the case of a plan in endangered status which is not in seriously endangered status, a failure by the plan to meet the applicable benchmarks under section 305 by the end of the funding improvement period with respect to the plan.

(2) For purposes of this section, violations or failures referred to in paragraph (a)(1) of this section shall mean a failure or refusal, in whole or in part, to adopt a funding improvement or rehabilitation plan, or to meet the applicable benchmarks, at the relevant times and manners prescribed in section 305 of the Act.

(b) *Amount assessed.* The amount assessed under section 502(c)(8) of the

Act for each separate violation shall be determined by the Department of Labor, taking into consideration the degree or willfulness of the failure or refusal to comply with the specific requirements referred to in paragraph (a) of this section. However, the amount assessed for each violation under section 502(c)(8) of the Act shall not exceed \$1,100 a day (or such other maximum amount as may be established by regulation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended), computed from the date of the plan sponsor's failure or refusal to comply with the specific requirements referred to in paragraph (a) of this section.

(c) *Notice of intent to assess a penalty.* Prior to the assessment of any penalty under section 502(c)(8) of the Act, the Department shall provide to the plan sponsor of the plan a written notice indicating the Department's intent to assess a penalty under section 502(c)(8) of the Act, the amount of such penalty, the period to which the penalty applies, and the reason(s) for the penalty.

(d) *Reconsideration or waiver of penalty to be assessed.* The Department may determine that all or part of the penalty amount in the notice of intent to assess a penalty shall not be assessed on a showing that the plan sponsor complied with the requirements of section 305 of the Act, or on a showing by the plan sponsor of mitigating circumstances regarding the degree or willfulness of the noncompliance.

(e) *Showing of reasonable cause.* Upon issuance by the Department of a notice of intent to assess a penalty, the plan sponsor shall have thirty (30) days from the date of service of the notice, as described in paragraph (i) of this section, to file a statement of reasonable cause explaining why the penalty, as calculated, should be reduced, or not be assessed, for the reasons set forth in paragraph (d) of this section. Such statement must be made in writing and set forth all the facts alleged as reasonable cause for the reduction or nonassessment of the penalty. The statement must contain a declaration by the plan sponsor that the statement is made under the penalties of perjury.

(f) *Failure to file a statement of reasonable cause.* Failure to file a statement of reasonable cause within the thirty (30) day period described in paragraph (e) of this section shall be deemed to constitute a waiver of the right to appear and contest the facts alleged in the notice of intent, and such failure shall be deemed an admission of the facts alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under

section 502(c)(8) of the Act. Such notice shall then become a final order of the Secretary, within the meaning of § 2570.161(g) of this chapter, forty-five (45) days from the date of service of the notice.

(g) *Notice of determination on statement of reasonable cause.* (1) The Department, following a review of all of the facts in a statement of reasonable cause alleged in support of nonassessment or a complete or partial waiver of the penalty, shall notify the plan sponsor, in writing, of its determination on the statement of reasonable cause and its determination whether to waive the penalty in whole or in part, and/or assess a penalty. If it is the determination of the Department to assess a penalty, the notice shall indicate the amount of the penalty assessment, not to exceed the amount described in paragraph (c) of this section. This notice is a "pleading" for purposes of § 2570.161(m) of this chapter.

(2) Except as provided in paragraph (h) of this section, a notice issued pursuant to paragraph (g)(1) of this section, indicating the Department's determination to assess a penalty, shall become a final order, within the meaning of § 2570.161(g) of this chapter, forty-five (45) days from the date of service of the notice.

(h) *Administrative hearing.* A notice issued pursuant to paragraph (g) of this section will not become a final order, within the meaning of § 2570.161(g) of this chapter, if, within thirty (30) days from the date of the service of the notice, the plan sponsor or a representative thereof files a request for a hearing under §§ 2570.160 through 2570.171 of this chapter, and files an answer to the notice. The request for hearing and answer must be filed in accordance with § 2570.162 of this chapter and § 18.4 of this title. The answer opposing the proposed sanction shall be in writing, and supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to paragraph (g) of this section.

