

2016 Enrolled Actuaries Meeting

Questions to the PBGC
and Summary of Their Responses

April 2016

Updated April 21, 2016

Summary of Discussions between the Enrolled Actuaries Program Committee
and Staff of the Pension Benefit Guaranty Corporation
on March 3, 2016

The following pages set forth the questions posed to staff of the Pension Benefit Guaranty Corporation at discussions on March 3, 2016, with representatives of the Enrolled Actuaries Program Committee. Included also are summaries of the responses to those questions. The summary responses to the questions are intended to reflect as accurately as possible the statements made by the government representatives. However, those responses are merely the current views of the individuals and do not represent the positions of the Pension Benefit Guaranty Corporation or of any other governmental agency and cannot be relied upon by any person for any purpose. Moreover, PBGC has not in any way approved this booklet or reviewed it to determine whether the statements herein are accurate or complete.

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QUESTION #1

Premiums: Application of Holiday/Weekend Rule for Reconciliation Filings

If a calendar year plan based its October 15, 2015 variable rate premium on an estimated premium funding target, a reconciliation filing would normally be due by April 30, 2016, which falls on a Saturday.

In previous years, if April 30 fell on a weekend, it was clear from the instructions that both the calendar year small plan due date and the calendar year reconciliation due date were extended to the next business day. However, there is no longer a separate small plan due date, and the 2015 instructions are not explicit on whether the April 30 reconciliation due date is extended to the next business day.

Does the weekend and holiday rule apply for purposes of the reconciliation filing?

RESPONSE

Yes. Under section 4000.43 of PBGC's regulation on Filing, Issuance, Computation of Time, and Record Retention, and section 4007.6 of PBGC's regulation on Payment of Premiums, the weekend and holiday rule applies to the reconciliation due date. In the example, the filing would be due Monday, May 2.

QUESTION #2

Premiums: Short Plan Year Created by a Mid-year Spinoff

Consider the following scenario:

- Plan B is created on July 1, 2016 as the result of a spin off from Plan A (a plan with a calendar year plan year).
 - Plan B will also have a calendar year plan, but for its first plan year has a short plan year (July 1, 2016 – December 31, 2016).
 - Both plans have beginning of year valuation dates (i.e., UVB measurement dates).
 - Plan A determines its 2016 premiums as follows:
 - Flat rate premium – based on the number of participants on the applicable Participant Count Date (December 31, 2015).
 - Variable rate premium – based on unfunded vested benefits as of the applicable UVB valuation date (January 1, 2016).
- a) Does Plan B owe premiums for its short 2016 plan year, and if so, how are they determined and when are they due?
- b) Is Plan A entitled to a refund for any of premium paid on behalf of the Plan B participants that were included in its 2016 participant count?

RESPONSE

- a) Plan B is considered a new plan. Like all new plans, Plan B owes premiums for its first year of coverage. And like all new plans, special rules apply:
- Proration — Plan B's first year of coverage is a short plan year (July 1, 2016 – December 31, 2016). Because the short plan year was created as the result of a spinoff, the premium is prorated. In this case, there are six months in the partial plan year, so the plan owes 50% (i.e., 6/12) of the otherwise determined premium. Note that for proration purposes, a partial month is treated as a full month. So, for example, if the spinoff had occurred on July 25th instead of July 1st, Plan B still would have owed 50% of the otherwise determined premium.
 - Flat-rate premium — The applicable participant count date for purposes of determining Plan B's 2016 flat-rate premium is July 1, 2016. This exception to the general definition of "participant count date" is provided in PBGC's premium payment regulation. See 29 CFR § 4006.5(d)). Note that some (or all) of these participants may have been included in the participant count for Plan A's 2016 flat-rate premium and some may not have been so included.

- Variable-rate premium — PBGC's premium payment regulation provides that for purposes of determining a plan's variable-rate premium, unfunded vested benefits and assets are measured on the plan's "UVB valuation date," which is the same valuation date used for funding purposes. So, whatever valuation date is being used to determine funding requirements for Plan B's first (short) plan year should also be used to determine its variable-rate premium for that plan year.
- Due date — In general, premiums are due on the 15th day of the 10th full calendar month in the plan year. For Plan B, that date is April 17, 2017 because the 15th falls on a Saturday. In some cases, a new plan is subject to an extended due date, but in the example noted above, no extension applies (See 29 CFR § 4007.11(c)).

b) No.

QUESTION #3

Standard Terminations: Content of Notice of Plan Benefits

PBGC's standard termination regulations require (at §4041.24(c)(4)) that a notice of plan benefits include the personal data (or best available data) used to calculate an affected party's benefit "[e]xcept in the case of an affected party in pay status for more than one year as of the proposed termination date."

Assume that a participant was placed in pay status more than one year before the proposed termination date and dies during the one-year period preceding the proposed termination date; that the benefit was in the form of a J&S 50% benefit; and that the participant's spouse, as the participant's beneficiary, enters pay status during that one-year period preceding the proposed termination date and begins receiving a monthly benefit that is 50% of the previously-calculated J&S 50% benefit that had been paid to the participant.

Does the exception apply, so that the notice of plan benefits sent to the beneficiary need not include the personal data (or best available data) used to determine the benefit being paid to the beneficiary?

RESPONSE

No, the exception applies only to an affected party in pay status for more than one year as of the proposed termination date. The definition of affected party in §4001.2 includes each beneficiary of a deceased participant. Therefore, the exception does not apply if the survivor annuitant has been in pay status for less than a year.

Note, however, that if any of the personal data needed to calculate the affected party's plan benefits is not available, 29 CFR § 4041.24(b)(4)(ii) requires the plan administrator to give the affected party "the best available data, along with a statement informing the affected party of the data not available and affording him or her the opportunity to provide it." A plan administrator may contact the PBGC for case specific guidance on how to proceed.

