Legal Developments

PBGC Proposes Reportable Event Regulation Changes

On April 3, 2013, the PBGC issued a new proposed regulation regarding "reportable events" under Section 4043 of ERISA. The new regulation changes or clarifies certain reportable events, establishes a financial soundness safe harbor that allows plans or plan sponsors to avoid many of the rule's reporting requirements, and expands small-plan waivers and modifies other waivers. If finalized, the proposed regulation would significantly change how plans and plan sponsors need to evaluate their reportable event obligations.

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Introduction

Section 4043 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the accompanying regulation (29 C.F.R. Part 4043) require plan administrators and sponsors to notify the Pension Benefit Guaranty Corporation (PBGC) of certain events—so called "reportable events"—that may signal problems with a pension plan or contributing employer. Many of the reportable events described in ERISA section 4043 have been waived under the regulation. Some reportable events are waived entirely under the regulation under some circumstances, and reportable events that are not specifically defined in the statute are identified in the regulation. The reportable events that are not waived entirely are:

- The reduction in active participants (20 percent over one year or 30 percent over two years);
- The failure to make required minimum contributions when due;
- The plan's inability to pay benefits when due;
- A distribution of benefits above a certain amount to a substantial owner of the plan sponsor;
- A change in contributing sponsor or controlled group;
- A liquidation or bankruptcy filing;
- An extraordinary dividend or stock redemption;
- A transfer of benefit liabilities to another plan outside the controlled group;
- An application for minimum funding waiver; and
- A loan default. [29 C.F.R. §§ 4043.23, 4043.25, 4043.26, 4043.27, 4043.29, 4043.30, 4043.35, 4043.31, 4043.32, 4043.33, 4043.34]

Generally, reportable event filings must be made within 30 days after the event, but the reportable event filing is due 30 days before the event if the plan sponsor or controlled group member to which the reportable event relates is not a public company and the aggregate unfunded vested benefits of plans in the controlled group subject to Title IV exceeds $50 million and the funded vested percentage for the plans is less than 90 percent. [ERISA § 4043(a), (b)]

The PBGC may assess a penalty of up to $1,100 per day for failure to comply with the reportable event requirements, although the penalty generally is reduced for most reportable events. [ERISA § 4071; 29 C.F.R. § 4071]

Proposed Amendments

In 2009, the PBGC proposed revisions to its reportable events regulation. Following criticism of the 2009 proposal by plan sponsors and the President's 2011 Executive Order calling for the streamlining of regulations, the PBGC issued a new proposed regulation that is less onerous. [78 Fed. Reg. 20,039 (April 3, 2013)]

The new proposed rule would, for example, replace some automatic reporting waivers with "safe harbors" based on the financial soundness of plan sponsors and plans, require the use of PBGC-prescribed forms and require electronic reporting, and make the advance reporting threshold consistent with the Pension Protection Act of 2006 (PPA). According to the PBGC, the revised proposal should reduce reporting requirements for more than 90 percent of companies and pension plans.

The PBGC has requested comments on the proposed regulation and a public hearing was held, for the first time in the PBGC's history, on June 18, 2013. The proposed changes are scheduled to apply to post-event reports occurring on or after January 1, 2014, and to advance reports due on or after that date. This is subject to change when final rules are released.

The proposed changes are summarized below.

Changes in Reportable Events

The proposed regulation changes or clarifies some of the reportable events, including the following.

Active participant reduction. A reportable event occurs when the number of active participants is reduced below 80 percent of the number at the beginning of the year, or below 75 percent of the number at the beginning of the prior year, with several automatic extension provisions. The new rule provides a single extension to 120 days after year end, unless, during the plan year, the participant reduction occurred within a single 30-day period or as a result of a single cause, such as a reorganization or an early retirement program.

Missed contributions. The proposed rule would clarify that this reportable event applies not only to contributions required by statute, but also to contributions required as a condition of obtaining a funding waiver. The rule would retain the current grace-period waiver for missed contributions that are made within 30 days, and would include a waiver for plans considered "small" for purposes of the premium filing rules (*i.e.*, having fewer than 100 participants) that miss a quarterly contribution. The current 10-day reporting deadline for missed contributions exceeding $1 million in the aggregate, required under Section 303(k) of ERISA and Section 430(k) of the Internal Revenue Code of 1986, as amended (IRC) remains unchanged.

Inability to pay benefits when due. The proposed rule would clarify that the large plan waiver applies to plans that are subject to the liquidity shortfall requirements, for example, plans that do not meet the "small plan" definition in Section 303(g)(2) of ERISA and IRC Section 430(g)(2).

Distributions to substantial owners. The current rule requires reporting if a distribution to a substantial owner exceeds $10,000 a year, with some exceptions. The proposed rule requires reporting only if the distribution exceeds 1 percent of plan assets or distributions to all substantial owners exceed 5 percent of plan assets.