(i) *Service of notices and filing of statements.* (1) Service of a notice for purposes of paragraphs (c) and (g) of this section shall be made:

(i) By delivering a copy to the plan sponsor or representative thereof;

(ii) By leaving a copy at the principal office, place of business, or residence of the plan sponsor or representative thereof; or

(iii) By mailing a copy to the last known address of the plan sponsor or representative thereof.

(2) If service is accomplished by certified mail, service is complete upon mailing. If service is by regular mail, service is complete upon receipt by the addressee. When service of a notice under paragraph (c) or (g) of this section is by certified mail, five days shall be added to the time allowed by these rules for the filing of a statement or a request for hearing and answer, as applicable.

(3) For purposes of this section, a statement of reasonable cause shall be considered filed:

(i) Upon mailing, if accomplished using United States Postal Service certified mail or express mail;

(ii) Upon receipt by the delivery service, if accomplished using a "designated private delivery service" within the meaning of 26 U.S.C. 7502(f);

(iii) Upon transmittal, if transmitted in a manner specified in the notice of intent to assess a penalty as a method of transmittal to be accorded such special treatment; or

(iv) In the case of any other method of filing, upon receipt by the Department at the address provided in the notice of intent to assess a penalty.

(j) *Liability.* (1) If more than one person is responsible as plan sponsor for violations referred to in paragraph (a) of this section, all such persons shall be jointly and severally liable for such violations.

(2) Any person, or persons under paragraph (j)(1) of this section, against whom a civil penalty has been assessed under section 502(c)(8) of the Act, pursuant to a final order within the meaning of § 2570.161(g) of this chapter, shall be personally liable for the payment of such penalty.

(k) *Cross-reference.* See §§ 2570.160 through 2570.171 of this chapter for procedural rules relating to administrative hearings under section 502(c)(8) of the Act.

#### **PART 2570—PROCEDURAL REGULATIONS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT**

■ 3. The authority citation for Part 2570 is revised to read as follows:

**Authority:** 5 U.S.C. 8477, 29 U.S.C. 1002(40), 1021, 1108, 1132, 1135; sec. 102, Reorganization Plan No. 4 of 1978, 43 FR 47713, 3 CFR, 1978 Comp. p. 332, and E.O. 12108, 44 FR 1065, 3 CFR, 1978 Comp., p. 275; Secretary of Labor's Order 1-2003, 68 FR 5374 (Feb. 3, 2003).

Subpart I is also issued under 29 U.S.C. 1132(c)(8).

■ 4. Add a new Subpart I to Part 2570 to read as follows:

#### **Subpart I—Procedures for the Assessment of Civil Penalties Under ERISA Section 502(c)(8)**

Sec.

2570.160	Scope of rules.
2570.161	Definitions.
2570.162	Service: Copies of documents and pleadings.
2570.163	Parties, how designated.
2570.164	Consequences of default.
2570.165	Consent order or settlement.
2570.166	Scope of discovery.
2570.167	Summary decision.
2570.168	Decision of the administrative law judge.
2570.169	Review by the Secretary.
2570.170	Scope of review.
2570.171	Procedures for review by the Secretary.

#### **Subpart I—Procedures for the Assessment of Civil Penalties Under ERISA Section 502(c)(8)**

##### **§ 2570.160 Scope of rules.**

The rules of practice set forth in this subpart are applicable to "502(c)(8) civil penalty proceedings" (as defined in § 2570.161(n) of this subpart) under section 502(c)(8) of the Employee Retirement Income Security Act of 1974, as amended (the Act). The rules of procedure for administrative hearings published by the Department's Office of Administrative Law Judges at Part 18 of this title will apply to matters arising under ERISA section 502(c)(8) except as modified by this subpart. These proceedings shall be conducted as expeditiously as possible, and the parties shall make every effort to avoid delay at each stage of the proceedings.