QUESTION #4

Distress or Involuntary Termination: Form 5500 Filings after PBGC Trusteeship

The Form 5500 filing instructions (see, e.g., p. 6 of the 2015 instructions) provide that “[i]f a trustee is appointed for a terminated defined benefit plan pursuant to §4042, the last plan year for which a return/report must be filed is the year in which the trustee is appointed.” There are circumstances in which complying with this requirement for the final plan year (or even for the immediately preceding plan year) will not be possible or, even if possible, will be problematic.

In such circumstances, would PBGC make the Form 5500 filing for the plan and if not, can PBGC provide any guidance relating to compliance with this requirement?

RESPONSE

PBGC does not make Form 5500 filings on behalf of trustee plans. In addition to the language quoted in the question, the 2015 Form 5500 filing instructions also provide that a plan administrator in this situation may contact PBGCTrusteedPlan@dol.gov for further information.

QUESTION #5

Guaranteed Benefits: Application of "Earliest PBGC Retirement Date" Rules

Assume that a plan is terminated in a distress or involuntary termination during the bankruptcy proceeding of the plan sponsor, that the plan allows for unsubsidized early retirement at age 55 with 10 years of service, and that the plan's normal retirement age is age 65.

- Participants A, B, C, and D are each at least 55 years old and no more than 64 years old at all relevant times.
- Participants A and B each attain 10 years of service between the bankruptcy petition date and the plan's termination date, and Participants C and D each attain 10 years of service between the plan's termination date and the date the termination and trusteeship agreement is signed by the plan administrator of the plan and PBGC.
- Participants A and C each go into pay status immediately upon attaining 10 years of service.
- Participants B and D had not yet gone into pay status, or elected to do so, when the termination and trusteeship agreement is signed.

What is the "Earliest PBGC Retirement Date" for Participants A, B, C, and D?

RESPONSE

PBGC determines a participant's earliest PBGC retirement date (EPRD) under the rules in PBGC Reg. § 4022.10.

For Participants A and B, who met the requirements for an early retirement benefit by the plan's termination date, EPRD is the date the participant reaches age 55 (or if later, the date he attains 10 years of service). The guaranteed benefit for each participant, however, is based on the amount of his service and the amount of his compensation, if applicable, as of the bankruptcy filing date.

For Participants C and D, who had not met the requirements for an early retirement benefit as of the plan's termination date, EPRD is the date the participant reaches age 65, unless there is another early retirement benefit for which they have met the requirements by the plan's termination date.

QUESTION #6

Reportable Events: Retroactive valuation changes

Treasury Regulation §1.430(j)-1(g)(2) issued in 2015 changed the manner in which interest is credited on contributions and funding balance applied for the purposes of determining the extent to which required quarterly contributions have been satisfied. Regulation §1.430(j)-1(g)(2) permits plan sponsors to apply the rules of §1.430(j)-1(c)(3)(ii) to plan years that began after 12/31/2007 and before 1/1/2016. Such retroactive application could reduce or eliminate late quarterly contribution(s) and the period(s) for which they were late.

- a) If a plan sponsor retroactively applies these rules for a plan year that showed quarterlies late by more than 30 days and the revision would have eliminated the reportable event, what steps must the sponsor take for the PBGC to treat the reportable event as not having occurred?
- b) If a previously filed Form 200 and/or Schedule SB reflects missed contributions that (with interest and possibly with other missed contributions) total in excess of \$1,000,000, but a retroactive application of the new rules reduces that total to not more than \$1,000,000, what steps must the sponsor take for the PBGC to treat the previously applicable lien as not having arisen?
- c) If the sponsor paid a penalty for late filing of a Form 10 or Form 200 to report a late contribution and the revision eliminated or reduced the late contribution, what steps must the sponsor take to receive a refund of some or all of the penalty with interest?

RESPONSE:

- a) The Reportable Event occurred. PBGC would determine whether the retroactive valuation would resolve any concern about the missed contribution and if so, close the file.
- b) A lien arose but the retroactive valuation could make the lien value drop to no more than \$1,000,000. If PBGC had perfected a lien, the lien would go away at the end of the plan year if the value had dropped to no more than \$1,000,000, and PBGC would file lien withdrawal notices.
- c) PBGC is not aware of any penalty having been assessed under these circumstances. If a sponsor is assessed a penalty for a late filing to report a late missed contribution and then later makes retroactive valuation changes, the sponsor should contact PBGC to discuss the penalty.

QUESTION #7

Reportable Events: Forms 10 and 10-A

The revised Forms 10 and 10-A and instructions now require a "statement of any material change in liabilities after the most recent valuation date". No detail is provided on this requirement.

- a) Does this requirement apply if the valuation report supplied is for the current year, or only if it was for the prior year?
- b) Would any of the following be required to be disclosed?
 - (i) The effect of a change in the discount rate environment?
 - (ii) The occurrence of an unpredictable contingent event (e.g., a plant shutdown)?

RESPONSE:

- a) The requirement is to provide a statement about material changes in plan liabilities known by the date the reportable event is filed with PBGC and not reflected in the last valuation report provided to the PBGC.
- b) (i) No.
 - (ii) Yes. Other items that could materially change the plan liabilities may include a spinoff or merger, an early retirement window, a lump sum window, a temporary or permanent layoff, a plan amendment impacting benefits, a plan de-risking event, etc.

