PBGC Pension Benefit Guaranty Corporation

2019 ACOPA Actuarial Symposium

GS3: PBGC Update

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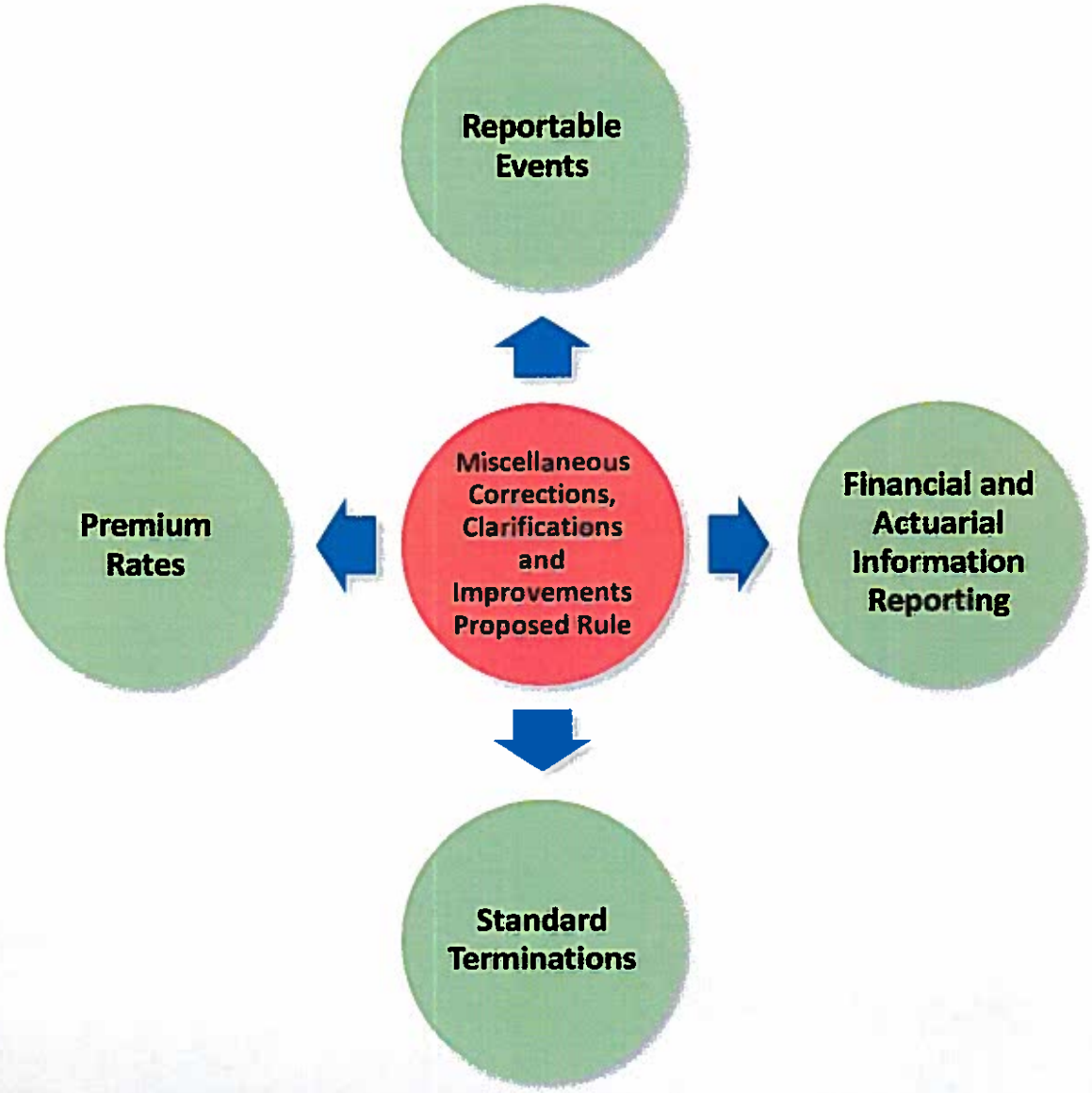
Topics

