



Issue Date: 30 August 2010

Case No.: 2010-RIS-00017

In the Matter of

**U.S. DEPARTMENT OF LABOR,
EMPLOYEE BENEFITS SECURITY
ADMINISTRATION,
Complainant**

v.

**NEBRASKA MEAT CORPORATION
(09-1622D)
Respondent**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PROCEDURAL BACKGROUND

This matter arises under § 502(c)(2), 29 U.S.C. § 1132(c)(2), of the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. § 1001, et seq. EBSA, by way of its Office of the Chief Accountant (“OCA”), Division of Reporting Compliance (“DRC”), which assessed a \$50,000.00 penalty against Respondent Nebraska Meat Corporation (“Nebraska Meat”), as plan administrator of the Nebraska Meat Corporation 401(k) Profit Sharing Plan & Trust (“401(k)” or “Plan”), an employee retirement benefit plan, for reporting and disclosure violations in connection with the Plan Administrator’s failure to file an acceptable report of an independent qualified public accountant (“IQPA report” or “auditor’s report”) with the 2007 Form 5500 Annual Report, as required by ERISA § 103, 29 U.S.C. § 1023, and regulations issued there under.

On April 30, 2009, OCA rejected the 2007 filing and issued its Notice of Rejection (“NOR”) for Respondent’s initial failure to provide the required IQPA report and schedule of assets under investment. On June 29, 2009, OCA issued a Notice of Intent to Assess a Penalty (“NOI”), which disclosed that an \$86,500 penalty would be assessed if Respondent failed to come into compliance and/or failed to submit a reasonable cause statement. By August 10, 2009, Respondent submitted an acceptable Reasonable Cause Statement (“RC Statement”) and had filed an amended 2007 Form 5500 with the schedule of assets held for investment and an IQPA report. Upon consideration of Respondent’s RC Statement and the correction of the Schedule H deficiency, a Notice of Determination (“NOD”), assessing an abated \$50,000 penalty was issued on September 28, 2009. OCA determined that reasonable cause was not shown for the failure to

timely correct the deficiency by the filing of an acceptable IQPA report. The scope of the audit submitted with the RC Statement was inappropriately limited pursuant to DOL regulation 29 CFR. §2520.103-8. Furthermore, Respondent could not have obtained the required certification, pursuant to the DOL regulations, because Merrill Lynch & Company did not qualify as a bank or similar institution or insurance company.

Respondent timely requested a hearing. At the time that Respondent requested a hearing in this matter and at all times thereafter, it had not filed an amended 2007 Form 5500 with the required full scope auditor's report.

The hearing in this matter was held on July 13, 2010. Respondent did not appear to defend its case. Complainant appeared for trial with its witness. On July 28, 2010, this Court issued a Show Cause Order to Respondent. On or about August 10, 2010, Respondent's attorney averred that its client did not authorize its representative of record to attend the July 13, 2009 hearing.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Legislative History and Purpose of ERISA's Annual Reporting Requirements

ERISA, as amended, 29 U.S.C. § 1001, et seq, is a comprehensive statute adopted by Congress after careful study of employee benefit plans. Alessi v. RaybestosManhattan, Inc., 451 U.S. 504, 510 (1981). Its provisions are remedial in nature and were designed to carry out the vitally important purpose of protecting those plans. Brink v. DaLesio, 667 F.2d 420, 427 (4th Cir. 1981). See Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923, 929 (3rd Cir. 1985); Eaves v. Penn, 587 F.2d 453, 457 (10th Cir. 1978); ERISA § 2, 29 U.S.C. § 1001.

Among the means employed to accomplish this purpose are the extensive reporting and disclosure provisions, which expanded upon the requirements of the predecessor Welfare and Pension Plans Disclosure Act ("WPPDA"). ERISA's legislative history indicates that Congress considered the expanded reporting requirements in ERISA § 103 crucial "so that the individual participant knows exactly where he stands with respect to the plan." Moreover, Congress believed that the reporting and disclosure requirements of ERISA § 103 were critical to ensuring that:

fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.

Report No. 93-127 To Accompany S.4, April 18, 1973, pps.27-28, reprinted in 3 U.S. Cong. & Adm. News 1974, pps. 4863--64.