QUESTION #8

Reportable Events: "U.S. Entity" Definition

Under PBGC's reportable events regulation, qualifying for the low-default-risk waiver requires that each contributing sponsor and the highest-level U.S. parent of each contributing sponsor be "low-default risk" on the date of the event. "U.S. entity means an entity subject to the personal jurisdiction of the U.S. district court" (29 CFR § 4043.2) (presumably so defined because in such circumstances PBGC and/or the pension plan may be able to pursue claims against the entity in the U.S.).

- a) For purposes of this definition, is an entity to be treated as "subject to the personal jurisdiction of the U.S. district court" if it is not subject to the personal jurisdiction of any U.S. district court except solely as a result of specific jurisdiction in connection with some matter that is entirely unrelated to any PBGC-covered pension plan maintained by any member of the relevant plan's controlled group? (Note that, in such circumstances, there would be no reason to believe that PBGC and/or the pension plan may be able to pursue claims against the entity in the U.S.)

For example, consider a situation in which:

- the contributing sponsor of the plan for which the reportable event has occurred meets the low default risk standard;
 - its highest-level parent domiciled in the U.S. does not meet this standard;
 - its highest level parent that (depending on the resolution of the issues raised by this question) may or may not be a U.S. entity ("Entity X") does meet this standard;
 - Entity X is not subject to the jurisdiction of any U.S. district court based on general jurisdiction; and
 - Entity X is subject to the specific jurisdiction of a U.S. district court solely as a result of litigation that is entirely unrelated to any PBGC-covered pension plan maintained by any member of the relevant plan's controlled group.
- b) If the answer to (a) is "Yes", how is the period during which the entity is subject to such jurisdiction to be determined? For example, does the period start when the entity enters into a contract that is later the subject of a dispute, when the dispute arises, when litigation commences, or at some other time?

RESPONSE

- a) No. For purposes of applying the waiver, an entity is treated as "subject to the personal jurisdiction of the U.S. district court" only if the entity is subject to the general jurisdiction of the U.S. district court.
- b) N/A

QUESTION #9

Reportable Events: "As of" Date(s) for "Low Default Risk" Determination

Under PBGC's reportable events regulation, "a company meets the low-default risk standard as of a financial information date (the 'qualifying date') if the company has adequate capacity to meet its obligations in full and on time *as of the qualifying date*" (emphasis added), as evidenced by meeting either both the commercial measures criterion and the secured debt criterion, or any four of the seven listed criteria (§4043.9(e)(1)).

- In evaluating three of the criteria (the secured debt criterion, the ratio of total-debt-to-EBITDA criterion, and the ratio of retained-earnings-to-total-assets criterion), "a company must use the supporting financial information. . . associated with the qualifying date" (§4043.9(e)(3)(i)).
- That supporting financial information relates to a fiscal year that will virtually always have ended before (and generally months before) the qualifying date, and may not include information that bears on these three criteria and that relates to the period between the end of the applicable fiscal year and the qualifying date.

May a company, in addition to using this supporting financial information to evaluate these three criteria, use information that is not included therein and that relates to a period between the end of the applicable fiscal year and the qualifying date?

RESPONSE:

No. The qualifying date is intended as a bright line test to make the determination simpler for plan sponsors. Supporting financial information relating to a period between the end of the applicable fiscal year and the qualifying date would be reflected in the following year's determination of whether the low-default risk safe harbor is available.

For example, Company A's fiscal year ends December 31. Financial statements reflecting a fiscal year are generally completed by the following March 31. Assume Company A's annual financial information reflecting fiscal year 2016 financial results is completed on March 31, 2017. Thus, March 31, 2017 would be the financial information date (and qualifying date if the company meets the waiver requirements) for events occurring between March 31, 2017 and the next financial information date (*i.e.*, the date in 2018 that is the earlier of the completion of the next annual financial information cycle or 13 months).

First quarter financial information for the period between January 1, 2017 and March 31, 2017 would be reflected in the full fiscal year 2017 annual financial information used for purposes of this next financial information date.

Note: For 2016, if the financial information date reflecting 2015 annual financial information has not yet occurred, plan sponsors may use the date that would have been a qualifying date for 2014 fiscal year financial information had the new reportable events regulation been in effect to determine whether the waiver is available for events that may occur prior to the 2015 financial information date.

QUESTION #10

Reportable Events: Commercial Measures Criterion

A company meets the commercial measures criterion under PBGC's reportable events regulation if "[t]he probability that the company will default on its financial obligations is not more than four percent over the next five years or not more than 0.4 percent over the next year, in either case determined on the basis of widely available financial information on the company's credit quality," with the determination to be made as of the financial information date (§4043.9(e)(1), (e)(2)(i)).

- a) In order to determine whether the company meets the commercial measures criterion, must the probability of default be determined by a third party or can the company make this determination on its own?
- b) Under what circumstances, if any, may or must a company take into account a credit rating or credit score that is published after the financial information date? (Consider, for example, a situation in which the financial information date is the date on which the company files its 10-K for its 2016 fiscal year, and shortly thereafter, based on the information in that 10-K relating to the period during (or after the end of) its 2016 fiscal year, a credit rating or score that is significantly better or worse than the previous one is published.)

RESPONSE:

- a) The probability of default must be determined by a third party. (See preamble to the 2015 Reportable Events final rule stating PBGC's intent to "allow a company to determine whether it satisfies the new criterion by referring to *third party* information . . ." (80 FR 54986)).
- b) A change in credit rating or commercial credit score published after the financial information date does not affect the determination of whether the low-default-risk waiver is available as of the qualifying date (i.e., that financial information date). Any such change would affect whether the low-default-risk waiver is available as of the financial information date the following year.

QUESTION #11

Reportable Events: Secured Debt Criterion

A company meets the secured debt criterion under PBGC's reportable events regulation if "[t]he company's secured debt (disregarding leases and debt incurred to acquire or improve property and secured only by that property) does not exceed 10 percent of the company's total assets". The determination is to be made as of the financial information date, using the annual financial statements (or, in certain circumstances, the return) for the most recently completed fiscal year (§4043.9(d), (e)(1), (e)(2)(ii)).

