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REPORT OF SUBCOMMITTEE ON CORPORATE PLAN TERMINATIONS
AND BENEFIT INSURANCE

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(Chapter 9 of *Employee Benefits Law*)

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III. PBGC Guarantees and Other Title IV Benefit Matters

C. Allocation of Assets


This litigation, on which we reported in 2016 and 2017, involves claims of Delta Air Lines pilots challenging their PBGC benefit determinations. They argued that the PBGC breached its fiduciary duty as the statutory trustee by certain actions in its administration of the terminated plan that allowed it to control plan assets for a longer period and collect investment returns rather than timely paying benefits. They requested disgorgement of the investment gains as a part of the relief that they sought for the alleged breach. The PBGC moved to dismiss the fiduciary breach claim on the ground, inter alia, that ERISA Section 4044(c) provides that any increase or decrease in the value of plan assets occurring after the date of termination is to be credited to, or suffered by, the PBGC. The district court denied the motion, reasoning that the pilots sought the alleged ill-gotten gains on assets that should have been distributed to them, and not the investment earnings from assets properly held by the PBGC, the disposition of which is governed by Section 4044(c).

On an interlocutory appeal, the DC Circuit held that Section 4044(c) precluded disgorgement of the investment gains because it provides that any post-termination increase or decrease in the value of plan assets flows to the PBGC.


This decision is also from the Delta pilots litigation described above. The pilots challenged their benefit determination on several grounds. As a threshold matter, they argued that the PBGC’s determinations, including the asset allocation determinations made as the trustee, should be reviewed de novo instead of being subject to Chevron deference. They argued that: 1) the interpretation of ERISA at issue was a policy matter that could not be delegated to the PBGC Appeals Board by the PBGC Board of Directors; 2) Chevron deference does not apply to the PBGC’s interpretations made as trustee; 3) the Appeals Board’s decision was too informal to be entitled to deference; 4) the administrative record was facially flawed because of the outdated evaluation of the Plan’s assets. The district court held that the Chevron framework applied to the pilots’ benefit determinations.

The district court further held that the PBGC did not improperly value the plan’s liabilities and allocate assets by disregarding payments that the active pilots received under
a collective bargaining agreement in connection with Delta’s bankruptcy. That agreement obligated Delta, in the event of plan termination, to issue notes and recognize an unsecured claim, the proceeds of which were distributed to the union’s active members, essentially to compensate them for the loss of unfunded, non-guaranteed benefits. The court explained that the PBGC’s opposition to the agreement in the bankruptcy case is irrelevant to whether the agency was required to consider the payments in its valuation and allocation decisions. Because ERISA Section 4001(a)(8)’s definition of a “nonforfeitable benefit” is limited to benefits a participant is entitled to under a plan (and not an agreement), the court ruled that the PBGC was not permitted to factor in those payments.

The pilots also challenged the PBGC’s determinations that plan provisions incorporating an increased compensation limit and qualified benefit limit permitted by EGTRRA were not in effect for the required five years prior to the plan’s termination such that benefits attributable to those changes were not included in Priority Category 3. The court held that the PBGC’s interpretation that the increased compensation limit amendment was not “in effect” until the benefits became payable was not arbitrary and capricious. Similarly, it upheld the PBGC’s conclusion that the qualified benefit limit was effective before the five-year period only for active pilots because of its earlier inclusion in a collective bargaining agreement which only applied to active, and not retired, pilots. The corresponding plan amendment provided for different effective dates depending on the participant’s annuity starting date, such that the effective date was not five years before the plan’s termination for pilots who had already retired.

The pilots also claimed that the PBGC erred in allocating the funds it recovered from Delta subsequent to the plan’s termination. Reasoning that ERISA Section 4022(c)(4) provides that the PBGC’s determinations regarding recovery benefits are binding unless shown by clear and convincing evidence to be unreasonable, the court rejected the plaintiffs’ claims that the agency improperly valued its recoveries as of the date of termination. In upholding the PBGC’s determination not to apply the increased compensation and qualified benefit limits in the calculations of the priority category 5(a) benefits, the court ruled that the PBGC reasonably interpreted the phrase “in effect” for priority category 5(a) benefits in the same manner as it interprets “in effect” for priority category 3 benefits.
IV. Termination of Single-Employer Plans

A. Standard Terminations

2. Procedures

h. Final Distribution of Assets


This case, on which we reported last year, involved the PBGC’s enforcement of its determination that the sponsor failed to distribute plan assets in full satisfaction of the plan’s benefit liabilities in a standard termination. A PBGC audit revealed that the employer did not pay participants the full cash surrender value of their insurance contracts and failed to vest certain plan participants upon plan termination, and otherwise failed to pay the full amount of benefits owed to participants. The employer opposed the PBGC’s motion for summary judgment, arguing that the errors were the fault of its third party administrator and that a judgment against the employer would likely result in it filing bankruptcy, which would not be in the interest of participants. The court granted summary judgment to the PBGC, holding that the employer, as the plan administrator, was responsible for properly terminating the plan and distributing benefits. The court further held that any financial hardship caused by a PBGC determination is not a valid basis to disregard it.