1. Miscellaneous Corrections, Clarifications, and Improvements Proposed Rule
2. Plan Sponsor Financial Difficulties
3. Title IV Coverage and Exemptions from Coverage
4. PBGC Request For Coverage Determination Forms & Instructions
5. PBGC Pilot Program: PBGC Opinion on Title IV Coverage of Prospective Plans

Miscellaneous Corrections, Clarifications, and Improvements Proposed Rule

Elements of Proposed Rule



Proposed Rule can be found at: https://www.federalregister.gov/documents/2019/06/27/2019-13419/miscellaneous-corrections-clarifications-and-improvements

Proposed Rule – Reportable Events

Small Plans Waived

- **Active Participant Reduction reporting**
  - Eliminates two-year reporting rule (75% look back)
  - Multiple single cause events must be reported separately
  - Attrition event disregards single cause event already reported in the same year
  - Participant is active if receives compensation from any member of the controlled group
  - Participant reductions already (and timely) reported under 4062(e) and/or 4063(a) can be disregarded
- **Inability to Make Payments When Due**
  - Verification eligibility requirement not subject to same time limit as other administrative delays

Proposed Rule – Reportable Events (cont.)

Small Plans Waived

- **Change in contributing sponsor or controlled group**
  - Event definition makes clear that change in contributing sponsor is also reportable
  - Added new examples for dissolution of a controlled group member and merger of controlled group members
- **Liquidation**
  - Clarifies definition to include event that occurs when company resolves to cease all revenue-generating operations, sell substantially all assets, or otherwise liquidate by decision of the Board of Directors, owner, or managing partners
  - Event date is tied to when decision is made to liquidate

Proposed Rule – Standard Terminations

- **Post-distribution certification**
  - Plan administrator can submit Form 501 60 days after last distribution date if plan administrator certifies to PBGC (in an email or otherwise) that all assets distributed in accordance with ERISA section 4044 within 30 days of the last distribution date

Option 1 → Form 501 filed with PBGC within **30 days** after last distribution date

Option 2 (need more time for data collection) → Certify to PBGC within **30 days** after last distribution date → Form 501 filed with PBGC within **60 days** after last distribution date

Proposed Rule – General Info

- Draft forms and instructions available on pbgc.gov (under Employers & Practitioners>Laws and Regulations>Federal Notices Open for Comment)
- Comments on the proposed rule (and related forms and instructions) are due by August 26, 2019

Plan Sponsor Financial Difficulties

Potential Indicators of Financial Difficulty

Pension Benefit Guaranty Corporation

PBGC Can Assist

- Early dialogue with PBGC about financial difficulties can be helpful to understand options
- If financial hardship is temporary, company can apply to IRS for a minimum funding waiver of annual required contributions
- Important for sponsor to know obligations with respect to plan and what entities are liable

Plan Termination Options

Standard Termination	Distress Termination	PBGC-initiated Termination
Plan has sufficient assets to pay benefits Majority owner can waive benefit so sufficient assets exist Sponsor can fund up plan to create sufficient assets	Insufficient assets to pay benefits One of distress criteria met (liquidation in court, bankruptcy, can't continue in business unless plan terminates)	Insufficient assets to pay benefits PBGC initiates termination Typically involves abandonment

All methods involve interaction with PBGC

PBGC.gov: New Pre-filing Consultation

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Distress Terminations

EXPAND ALL | COLLAPSE ALL

Request a Pre-filing Consultation

Schedule a pre-filing consultation call with PBGC's Corporate Finance and Restructuring Department to discuss the filing process and ensure the filing of a distress termination is appropriate given the sponsor's specific circumstances. Contact PBGC by sending an email to distress@pbgc.gov or calling (202) 326-4070.

What is a distress termination?