- a) Is the secured debt to be taken into account for this purpose the amount of secured debt that is available under a secured line of credit, or the amount of secured debt that is drawn thereunder?
- b) Is the secured debt to be taken into account for this purpose the full amount of a secured loan that is undersecured, or is it the amount of the loan only to the extent of the value of the security?
- c) Assume that \$15 million of debt has been incurred to acquire or improve property and secured only by that property. Assume further that the company has paid down \$10 million of that debt, which allows the company to take out a further loan of \$10 million (whether or not from the same lender). Must this new loan amount be factored into whether the secured debt criterion is met? Does it matter for what purpose the new loan is being made (e.g., to fund a business acquisition or to acquire or improve other property)?

RESPONSE:

- a) Only the drawn amount is taken into account.
- b) The full amount of the secured loan would be taken into account.
- c) The answer depends on the purpose of the loan. If the new loan is to acquire or improve other property or to improve further the same property, and (in either case) is secured by only that property, the carve-out for such secured debt would still apply for purposes of determining whether the secured debt criterion is met. However, if the new loan is for some other purpose, the carve-out would not apply.

QUESTION #12

Reportable Events: No Loan Default Event Criterion

A company meets the no loan default event criterion under PBGC's reportable events regulation if "during the two-year period ending on the qualifying date, the company has not experienced an event described in § 4043.34(a)(1) or (2) (dealing with a default on a loan with an outstanding balance of \$10 million or more) with respect to any loan with an outstanding balance of \$10 million or more *to the company* [emphasis added] regardless of whether reporting was waived under §4043.34(b)" (§4043.9(e)(2)(vi)).

- a) The loan default reportable event under the new regulations (as described in § 4043.34(a)(1) or (2)) may occur where the loan is to any member of the plan's controlled group. When a contributing sponsor or its highest level U.S. parent is determining whether it meets the no loan default event criterion, is there any need to take into account any loan default reportable event that relates to a loan that was made solely to a member of the plan's controlled group other than itself?
- b) In determining whether the no loan default event criterion is met, under what circumstances must or may an event be taken into account based on the new regulatory definition of a loan default reportable event where the event was not subject to that new regulatory definition because the new regulation did not yet apply? (Consider a situation in which there was a default in 2015 that did not result in a reportable event because the lender waived the default, but under the new regulatory definition, which captures such situations, it would have been a reportable event.)
- c) May a company meet this criterion even where, during a portion of the specified two-year period, the company did not yet exist?

RESPONSE

- a) No.
- b) In determining whether the no loan default event criterion is met, the old regulatory definition of a loan default event may be used to take into account events that would have been reportable prior to the applicability of the new regulatory definition. For example, a default in 2015 that did not result in a reportable event because the lender waived the default would not disqualify the sponsor from meeting the no loan default event criterion for purposes of determining the safe harbor in 2016 and 2017. However, assume a lender waived loan defaults in both 2015 and 2016. The old definition would apply for the 2015 default but the new definition would apply for the 2016 default.
- c) Yes.

QUESTION #13

Reportable Events: No Missed Contributions Event Criterion

A company meets the no missed contributions event criterion under PBGC's reportable events regulation if "during the two-year period ending on the qualifying date, there has not been any failure to make when due any contribution described in § 4043.25(a)(1) or (2) (dealing with failure to make required minimum funding payments), unless reporting was waived under § 4043.25(c)" (§4043.9(e)(2)(vii)).

- a) In determining whether this criterion is met, is it permissible to disregard a missed contribution where reporting *would have been waived* under § 4043.25(c) if the waiver in that provision *had been in effect* at the time of the missed contribution, but where it is not true that reporting *was waived* under that provision (because it was not yet in effect)?

Consider two situations involving a failure in 2015 to make a required quarterly contribution to a plan, where reporting would have been waived under that provision had it been in effect:

- (1) where the plan had 25–99 participants and satisfied the simplified reporting rules in PBGC Technical Update 13-1, with no reporting waiver applying; and
- (2) where the plan had fewer than 25 participants and the reporting waiver in PBGC Technical Update 13-1 applied, with no reporting waiver applying.
- b) May a company meet this criterion even where, during a portion of the specified two-year period, the company did not yet exist or the plan either did not yet exist or was not yet maintained by any member of a controlled group that included the company?
- c) Must a company take into account for this purpose a missed contribution reportable event that occurred when neither the company nor any member of its controlled group was maintaining the plan?

RESPONSE:

- a) If a waiver from reporting was available under Technical Update 13-1, it would be permissible to disregard a missed contribution where reporting would have been waived under new § 4043.25(c) (e.g., a plan that had fewer than 25 participants and was waived from reporting under Technical Update 13-1). However, where a plan qualified for simplified reporting under Technical Update 13-1, it would not be permissible to disregard a missed contribution for purposes of determining whether the missed contribution criterion is met, since reporting was not waived.
- b) Yes.
- c) No.

QUESTION #14

Reportable Events: Well-Funded Plan Safe Harbor

Under §4043.10, "a plan is in the well-funded plan safe harbor for an event year if no variable-rate premium was required to be paid for the plan under parts 4006 and 4007 of this chapter for the plan year preceding the event year." Please provide guidance as to how this works in the context of plan mergers, consolidations, and spinoffs.

