

PENSION BENEFIT GUARANTY CORPORATION**29 CFR Parts 4011 and 4071**

RIN 1212-AA95

Assessment of and Relief From Penalties—Participant Notices**AGENCY:** Pension Benefit Guaranty Corporation.**ACTION:** Proposed statement of policy.

SUMMARY: The PBGC is proposing a new penalty policy for failures to issue Participant Notices as required under section 4011 of the Employee Retirement Security Act of 1974 and 29 CFR part 4011. The new policy would tie the guideline penalty amounts primarily to the number of plan participants. Subject to a one-year transition period, the new policy would apply to: (1) 2004 and later Participant Notices, (2) 2002 and 2003 Participant Notices that do not meet the requirements for penalty relief under the Participant Notice Voluntary Correction Program ("VCP") announced elsewhere in today's **Federal Register**, and (3) pre-2002 Participant Notices, where there is a 2002 or 2003 Participant Notice failure that is covered by the VCP but that does not meet the requirements for penalty relief under the VCP.

DATES: Comments must be received on or before July 6, 2004.

ADDRESSES: Comments may be mailed to the Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005-4026, or delivered to Suite 340 at the above address. Comments also may be submitted electronically through the PBGC's Web site at <http://www.pbgc.gov/regs>, or by fax to 202-326-4112. The PBGC will make all comments available on its Web site, <http://www.pbgc.gov>. Copies of the comments may also be obtained by writing to the PBGC's Communications and Public Affairs Department at Suite 240 at the above address or by visiting that office or calling 202-326-4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4040.)

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, or Catherine B. Klion, Attorney, Pension Benefit Guaranty Corporation, Office of the General Counsel, Suite 340, 1200 K Street, NW., Washington, DC 20005-4026, 202-326-4024. (For TTY/TDD users, call the Federal relay service toll-free at 1-800-

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

SUPPLEMENTARY INFORMATION: Section 4011 of the Employee Retirement Income Security Act of 1974 ("ERISA") requires certain underfunded plans to issue a notice to participants of the plan's funding status and the limits on the PBGC's guarantee ("Participant Notice"). The Participant Notice helps to ensure that participants better understand the financial status of their plans and the consequences that plan underfunding may have on their promised benefits. The PBGC's implementing regulations are at 29 CFR part 4011.

Elsewhere in today's **Federal Register**, the PBGC is announcing a Participant Notice Voluntary Correction Program ("VCP"). This program, which generally covers Participant Notices for the 2002 or 2003 plan year that were not issued as required, is designed to encourage plan administrators to correct recent compliance failures without penalty and to facilitate plan administrators' future compliance. The VCP and the requirements generally governing Participant Notices, including the effect of the Pension Funding Equity Act of 2004, which was signed into law by the President on April 10, 2004, are more fully described in that announcement.

Under section 4071 of ERISA and 29 CFR part 4071, the PBGC may assess a penalty of up to \$1,100 a day for certain failures to provide notices or other material information in a timely manner, including a failure to provide a Participant Notice as required. The Department of Labor has advised the PBGC that a penalty assessed against a plan administrator under section 4071 of ERISA for failure to issue a Participant Notice as required is a liability of the plan administrator, not a liability of the plan, and may not be paid out of plan assets.

On July 18, 1995 (60 FR 36837), the PBGC published its current penalty policy, which applies to Participant Notices along with other types of information. The current policy provides:

General guideline penalty amounts: The penalty accrues at the rate of \$25 per day for the first 90 days of delinquency and \$50 per day thereafter. The penalty is reduced proportionately for plans with fewer than 100 participants, subject to a floor of \$5 per day. There is a cap on the total penalty for any violation of \$100 times the number of plan participants.

Facts-and-circumstances adjustments: The PBGC may adjust the penalty rate up or down based on the facts and

circumstances surrounding the violation. The policy identifies certain specific circumstances in which the PBGC may or will assess larger penalties.

Penalty waivers for reasonable cause: The PBGC evaluates each request for a waiver based on "reasonable cause" to determine whether the responsible person exercised ordinary business care and prudence and delay resulted from circumstances beyond that person's control.