Thus, the required financial statements and the audit and opinion of the independent qualified public accountant in the annual report are essential devices to achieve the disclosure and enforcement purposes of the Act. The annual report is the principal source of information

and data available to the Secretary of Labor on the over one million plans, covering an estimated 60 million participants and managing assets in excess of \$1.5 trillion, that the Secretary is mandated to regulate under ERISA. The annual report is also the primary means by which the operations of plans can be monitored by participants, beneficiaries, and the general public.

B. ERISA's Annual Reporting Requirements and the Secretary's Implementing Regulations

A plan administrator, pursuant to ERISA §~ 101 and 104, 29 U.S.C. 1021 and 1024, must complete and file the annual report within 210 days of the end of the plan year. The form and contents of the annual report are set forth in ERISA § 103, 29 U.S.C. § 1023. Paragraph (a)(3) specifies the requirements for an annual audit of an employee benefit plan and the report or opinion thereon to be performed by an IQPA, including the form and content of the required report or opinion.

ERISA § 104(a)(4) and (5), 29 U.S.C. § 1024(a)(4) and (5), authorizes the Secretary to reject annual report filings that do not comply with the requirements set forth in ERISA. Section 104(a)(5) provides that if the Secretary rejects a filing under § 104(a)(4) and a revised filing satisfactory to the Secretary is not submitted within 45 days of the rejection, the Secretary is empowered to, among other things, retain an IQPA on behalf of a plan to perform the required audit and report, bring an action for appropriate legal or equitable relief, or take other action authorized by Title I of ERISA.¹

Subsequent to the passage of ERISA, Congress recognized that there was no separate penalty mechanism in the Act to enforce compliance with ERISA's annual reporting requirement with respect to plan administrators, and the options available under § 104(a)(5) were either impractical or insufficient. Accordingly, Congress added § 502(c)(2), 29 U.S.C. § 1132(c)(2), by means of § 9342(c)(2) of the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203 ("OBRA"), for reports due after December 31, 1987 to provide that:

The Secretary may assess a civil penalty against any plan administrator of up to \$1,100 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 101 (b)(4).

In order to implement this broad mandate, the statute provides the Secretary with extensive regulatory, investigative, and litigation authority. ERISA § 505, 29 U.S.C. § 1135, states that the Secretary "may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this title."² Pursuant to this authority and the authority granted in

¹ ERISA § 104(a)(4) provides that:

The Secretary may reject any filing under this section—

- (A) if he determines that such filing is incomplete for purposes of this part; or
- (B) if he determines that there is any material qualification by an accountant or actuary contained in an opinion submitted pursuant to section 103(a)(3)(A) or section 103(a)(4)(B).

² Section 505, 29 U.S.C. § 1135 provides that:

§ 104(a)(5)(D), 29 U.S.C. § 1024(a)(5)(D), and in OBRA § 9342(d), the Secretary, following passage of 502(c)(2) in 1987 and in compliance with 5 U.S.C. § 554 of the Administrative Procedures Act, promulgated regulation 29 C.F.R. § 2560.502c-2, which sets forth the administration and procedures governing the assessment of civil penalties under § 502(c)(2).³

Regulation 29 C.F.R. § 2560.502(c)-2 defines, among other things, the scope of application of § 502(c)(2); the manner in which the penalty amount to be assessed is determined; and the procedures for considering reasonable cause for failure to file or why the penalty as calculated should not be assessed, as well as appeals of decisions on reasonable cause. The first step generally is the issuance of a Notice of Rejection, setting forth the reporting deficiencies and providing the plan administrator with the 45 day grace period specified in ERISA § 104(a)(5) within which to submit a revised filing satisfactory to the Secretary in order to avoid assessment of a civil penalty.⁴

If no annual report was filed in the first instance and/or if no satisfactory filing is received within the prescribed 45-day time frame, then the next step is the issuance of a Notice of Intent to Assess a Penalty (“NOI”), setting forth the reporting deficiencies and the intended penalty as calculated. The NOI also states that the Plan Administrator may file a Statement of Reasonable Cause explaining any mitigating circumstances and all alleged facts as to why the penalty, as calculated, should be reduced or not assessed. Under 29 C.F.R. § 2650.502c-2(e), the Secretary may waive or reduce the assessed penalty upon a showing that the plan administrator has complied with the reporting requirements of the Act or that there are mitigating circumstances regarding the degree of willfulness of non-compliance.