C. Involuntary Terminations


In this case, the magistrate judge recommended that the PBGC’s motion for default judgment terminating a frozen plan be granted. The plan had no assets and ceased operations upon the death of the sponsor’s owner. On review of the magistrate judge’s report and recommendation, the district court granted the PBGC’s motion and entered an order establishing that the plan is terminated, appointing the PBGC as statutory trustee, and ordering all persons having property of the plan to deliver such property to the PBGC.
V. Employer Liabilities Relating to Plan Termination and Missed Contribution Liens

A. Single-Employer Plans

1. Basic Liability

*PBGC v. Karp, 2018 WL 2267208 (S.D. Cal. May 17, 2018).*

This case was brought by the PBGC as the statutory trustee of a terminated plan against the previous trustees, a married couple, for breach of fiduciary duties. It alleged that the couple caused the plan to engage in loans and transfers that were prohibited transactions and failed to seek recovery for the plan of those transfers and loans. The wife moved to have the claims against her separately adjudicated, claiming that she “was a trustee in name only” and the husband made decisions without consulting her, the couple was legally separated, and she had received a discharge in bankruptcy. She contended that as a result the couple’s interests diverged and their defenses are different, such that she would be prejudiced by having her rights adjudicated in the same case. The court denied the wife’s motion, holding there is no misjoinder merely because two defendants have conflicting interests. Joinder was proper because the PBGC’s causes of action against both defendants were based on the same transactions or occurrences and raised the same questions of law. The court further held severance of the case was not warranted because it would be judicially inefficient and the wife failed to establish prejudice if the case were not severed.

5. Successor Liability

*PBGC v. Findlay Indus., 902 F.3d 597 (6th Cir. 2018).*

In 2017 we reported on the district court decision in this case that dismissed the PBGC’s claim to impose termination liability on a trust that was under common control with and leased real estate to the plan sponsor on the basis that it was not a trade or business. The district court also refused to hold the successor employers liable for the termination liability. The Sixth Circuit vacated the district court’s decision on both issues and remanded the case.

With respect to the liability of the trust, the Sixth Circuit rejected the district court’s reliance on *Commissioner v. Groetzinger*, 480 U.S. 23 (1987), which defines “trade or business” for specific tax code purposes as a business which is engaged in an activity: (1) for the primary purpose of income or profit, and (2) with continuity and regularity. Instead, the Sixth Circuit joined the Seventh, Eighth, and Ninth Circuits in adopting a categorical rule providing that any entity that leases property to a commonly controlled
company is a trade or business for ERISA purposes. It reasoned that applying *Groetzinger* would create dangerous incentives and not serve ERISA’s purposes, noting that the land was effectively an asset of the plan sponsor and should be used to help pay the benefits it promised.

As to successor liability, the Sixth Circuit observed that one of the sons of the plan sponsor’s founder, who was CEO and 45% owner of the plan sponsor at the time it failed, purchased its assets. The son was aware of the sponsor’s pension liability, yet made an offer to purchase the assets that did not assume that liability. The successor companies rehired a majority of the sponsor’s employees, operated the same plants, and sold to the plan sponsor’s largest customer.

The Sixth Circuit concluded that the creation of federal common law successor liability was appropriate because it is “essential to the promotion of fundamental ERISA policies,” namely, the PBGC’s authority to enforce employers’ promises to their employees. The Sixth Circuit adopted a rule that successor liability can be imposed in circumstances involving a sale that was not conducted at arm’s length. Although the court expressed reluctance to impose successor liability to a reorganization of a failing business, it explained that such reluctance should not apply to sale of assets which was not at arm’s length because such a transaction does not involve commercial expectations that a court should protect.

The dissent opined that the creation of common law successor liability was inappropriate because Congress had provided for narrower successor liability in ERISA Section 4069(b).

