



[Billing Code 7709-02-P]

## **PENSION BENEFIT GUARANTY CORPORATION**

**29 CFR Part 4908**

**RIN 1212-AB49**

### **Procedures for PBGC Guidance Documents**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule.

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**SUMMARY:** This final rule sets forth the Pension Benefit Guaranty Corporation's (PBGC) procedures for issuing PBGC guidance documents as required by an Executive order entitled "Promoting the Rule of Law Through Improved Agency Guidance Documents."

**DATES:** *Effective date:* This final rule is effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Hilary Duke ([duke.hilary@pbgc.gov](mailto:duke.hilary@pbgc.gov)), Assistant General Counsel for Regulatory Affairs, Office of the General Counsel, 1200 K Street NW, Washington, DC 20005-4026, 202-229-3839; or Karen B. Levin ([levin.karen@pbgc.gov](mailto:levin.karen@pbgc.gov)), Attorney, Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026, 202-229-3559. TTY users may call the Federal Relay service toll-free at 800-877-8339 and ask to be connected to 202-229-3559.

### **SUPPLEMENTARY INFORMATION:**

#### **Executive Summary**

*Purpose and Authority*

This final rule adds to the Code of Federal Regulations a new 29 CFR part 4908, which implements the requirements of Executive Order (EO) 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents.”<sup>1</sup> EO 13891 requires agencies to set forth processes and procedures for issuing guidance documents.

PBGC’s legal authority for this action comes from section 4002(b)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), which authorizes PBGC to issue regulations to carry out the purposes of title IV of ERISA, and from EO 13891.

### *Major Provisions*

The final rule provides the following procedures:

- Guidance documents will include specified information, including a statement that a guidance document does not bind the public, and will be posted at [www.pbgc.gov/guidance](http://www.pbgc.gov/guidance).
- Significant guidance documents will have a 30-day public notice and comment period, be reviewed by the Office of Management and Budget (OMB), and meet other requirements.
- Members of the public may request withdrawal or modification of a guidance document.

### **Background**

On October 9, 2019, the President issued Executive Order (EO) 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents.” Central principles of EO 13891 are that the American public should only be subject to binding rules imposed through duly enacted statutes or through regulations that are lawfully promulgated, and that Americans should

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<sup>1</sup> 84 FR 55235 (October 9, 2019).

have fair notice of any such obligations. Section 4 of the order directs that, “[w]ithin 300 days of the date on which [the Office of Management and Budget] issues an implementing memorandum under section 6 of this order, each agency shall, consistent with applicable law, finalize regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents.” On October 31, 2019, OMB issued OMB Memorandum M-20-02,<sup>2</sup> which provides agencies with instructions for complying with the requirements of EO 13891 (“OMB Memo M-20-02”).

In accordance with OMB’s direction, PBGC is amending title 29, chapter 40, subchapter L of the Code of Federal Regulations by adding a new part 4908, “Procedures for PBGC Guidance Documents.” These new regulations codify the requirements set forth in section 4 of EO 13891.

### **Compliance with Rulemaking Guidelines**

This is a rule of “agency organization, procedure or practice” and is limited to “agency organization, management, or personnel matters.” The final rule provides PBGC’s procedures for issuing guidance documents. Accordingly, this rule is exempt from notice and public comment requirements under 5 U.S.C. 553(b) and the requirements of Executive Order 12866 and Executive Order 13771.<sup>3</sup> Because no general notice of proposed rulemaking is required, the Regulatory Flexibility Act does not apply to this rule. See 5 U.S.C. 601(2), 603, 605.

PBGC finds good cause exists for making the additions set forth in this final rule effective less than 30 days after publication because the additions support PBGC’s procedures

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<sup>2</sup> M-20-02, Guidance Implementing Executive Order 13891, Titled “Promoting the Rule of Law Through Improved Agency Guidance Documents” (October 31, 2019) available at <https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf>.

<sup>3</sup> See section 3(d)(3) of Executive Order 12866 and section 4(b) of Executive Order 13771.

for issuing guidance documents in compliance with the deadlines in EO 13891 and OMB Memo M-20-02.

### **List of Subjects in 29 CFR Part 4908**

Administrative practice and procedure, Employee benefit plans, Organization and functions (Government agencies), Pension insurance.