Paragraph (1) provides that failure to file such a statement within the 35 day period specified in paragraph (c) shall be deemed a waiver of the right to appear and contest—and an admission of—the facts alleged in the Notice of Intent, which Notice shall then become a final order of the Secretary within the meaning of 5 U.S.C. § 704. Paragraphs (g) and (h) provide for a Notice of Determination on a statement of reasonable cause and opportunity to seek an

Subject to Title III and section 109, the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this title. Among other things, such regulations may define accounting, technical and trade terms used in such provisions; may prescribe forms; and may provide for the keeping of books and records, and for the inspection of such books and records (subject to section 504(a) and (b)).

In addition, § 9342(d) of OBRA provides specifically that:

(2) Regulation.-The Secretary of Labor shall issue the regulations required to carry out the amendments made by subsection not later than January 1, 1989.

³ In conjunction with promulgation of 29 C.F.R. § 2560.502c-2, the Secretary promulgated regulations found at 29 C.F.R. § 2570.60-71. These regulations modify for § 502(c)(2) hearings certain of the rules of procedure for Department of Labor administrative hearings set forth in part 18 of C.F.R. Title 29. These rules are generally patterned on the Federal Rules of Civil Procedure and Evidence, but limit discovery and recognize the less formal nature of AU proceedings.

⁴ See ERISA § 104(a)(5), 29 U.S.C. § 1024(a)(5).

administrative law judge hearing within 30 days of service of a Notice of Determination—for those cases where there is a proper filing of a statement of reasonable cause in compliance with paragraph (e).

The penalty levels established by the Secretary include the following categories:

(1) \$300 per day to a maximum of \$30,000 per year for failure to file an annual report, (2) missing or deficient accountant's report, \$150 per day to a maximum of \$50,000; (3) missing or deficient financial reporting items, \$100 per day to a maximum of \$36,500; (4) missing or deficient other reporting items, \$10 per day to a maximum of \$3,650. These levels are intended to reflect the relative materiality of the reporting failures and, individually and in total, are far below the maximum penalty level, \$1,100 per day, that the Secretary is authorized to assess under § 502(c)(2). Penalties are assessed from the day after the date that a proper report is due (without regard to extensions) to the date on which an annual report satisfactory to the Secretary is filed. Amounts in each category are capped at the equivalent of a year's penalty period to compensate for delays that may occur during the process that are not within the control of the respondent, and penalty accruals are tolled pending the process. See 29 C.F.R. § 2560.502c-2(b). Within this context, the Secretary's ERISA reporting enforcement program commenced in 1990 beginning with annual reports due for the 1988 plan year.

III. FINDINGS OF FACT

Nebraska Meat Corporation, ("Nebraska Meat" or "Respondent") is the plan administrator of Plan 001 (CX 1). At the beginning of the 2007 plan year, the Plan had 160 participants and held assets in trust. (CX 1 at p. 2, lines 6; at the end of 2007 plan year, the Plan had 209 participants, see line 7(g)). Nebraska Meat filed the 2007 Form 5500 annual report on or about June 30, 2008, without a satisfactory IQPA report, even though item 6 indicated that the total number of participants in the plan at the beginning of the plan year was 160, item 9a indicated that the plan's funding arrangement is a trust, and item 9b indicated that the benefit arrangement is a trust. Therefore the Plan was not exempt from the audit requirement. (CX. I - 2007 Deficient Form 5500).

Under ERISA, a plan with more than 100 participants that holds assets in trust is required to have an annual audit performed on the plan and to attach the report of an independent qualified public accountant (IQPA) to the plan's annual report. 29 CFR § 2520.104-20(b). The plan administrator of an employee benefit plan is required to file an annual report with the federal government within 210 days after the end of the plan year.

See ERISA § 104, 29 U.S.C. § 1024.

