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PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4003

RIN 1212-AB04

Rules for Administrative Review of Agency Decisions; Section 4071 Penalty Assessments

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This final rule amends the Pension Benefit Guaranty Corporation's administrative review regulation to make it applicable to assessments of penalties for failure to timely provide certain notices or other material information. Under the rule, such assessments will be subject to reconsideration in accordance with the provisions of the regulation.

DATES: Effective [insert date 30 days after publication in the **FEDERAL REGISTER**] and applicable to determinations made on or after that date.

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1-800-877-8339 and ask to be connected to 202-326-4024.)

SUPPLEMENTARY INFORMATION:

The Pension Benefit Guaranty Corporation (PBGC) administers the pension plan termination insurance program under title IV of the Employee Retirement Income Security Act

of 1974 (ERISA). PBGC's regulation on Rules for Administrative Review of Agency Decisions (29 CFR Part 4003) provides rules governing the issuance of initial determinations by PBGC involving the matters set forth in the regulation and procedures for requesting and obtaining PBGC review of those determinations, either by appeal (a more formal proceeding) or by request for reconsideration (a less formal process), depending on the type of matter. A person that fails to exhaust administrative remedies under the regulation with respect to a determination may not be able to raise in court some legal defenses against enforcement of the determination that might otherwise have been available.

Section 4071 of ERISA authorizes PBGC to assess a penalty for failure to timely provide any notice or other material information required under ERISA sections 4001–4071 or 303(k)(4) or regulations thereunder. PBGC published policy guidance on its assessment and review of section 4071 penalties on March 3, 1992 (at 57 FR 7605), and July 18, 1995 (at 60 FR 36837).¹ On January 12, 2001 (at 66 FR 2857), PBGC published a proposed rule on Assessment of and Relief from Penalties under both ERISA section 4007 (dealing with payment of premiums) and ERISA section 4071.² Among the proposed actions was amendment of the administrative review regulation to make determinations with respect to penalties under section 4071 subject to that

¹ The 1995 policy statement generally replaced the 1992 statement.

² Although it was published as a proposal with an invitation for public comment, the 2001 penalty policy proposed rule was (as its preamble stated) not subject to notice and comment rulemaking requirements under section 553 of the Administrative Procedure Act because it dealt only with general statements of PBGC policy and with PBGC procedural rules. On November 17, 2006 (at 71 FR 66867), PBGC published a final rule adding a penalty policy appendix, drawn from the 2001 proposed rule, to its regulation on Payment of Premiums.

regulation, in the class of matters reviewable by reconsideration.³ No comments were received on the proposal.⁴

This final rule amends the administrative review regulation consistent with the 2001 proposal. This change will promote uniformity in PBGC's procedures for making and reviewing determinations. The provisions of the administrative review regulation will supersede any inconsistent provisions of the 1992 and 1995 penalty policy statements; in other respects, those policy statements will be unaffected.

Applicability

The amendment made by this rule applies to determinations under section 4071 made on or after [insert date 30 days after publication in the **FEDERAL REGISTER**].

Compliance with Rulemaking Guidelines

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

This rule is not subject to notice and comment rulemaking requirements under section 553 of the Administrative Procedure Act because it deals only with PBGC procedural rules. Because no general notice of proposed rulemaking is required, the Regulatory Flexibility Act does not apply. See 5 U.S.C. 601(2), 603, 604.

³ Premium penalties under ERISA section 4007 are already covered by the administrative review regulation. Premium penalty determinations are in the class of matters for which reconsideration is provided.

⁴ On May 7, 2004 (at 69 FR 25797), PBGC proposed a new penalty policy for failures to issue Participant Notices as required under ERISA section 4011 and PBGC's regulation on Disclosure to Participants (29 CFR part 4011), the provisions of which are inapplicable to plan years starting after 2006. Comments received on that proposal were relevant to some aspects of the 2001 proposal, but not to the administrative review provisions.

This action is associated with retrospective review and analysis in PBGC's Plan for Regulatory Review⁵ issued in accordance with Executive Order 13563 on "Improving Regulation and Regulatory Review."

List of Subjects in 29 CFR Part 4003

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

For the reasons given above, PBGC is amending 29 CFR part 4003 as follows.

PART 4003 — RULES FOR ADMINISTRATIVE REVIEW OF AGENCY DECISIONS

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

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

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

⁵ See www.pbgc.gov/documents/plan-for-regulatory-review.pdf.

§ 4003.1 Purpose and scope.

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(b) *Scope.* * * *

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

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Issued in Washington, D.C., this 6 day of April, 2012.

Joshua Gotbaum
Director
Pension Benefit Guaranty Corporation

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