##### **§ 2570.161 Definitions.**

For 502(c)(8) civil penalty proceedings, this section shall apply in lieu of the definitions in § 18.2 of this title:

(a) *Adjudicatory proceeding* means a judicial-type proceeding before an administrative law judge leading to the formulation of a final order;

(b) *Administrative law judge* means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105;

(c) *Answer* means a written statement that is supported by reference to specific circumstances or facts surrounding the notice of determination issued pursuant to § 2560.502c-8(g) of this chapter;

(d) *Commencement of proceeding* is the filing of an answer by the respondent;

(e) *Consent agreement* means any written document containing a specified proposed remedy or other relief acceptable to the Department and consenting parties;

(f) *ERISA* means the Employee Retirement Income Security Act of 1974, as amended;

(g) *Final order* means the final decision or action of the Department of Labor concerning the assessment of a civil penalty under ERISA section 502(c)(8) against a particular party. Such final order may result from a decision of an administrative law judge or the Secretary, the failure of a party to file a statement of reasonable cause described in § 2560.502c-8(e) of this chapter within the prescribed time limits, or the failure of a party to invoke the procedures for hearings or appeals under this title within the prescribed time limits. Such a final order shall constitute final agency action within the meaning of 5 U.S.C. 704;

(h) *Hearing* means that part of a proceeding which involves the submission of evidence, by either oral presentation or written submission, to the administrative law judge;

(i) *Order* means the whole or any part of a final procedural or substantive disposition of a matter under ERISA section 502(c)(8);

(j) *Party* includes a person or agency named or admitted as a party to a proceeding;

(k) *Person* includes an individual, partnership, corporation, employee benefit plan, association, exchange or other entity or organization;

(l) *Petition* means a written request, made by a person or party, for some affirmative action;

(m) *Pleading* means the notice as defined in § 2560.502c-8(g) of this chapter, the answer to the notice, any supplement or amendment thereto, and any reply that may be permitted to any answer, supplement or amendment;

(n) *502(c)(8) civil penalty proceeding* means an adjudicatory proceeding relating to the assessment of a civil penalty provided for in section 502(c)(8) of ERISA;

(o) *Respondent* means the party against whom the Department is seeking to assess a civil sanction under ERISA section 502(c)(8);

(p) *Secretary* means the Secretary of Labor and includes, pursuant to any delegation of authority by the Secretary, any assistant secretary (including the Assistant Secretary for Employee Benefits Security), administrator, commissioner, appellate body, board, or other official; and

(q) *Solicitor* means the Solicitor of Labor or his or her delegate.

##### **§ 2570.162 Service: Copies of documents and pleadings.**

For 502(c)(8) penalty proceedings, this section shall apply in lieu of § 18.3 of this title.

(a) *General.* Copies of all documents shall be served on all parties of record. All documents should clearly designate the docket number, if any, and short title of all matters. All documents to be filed shall be delivered or mailed to the Chief Docket Clerk, Office of Administrative Law Judges, 800 K Street, NW., Suite 400, Washington, DC 20001–8002, or to the OALJ Regional Office to which the proceeding may have been transferred for hearing. Each document filed shall be clear and legible.

(b) *By parties.* All motions, petitions, pleadings, briefs, or other documents shall be filed with the Office of Administrative Law Judges with a copy, including any attachments, to all other parties of record. When a party is represented by an attorney, service shall be made upon the attorney. Service of any document upon any party may be made by personal delivery or by mailing a copy to the last known address. The Department shall be served by delivery to the Associate Solicitor, Plan Benefits Security Division, ERISA section 502(c)(8) Proceeding, P.O. Box 1914, Washington, DC 20013. The person serving the document shall certify to the manner and date of service.

(c) *By the Office of Administrative Law Judges.* Service of orders, decisions and all other documents shall be made by regular mail to the last known address.

(d) *Form of pleadings.* (1) Every pleading shall contain information indicating the name of the Employee Benefits Security Administration (EBSA) as the agency under which the proceeding is instituted, the title of the proceeding, the docket number (if any) assigned by the Office of Administrative Law Judges and a designation of the type of pleading or paper (e.g., notice, motion to dismiss, etc.). The pleading or paper shall be signed and shall contain the address and telephone number of the party or person representing the party. Although there are no formal specifications for documents, they should be typewritten when possible on standard size 8½ × 11-inch paper.

(2) Illegible documents, whether handwritten, typewritten, photocopied, or otherwise, will not be accepted. Papers may be reproduced by any duplicating process provided all copies are clear and legible.

#### **§ 2570.163 Parties, how designated.**

For 502(c)(8) civil penalty proceedings, this section shall apply in lieu of § 18.10 of this title.

