

Publications

PBGC's Regulatory Spring Cleaning: Numerous Changes, Updates, and Clarifications to PBGC Reporting, Termination, and Premium Rules

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On February 4, 2020, the Pension Benefit Guaranty Corporation (“PBGC”) issued final regulations (the “**Final Rule**”) covering reportable events, annual reporting under ERISA section 4010, plan termination filings, and PBGC premiums. 85 Fed. Reg. 6046. Many of these new rules incorporate the prior proposed rules issued by PBGC on June 27, 2019 (the “**Proposed Rule**”), but some have been updated based on public comment to those proposals.

The Final Rule impacts plan sponsors’ or administrators obligations to the PBGC in several ways. Below we summarize the key provisions of the new rules.

Changes to Reportable Events Rules

Under ERISA section 4043 and the corresponding regulations, plan sponsors and administrators are required to notify PBGC of events that PBGC perceives indicate an increased risk to the pension plan or PBGC, such as a liquidation, active participant reduction, or a missed contribution. In 2015, PBGC largely revamped the reportable event rules to refine the situations in which PBGC believes events indicate an increased risk and should be reported. PBGC believes that the latest rules further improve on the 2015 rules by, *inter alia*, providing needed guidance, codifying policies, and reducing unnecessary reporting.

To that end, the Final Rule makes the following changes to the reportable event requirements, effective for events on or after March 5, 2020.

- **Low-Default-Risk Safe Harbor:** Under the rules, a plan sponsor or administrator may qualify for a waiver to notify PBGC of certain reportable events if the sponsor can show that it is a “low-default risk.” Among the criteria used to establish a company is a low-default risk is the “commercial measures criterion,” *e.*, whether the probability of the company defaulting on its financial obligations is no more than 4% over the next five years, or not more than 0.4% over the next year, based upon “widely available financial information” on the company’s credit quality. The Final Rule clarifies that “widely available” financial information must be third-party information, not information generated by the company itself.

- Active Participant Reduction:

- *75% Lookback Eliminated:* Under the old rule, a reportable event occurred if there was a reduction to 80% of the active participants from the start of the current year, or a reduction to 75% of the active participants from the start of the previous year. Under the Final Rule, reporting under the 75%, two-year lookback test is eliminated.
- *Multiple Events:* The Final Rule clarifies that in the event there are multiple events that trigger an active participant reduction (e., a single-cause event and an attrition event), each event must be reported separately. However, the Final Rule also provides that if a single-cause active participant reduction was timely reported to the PBGC, the active participants associated with that event are included in the active participant count at the end of the year for the purpose of determining whether an active participant reduction on account of attrition has occurred. Thus, PBGC intends that the Final Rule eliminate duplicative reporting for the same event.
- *Clarification of “Active Participant”:* The Final Rule provides that, for purposes of the active participant reduction reportable event, an “active participant” includes any participant who receives compensation from any member of the plan’s controlled group. In other words, an employee will not be included in an active participant reduction count when that employee simply transfers employment among employers in the same controlled group.
- *Duplicate Reporting Not Required:* The Final Rule provides that if an active participant reduction is already reported due to other rules under ERISA (withdrawal of participating employer under ERISA section 4063(a), or a substantial shutdown of operations under ERISA section 4062(e)), then there is no need to report the active participant reduction if PBGC has already been notified of those other events.
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- *Inability to Pay Benefits when Due*: Generally, a reportable event occurs when a plan is unable to pay benefits that are due over the next six months. Prior to the Final Rule, the PBGC rules provided that a reportable event does not occur if the payment was delayed for less than two months (or two benefit payment periods, if shorter) for administrative reasons, including the need to verify a person’s benefit eligibility. The Final Rule clarifies that the two-month period only applies to *administrative* delay, and that a plan is not constrained by the same two-month period for purposes of verifying a person’s eligibility for benefits, which PBGC recognizes could take longer than two months.
- *Change in Controlled Group*: The Final Rule clarifies that there is no reportable event if there is a change in the plan’s sponsor, so long as the new sponsor of the plan is in the same controlled group.
- *Liquidation*: Prior to the Final Rule, a “liquidation” reportable event occurred if a controlled group member was involved in “any transaction to implement its complete liquidation”. In the Final Rule, PBGC clarifies that reporting is required when a controlled group member’s board of directors or similar actor “resolves to cease all revenue-generating business operations, sell substantially all its assets, or otherwise effect or implement its complete liquidation (including liquidation into another controlled group member)”. PBGC’s justification for this change is to provide PBGC with notice of a company’s liquidation earlier, reasoning that, in the vast majority of cases, a company will make a decision to liquidate in advance of the actual liquidation. The Final Rule also recognizes that there are non-revenue generating activities that occur in the process of the wind-up and liquidation of a company that should not prevent a company from reporting the liquidation to PBGC.
- PBGC also clarifies in the Final Rule that if liquidation coincides with insolvency, there is no need to duplicate reporting for both of these reportable events.
- Moreover, where the reporting entity is a public company, the Final Rule extends the deadline for reporting a liquidation to the earlier of the filing of the SEC Form 8-K regarding the liquidation event or the issuance of a press release discussing the liquidation.
- *Expansion of Public Company Waiver*: Currently, there is a waiver for reporting with respect to five reportable events when the plan sponsor is a public company and timely files an SEC Form 8-K disclosing the event. The Final Rule expands the public company waiver to situations where the plan sponsor *or* the parent company (if not the sponsor) files a SEC Form 8-K adequately disclosing the event. The Final Rule clarifies that adequate disclosure requires that the plan name, a brief description of all pertinent facts relating to the event, and the date and type of event being disclosed are all included in the 8-K filing.