A plan that does not have enough money to pay all benefits owed participants and beneficiaries may be terminated only if the employer and the members of the employer's "controlled group" of affiliated companies each meets one of the distress termination tests. To do so, however, the employer must prove that the controlled group is financially unable to support the plan. PBGC takes over the plan as trustee and

Indications of Risk - Reportable Events

- Companies facing financial difficulties may have triggered a reportable event filing
- Reportable events in red below are those that indicate a possible risk of inability to maintain a pension plan
- Make sure companies report to PBGC timely

Corporate Events	Plan Events
1. Extraordinary Dividend or Stock Redemption 2. Change in Contributing Sponsor or Controlled Group **3. Insolvency or Similar Settlement** **4. Liquidation** **5. Loan Default**	1. Active Participant Reduction 2. Transfer of Benefit Liabilities 3. Distribution to a Substantial Owner **4. Failure to Make a Required Contribution*** **5. Application for a Funding Waiver** **6. Inability to Pay Benefits When Due**

** Reporting waived for small plans if missed contribution is quarterly. Reporting waived for plans of any size if contribution made w/in 30 days of due date.*

More Information on PBGC.gov

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Reportable Events & Large Unpaid Contributions

- Overview
- Forms and Instructions
- New e-filing portal
- Filing Assistance
- Penalties and Enforcement
- Reportable Events FAQs
- Staff Responses to Practitioner Questions
- Enrolled Actuaries Meeting Bluebooks - 4043 reporting
- Reportable Events Reference Sheet for Small Plans

New Reference Sheet for Small Plans

More Information on PBGC.gov

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Reportable Events Reference Sheet for Small Plans

Printer-friendly page

This is a quick checklist to help identify possible reportable events for small plans (plans with 100 or fewer participants). This page is available as a downloadable PDF file for future reference: Reportable Events Reference Sheet for Small Plans

Possible Trigger	Possible Event To Be Reported	Applicable PBGC Form
Plan failed to make a required contribution of $1 million or less to the pension plan by the required due date and did not make up the contribution within 30 days (with exception of quarterly contributions)	Failure to Make a Required Minimum Funding Payment	Form 10

Share

Text Resize

Online Premium Filing (My PAA)

Reportable Event Filing Reminders

- Use PBGC Form 10 – available on PBGC.gov
- Filings due within 30 days of date of event
- Late filing penalties apply if filings not made on time
- Mandatory e-filing:
  - Emailing pdf version of Form 10 is acceptable – send to post-event.report@pbgc.gov
  - Submit via e-filing portal
- Make sure filing is complete with all additional information attached or filing may be considered late
- Anyone can file the form (does not need to be plan sponsor)

Title IV Coverage and Exemptions from Coverage

PBGC Insures Defined Benefit Plans

- PBGC insures most private-sector defined benefit pension plans
- When a PBGC-covered single-employer plan fails, PBGC pays participants their pension benefits up to certain legal limits
- Covered plans must comply with PBGC's rules and requirements, including paying PBGC premiums

Title IV Coverage

- Whether a private-sector defined benefit plan is or is not covered by PBGC is based on the law (*See* ERISA Section 4021)
- Generally, a plan that satisfies IRC Section 401(a) is covered under Title IV of ERISA
- A plan may be exempt from Title IV Coverage under ERISA Section 4021(b) – *e.g.*, Substantial Owners Plans and Small Professional Service Plans

Substantial Owners Plans - ERISA § 4021(b)(9)

Title IV coverage does not apply to any plan that is established and maintained exclusively for substantial owners.

Substantial Owners Plans (cont.)

Substantial Owner Qualification Requirements Under ERISA § 4021(d)

Business Type	*A participant is a substantial owner if, at any time in the last 60 months…*
Unincorporated trade or business	The participant owns the entire interest.
Partnership	(1) The participant is a partner **and** (2) directly or indirectly owns more than 10% of ***either*** the capital interest ***or*** the profits interest in such partnership.
Corporation	The participant directly or indirectly owns **more** than 10% in value of ***either*** the voting stock of that corporation ***or*** all the stock of that corporation. Constructive ownership rules in IRC §§ 414(c), 1563(e) apply **only** in the context of a corporation. *See* 29 U.S.C. § 1321(d).
LLC	Depending on how the LLC is taxed (i.e., as a partnership or corporation), apply the rules above accordingly.