For example:

- a) If Plan A merges into Plan B at the beginning of Plan B's 2016 plan year, would the test be based solely on whether a variable-rate premium was required to be paid for Plan B for the 2015 plan year, without taking into account whether a variable-rate premium was required to be paid for Plan A for the 2015 plan year?
- b) If Plan A and Plan B are both maintained on a calendar year basis and consolidate to form new Plan C effective January 1, 2016, is Plan C treated as a new plan that qualifies for the safe harbor for the 2016 event year because it had no "plan year preceding the premium payment year," regardless of whether or not a variable-rate premium was required to be paid for Plan A and/or Plan B for the 2015 plan year?
- c) If Plan A, a calendar year plan, spins off new calendar year Plan B effective January 1, 2016, does Plan B qualify for the well-funded plan safe harbor for the 2016 event year because it had no "plan year preceding the premium payment year"?

RESPONSE

- a) Yes.
- b) Yes.
- c) Yes.

QUESTION #15

Reportable Events: Public Company Waiver

Under §§ 4043.23(d)(4), .27(c)(3), .29(b)(6), .31(c)(6), .32(c)(4), a reporting waiver applies for various reportable events "if any contributing sponsor of the plan before the transaction is a public company and the contributing sponsor timely files a SEC Form 8-K disclosing the event under an item of the Form 8-K other than under Item 2.02 (Results of Operations and Financial Condition) or in financial statements under Item 9.01 (Financial Statements and Exhibits)."

- a) In determining whether any contributing sponsor "before the transaction" is a public company for purposes of the waiver from reporting an active participant reduction reportable event, is the date of "the transaction" the date on which the active participant reduction event occurs?
- b) In determining whether any contributing sponsor "before the transaction" is a public company for purposes of the waiver from reporting a change in contributing sponsor or controlled group reportable event, is the date of "the transaction" the date on which a legally binding agreement as a result of which a person will cease to be a member of the plan's controlled group becomes effective or the date on which the legally binding agreement is entered into?
- c) Please provide guidance on the level of detail that must be included in the Form 8-K to satisfy the requirement for "disclosing the event" to qualify for the public company waiver.
- d) Under what circumstances, if any, would the public company waiver apply where the event is disclosed as part of a Form 8-K that is filed by a member of a contributing sponsor's controlled group, but not by any contributing sponsor of the plan?

RESPONSE

- a) Yes.
- b) The date of the transaction is the date the legally binding agreement was entered into (i.e., when obligations that are material become enforceable by and against the parties to the agreement, regardless of whether any conditions of the agreement have been met or satisfied). See preamble to reportable events final rule at 80 FR 54993.
- c) The Form 8-K should include the information the following:

All Events

- Plan Name
- Brief description of the pertinent facts relating to each event.
- Date of the event
- Type of event

Active Participant Reduction

- Single cause event - statement explaining the cause of the reduction (e.g., facility shutdown or sale, discontinued operations, winding down of the company, or reduction in force).
- Attrition event – statement of factors involved in the attrition such as frozen plan, aging workforce or improved operational efficiencies that do not require replacing departing active participants

Number of active participants at the date the event occurs and at the beginning of the plan year in which the event occurred. If reporting two-year reduction, also include number at beginning of plan year two years prior to the plan year in which the event occurred.

Distribution to a Substantial Owner

- Amount, form and date of each distribution
- Reason for the distribution

Transfer of Benefit Liabilities

- Name, contributing sponsor, EIN/PN of transferee plan(s)
- Name of transferor plan and plan administrator or contributing sponsor
- Description of the transferor's controlled group structures, including the name of each controlled group member

Change in Contributing Sponsor or Controlled Group

- Description of the change in the plan's controlled group structure
- Name of each plan maintained by any member of the plan's old and new controlled groups, its contributing sponsor(s) and EIN/PN

Extraordinary Dividend or Stock Redemption

- Name and EIN of person making the distribution
- Date and amount of cash distribution(s) during fiscal year
- Description, fair market value, and date or dates of any non-cash distributions
- Statement whether the recipient was a member of the plan's controlled group

- d) Note that this language does not differ from the old regulation's provision on public companies which also referred only to a contributing sponsor. PBGC's experience is that in the vast majority of cases, operations for public company businesses are consolidated for purposes of SEC reporting so this will likely not be an issue. However, if there is an instance where an SEC Form 8-K is filed by a member of a controlled group that is not a contributing sponsor of a plan, the plan sponsor may discuss with PBGC whether the waiver is available, based on the facts and circumstances.

QUESTION #16

Reportable Events: Active Participant Reduction

Under a literal interpretation of PBGC's new regulatory provisions governing active participant reduction reportable events (§4043.23), an active participant reduction based on a single cause, with no further active participant reductions (or even with the active participant count thereafter increasing) can result in three separate reportable events, and (therefore) three separate filings.

Consider a situation in which a calendar year plan's active participant count is 1,000 as of January 1, 2015, and January 1, 2016, is reduced to 500 based on a single cause on October 1, 2016, increases to 600 on November 1, 2016, and remains at 600 at all times thereafter.

In such circumstances:

- a single-cause event would occur on October 1, 2016;
- an attrition event (based on the count being under 80 percent of the January 1, 2016, count and being under 75 percent of the count on January 1, 2015) would occur on December 31, 2016, and
- another attrition event (based on the count being under 75 percent of the January 1, 2016, count) would occur on December 31, 2017.

Would PBGC consider providing relief (e.g., through issuance of a Technical Update) from such duplicative reporting requirements?

RESPONSE

Because of the automatic extension for reporting an attrition event, the due date for reporting the first attrition event in the example (the attrition event that occurs on December 31, 2016) would be October 15, 2017. See § 4043.23(e). We are considering providing guidance that would relieve plans of having to report the attrition events in these circumstances, and would hope to do so well before any plan would be affected.