4010 Reporting Guidance

Under ERISA section 4010, a plan sponsor and each member of the sponsor's controlled group generally must submit certain actuarial and financial information to PBGC for each year where (1) a plan maintained by the controlled group has a funding target attainment percentage that is less than 80%; (2) a controlled group member misses a required contribution that gives rise to a lien under ERISA section 303(k); or (3) a plan maintained by a controlled group member has been granted one or more minimum funding waivers totaling in excess of \$1 million where any portion of the waiver is still outstanding. However, reporting is generally waived if (a) the aggregate funding shortfall of the Plan is not in excess of \$15 million; (b) the aggregate participant count is less than 500; or (c) the sole reason filing would be required is due to a statutory lien resulting from missed contributions or outstanding minimum funding waiver exceeding \$1 million.

The Final Rule impacts these filing requirements as follows.

- **Controlled Group Information:** ERISA section 4010 requires a filer to submit controlled group information to PBGC and, previously, PBGC required a description of the legal relationship of each entity to the filer. In the Final Rule, for filings due on or after April 15, 2020, if a controlled group has more than 10 members, an organizational chart (or other diagram) must be submitted to show the controlled group structure. Note that the submission of an organizational chart is mandatory; if a company does not have such a chart, it must create one.
- **Actuarial Assumptions:** The plan liabilities to be reported under ERISA section 4010 need to be calculated using actuarial assumptions prescribed by PBGC regulations. PBGC recognized that the old regulation did not have detail on assumptions that would be necessary for cash balance plans, such as the assumptions for conversion of lump sum payments to an annuity form. The Final Rule incorporates a table into the regulations that provides what actuarial assumptions are acceptable for this purpose. This part of the Final Rule is applicable for plan years beginning on or after January 1, 2020.
- **Financial Disclosure:** Previously, a 4010 filer could provide consolidated financial details for the controlled group, but needed to separate out the net assets, revenues, and operating income for each controlled group member. PBGC recognized that it can be burdensome for some controlled groups to determine this level of specific detail, and has eliminated the entity-specific reporting in the Final Rule. For controlled group members with a foreign parent, however, a filer must submit consolidated (or separate, if consolidated is not available) financial statements for only the U.S. controlled group members. Finally, when financial information is publically available, the Final Rule requires filers to point PBGC to the exact URL for the webpage where the information is located, not a link to a general website (such as the SEC website). These provisions are applicable for filings due on or after April 15, 2020.
- **Plans "At-Risk" Under IRS Funding Rules:** If a plan is "at-risk" under Code section 430, special rules apply on how to determine the plan's liabilities. In the Final Rule, PBGC provides that the special "at-risk" assumptions under Code section 430(i) are to be disregarded to determine whether a plan is subject to 4010 reporting. This part of the Final Rule is applicable for filings due on or after April 15, 2020.
- **Late Funding Waiver:** Under the Proposed Rule, PBGC had proposed an automatic waiver of the reporting requirement under ERISA section 4010 where a plan sponsor makes a "late" election to reduce the plan's funding balance, which would have resulted in an FTAP that is at least 80% had the election been timely made. According to PBGC, the comments to the Proposed Rule made clear that this automatic waiver would have left questions unanswered regarding its implementation; therefore, PBGC did not include this automatic waiver in the Final Rule. However, PBGC indicates in the Final Rule that if a sponsor makes a "late" election to reduce a prefunding balance due to an administrative error, it may request a waiver of the 4010 requirement on a case-by-case basis.

Plan Termination Post-Distribution Certification

The current rules for a plan to close out in a "standard" termination (*i.e.*, where a plan has sufficient assets to satisfy all benefit liabilities) require that a plan administrator file a Form 501 (Post-Distribution Certification) with PBGC no later than 30 days after the plan paid out all benefits. This post-distribution certification includes documentation that all benefit obligations were settled for all participants, which can take longer than 30 days to collect and prepare. Recognizing this reality, under the Final Rule, PBGC has extended the time for submitting the Form 501 to PBGC to 60 days after the last distribution date for participants or beneficiaries, as long as the plan administrator certifies to PBGC that all assets have been distributed in accordance with ERISA section 4044 and the

corresponding regulations. This certification may be made in an email or otherwise, as described in the instructions to the Form 501. This part of the Final Rule is effective for all plan terminations for which the prior Form 501 deadline has not already passed.

PBGC Premiums

- Variable-Rate Premium for Plans Terminating in a Standard Termination: Under the previous rule, a plan would be exempt from paying a variable-rate premium in the year that it distributed all benefits to participants. The rationale was that the plan had satisfied all payment obligations, so it was not necessary for PBGC to additionally charge these plans for PBGC's coverage. However, the rule arguably allowed this exemption to apply where a plan completed a spinoff and terminated within the same year. The Final Rule provides that the variable rate exemption does not apply for a year in which a plan terminates if the plan engages in a spinoff during the same year (unless the spinoff is *de minimis* (e., fewer than 3% of the plan's total assets). This rule memorializes the position PBGC took in its revisions to the premium instructions in 2018.
- Flat-Rate Premium Headcounts in Mergers or Plan Transfers: Generally, a plan's participant count for the purpose of determining flat-rate premiums is determined the day before the plan year begins. However, the Final Rule implements a "special rule" under which the participant count is determined on the first day of the plan year only where the plan year (1) is the first year a plan exists, (2) relates to a transferor plan in the case of a beginning-of-year non-*de minimis* spinoff, or (3) relates to a transferee plan in the case of a beginning-of-year non-*de minimis* merger.