EBSA issued two thirty-day request letters to Nebraska Meat on August 12, 2008 and October 6, 2008, requesting submission of the missing 2007 IQPA report for Plan 001. (CX. 2 and 3). Nebraska Meat did not respond to either of the August 12, 2008 or October 6, 2008 request letters. EBSA issued a Notice of Rejection (NOR) to Nebraska Meat on or about April 30, 2009, which reiterated the request for the 2007 IQPA report and Schedule H plan asset investment information. The NOR advised Nebraska Meat that it had 45 days within which to

comply without incurring a penalty. (CX 4) The NOR, inter alia, specifically contains the following notice:

“WARNING: Read this Notice carefully. YOU must file a written response within 45 days of the date of this Notice to avoid potential civil penalties authorized by Title I of ERISA. The law does not allow for extensions of time to respond to this Notice, therefore no extensions will be granted by the Department.”;(CX 4, p.1).

Nebraska Meat did not file an amended 2007 Form 5500 within 45 days from the date of the NOR. EBSA issued a Notice of Intent to Assess a Penalty (NOI) on or about June 29, 2009, again requesting submission of the 2007 IQPA report and schedule of assets under investment information, for Plan 001 and proposing an \$86,580 penalty against Nebraska Meat for its failure to file the 2007 IQPA report and Schedule H information. (CX 6). The NOI further advised Nebraska Meat that it had thirty-five days within which to submit a statement of reasonable cause --which requires setting forth the facts alleged as reasonable cause in writing and under penalty of perjury--for the failure to file the 2007 IQPA report or why the penalties, as calculated, should not be assessed. The NOI, inter alia, specifically contains the following:

“WARNING: Read this Notice carefully. YOU must file a written response within 35 days of the date to preserve your administrative rights. The law does not allow for extensions of time to respond to this Notice, therefore no extensions will be granted by the Department.” (CX 6, p.1).

Nebraska Meat responded by letter dated July 3, 2009, signed by Christine Lee, Controller at Nebraska Meat to OCA Analyst Roeda Miller in Response to NOI, stating that they had informed their accountant to do an audit on the 401(K) retirement plan and that an audit would be filed within two weeks. (CX 5) Additionally, on July 29, 2009, Gerald Romanoff, on behalf of the Plan Administrator, wrote to Roeda Miller; however, the RC Statement failed to contain the required penalty of perjury statement. Respondent alleged that they had mistakenly omitted the financial statement when filing form 5500 for the year 2007. Respondent further alleged that it had not intended to file without an accountant’s opinion. Also submitted with the RC Statement was an amended 2007 Form 5500, which included the required Schedule H plan asset investment information and a limited scope auditor’s report. (CX 7). EBSA issued a Penalty of Perjury Statement Notice on Statement of Reasonable Cause (POP) to Nebraska Meat on or about August 5, 2009, providing Respondent with an additional 10 days to submit a revised RC Statement containing the required penalty of perjury clause. (CX 8). In response to the POP, Complainant received a letter dated August 10, 2009 from Gerald Romanoff to Roeda Miller stating that when the original Form 5500 was filed the auditor’s report was not completed. The plan administrator did not want to file the return late, so the return was filed without the auditor’s report. Respondent sought abatement of the entire \$86,500 penalty with the filing of the amended 2007 return, allegedly correcting the noted deficiencies.⁵ (CX 9).

⁵ Respondent also filed its 2008 Form 5500 Annual Report. The 2008 return is not at issue for this proceeding.

Upon consideration of Respondent's RC Statement, OCA's Reasonable Cause Committee recommended abatement \$36,500 for the correction of the schedule of assets under investment information. However, the non-abatement of \$50,000 was recommended for Respondent's failure to provide an acceptable IQPA report. Specifically, Respondent failed to respond to the requests to obtain a copy of the "certification" allegedly issued by Merrill Lynch & Company Inc., in support of the limited scope audit. (CX 10, CX 13). EBSA issued a Notice of Determination on Statement of Reasonable Cause (NOD) or around September 28, 2009, to Nebraska Meat rejecting its reasons for its failure to file a 2007 IQPA report for Plan 001 and assessing an abated \$50,000 penalty against Nebraska Meat because Respondent failed to file a compliant, amended 2007 annual report that contained an accepted IQPA report. The NOD specifically found that no reasonable cause existed to waive the penalty because the scope of the IQPA report was inappropriately limited. Merrill Lynch & Co, Inc. was not a qualified financial institution pursuant to DOL regulation 29 CFR 2520.103-8. (CX 10-02 and CX1 1-02).