QUESTION #17

Reportable Events: Missed Contributions Because of Failure to Make Timely Funding Balance Election

Under §4043.25(c)(3), a waiver applies to a missed contributions reportable event "if the failure to make a required contribution is solely because of the plan sponsor's failure to timely make a funding balance election."

Does the waiver apply regardless of whether the plan sponsor later makes a funding balance election to offset at least a portion of the minimum required contribution for the plan year for which the missed contribution was required to have been made?

RESPONSE

The waiver in §4043.25(c)(3) would apply only if the funding balance election was actually made.

QUESTION #18

Reportable Events: Inability to Pay Benefits When Due

An "inability to pay benefits when due" reportable event occurs based on a "current inability" to pay benefits when the plan "fails to provide any participant or beneficiary the full benefits to which the person is entitled under the terms of the plan, at the time the benefit is due and in the form in which it is due." (This reportable event can also occur based on a "projected inability" to pay benefits based on the plan's "liquid assets" at the end of a quarter being less than two times the amount of the "disbursements from the plan" for that quarter.) (§4043.26)

- a) Under PBGC's reportable events regulations before they were amended by the final rule published on September 11, 2015, a plan was not treated as having a "current inability" reportable event "if its failure to pay is caused solely by the need to verify the person's eligibility for benefits; the inability to locate the person; or any other administrative delay if the delay is for less than the shorter of two months or two full benefit payment periods."

Under the September 11, 2015 final rule, a plan is not treated as having a "current inability" reportable event "if its failure to pay is caused solely by: (i) [a] limitation under section 436 of the Code and section 206(g) of ERISA (dealing with funding-based limits on benefits and benefit accruals under single-employer plans), (ii) [t]he inability to locate a person, or (iii) [a]ny other administrative delay, including the need to verify a person's eligibility for benefits, to the extent that the delay is for less than the shorter of two months or two full benefit payment periods."

The preamble to the September 11, 2015 final rule explains that the revisions to the rules governing when a plan is not treated as having a "current inability" reportable event where the failure is due to an administrative delay were intended to "clarif[y] that the [two month or two full benefit payment periods] time limit does not apply to delay in paying a missing payee." 80 Fed. Reg. 54980, 54993. The revision to the regulatory text not only makes this point clear, but also imposes that time limit, for the first time, where the delay is caused solely by the need to verify a person's eligibility for benefits. It is not uncommon for such delays to exceed the specified time limit (e.g., where an individual applies for benefits based on a claim that he or she worked for a predecessor company decades earlier, with records supporting that claim not being readily available) in circumstances that are in no way indicative of a possible need for plan termination.

Would PBGC consider providing relief (e.g., through a Technical Update) from reporting where this new time limit is exceeded?

- b) Under what circumstances, if any, does a "current inability" reportable event occur when a plan with fully adequate assets miscalculates a monthly benefit or a lump sum benefit and corrects it with a supplemental payment three months (or three years) later?

If such an event does occur, how is it determined when the person required to report "has reason to know" of the occurrence of such a reportable event, thus triggering the start of the 30-day period during which the reportable event notice must be filed?

RESPONSE:

- a) PBGC did not intend for this result. PBGC is considering the appropriate method of providing relief.
- b) The situation described above does not constitute a "current inability" to pay benefits when due.

QUESTION #19

Reportable Events: Distribution to a Substantial Owner

A "distribution to substantial owner" reportable event occurs if there is a distribution to a substantial owner, the total distributions made to the owner during the one-year period ending on the date of the distribution exceed \$10,000, the distribution is not made by reason of the substantial owner's death, the plan is not fully funded for nonforfeitable benefits immediately after the distribution, and the sum of the values of all distributions to any one substantial owner (not necessarily the one who to whom the current distribution is being made) during such one-year period exceeds a one-percent-of-plan assets threshold or the sum of the values of all distributions to all substantial owners during that same one-year period exceeds a five-percent-of-plan-assets threshold (§4043.27(a)).

For purposes of determining whether the one-percent-of-all-plan-assets threshold or the five-percent-of-all-plan-assets threshold is crossed, is a distribution taken into account where:

- a) the distribution is by reason of the substantial owner's death; or
- b) reporting of the distribution was waived (e.g., because the distribution occurred at a time when the low-default risk waiver or the well-funded-plan waiver applied)?

RESPONSE:

- a) A distribution by reason of the substantial owner's death would be disregarded for purposes of determining whether the thresholds are crossed.
- b) A distribution that was not required to be reported because a waiver applied would be included in the determination of whether the thresholds are crossed.

QUESTION #20

Reportable Events: Loan Default

A "loan default" reportable event occurs "when, with respect to a loan with an outstanding balance of \$10 million or more to a member of the plan's controlled group, (1) [t]here is an acceleration of payment or a default under the loan agreement, or (2) [t]he lender waives or agrees to an amendment of any covenant in the loan agreement the effect of which is to cure or avoid a breach that would trigger a default."

- a) It is common for a loan agreement to define "default" in a way that captures events that, but for the passage of time (e.g., a grace period) or some other requirement (e.g., the issuance of a notice or the making of a determination), would constitute an "event of default" that would allow the lender to accelerate the loan. In effect, under such a loan agreement, a "default" is defined in a way that in substance means a "potential event of default."

Does PBGC interpret the provisions governing loan defaults to capture such "potential" events of default? Does it matter for this purpose whether the particular loan agreement defines the term "default" as capturing such "potential" events of default or as capturing only those events that allow the lender to accelerate the loan?

- b) Regarding the reportable event where "the lender waives or agrees to an amendment of any covenant in the loan agreement the effect of which is to cure or avoid a breach that would trigger a default," does the "breach" that is cured or avoided have to have already occurred or have to be reasonably imminent to trigger reporting?