Substantial Owners Plans (cont.)

Spousal Attribution Under IRC §§ 414(c), 1563(e)

- The attribution rules apply only to substantial ownership of corporations
- An example is spousal attribution (IRC § 1563(e)(5)):
  - "An individual shall be considered to own the stock in a corporation owned, directly or indirectly, by or for his spouse . . . EXCEPT in the case of a corporation with respect to which <u>*each*</u> of the following conditions *is satisfied* for its taxable year--
    - (A) The individual does not, at any time during such taxable year, own directly any stock in the corporation;
    - (B) The individual is not a director or employee and does not participate in the management of such corporation at any time during such taxable year;
    - (C) Not more than 50 percent of such corporation's gross income for such taxable year was derived from royalties, rents, dividends, interest, and annuities; and
    - (D) Such stock in such corporation is not, at any time during such taxable year, subject to conditions which [i] substantially restrict or limit the spouse's right to dispose of such stock and [ii] which run in favor of the individual or his children who have not attained the age of 21 years."

Professional Service Employer Plans

Professional Service Employer Plans - ERISA § 4021(b)(13)

A pension plan is exempt from Title IV if it is "established and maintained" by a professional service employer which does not at any time after the date of ERISA's enactment have more than 25 active participants in the plan.

- Any proprietorship, partnership, corporation, or other association or organization;
- Owned or controlled by a professional individual; and
- Principal business is the performance of the same professional service.

Professional Service Employer Plans (cont.)

Owned or Controlled

- Fifty-one percent is sufficient to find **ownership**. *See* PBGC Opinion Letter 82-18
- An owner with less than fifty-one percent ownership can **control** the company

Professional Service Employer Plans (cont.)

Professional Individual Listed

- Section 4021(c)(2)(B) of ERISA provides that a "professional individual" includes, physicians, dentists, chiropractors, osteopaths, optometrists, other licensed practitioners of the healing arts, attorneys at law, public accountants, public engineers, architects, draftsmen, actuaries, psychologists, social or physical scientists, and performing artists.

Professional Service Employer Plans (cont.)

Professional Individual Not Listed

- Determination of whether such individuals, and others not listed, are "professional individuals" depends on an analysis of the services performed and the expertise required to perform them
- PBGC makes these determinations on a case-by-case basis. PBGC looks at the following:
  - Educational background;
  - Level of education required for position;
  - Coursework taken;
  - Licensures and certifications (mandatory and optional; federal and state);
  - Examinations requirements;
  - Continuing education requirements;
  - Years of work experience;
  - Teaching experience;
  - Public trust/ethical standards.
- See PBGC Opinion Letter 76-106

Professional Service Employer Plans (cont.)

Examples of Professional and Non-Professional Individuals

- PBGC Determinations of Non-Professional Individuals:
  - Insurance salesperson
  - Real estate agent

- PBGC Determinations of Professional Individuals:
  - Employee benefits consultant
  - Pharmacist

Professional Service Employer Plans (cont.)

Principal Business

- The company must render a professional service that is the same as the professional individual. *See* PBGC Opinion Letters 76-106, 80-13, 80-15, 97-2, and 98-1 (opining that professional individuals must engage in the performance of the professional service of which they are a professional individual for).
- Focus on revenue, amount of time, customer expectations
- PBGC Opinion Letter 82-18 (because over 50% of sales derived from sale of prescription drugs, the principal business was a professional service)

Professional Service Employer Plans (cont.)