(a) The term “party” wherever used in this subpart shall include any natural person, corporation, employee benefit

plan, association, firm, partnership, trustee, receiver, agency, public or private organization, or government agency. A party against whom a civil penalty is sought shall be designated as “respondent.” The Department shall be designated as the “complainant.”

(b) Other persons or organizations shall be permitted to participate as parties only if the administrative law judge finds that the final decision could directly and adversely affect them or the class they represent, that they may contribute materially to the disposition of the proceedings and their interest is not adequately represented by existing parties, and that in the discretion of the administrative law judge the participation of such persons or organizations would be appropriate.

(c) A person or organization not named as a respondent wishing to participate as a party under this section shall submit a petition to the administrative law judge within fifteen (15) days after the person or organization has knowledge of or should have known about the proceeding. The petition shall be filed with the administrative law judge and served on each person who or organization that has been made a party at the time of filing. Such petition shall concisely state:

- (1) Petitioner’s interest in the proceeding;
- (2) How his or her participation as a party will contribute materially to the disposition of the proceeding;
- (3) Who will appear for petitioner;
- (4) The issues on which petitioner wishes to participate; and
- (5) Whether petitioner intends to present witnesses.

(d) Objections to the petition may be filed by a party within fifteen (15) days of the filing of the petition. If objections to the petition are filed, the administrative law judge shall then determine whether petitioner has the requisite interest to be a party in the proceedings, as defined in paragraph (b) of this section, and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interests, the administrative law judge may request all such petitioners to designate a single representative, or he or she may recognize one or more of such petitioners. The administrative law judge shall give each such petitioner, as well as the parties, written notice of the decision on his or her petition. For each petition granted, the administrative law judge shall provide a brief statement of the basis of the decision. If the petition is denied, he or she shall briefly state

the grounds for denial and shall then treat the petition as a request for participation as *amicus curiae*.

#### **§ 2570.164 Consequences of default.**

For 502(c)(8) civil penalty proceedings, this section shall apply in lieu of § 18.5(a) and (b) of this title. Failure of the respondent to file an answer to the notice of determination described in § 2560.502c–8(g) of this chapter within the 30 day period provided by § 2560.502c–8(h) of this chapter shall be deemed to constitute a waiver of his or her right to appear and contest the allegations of the notice of determination, and such failure shall be deemed to be an admission of the facts as alleged in the notice for purposes of any proceeding involving the assessment of a civil penalty under section 502(c)(8) of the Act. Such notice shall then become the final order of the Secretary, within the meaning of § 2570.161(g) of this subpart, forty-five (45) days from the date of service of the notice.

#### **§ 2570.165 Consent order or settlement.**

For 502(c)(8) civil penalty proceedings, the following shall apply in lieu of § 18.9 of this title.

(a) *General.* At any time after the commencement of a proceeding, but at least five (5) days prior to the date set for hearing, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding. The allowance of such a deferral and the duration thereof shall be in the discretion of the administrative law judge, after consideration of such factors as the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of reaching an agreement which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice and the agreement;

(3) A waiver of any further procedural steps before the administrative law judge;

(4) A waiver of any right to challenge or contest the validity of the order and decision entered into in accordance with the agreement; and

(5) That the order and decision of the administrative law judge shall be final agency action.

(c) *Submission.* On or before the expiration of the time granted for negotiations, but, in any case, at least five (5) days prior to the date set for hearing, the parties or their authorized representative or their counsel may:

(1) Submit the proposed agreement containing consent findings and an order to the administrative law judge; or

(2) Notify the administrative law judge that the parties have reached a full settlement and have agreed to dismissal of the action subject to compliance with the terms of the settlement; or

(3) Inform the administrative law judge that agreement cannot be reached.

(d) *Disposition.* In the event a settlement agreement containing consent findings and an order is submitted within the time allowed therefor, the administrative law judge shall issue a decision incorporating such findings and agreement within 30 days of his receipt of such document. The decision of the administrative law judge shall incorporate all of the findings, terms, and conditions of the settlement agreement and consent order of the parties. Such decision shall become final agency action within the meaning of 5 U.S.C. 704.