For the reasons given above, PBGC amends title 29, chapter 40, subchapter L of the Code of Federal Regulations by adding part 4908 to read as follows:

### **PART 4908 — PROCEDURES FOR PBGC GUIDANCE DOCUMENTS**

Sec.

4908.1 Purpose and scope.

4908.2 Definitions.

4908.3 Procedures for issuing guidance documents.

4908.4 Procedures for issuing significant guidance documents.

4908.5 Public access to guidance documents.

4908.6 Procedures for requests from the public to withdraw or modify a guidance document.

Authority: 29 U.S.C. 1302(b)(3), E.O. 13891, 84 FR 55235, 3 CFR, 2019 Comp., p. 371.

#### **§ 4908.1 Purpose and scope.**

This part provides general procedures that apply to PBGC guidance documents.

#### **§ 4908.2 Definitions.**

In addition to the terminology in part 4001 of this chapter, as used in this part—

*Director* means the Director of PBGC.

*Guidance document* means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation, but does not include, for example, the following:

(1) Statements of specific applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions (e.g., case or investigatory letters responding to complaints, warning letters), notices regarding particular locations or facilities (e.g., guidance pertaining to the use, operation, or control of a Government facility or property), and correspondence with individual persons or entities (e.g., congressional correspondence or notices of violation), except documents ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public;

(2) Statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including speeches and individual presentations, editorials, media interviews, press materials, or congressional testimony that do not set forth for the first time a new regulatory policy;

(3) Rules promulgated pursuant to notice and comment under section 553 of title 5, United States Code, or similar statutory provisions;

(4) Rules exempt from rulemaking requirements under section 553(a) of title 5, United States Code;

(5) Rules of agency organization, procedure, or practice;

(6) Decisions of agency adjudications under section 554 of title 5, United States Code, or similar statutory provisions;

(7) Internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties or the public;

(8) Legal briefs, other court filings, or positions taken in litigation or enforcement actions;

(9) Contract solicitations or awards; or

(10) Internal executive branch legal advice or legal advisory opinions addressed to executive branch officials.

*OMB* means the Office of Management and Budget.

*Significant guidance document* means a guidance document that may reasonably be anticipated to:

(1) Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866.

### **§ 4908.3 Procedures for issuing guidance documents.**

(a) *Required elements of guidance documents.* A PBGC guidance document will comply with all relevant statutes and regulations and include, at a minimum, all of the following:

(1) The term "guidance;"

(2) Identification of PBGC as the agency issuing the guidance document;

(3) Identification of the activities to which and the persons to whom the guidance document applies;

(4) The date of issuance;

(5) A statement if it is a revision to a previously issued guidance document and, if so, identification of the guidance document that it replaces;

(6) The title of the guidance document and a unique identification number;

(7) The citation to the statutory provision or regulation (in Code of Federal Regulations format) to which it applies or which it interprets;

(8) A short summary of the subject matter covered in the guidance document at the top of the document; and

(9) A prominent statement that “The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or PBGC policies.”

PBGC will modify the statement to reflect when the guidance document is authorized by law or incorporated into a contract.

(b) *Plain English requirement.* Guidance documents will be written in plain English and avoid using mandatory language, such as “shall,” “must,” “required,” or “requirement,” unless the language is describing an established statutory or regulatory requirement, is authorized by law, or is addressed to PBGC staff and will not foreclose PBGC's consideration of positions advanced by affected private parties.

(c) *Review and clearance procedures—(1) In general.* All guidance documents proposed to be issued will be reviewed and cleared by the General Counsel, in consultation with the Chief Policy Officer and the Director.

(2) *OMB significance determination.* Before issuance, unless waived by OMB, PBGC will send a guidance document to OMB for it to determine whether the guidance document is a

significant guidance document within the meaning of Executive Order 13891. Requests for waivers will be approved by the Director.

(3) *Nonsignificant guidance documents.* If OMB determines that a guidance document is not a significant guidance document, PBGC will post the guidance document at [www.pbgc.gov/guidance](http://www.pbgc.gov/guidance).

(4) *Significant guidance documents.* If OMB determines that a guidance document is a significant guidance document, PBGC will follow the procedures in § 4908.4.