Participant Count

- Does the plan have, or has the plan had at any time, more than 25 active participants?
- What is an active participant?
  - Pursuant to PBGC's Reportable Events regulations, an active participant is: a participant who-- (i) Is receiving compensation for work performed; (ii) Is on paid or unpaid leave granted for a reason other than a layoff; (iii) Is laid off from work for a period of time that has lasted less than 30 days; or (iv) Is absent from work due to a recurring reduction in employment that occurs at least annually. 29 C.F.R. § 4043.23(b)(2); *see also* PBGC Opinion Letter 75-49.

Professional Service Employer Plans (cont.)

Documents Reviewed by PBGC

- Plan sponsor's website
- Plan documents
- IRS determination letter
- Tax returns of plan sponsor and owner(s)
- Name, principal business, services performed, and organizational structure of every employer involved in establishing and maintaining the plan
- A percentage breakdown of the services performed, including the amount of revenue generated from each service (if the plan sponsor provides multiple services)
- Names, occupations, levels of education, and percentages and periods of ownership of all individuals who own or have ever owned the plan sponsor
- Names, occupations, levels of education, and titles of all individuals who control, manage, or direct the plan sponsor
- Licensing of owner(s)
- Level of education required to perform the duties for the plan sponsor and qualifications such as coursework, graduate school, continuing education, specific state licensure requirement, or similar requirements
- Number of participants since September 2, 1974

PBGC Request For Coverage Determination Forms & Instructions

Request For Coverage Determination Form & Instructions

- PBGC's new form and instructions for requesting a determination whether a plan is covered under Title IV of ERISA have been approved by OMB and are now available for use
- The form was created to streamline and simplify the coverage determination process
- The form and instructions are available on PBGC's Coverage web page (Employers & Practioners>Other Guidance>PBGC Insurance Coverage)

PBGC

REQUEST FOR COVERAGE DETERMINATION

OMB No 1212-0072
Expires 06/30/2022

This form is used by a plan administrator or plan sponsor of a plan to request that the Pension Benefit Guaranty Corporation determine whether a plan is covered under title IV of the Employee Retirement Income Security Act of 1974 (ERISA). For questions about this form, send an email to Coverage@pbgc.gov or call 800-736-2444 or 202-326-4242.

Part I. Identifying Information

Plan name

Name of authorized contact person for filer

Plan administrator

Title of contact

Street address of plan administrator

Street address of contact

City, State, and Zip Code of plan administrator

City, State, and Zip Code of contact

Plan sponsor (if different from plan administrator)

Email address of contact

Street address of plan sponsor

Telephone number of contact

Ext.

City, State, and Zip Code of plan sponsor

Filer is: ☐ Plan administrator
☐ Plan sponsor

EIN of plan sponsor

Plan number

Part II. All Plans, Required Information

1 This request is for a determination of ☐ non-coverage or ☐ coverage under title IV of ERISA.

2 Check the applicable box(es) that apply to the coverage determination request (see instructions).
☐ Substantial owners plan
☐ Other exemption under section 4021(b) of ERISA
☐ Small professional service employer plan
☐ Puerto Rico-based plan
☐ Church plan
☐ Other

3 Has PBGC issued a coverage determination for the plan before? ☐ Yes ☐ No
If yes, provide an explanation in Part VIII, Narrative Information of the plan's changed circumstances from those of the prior determination.

Request For Coverage Determination Form & Instructions

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PBGC Insurance Coverage

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New and Noteworthy
Coverage Determination Form and Instructions Now Available

Overview

Private-sector defined benefit plans that are not covered by PBGC

- Small professional service plans
- Substantial owners plans
- Certain Puerto Rico plans
- Certain church plans

Requesting a Coverage Determination

- When to request a coverage determination
- Form and instructions
- Pilot program for employers considering establishing a plan
- Filing assistance

PBGC Pilot Program: PBGC Opinion on Title IV Coverage of Prospective Plans

PBGC Opinion Letters

- To obtain from PBGC a Title IV coverage determination, the plan must already be established
- Under a pilot program, a plan that is not yet established may request a PBGC opinion regarding the following:
  - (i) whether all participants are substantial owners under ERISA § 4021(b)(9); and
  - (ii) whether the sponsoring employer is a professional service employer under ERISA § 4021(b)(13).
- These opinions are non-binding guidance and are not initial determinations with rights to reconsideration or appeal under 29 C.F.R. §§ 4003.1 – 4003.61

PBGC Opinion Letters (cont.)