(e) *Settlement without consent of all parties.* In cases in which some, but not all, of the parties to a proceeding submit a consent agreement to the administrative law judge, the following procedure shall apply:

(1) If all of the parties have not consented to the proposed settlement submitted to the administrative law judge, then such non-consenting parties must receive notice, and a copy, of the proposed settlement at the time it is submitted to the administrative law judge;

(2) Any non-consenting party shall have fifteen (15) days to file any objections to the proposed settlement with the administrative law judge and all other parties;

(3) If any party submits an objection to the proposed settlement, the administrative law judge shall decide within 30 days after receipt of such objections whether he shall sign or reject the proposed settlement. Where the record lacks substantial evidence upon which to base a decision or there is a genuine issue of material fact, then the administrative law judge may establish procedures for the purpose of receiving additional evidence upon which a decision on the contested issues may reasonably be based;

(4) If there are no objections to the proposed settlement, or if the

administrative law judge decides to sign the proposed settlement after reviewing any such objections, the administrative law judge shall incorporate the consent agreement into a decision meeting the requirements of paragraph (d) of this section.

#### **§ 2570.166 Scope of discovery.**

For 502(c)(8) civil penalty proceedings, this section shall apply in lieu of § 18.14 of this title.

(a) A party may file a motion to conduct discovery with the administrative law judge. The motion for discovery shall be granted by the administrative law judge only upon a showing of good cause. In order to establish "good cause" for the purposes of this section, a party must show that the discovery requested relates to a genuine issue as to a material fact that is relevant to the proceeding. The order of the administrative law judge shall expressly limit the scope and terms of discovery to that for which "good cause" has been shown, as provided in this paragraph.

(b) A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (a) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon showing that the party seeking discovery has substantial need of the materials or information in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials or information by other means. In ordering discovery of such materials when the required showing has been made, the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representatives of a party concerning the proceeding.

#### **§ 2570.167 Summary decision.**

For 502(c)(8) civil penalty proceedings, this section shall apply in lieu of § 18.41 of this title.

(a) *No genuine issue of material fact.* (1) Where no issue of a material fact is found to have been raised, the administrative law judge may issue a decision which, in the absence of an appeal pursuant to §§ 2570.169 through 2570.171 of this subpart, shall become a final order.

(2) A decision made under paragraph (a) of this section shall include a statement of:

(i) Findings of fact and conclusions of law, and the reasons therefor, on all issues presented; and

(ii) Any terms and conditions of the rule or order.

(3) A copy of any decision under this paragraph shall be served on each party.

(b) *Hearings on issues of fact.* Where a genuine question of a material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing.

#### **§ 2570.168 Decision of the administrative law judge.**

For 502(c)(8) civil penalty proceedings, this section shall apply in lieu of § 18.57 of this title.

(a) *Proposed findings of fact, conclusions, and order.* Within twenty (20) days of the filing of the transcript of the testimony, or such additional time as the administrative law judge may allow, each party may file with the administrative law judge, subject to the judge's discretion, proposed findings of fact, conclusions of law, and order together with a supporting brief expressing the reasons for such proposals. Such proposals and briefs shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) *Decision of the administrative law judge.* Within a reasonable time after the time allowed for the filing of the proposed findings of fact, conclusions of law, and order, or within thirty (30) days after receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the administrative law judge shall make his or her decision. The decision of the administrative law judge shall include findings of fact and conclusions of law with reasons therefor upon each material issue of fact or law presented on the record. The decision of the administrative law judge shall be based upon the whole record. In a contested case in which the Department and the Respondent have presented their positions to the administrative law judge pursuant to the procedures for 502(c)(8) civil penalty proceedings as set forth in this subpart, the penalty (if any) which may be included in the decision of the administrative law judge shall be limited to the penalty expressly provided for in section 502(c)(8) of ERISA. It shall be supported by reliable and probative evidence. The decision of the administrative law judge shall become final agency action within the meaning of 5 U.S.C. 704 unless an appeal is made pursuant to the procedures set forth in §§ 2570.169 through 2570.171 of this subpart.