Controlled group changes. The proposed rule would clarify that no reportable event occurs when one member of a controlled group merges into another. It would also provide that whether an agreement to change a controlled group is legally binding, which triggers this reporting requirement, should be determined without regard to any conditions in the agreement.

Extraordinary dividends. A reportable event would occur when a dividend or redemption exceeds 100 percent of net income for the prior fiscal year, simplifying the current rule providing for one-year and four-year testing periods and disregarding distributions within a controlled group.

Transfer of benefit liabilities. The proposed rule would clarify that the payment of a lump sum, or the purchase of an irrevocable commitment to provide an annuity, do not constitute transfers of benefit liabilities that need to be reported. In addition, the proposal would change the advance reporting requirement for this event to require reporting only by the transferor plan, not both the transferee and transferor plan as the current rule requires in a spinoff or similar transaction.

Loan default. The proposed rule would revise the definition of the loan default event to cover acceleration by the lender and default of any kind by the debtor, and expand it to include any amendment or waiver by a lender of any loan agreement covenant for the purpose of avoiding a default.

Bankruptcy and insolvency. The proposed rule would limit the reporting requirement to exclude bankruptcies under the Bankruptcy Code, because the PBGC learns of them by other means.

Financial Soundness Safe Harbors

Under the current regulation, reportable event filing is waived if certain standards are met. For example, the reportable event filing for the change in controlled group event is waived if the plan and/or plan sponsor meet certain financial benchmarks. [29 C.F.R. § 4043.29(c)] Instead of individual waiver conditions for different reportable events, the proposed regulation establishes safe harbors that apply to different reportable events. Reportable event filing for an active participant reduction, distribution to a substantial owner, controlled group change, extraordinary dividend, or a transfer of benefit liabilities would be waived if the plan and plan sponsor met these financial soundness safe harbors.

A plan would fall within the safe harbor if it were either 100 percent funded on a termination basis or 120 percent funded on a PBGC premium basis. The proposed rule, like the prior proposal in 2009, would require the calculation of unfunded vested benefits for purposes of the advance reporting threshold test to be made as of the valuation date for the preceding plan year. This amendment would resolve ambiguity created by changes to plan funding rules made by the PPA.

A plan sponsor would fall within the proposed safe harbor if it met the following five financial soundness criteria:

- "Credit report" test. The company must have a credit report score from a commercial credit reporting company, such as Dun & Bradstreet (D&B), that is commonly used in the business community, and the score must indicate a low likelihood that the company would default on its obligations. For example, a D&B score of 1477 would have met the standard for 2011.
- Positive net income for the past two years.
- No secured debt (with some exceptions, such as mortgages and equipment leases).
- No default on outstanding loans of $10 million or more for the past two years.
- No missed pension plan contributions for the past two years (with some exceptions).

For a multiple employer plan, for example, a single-employer plan maintained by two or more unrelated employers, each employer would have to meet the above tests.

Other Waivers

Small plan waiver. Under the current rule, reportable event filing for active participant reductions is waived. The proposed rule retains a modified version of the small plan waiver for active participant reductions and makes it applicable to more events. Small plan status would be determined in the same way as for purposes of the premium filing rules, meaning that the waiver applies to plans that had fewer than 100 participants for whom flat-rate premiums were payable for the plan year preceding the year of the reportable event. The small plan waiver would be extended to controlled group changes, benefit liability transfers, and extraordinary dividends.

De Minimis transactions. Under the current rule, post-event filing is waived for certain *de minimis* transactions. The proposed rule preserves all reporting waivers for *de minimis* transactions, and adds *de minimis* waivers for loan defaults and non-bankruptcy insolvency. *De minimis* transactions are those in which the person or persons that will cease to be members of the plan's controlled group represent a *de minimis* 10 percent segment of the plan's old controlled group for the most recent fiscal year(s) ending on or before the date the reportable event occurs. As defined in the proposed regulations, a *de minimis* 10 percent segment means, in connection with a plan's controlled group, one or more entities that in the aggregate meet all of the following for a fiscal year: (1) revenue not exceeding 10 percent of the controlled group's revenue; (2) annual operating income not exceeding the greater of (i) 10 percent of the controlled group's annual operating income, or (ii) $5 million; and (3) net tangible assets at the end of the fiscal year(s) not exceeding the greater of (i) 10 percent of the controlled group's net tangible assets at the end of the fiscal year(s), or (ii) $5 million.

Conclusion

In summary, the PBGC's proposed reportable events regulation (1) changes or clarifies certain reportable events; (2) establishes a financial soundness safe harbor that allows plans or plan sponsors to avoid many of the rule's reporting requirements; and (3) expands small-plan waivers and modifies other waivers. The proposed regulation, if finalized, would significantly change how plans and plan sponsors need to evaluate their reportable event obligations. ■