Consider a situation:

- in which a loan agreement is modified for reasons entirely unrelated to the occurrence or anticipated occurrence of any breach of the agreement (e.g., to increase or to decrease the amount of a credit line, to substitute collateral, or to address inter-creditor issues) and, as part of the renegotiation, some changes are made to the agreement that could result in some future event or circumstance that would otherwise constitute a breach not constituting a breach, or
- in which a lender forgives all or part of a loan, perhaps in connection with an intra-controlled group loan, as a result of which a potential future non-payment breach is avoided.

RESPONSE

- a) The answer depends on the terms of the loan agreement. For example, if a loan agreement stipulates that a default does not occur until after a grace period expires without the required action having been taken, then an event is not triggered for purposes of § 4043.34. Whether the only remedy available to the lender is loan payment acceleration is irrelevant to the analysis. The key factor is whether a default is triggered under the terms of the loan agreement.
- b) Generally this is a facts and circumstances analysis. However, PBGC intends that reportable event occurs in situations where the avoidance of a default was a direct and proximate result of the waiver or amendment, rather than a waiver or amendment that may, in the future, result in the avoidance of a default.

For example, an amendment to a loan agreement that changes the amount available under a line of credit would not in and of itself avoid a default and thus, would not be reportable at the time of the amendment (i.e., the circumstance would only be reportable if the company later is not able to pay the amounts drawn on the new amount of the credit line). However, if a company is required to maintain a certain amount of liquidity and is unable to maintain that amount, a waiver of that requirement would be reportable.

QUESTION #21

Reportable Events: Low Default Risk

For purposes of meeting the low default risk waiver:

- a) Do all entities in the controlled group that are required to meet the waiver have to use the same criteria (e.g., may the contributing sponsor use the probability of default and secured debt criteria to meet the waiver but the highest level U.S. parent use four of other five criteria in determining whether the waiver is available)?
- b) For purposes of meeting the low-default risk waiver, how should holding company situations be treated? For example, assume a holding company has no operations or separate financials of its own but has 20 wholly-owned U.S. subsidiaries, of which three are contributing sponsors, and ten wholly-owned foreign subsidiaries. Assume the holding company would therefore be the highest-level U.S. parent.

RESPONSE

- a) The contributing sponsor and the highest level U.S. parent may use different criteria to meet the low default risk waiver.
- b) Holding companies should be treated as the highest U.S. level parent and must meet the low default risk waiver along with the contributing sponsor. In our experience, most holding companies consolidate financial statements so that the operations of subsidiaries should provide the information necessary to determine whether the waiver is available. However, we understand that other holding companies do not consolidate financial statements. While such holding companies may generate no income from operations when not consolidated with the contributing sponsor, they do have separate financials (often required to file tax returns). As a result, they more than likely will have information available to determine whether the low default risk waiver is available. Here is an example:

A holding company does not consolidate its financials with its operating subsidiaries and does not have a measure of its credit quality prepared by a third party. The holding company has no debt (since the debt is held at the operating companies) but does have assets in the form of investments in subsidiaries. A holding company may be able to meet the low default risk waiver by meeting the four criteria listed below. It can meet the first two criteria below since the secured debt is \$0 and can also meet the last two criteria if there has been no loan defaults and no missed contributions.

Criteria:

- The company's secured debt (with some exceptions) does not exceed 10 percent of its total asset value.
- The company's ratio of total-debt-to-EBITDA is 3.0 or less.
- The company has not experienced a loan default in the past two years regardless of whether reporting was waived.
- The company has not missed a contribution in the past two years unless reporting is waived.

QUESTION #22

IRC Section 430(k) Liens: Treatment of Interest

Is the determination as to whether the total of missed contributions, including interest, exceeds \$1M such that an IRC §430(k) lien arises, determined only at the time of a missed contribution, or is it determined on a continuing basis by adding interest for the period following the most recent missed contribution date? For example, if the total of missed contributions (including interest) once the first quarterly contribution for a plan's 2016 calendar plan year (due April 15, 2016) is missed is \$999K, could an IRC §430(k) lien arise before the next required contribution is due and missed at least in part?

RESPONSE

Whether the \$1M lien threshold is crossed is determined only at the time a required contribution is due. Therefore, in the hypothetical presented, an IRC Section 430(k) lien could not arise until the next required contribution is due.

QUESTION #23

IRC Section 430(k) Liens: Effect of Corrective Contribution

Assume that an IRC §430(k) lien arises because the total of missed contributions including interest exceeds \$1M, and that thereafter the full amount of missed contributions including interest is paid so that the IRC §430(k) lien amount is zero. Under IRC §430(k), the lien continues to exist until the end of the first plan year in which the total of missed contributions, including interest, no longer exceeds \$1M.

Assume further that, during that same plan year, one or more other contributions are missed, at least in part, and that the highest total of such missed contributions, including interest, does not exceed \$1M.

Does the original lien that had been reduced to zero apply to these additional missed contributions, including interest, or does the original lien remain at zero, with the additional missed contributions, including interest, resulting in a lien only if and when they cross over the \$1M threshold?

RESPONSE

The lien continues to exist until the end of the first plan year in which the total no longer exceeds \$1M. Until then, the lien amount on any date equals the total amount of missed contributions plus interest.

QUESTION #24

IRC Section 430(k) Liens: Perfection and Enforcement at Direction of PBGC

When a lien arises under IRC §430(k), the lien “may be perfected and enforced only by the [PBGC], or at the direction of the [PBGC], by the contributing sponsor (or any member of the controlled group of the contributing sponsor).” IRC §430(k)(5).

