

## IRS and PBGC Guidance on Single-Employer Defined Benefit Funding Relief Under The CARES Act

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On July 31, the IRS issued Notice 2020-61 (the “Notice”) to provide guidance related to the special funding rules applicable to single-employer defined benefit pension plans under the Coronavirus Aid, Relief, and Economic Security (the “[CARES Act](#)”). The Pension Benefit Guaranty Corporation (“PBGC”) previously posted on its website answers to frequently asked questions regarding the impact of the CARES Act on certain reportable event requirements, premium filings for single-employer defined benefit pension plans, plan terminations, and PBGC investigations. Highlights of both Agencies’ guidance are summarized below. We expect that plan sponsors who opt to delay contributions will need to address these issues with their actuaries very soon.

### A. IRS Notice 2020-61

Section 3608 of the CARES Act delayed the funding deadlines for 2020. Any contributions otherwise due in 2020 are instead due on January 1, 2021 (even though it is a legal holiday). For a calendar-year plan, the changes would be as follows:

Contribution	Original Deadline	New Deadline
1st Quarterly for 2020 Plan Year	April 15, 2020	January 1, 2021
2nd Quarterly for 2020 Plan Year	July 15, 2020	January 1, 2021
Final Contribution for 2019 Plan Year	September 15, 2020	January 1, 2021
3rd Quarterly for 2020 Plan Year	October 15, 2020	January 1, 2021

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For the period between the original deadline and the new deadline, the CARES Act provided that interest would accrue at the plan's effective rate of interest for the plan year in which the payment is made. In addition, for plan years that include any part of the 2020 calendar year, the CARES Act allowed plan sponsors to elect to treat the plan's AFTAP as being equal to the percentage from the last plan year ending before January 1, 2020. The Notice provides additional guidance related to this relief, including the following major takeaways.

- The CARES Act delayed the due dates for certain defined benefit plan contributions but did not delay any Form 5500 filing deadlines. If a plan sponsor makes a contribution after the applicable Form 5500 deadline on account of the prior year, the original filing will not reflect that contribution and the sponsor must subsequently file an amended Form 5500.
- Plan sponsors can apply the extended contribution deadlines under the CARES Act not only to minimum required contributions, but also to contributions above the minimum funding requirements. Thus, certain contributions in excess of the minimum required contribution may be credited to an earlier plan year than would normally be permitted.
- The CARES Act permits plan sponsors to elect to use the Adjusted Funding Target Attainment Percentage ("AFTAP") from the last plan year ending before January 1, 2020 for any plan year that includes calendar year 2020. However, any presumed AFTAPs for subsequent years may not be based on such AFTAPs, but must instead be based on actual certifications from the enrolled actuary.
- An election to use an AFTAP from a prior year in place of the AFTAP for a plan year that includes calendar year 2020 must be made in writing to the plan's enrolled actuary and plan administrator. Elections made using a different procedure will be considered valid, provided the plan sponsor notifies the plan actuary and administrator in writing by September 30, 2020.

## Failure to Meet January 1, 2021 Contribution Deadline

If the January 1, 2021 extended deadline for a contribution is not satisfied, the penalties will apply as of January 1, 2021. If a sponsor misses a final contribution the sponsor will be subject to excise taxes for the unpaid minimum required contribution originally due September 15, 2020 for calendar-year plans. While missed quarterly contributions do not result in excise taxes, an additional 5% of interest will be added to the plan's effective interest rate for the period after January 1, 2021.

## Form 5500 Guidance

The Notice also contains guidance on how plans should complete the Schedule SB of the Form 5500. To the extent the Notice is inconsistent with the Schedule SB instructions, the Notice supersedes them.

- *Contribution Reporting:* If a sponsor takes advantage of the extended contribution deadline offered by the CARES Act, some contributions may be made timely, but after the date the Form 5500 is due. If a sponsor wishes to designate contributions for a plan year after the Form 5500 for that plan year has been filed, the sponsor must submit an amended Schedule SB to reflect the additional contributions.