On January 12, 2001 (66 FR 2856), the PBGC published a proposed rule that would, among other things, codify in its regulations an expanded version of its 1995 penalty policy. The proposed policy leaves the guideline amounts for assessing penalties basically unchanged and provides guidance on determining whether there is "reasonable cause" that would justify a waiver of penalties. The PBGC did not receive any comments on this proposal.

Based on its experience in enforcing Participant Notice requirements, the PBGC has reconsidered its 2001 proposal as applied to Participant Notices. The PBGC believes that its guideline penalties for Participant Notice failures should be tied primarily to the number of plan participants rather than, as is the case under the existing policy and the 2001 proposal, the number of days of delinquency. This approach recognizes that the significance of a failure to provide a Participant Notice varies with the number of participants who were entitled to, but did not, receive the Participant Notice. Accordingly, the PBGC is issuing a supplemental proposal relating to its penalty policy for Participant Notice failures. Under the proposed new penalty structure, as under the existing penalty policy and the 2001 penalty policy proposal, the PBGC would continue to consider the facts and circumstances of each case to ensure that the penalty fits the violation. The PBGC intends to publish its final Participant Notice penalty policy as soon as practicable after considering public comments.

Proposed Participant Notice Penalty Policy

The guideline penalty amount for a failure to issue a Participant Notice as required would equal the number of participants in the plan multiplied by the applicable per-participant information penalty rate. That rate would depend on whether the failure is a repeat violation and on the timing of its correction in relation to a PBGC audit:

Pre-audit corrections: If the plan administrator corrects the failure on or before the date the PBGC issues a written notice to the plan that it is or may be auditing compliance with Participant Notice requirements, the per-participant information penalty rate would be \$5, unless the violation is a repeat violation, in which case the per-participant information penalty rate would be \$20.

Post-audit corrections: If the plan administrator corrects the failure after the date the PBGC issues a written notice to the plan that it is or may be auditing compliance with Participant Notice requirements, the per-participant information penalty rate would be \$40, unless the violation is a repeat violation, in which case the per-participant information penalty rate would be \$100.

However, if the plan administrator corrects the failure within one year after the Participant Notice was originally due (regardless of whether the correction was pre-audit or post-audit), the PBGC would prorate the penalty based on the number of days before correction. For example, if the plan administrator corrects the failure 90 days after the Participant Notice deadline, the PBGC would reduce the penalty by multiplying it by 90/365. The PBGC would not increase the penalty for failures corrected after a year.

Determination of Participant Count

In applying the new penalty structure, the PBGC generally would use the number of plan participants as determined for premium purposes for the plan for which the Participant Notice is required. Thus, the participant count would ordinarily be determined as of the last day of the prior plan year, which usually serves as the "snapshot" date used to count participants for premium purposes. However, where this participant count is significantly higher or lower than the number of persons entitled to receive the Participant Notice, the PBGC may make an appropriate adjustment to the participant count.

Determination of Repeat Violation Status

The PBGC would treat a failure to issue a Participant Notice as required for a plan year as a repeat violation if it occurred after the date the plan administrator knew, or should have known, that there was a non-*de minimis* Participant Notice failure for a previous plan year. For this purpose, the PBGC would disregard any Participant Notice failure for: (1) Any plan year more than six years before the plan year in question, (2) any 2002 or 2003 plan

year, provided the 2002 or 2003 Participant Notice failure meets the requirements for penalty relief under the VCP announced elsewhere in today's **Federal Register**, and (3) any pre-2002 plan year, except where there is a 2002 or 2003 Participant Notice failure that is covered by the VCP but that does not meet the requirements for penalty relief under the VCP.

Determination That Valid Corrective Notice Has Been Issued

The PBGC would determine whether a corrective notice issued by a plan administrator is valid for purposes of this penalty policy under the following guidelines:

Pre-audit corrections: If the plan administrator corrects a Participant Notice failure on or before the date the PBGC issues a written notice to the plan that it is or may be auditing compliance with Participant Notice requirements, the correction would be valid for purposes of this penalty policy if the PBGC determines, based on the facts and circumstances, that the corrective notice serves the statutory purposes of the Participant Notice requirement. There would be a "safe harbor" under which the PBGC would treat the corrective notice as valid if the corrective notice:

(1) Included, in addition to the information originally required in the delinquent Participant Notice, all information that was required in all later Participant Notices that were due on or before the date the corrective notice is issued; and

(2) Was issued to the persons who were entitled to receive the most recent Participant Notice that was due on or before the date the corrective notice was issued.