Subsequent to its request for a hearing on the penalty assessment, Respondent provided three letters from Merrill Lynch Wealth Management/Bank of America Corporation, signed by Jonathan Wolfe, Resident Vice-President. The letters were dated December 31, 2007, December 31, 2008, and April 5, 2010. All three letters purported to be a response to a request that Merrill Lynch, Pierce, Fenner & Smith Incorporated (MLPF&S") certify, pursuant to ERISA section 103(a)(2), that certain account statements, for the proceeding twelve months, are complete and accurate. (See CX 16, CX 17 and attachment to July 7, 2010 letter to this Court). It must be noted that the "certifications" dated December 31, 2007 and December 31, 2008, were not issued on the stated dates. Rather these certifications were issued on July 8, 2010. CX 16, CX 17. The "certification" dated April 5, 2010, as well as the "certifications" dated in 2007 and 2007, are acceptable certifications for purposes of a limited scope certification under DOL regulation 29 CFR §2520.103-8.

IV. STANDARD OF REVIEW

EBSA must show that substantial evidence existed to justify its penalty assessment. PWBA v. Bakery and Confectionery Workers Local 125 health and Welfare Fund, 94-RIS-48 (April 12, 1995). The courts of the Office of Administrative Law Judges have recognized that the standard of review in these cases is the deferential abuse of discretion or arbitrary and capricious standard. 5 U.S.C. § 704 and 706; Northwestern Institute of Psychiatry v. Martin, 1993 WL 52553, 16 Employee Benefits Case. 2066 (E.D. Pa. Feb. 24, 1993).⁶

⁶ 6 Section 706(2) of the Administrative Procedures Act, sets forth the scope of review for agency actions and provides that a reviewing court shall:

Hold unlawful and set aside agency action, findings, and conclusions found to be—

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

V. DISCUSSION AND CONCLUSIONS OF LAW

Respondent failed to appear at the July 13, 2010 hearing and failed to show cause why a default judgment should not be entered. At the hearing, Complainant averred that the Respondent remains in non-compliance. In addition to a judgment in the amount of \$50,000, Complainant requested injunctive relief ordering Respondent to submit a compliant 2007 report with a full scope audit.

As the entire evidentiary record, including pleadings and Complainant's Proffer of Proof shows, Respondent, the plan administrator for the Nebraska Meat 40 1(k) Plan, failed to timely and satisfactorily file and/or correct the 2007 Form 5500 and provide an IQPA report. Respondent does not dispute that it received all of the government's Notices. Respondent does not dispute that it did not obtain, nor did it provide a certification statement, from Merrill Lynch, to its auditor for the 2007 plan year. Instead, Respondent provided documentation from MLPF&S, dated December 31, 2007, December 31, 2008 and April 5, 2010.

The Complainant has clearly demonstrated, by substantial evidence, that the penalty was properly assessed. Respondent never made corrected filing in response to any of EBSA's Notices. When the Respondent finally submitted an amended 2007 annual return, containing an IQPA report with its Reasonable Cause ("RC") Statement, the audit was inappropriately limited because it failed to meet the requirements for a limited scope audit. Prior to issuing the NOD, OCA attempted to obtain a copy of the required certification in support of the limited scope audit. No evidence was submitted demonstrating that Merrill Lynch was a qualified financial institution under the DOL regulations. For the reasons set forth below, this Court upholds EBSA's penalty assessment

a. The Penalty Assessment is supported by substantial evidence

As the evidence demonstrates, EBSA's penalty assessment was appropriate, especially in light of Respondent's continued failure to come into compliance.

There are no challenges to the service of the Notices issued by EBSA. Nor can Respondent show that EBSA did not observe its own procedures or that the Respondent was not afforded all procedural opportunities available under the statute and regulations to cure the filing deficiencies without incurring a penalty. Before issuing a notice to assess a penalty, EBSA issued two 30-day clarification letters and a 45-day Notice of Rejection letter, which provided Respondent with a 105-day penalty free period. This notice and penalty-free grace period provides "the element of fairness, due process, and reasonableness." PWBA v. Spalding & Evenflo Companies, Inc., 1992-RIS-19, p. 11 (PWBA Nov. 18, 1994).