*Example:* The sponsor of Plan X, a calendar year plan, makes a contribution of \$100,000 on December 1, 2020, and wishes to designate that contribution for the 2019 plan year. Due to the

CARES Act, this contribution is timely because it is made before January 1, 2021. However, the deadline for the 2019 Form 5500 (October 15, 2020) had already passed. Because 2019 contributions must be designated on the appropriate Form 5500, an amended Schedule SB must be filed after the plan sponsor makes the \$100,000 contribution on December 1, 2020. Without the amended Schedule SB, the contribution would be designated to the 2020 plan year and listed on the Form 5500 for 2020.

- *Contribution Delay:* If a sponsor makes a contribution after the original deadline (without regard to the CARES Act), but on or before the extended due date under the CARES Act, the plan's actuary must attach a schedule for Line 19 of the Schedule SB. This schedule shows the dates and amounts of individual contributions, the effective interest rate that applies to those contributions (including any potential 5% increase for late quarterly contributions), and the discounted contribution for the plan year. This schedule applies to both quarterly contribution requirements and annual funding requirements, and must be included any time a contribution is deemed to be timely under the CARES Act, even if an amended Form 5500 is not required.
- *AFTAP Carryover:* If the sponsor has elected to use the prior year's AFTAP as provided by the CARES Act relief, the plan's actuary must attach a statement related to Line 15 of the Schedule SB. This statement identifies that the sponsor has made the election to use the prior year's AFTAP, the date of that election, and the AFTAP that is applied for the plan year pursuant to that election.

It is important to note that although contributions can continue to be made until January 1, 2021, the PBGC guidance (discussed below) takes the position that a contribution must be made before the premium due date for it to be considered when calculating the variable rate premium. This means that, for calendar year plans, any contributions made after the October 15, 2020 premium due date will *not* affect calculation of the 2020 variable-rate premium amount.

## AFTAP Guidance

A plan's AFTAP is the key determinant of whether and which benefit restrictions under Code section 436 apply to a defined benefit plan. As noted above, a plan sponsor can elect to use the AFTAP for the last plan year ending before January 1, 2020 in place of the actual AFTAP for any plan year that includes the 2020 calendar year. To make this election, the plan sponsor must provide written notification to the plan's actuary and the plan administrator using the same procedure for making an election with regard to funding balances. To the extent a sponsor's AFTAP election did not originally follow this procedure, the sponsor has until September 30, 2020 to meet these written notification requirements.

For plans that do not use a calendar year for a plan year, the Notice confirms that such plans can apply the AFTAP relief to both the plan year ending in 2020 and the plan year beginning in 2020. For example, if a plan has a July 1 to June 30 plan year, the plan sponsor can choose to use the AFTAP certified for the July 1, 2018 to June 30, 2019 plan year for the plan year beginning July 1, 2019. The plan sponsor may also separately elect to use that AFTAP for the plan year that begins on July 1, 2020.

If a plan sponsor elects to use the deemed AFTAP under the CARES Act, the election is generally treated the same as a certified AFTAP. In most cases, even if the plan sponsor uses the deemed

AFTAP, the plan actuary should still prepare a formal AFTAP certification for the year, as any presumed AFTAPs in the subsequent year must be based on an actual certification, not an elected AFTAP. However, if a plan does not use a calendar year plan year, and will use the relief in two consecutive years, then there is no need to prepare the AFTAP certification for the earlier year.

## Technical Guidance

A number of highly technical issues covered in the Notice relate to the mechanics of interest adjustments, funding credits, and the application of a deemed AFTAP on the restrictions affecting plan amendments and unpredictable contingent event benefits. We do not cover them here, but are glad to assist on request.

## **B. PBGC Guidance**

The PBGC guidance was posted on the agency's Covid-19 Resources webpage on July 20. Highlights of the guidance follow.

### 2020 Contributions

When a sponsor misses a minimum funding contribution, it is required to notify the PBGC within 30 days (unless the accumulated missed contributions exceed \$1 million, in which case the sponsor must notify PBGC within 10 days). Additionally, when the missed contributions (plus interest) exceed \$1 million, a lien on the sponsor and all controlled group members arises in favor of the plan and is enforceable by PBGC.