#### **§ 4908.4 Procedures for issuing significant guidance documents.**

(a) *Procedures for proposed significant guidance documents—(1) In general.* If OMB determines that a guidance document is a significant guidance document within the meaning of Executive Order 13891, the procedures in this section will apply unless otherwise agreed to by OMB and PBGC. PBGC will demonstrate to OMB how a significant guidance document complies with Executive Orders 12866, 13563, 13609, 13771, and 13777, as applicable.

(2) *OMB review.* If requested by OMB, PBGC will submit a proposed significant guidance document to OMB for review under Executive Order 12866 before issuance.

(3) *Notice and comment.* Except when PBGC for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest (and incorporates the finding and a brief statement of reasons for the finding into the significant guidance document), PBGC will—

(i) Publish a notice in the Federal Register announcing the availability of a proposed significant guidance document and a 30-day public notice and comment period; and

(ii) Provide an electronic method for the public to comment on the significant guidance document.



(b) *Procedures for final significant guidance documents*—(1) *In general.* PBGC will submit a final significant guidance document to OMB for review under Executive Order 12866 before issuance.

(2) *Response to comments.* PBGC will provide a public response to comments on a proposed significant guidance document either in a final significant guidance document or in a companion document that addresses major concerns raised in comments.

(c) *Issuance.* All proposed and final significant guidance documents will be signed by the Director on a non-delegable basis and posted at [www.pbgc.gov/guidance](http://www.pbgc.gov/guidance).

#### **§ 4908.5 Public access to guidance documents.**

(a) *In general.* PBGC will maintain on PBGC's public website a single, searchable, indexed database that contains, or links to PBGC's guidance documents at [www.pbgc.gov/guidance](http://www.pbgc.gov/guidance). Any guidance document posted on the database is final unless it is a proposed significant guidance document under § 4908.4.

(b) *Nonbinding effect.* The database described in paragraph (a) of this section will state that guidance documents do not have the force and effect of law, unless expressly authorized by statute or incorporated into a contract and are not meant to bind the public in any way.

(c) *Rescinded guidance documents.* All guidance documents that are not posted on the database described in paragraph (a) of this section are considered rescinded. PBGC will not cite, use, or rely upon any guidance document that is rescinded, except to establish historical facts.

(d) *Withdrawal.* When PBGC withdraws a guidance document, PBGC will remove the hyperlink to the guidance document from the database and will clearly identify the guidance document as withdrawn. The name, title, unique identifier, and date of withdrawal will be listed on the database for at least one year after withdrawal.

**§ 4908.6 Procedures for requests from the public to withdraw or modify a guidance document.**

(a) *In general.* A member of the public may petition PBGC in writing for withdrawal or modification of an existing guidance document issued by PBGC.

(b) *Petition instructions.* PBGC will provide clear instructions on its website regarding how to submit petitions for withdrawal or modification of any guidance document at [www.pbgc.gov/guidance](http://www.pbgc.gov/guidance). These instructions will include an email address, a physical mailing address for hard copy petitions, and the office responsible for coordinating responses to petitions. PBGC will clearly identify the General Counsel as the designated PBGC official to whom petitions should be directed at [GuidanceComments@pbgc.gov](mailto:GuidanceComments@pbgc.gov).

(c) *Contents of petition.* A petition must—

(1) Specify the petitioner's name and a means for PBGC to contact the petitioner, such as an email address or a mailing address;

(2) Identify the guidance document that is the subject of the petition;

(3) Present any information and arguments in support of the request for withdrawal or modification of the guidance document, including any specific circumstances in which the guidance document is incorrect or obsolete; and

(4) Be directed to the designated PBGC official.

(d) *Response.* In response to a petition, the General Counsel, in consultation with the Chief Policy Officer and the Director, will determine whether to withdraw, modify, or retain a guidance document. PBGC will respond to a petition promptly, but no later than 90 days after receiving the petition. If PBGC withdraws a guidance document in response to a petition, PBGC

will follow the procedures in § 4908.5(d) and post a response to the petition on its guidance database.

Issued in Washington, DC, by

**Gordon Hartogensis,**

*Director,*

*Pension Benefit Guaranty Corporation*

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