There is no dispute between the parties that the Plan is an employee benefit plan covered by ERISA pursuant to 4(a), 29 U.S.C. § 1003(a). There is no dispute that Respondent is the plan

5 U.S.C. § 706(2).

administrator of the Plan within the meaning of ERISA § 3 (16), 29 U.S.C. § 1002(16).

The legislative history and statutory provisions of ERISA make clear that a Plan's annual report is of central importance in the reporting, monitoring and enforcement scheme. It includes a required plan audit and schedule of invested assets. Thus, it is evident that, if required, the failure to file satisfactory reports for the Plan is a material reporting failure by any definition of the term "material." The violations sought to be enforced by the DOL are not mere technical reporting provisions, but are important measures designed to promote the purpose of ERISA, that is, a remedial statute designed to protect valuable employee benefit plans, through careful administration and regulation." PWBA v. Northwestern Institute of Psychiatry, 1993-RIS-23, p. 6 (December 21, 1993).

The only issue for resolution is whether Respondent failed to provide a compliant IQPA report that was not inappropriately limited pursuant to the conditions set forth in the DOL regulation.

Respondent's submission of an IQPA report, for the 2007 plan year, does not qualify for the limited scope exemption under DOL regulation 29 CFR §2520.103-8.⁷ At the time that Respondent retained its auditor to perform a limited scope audit, Respondent did not provide the auditor with a copy of the required certification of the accuracy of the financial statements with respect to the plan assets held by Merrill Lynch. The American Institute of Certified Public Accountants ("AICPA") March 1, 2010 publication entitled Audit & Accounting Guide: Employee Benefit Plans ("AAG-EBP") sets forth guidance and/or procedures for the auditor to follow for a limited scope audit in accordance with Generally Accepted Auditing Standards "GAAS." When an auditor is retained to perform a limited scope audit, for any assets covered by the full scope audit exception, the auditor is responsible for, inter alia, to "(1) obtain and read a copy of the certification from the plan administrator, and (2) determine whether the entity issuing the certification is a qualifying institution under DOL regulations." See AAG-EBP 7.65, p. 182 (March 1, 2010) (see attached as Addendum I). In or around December 31, 2007, Respondent did not request or receive a certification from Merrill Lynch regarding the accounts held by Merrill Lynch. In the plan year at issue, Merrill Lynch was not a qualified financial institution as defined under 2520.103-8.

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§2520.103-8 Limitation on scope of accountant's examination, provides:

- (a) General. Under the authority of section 103(a)(3)(C) of the Act, the examination and report of an independent qualified public accountant need not extend to any statement or information prepared and certified by a bank or similar institution or insurance carrier. A plan, trust or other entity which meets the requirements of paragraph (b) of this section is not required to have covered by the accountant's examination or report any of the information described in paragraph (c) of this section.
- (b) Application. This section applies to any plan, trust or other entity some or all of the assets of which are held by a bank or similar institution or insurance carrier which is regulated and supervised and subject to periodic examination by a State or Federal agency.
- (c) Excluded information. Any statements or information certified to by a bank or similar institution or insurance carrier described in paragraph (b) of this section, provided that the statements or information regarding assets so held are prepared and certified to by the bank or insurance carrier in accordance with §2520.103-5.

On August 10, 2009, Respondent submitted its Reasonable Cause Statement as required by the NOI. Respondent also submitted an amended 2007 Form 5500, which also contained the required auditor's report cited, as one of the deficiencies in rejection notice. On or about September 28, 2009, EBSA issued its Notice of Determination, which abated the originally intended penalty of \$86,580 to the reduced penalty of \$50,000. The Department determined that reasonable cause did not exist to waive \$50,000 of the assessed penalty because Respondent failed to file a compliant annual return with the required IQPA report. EBSA determined that the IQPA report was deficient because the scope of the IQPA report was inappropriately limited. Furthermore, EBSA determined that Merrill Lynch, the financial institution holding the plan's assets, did not qualify for limited scope treatment pursuant to DOL regulation 29 C.F.R. 2520.103-8. CX 11-02.