(If the plan was not required to issue a Participant Notice for a particular plan year, the safe-harbor requirements would apply as if the plan had been required to issue a Participant Notice for that plan year.) The PBGC encourages plan administrators to correct Participant Notice failures as soon as possible, both to ensure that participants receive more timely information and to minimize penalty exposure. However, depending on the timing, a plan administrator might choose to combine into a single document a "safe-harbor" corrective notice and a required Participant Notice for a later plan year. If so, the PBGC would not treat the required Participant Notice as violating the requirement in § 4011.10(d) that additional information may be included only if it is in a separate document.

Example: Assume that a Plan Administrator fails to issue a required Participant Notice for the 2004 plan year, is not required to issue a Participant Notice for the 2005 plan year, and is required to issue a Participant Notice for the 2006 plan year. Assume further that the Plan Administrator issues the 2006 Participant Notice to the persons entitled to receive it and includes as part of the 2006 Participant Notice all information originally required in the 2004 Participant Notice and all information that would have been required in the 2005 Participant Notice if it had been required to be issued. The PBGC would treat the plan administrator as having issued a valid corrective notice, and the 2006 Participant Notice would not violate the requirement in § 4011.10(d) that additional information may be included only if it is in a separate document.

Plan administrators are encouraged to contact the PBGC for guidance on pre-audit corrections of Participant Notice failures by submitting questions electronically through the PBGC's Web site at <http://www.pbgc.gov/participantnotice> or by calling the toll-free telephone number at the PBGC's Practitioner Customer Service Center (1-800-736-2444). **Post-audit corrections:** If the plan administrator corrects a Participant Notice failure after the date the PBGC issues a written notice to the plan that it is or may be auditing compliance with Participant Notice requirements, the PBGC would treat the correction as valid only if the corrective notice is approved by the PBGC.

Downward Adjustment to Guideline Penalty Amount for Partial Failure

The PBGC would make an appropriate downward adjustment to the penalty amount where there was a partial failure to comply with the Participant Notice requirements other than a late issuance of an otherwise valid Participant Notice (e.g., a failure to issue the Participant Notice to some of the persons entitled to receive it or a failure to include in the Participant Notice some of the required information).

Upward Adjustment to Guideline Penalty Amount for Failure To Cooperate

The PBGC would make an appropriate upward adjustment to the penalty amount where it determines upon audit that there was a failure to comply with the Participant Notice requirements and the plan administrator does not promptly issue a corrective notice approved by the PBGC. The upward adjustment would generally be to a penalty that is significantly higher.

Applicability

The new Participant Notice penalty policy would apply to: (1) 2004 and later Participant Notices, (2) 2002 and 2003 Participant Notices that do not meet the requirements for penalty relief under the VCP, and (3) pre-2002 Participant Notices, where there is a 2002 or 2003 Participant Notice failure that is covered by the VCP but that does not meet the requirements for penalty relief under the VCP.

The PBGC would generally use the new guideline penalty amounts for its penalty assessments and reviews of penalty assessments on and after the effective date of the new penalty policy, which the PBGC anticipates will be at least 30 days after the date it publishes its final penalty policy. However, the PBGC would apply a transition rule in the case of a Participant Notice failure

that starts before the effective date of the new penalty policy and that is corrected no later than one year after the effective date of the new penalty policy (including a delinquency corrected before the new penalty policy becomes effective). For such delinquencies, the guideline penalty amount would be the lesser of the amount calculated under the current penalty policy and the amount calculated under the new penalty policy.

Compliance With Rulemaking Guidelines

The PBGC has determined, in consultation with the Office of Management and Budget, that this proposed Statement of Policy is a "significant regulatory action" under Executive Order 12866. The Office of Management and Budget has therefore

reviewed this proposed Statement of Policy under Executive Order 12866.

This action is not subject to notice and comment rulemaking requirements under section 553 of the Administrative Procedure Act because it deals only with a general statement of PBGC policy. However, the PBGC nonetheless is publishing this Statement of Policy in proposed form and invites public comment. 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.

Issued in Washington, DC, this 3rd day of May, 2004.

Bradley D. Belt,

Executive Director, Pension Benefit Guaranty Corporation.

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