Has PBGC ever directed a plan’s contributing sponsor or a member of its controlled group to perfect or to enforce an IRC §430(k) lien? If so, please describe the circumstances and what happened. Also, please explain the circumstances in which PBGC would anticipate directing a plan’s contributing sponsor or a member of its controlled group to perfect or to enforce an IRC §430(k) lien.

RESPONSE

We are not aware of any case in which PBGC has directed a plan’s contributing sponsor or a member of its controlled group to perfect or to enforce an IRC Section 430(k) lien. And outside the context of an actual case, PBGC is unable to speculate on any circumstances in which it would be in a plan’s best interest for PBGC to direct such perfection or enforcement instead of taking such action itself on the plan’s behalf.

QUESTION #25

Other: Missing Participants and Default IRAs

Plans are currently required to provide for default IRA rollovers when distributing benefits under the plan's automatic cashout rule in the absence of an affirmative election by the plan participant to accept cash or set up their own IRA. IRS guidance in Notice 2005-5 specifically provided that the trustee and plan administrator would not be faulted for not providing notice before making the transfer in situations where the requisite disclosure statement is returned by the United States Postal Service as undeliverable after it was mailed to the participant using the participant's most recent mailing address.

Does the PBGC take a different view of the plan's ability to execute default rollover transactions after the date of proposed plan termination?

RESPONSE

A terminating single-employer plan may execute a default rollover transaction with respect to a participant only if the participant is not a "missing participant" under ERISA section 4050 and 29 CFR part 4050. If the participant is not a missing participant, the plan may execute a default rollover in connection with the termination in accordance with all applicable requirements under the Code, including applicable IRS guidance.

If the participant is a missing participant, the plan administrator must either pay the participant's designated benefit to the PBGC or purchase an irrevocable commitment for the participant from an insurer.

QUESTION #26

Other: Delivery of AFN to PBGC

DOL regulations require that:

- All multiemployer plans provide a copy of the plan's annual funding notice (AFN) to PBGC;
- Single-employer plans whose liabilities exceed plan assets by more than \$50 million provide a copy of the plan's AFN to PBGC; and
- Other single-employer plans provide a copy of the plan's AFN only if PBGC requests it in writing.

Where and how should these copies be sent?

RESPONSE

PBGC prefers to receive copies of AFNs electronically.

- For multiemployer plans, PBGC's new [PBGC e-filing portal](#) is set up to receive electronic copies of AFNs. PBGC encourages all practitioners to use the portal. However, it is also acceptable to submit the copy via email at Multiemployerprogram@pbgc.gov.
- For single-employer plans, the only way to send copies electronically is via email. The applicable email address is single-employerAFN@pbgc.gov.

Hard copies may also be sent by mail (addresses are posted on PBGC's website).

In recent years, some plans have sent copies of the same AFN by both regular mail and email. PBGC prefers receiving only one copy.

QUESTION #27

Other: Withdrawal Liability for Multiple Employer Plan

A multiple employer plan sponsor wants to amend the plan to include a “minimum withdrawal liability” provision that would require a plan sponsor electing to voluntarily withdraw from the plan (as contrasted with spinning off to a separate plan) to pay an additional contribution to the plan equal to a defined amount (either a fixed dollar amount per participant or a calculated amount based upon an allocated share of plan liabilities), which may not be the same as the amount that would be assessed under ERISA §4063.

The amount due under the plan-defined methodology may be offset by any amount assessed under ERISA §4063, or could be in addition to that amount (e.g., to cover administrative expenses expected to be incurred by the plan after withdrawal). Alternatively, pursuant to the PBGC’s authority under ERISA §4063, PBGC may agree to permit the plan to treat any such payment as an offset to or a substitute for the ERISA §4063 amount.

Are there any restrictions that would preclude or limit the inclusion of such a provision in the plan?

RESPONSE

PBGC would consider such a provision on a case-by-case basis and might conclude in some cases that the liability under the plan’s provision would satisfy all or a portion of the ERISA §4063 liability. Note that the determination with respect to qualification issues under Code §401(a) is in the jurisdiction of the IRS and Treasury, and PBGC offers no comment on plan qualification. Plan sponsors should also keep in mind that the contribution may not be fully deductible in the year contributed if it exceeds the Code §404 limits.

QUESTION #28

Other: Complete Withdrawal from a Multiemployer Plan after a Partial Withdrawal

Consider an employer participating in a multiemployer plan that has a partial withdrawal in Year 1 and then has a complete withdrawal in Year 2. The withdrawals are not part of a mass withdrawal.

How is the amount of the complete withdrawal liability determined, and how is the 20 year cap on payments affected?

RESPONSE

In the scenario described above, the employer's complete withdrawal liability is initially calculated pursuant to ERISA section 4201(b), without regard to the prior partial withdrawal. The complete withdrawal liability is determined as the employer's allocable share of unfunded vested benefits, adjusted by section 4201(b)(1)(A)-(D), as applicable (which, under §4201(b)(1)(C), reflects the 20-year cap). That amount is then reduced by a credit for the prior partial withdrawal liability (likewise reflecting any applicable 20-year cap), determined in accordance with ERISA section 4206(b)(1) and 29 CFR 4206 (which determination includes application of the special limitation under section 4219(c)(1)(E) for determining the annual payment amount).

The net amount for the complete withdrawal is payable subject to the annual payment and schedule requirements under ERISA section 4219. For this step, the calculation of the annual payment for the complete withdrawal under section 4219(c)(1)(C) is determined without regard to the annual payment being made for the partial withdrawal. The employer continues to be liable for withdrawal liability determined under the partial withdrawal.

In this regard, PBGC has not changed its conclusion expressed in the preamble to the proposed regulation, "Adjustment of Liability for a Withdrawal Subsequent to a Partial Withdrawal," 52 FR 37329, 37330 (October 6, 1987).