- A request for a Title IV coverage opinion must include the required information listed on the PBGC Request for Coverage Determination Form
- Requests for such an opinion should be sent to:
  - OGC.Coverage.OpLtr@pbgc.gov; or
  - Attention: OGC Coverage Opinion Letter
    1200 K Street, NW
    Washington DC 20005

Helpful Resources

- **PBGC Coverage Page**
  https://www.pbgc.gov/prac/other-guidance/insurance-coverage
- **PBGC Appeals Board Decisions**
  https://www.pbgc.gov/prac/appeals-board/appeals-decisions
- **PBGC Opinion Letters**
  https://www.pbgc.gov/prac/other-guidance/opinion-letters

Premium proration for short plan years

Premium proration for short coverage years

PBGC PROPOSED REGULATIONS — "HOUSEKEEPING"—PREMIUM ISSUES

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Premium Proration for Short Plan Years

- PBGC regs allow for prorated premiums (Flat and VRP) for some, but not all, short plan years
- One situation where premium proration applies is a short year resulting from all assets being distributed in a standard termination*

– Under the proposal, proration would not apply in this case if plan did a non de minimis spinoff in its final year (i.e., before terminating).

* Note re: VRP exemption for terminating plans

- Current regulation also provides such plans are exempt from VRP in their final plan year.
- Premium filing instructions clarify that VRP exemption doesn't apply if assets and liabilities for a group of participants transferred to another plan in the year of termination (sometimes called a "reverse spinoff termination")
- Proposed regs codify this clarification and provides an exception if spinoff was de minimis

Proration for Short Coverage Years

- Prorate premiums for plan that is not covered by PBGC at beginning of year, but becomes covered during plan year
  - E.g., all non-substantial owner participants drop from plan mid-year
- No proration for plan that is covered by PBGC at beginning of year, but goes out of coverage during plan year
  - E.g., participants besides substantial owners are added mid-year
  - Remember: when reporting the plan year on PBGC forms, the last day of the plan year is December 31 (for calendar year plan year), not the date the plan is no longer covered by PBGC

MISSING PARTICIPANTS

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Missing Participant Guidance

- DOL Field Assistance Bulletin 2014-01
- IRS Rev. Proc. 2018-52, section 6.02(5)(d)
- IRS Field Directives on Lost and Missing Participants and RMD's
- PBGC Final Regulations 82 FR 60800, December 22, 2017
- Actuarial Intersector notes (March 2019)—IRS, DOL & PBGC will be coordinating on guidance

Missing Participants—Final PBGC Regulation

- Final regs effective 1/22/18
- Expands the program, beyond terminated DB plans, to
  - Most terminated DC plans
  - Terminated multiemployer plans
  - Terminated professional service plans with < 25 participants (not covered by PBGC)
- Missing participant definitions:
  - Unknown location
    - participant is "missing" if plan does not know "with reasonable certainty" the location of the distributee on close out
    - e.g., if there is unreturned mail, the plan administrator would not know with reasonable certainty the location of the participant
  - Unresponsive
    - De minimis benefits only for DB plans
    - Any size account for DC plans
  - Uncashed check

Missing participants program

- Fees are charged
  - $35 per head when benefit transfer amounts paid to PBGC
  - No charge for amounts transferred if < $250 total
  - No charge for plans sending info on where benefits are held (e.g., IRA)
- Diligent search
  - DC plans: use DOL fiduciary disclosure standards
  - DB plans: commercial locator service or records search method
  - Must complete within 9 months before benefit transfer
- Assumptions differ for determining DB benefit transfer amount
  - De minimis
  - Non de minimis, single sum not available
  - Non de minimis, single sum can be elected