**§ 2570.169 Review by the Secretary.**

(a) The Secretary may review a decision of an administrative law judge. Such a review may occur only when a party files a notice of appeal from a decision of an administrative law judge within twenty (20) days of the issuance of such decision. In all other cases, the decision of the administrative law judge shall become final agency action within the meaning of 5 U.S.C. 704.

(b) A notice of appeal to the Secretary shall state with specificity the issue(s) in the decision of the administrative law judge on which the party is seeking review. Such notice of appeal must be served on all parties of record.

(c) Upon receipt of a notice of appeal, the Secretary shall request the Chief Administrative Law Judge to submit to him or her a copy of the entire record before the administrative law judge.

**§ 2570.170 Scope of review.**

The review of the Secretary shall not be a de novo proceeding but rather a review of the record established before the administrative law judge. There shall be no opportunity for oral argument.

**§ 2570.171 Procedures for review by the Secretary.**

(a) Upon receipt of the notice of appeal, the Secretary shall establish a briefing schedule which shall be served on all parties of record. Upon motion of one or more of the parties, the Secretary may, in his or her discretion, permit the submission of reply briefs.

(b) The Secretary shall issue a decision as promptly as possible after receipt of the briefs of the parties. The Secretary may affirm, modify, or set aside, in whole or in part, the decision on appeal and shall issue a statement of reasons and bases for the action(s) taken. Such decision by the Secretary shall be final agency action within the meaning of 5 U.S.C. 704.

Signed at Washington, DC, this 23rd day of February 2010.

**Phyllis C. Borzi,**

*Assistant Secretary, Employee Benefits Security Administration, Department of Labor.*

[FR Doc. 2010-4005 Filed 2-25-10; 8:45 am]

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**DEPARTMENT OF HOMELAND SECURITY****Coast Guard****33 CFR Part 165**

[Docket No. USCG-2010-0093]

RIN 1625-AA00

**Safety Zone; NASSCO Launching of USNS Charles Drew, San Diego Bay, San Diego, CA.**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone on the navigable waters of the San Diego Bay in support of the NASSCO Ship Launching for the United States Naval Ship (USNS) Charles Drew. The safety zone is necessary to provide for the safety of vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port (COTP) San Diego or his designated representative.

**DATES:** This rule is effective from 6:30 a.m. through 8:30 a.m. on February 27, 2010.

**ADDRESSES:** Documents indicated in this preamble as being available in the docket are part of docket USCG-2010-0093 and are available online by going to <http://www.regulations.gov>, inserting USCG-2010-0093 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call or e-mail Petty Officer Corey McDonald, Waterways Management, U.S. Coast Guard Sector San Diego; telephone 619-278-7262, e-mail [Corey.R.McDonald@uscg.mil](mailto:Corey.R.McDonald@uscg.mil). If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

**SUPPLEMENTARY INFORMATION:****Regulatory Information**

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision

authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the event would occur before the rulemaking process was complete. As such, any delay in the regulation's effective date would be contrary to the public interest, as immediate action is necessary to provide for the safety of vessels and users of the waterway.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. The issuance of final approval was so recent that the rule will be made effective less than 30 days after publication. Any delay in the effective date of this rule will expose vessels and persons of the waterway to dangers posed by ship launchings.

**Background and Purpose**

The Coast Guard is establishing a temporary safety zone on the navigable waters of the San Diego Bay to contribute to the safety of the USNS Charles Drew and surrounding vessels as this ship launches from NASSCO shipyards. There will be three tugboats to take control of the vessel after the launch. This temporary safety zone is necessary to provide for the safety of the vessels and users of the waterway.

**Discussion of Rule**

The USNS Charles Drew will be launched from NASSCO shipyard into the San Diego Bay the morning of February 27, 2010. The safety zone is required because the vessel's planned launch location is in the maritime navigation channel. The limits of the temporary safety zone include all navigable waters encompassed by the following coordinates:

32°41.39' N, 117°08.66' W;  
32°41.24' N, 117°09.05' W;  
32°41.05' N, 117°08.73' W;  
32°41.20' N, 117°08.34' W;  
thence north along the shoreline to 32°41.39' N, 117°08.66' W.

The safety zone is necessary to provide for the safety of the vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the COTP San Diego or his designated representative. Vessels or persons violating this zone will be