Under the CARES Act, all required contributions—including quarterly contributions—that would otherwise be due in calendar year 2020 are now due on January 1, 2021. PBGC clarified that unpaid contributions that would be due in 2020 but for the CARES Act are not considered “missed contributions” for the purpose of PBGC’s reportable event requirements as long as the contributions are made by January 1, 2021. In other words, there is no PBGC reporting requirement with respect to these contributions as long as they are made by the due date under the CARES Act.

By extension, given that 2020 contributions are not “missed” until January 1, 2021, the statutory lien resulting from missed contributions of over \$1 million should also not arise until January 1, 2021, and only then if the contributions are not made on that date.

If the sponsor does not make all required contributions by January 1, 2021, the missed contributions will need to be reported to PBGC. As always, if the accumulated value of the missed contributions (plus interest) exceeds \$1 million, the sponsor must report the missed contribution(s) on a Form 200, which must be submitted by January 11, 2021. If the accumulated value of the missed contributions is \$1 million or less, reporting is made within 30 days of January 1, 2021 via a Form 10. Because January 31 falls on a Sunday in 2021, the deadline to submit the Form 10 will be February 1, 2021.

### Premiums

Variable rate premiums are due to PBGC by a plan with “unfunded vested benefits,” meaning the value of the vested benefit liabilities exceeds the value of the plan assets. The plan’s liabilities for this purpose are calculated using specific assumptions that often result in a larger liability amount than

what is calculated for ongoing plans. Plans are required to pay a variable rate premium equal to a dollar amount specified for that year under PBGC regulations for each \$1,000 of unfunded vested benefits.

While 2019 plan year contributions typically would be made by September 15, 2020 (for calendar year plans), sponsors taking advantage of CARES Act funding relief need not make those contributions prior to the due date of the premium filing on October 15, 2020 (for calendar year plans). PBGC has clarified that contributions made after the premium due date may not be included in the calculation of a plan's unfunded vested benefits for premium purposes. Therefore, sponsors who delay payment of contributions until January 1, 2021 may face higher variable rate premiums.

## Plan Terminations and Early Warning Program

PBGC continues to process distress termination applications. PBGC reiterated that sponsors should schedule a pre-filing consultation with PBGC. PBGC is likely pushing for these meetings to ensure that sponsors are aware of the distress termination requirements rather than filing an application that may not be appropriate.

PBGC will also continue to initiate involuntary terminations where appropriate, which it has the authority to do in certain circumstances. Common situations where PBGC may terminate a plan include where the plan will be unable to pay benefits when due (such as when the sponsor goes out of business) or where PBGC determines that its "long-run loss" with respect to a plan is reasonably expected to increase unreasonably if the plan is not terminated.

Similarly, PBGC will not suspend investigations under the "Early Warning Program" under which PBGC analyzes corporation transaction or events that could increase PBGC's risk as the pension insurer. Indeed, PBGC may well initiate more involuntary terminations and/or Early Warning Program investigations due to the financial distress that many sponsors are currently experiencing.

When a pension plan does terminate, either in an involuntary or distress termination, the sponsor and controlled group members are liable to PBGC for the underfunding of the pension plan, as well as any unpaid contributions and premiums. PBGC suggests that it will not suspend collection of termination liabilities in 2020, but will work with plan sponsors to resolve such liabilities taking into account the sponsor's ability to pay.

## C. Next Steps

Plan sponsors should consult with their plan actuaries and legal/tax advisors soon to be sure they understand the implications of delaying plan contributions and the IRS and PBGC guidance and take the necessary actions in a timely manner. As noted above, the decisions to be made have important tax and financial implications. And some decisions – whether to make contributions by the normal 8½-month "grace period" to claim a tax deduction for the prior year, elect a revised AFTAP determination, etc. – need to be made quite soon.

Groom professionals are available to assist plan sponsors and service providers as they navigate these highly complex rules.