In or around December 31, 2007, Merrill Lynch & Co., Inc. did not meet the requirement as a bank or similar institution or insurance carrier pursuant to the DOL regulations. Moreover, Merrill Lynch & Co., Inc. ("Merrill Lynch" or "MLC") never issued or provided a certification to Respondent and/or its auditor.

On or about July 8, 2010, approximately 3 business days before the trial date, Respondent produced to Complainant and to this Court, two letters dated December 31, 2007 and December 31, 2008. See CX 16, pp. 3-4 and CX 17, pp. 3-4). The letters are on Merrill Lynch Wealth Management Bank of America⁸ letterhead, signed by Jonathan Wolfe, Resident Vice President, and addressed to Nebraska Meat. The December 2007 and 2008 letters purport to be certifications, pursuant to ERISA section 103(A)(2), of account statements held by Merrill Lynch, Pierce, Fenner & Smith Incorporated ("MLPF&S"). On July 9, 2010, Complainant obtained the Declarations of Jonathan Wolfe ("Wolfe") and Edward James ("James"). Both the Wolfe and James declarations attest that the December 31, 2007 and December 31, 2008 letters were issued on July 8, 2010 and attempt to attest to the accuracy of the account statements provided in or around the year end of 2007 and 2008 by Merrill Lynch; however, the "certifications were dated December 31, 2007 and December 31, 2008, respectively, to indicate that the twelve months of statements preceding the above-mentioned dates were accurate. These letters were not produced or distributed with the intent of creating the appearance that they were issued or signed on December 31, 2007 and December 31, 2008, respectively." CX 16-01, CX 17-01.

In 2007, Merrill Lynch was not a qualified financial institution for purposes of the **DOL regulation**. Nebraska Meat did not receive the requisite certification from Merrill Lynch to provide to its auditor. Such certifications were not received in 2007, 2008 nor in 2009. Therefore, the amended 2007 annual report, filed in August 2009, in response to the NOT did not contain an acceptable IQPA report because the audit was inappropriately limited. Respondent's attempt to produce "back dated" certifications fail because the issuing entity did not exist at the time that the certification should have been received by the Plan Administrator; therefore, it is clear that the Plan Administrator did not and could not have provided the auditor with the certification at the time the auditor was engaged to perform a limited scope review. DOL

⁸ On or after January 1, 2009, Bank of America acquired Merrill Lynch & Company, Inc., thereby forming Merrill Lynch, Pierce, Fenner & Smith/Bank of America.

regulation §2520.103-8 requires the Plan Administrator to obtain and provide the certification for the specified plan year at the time its auditor is retained to render the limited scope audit.

Because Respondent has failed to demonstrate that the Plan qualified for a limited scope review pursuant to DOL regulation §2520.103-8 and has not provided a full scope issued. Therefore, EBSA's penalty assessment and rejection of the Respondent's reasonable cause statement was not unreasonable, nor was EBSA's penalty determination arbitrary or capricious.

VI. ORDER

IT IS HEREBY ORDERED that Respondent, the Plan Administrator for the Nebraska Meat Corp. 401(k) Profit Sharing Plan & Trust, shall pay to the U.S. Department of Labor a civil penalty in the amount of \$50,000 within 45 days of this Decision and Order. Additionally, Respondent is ordered to file an amended 2007 Form 5500 Annual Report with the required full scope IQPA report.

A

Ralph A. Romano
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Pursuant to 29 C.F.R. § 2570.69, a notice of appeal must be filed with the Secretary of Labor within 20 days of the date of issuance of this Decision and Order or this decision will become the final agency action within the meaning of 5 U.S.C. § 704. A notice of appeal should be filed with:

Director of the Office of Policy and Research
Employee Benefits Security Administration
200 Constitution Av, NW, Ste N-5718
Washington, DC 20210

See Secretary's Order 6-2009, 74 Fed. Reg. 21524-01, 2009 WL 1227622 (signed Apr. 30, 2009) (delegation of review authority to the Assistant Secretary for Employee Benefits Security). A notice of appeal must state, with specificity, the issue or issues on which the party is seeking review. The notice of appeal must be served on all parties of record.