**Miscellaneous**


This case, on which we reported back in 2017, involved a dispute over attorneys’ fees provided for in a 2001 “wrap-up” agreement between the PBGC and the plaintiff class. Because a number of class members entitled to benefits could not be located, the agreement obligated the PBGC to pay attorneys’ fees for each such person located during a ten-year period beginning in 2002, with the amount calculated as a percentage of the benefit payments. Class counsel claimed that the payments should continue beyond the ten-year period because the PBGC allegedly was not diligent in identifying and paying class members during the ten-year period and because the PBGC prevented the class counsel’s performance of their duties under the agreement. The district court denied class counsel’s motion. On appeal, the DC Circuit affirmed. It found that the agreement unambiguously limited the PBGC’s obligation to pay the fees to the fixed ten-year period. It
also rejected the argument that the PBGC made class counsel’s work impossible, finding that class counsel continued to locate class members during the ten-year period.


This case stems from the litigation over the termination of the Delphi Corporation salaried employees pension plan. Black v. PBGC, U.S. District Court, E.D. Mich. Case No. 09-13616. We previously reported on this case and on the underlying Black case in 2017. The Black plaintiffs claim, inter alia, that the PBGC’s termination of that plan was unlawful and the product of improper pressure from the Treasury Department as part of the Department’s involvement in the auto industry restructuring. They served a subpoena duces tecum on the Department that sought documents related to the termination decision. The Department filed suit to quash the subpoena, and the Black plaintiffs moved to compel production of the documents. The issue before the court at this juncture was whether the agency could withhold certain documents under a claim of the presidential communications privilege. The court granted the motion to compel in part and denied it in part ordering production of some of the documents at issue for in camera review.


The plaintiff in this pro se case brought unspecified ERISA claims related to a plan in which he apparently is a participant. The plaintiff failed to appear at two screening hearings and the magistrate judge issued a report and recommendation that the case be dismissed without prejudice for plaintiff’s failure to abide by the court’s orders and failure to prosecute. Plaintiff objected to the report, but did not challenge its findings. On review, the district court dismissed the case without prejudice.

LEGISLATIVE AND REGULATORY DEVELOPMENTS

Issuance of 2018 Premium Filing Forms and Instructions

On January 8, 2018, PBGC announced on its What’s New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that OMB had approved its Comprehensive Premium Filing Instructions for 2018 Plan Years (including the illustrative form) and that those instructions are available on PBGC’s website. Of particular note is a new section alerting practitioners to the most common premium filing mistakes. In addition, PBGC expanded the section about short plan years to provide additional information for plans expecting to distribute assets during the 2018 plan year pursuant to a standard termination, and expanded the examples in the section about how to determine premiums in a year when a plan is involved with a spinoff, merger, or consolidation.
**PBGC Final Rule on Adjustment of Civil Penalties**

On January 12, 2018, PBGC issued a final rule (83 Fed. Reg. 1555) to amend its regulations, in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and OMB memorandum M-18-03, to make an annual adjustment, as required by law, to the maximum penalty amounts provided for in sections 4071 and 4302 of ERISA. The new maximum amounts, applicable to penalties assessed after January 12, 2018, are $2,140 per day (up from $2,097 per day) for section 4071 penalties and $285 per day (up from $279 per day) for section 4302 penalties. When it announced this final rule on January 11, 2018, on its What's New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm), PBGC stated as follows:

> Although the maximum penalty is increasing, it's worth noting that it is uncommon for PBGC to assess information penalties. The agency's goal is to encourage compliance, not to penalize plans that inadvertently forget to file information. In most cases, when PBGC does assess an information penalty, it is for an amount significantly less than the maximum permitted.

**Proposed Rule on Owner-Participant Changes to Guaranteed Benefits and Asset Allocation**

On March 7, 2018, PBGC issued a proposed rule (83 Fed. Reg. 9716) that addresses certain changes made by the Pension Protection Act of 2006 (“PPA”) to the phase-in and asset allocation rules under Sections 4022 and 4044 of ERISA. Special provisions within these sections apply to participants who have certain ownership interests in their plan sponsors. PPA made changes to these provisions by replacing the phase-in limitation on guaranteed benefits that applied to substantial owners under pre-PPA law with a new phase-in limitation that applies to majority owners, and by amending the asset allocation rules to prioritize funding of all other benefits in priority category 4 ahead of those benefits that would be guaranteed but for the new, owner-participant limitation under PPA. PBGC stated that it has been operating in accordance with the amended PPA provisions since they became effective.

The proposed rule, in addition to providing that PBGC’s regulations would be conformed to these PPA changes, would amend PBGC’s regulations governing the determination of estimated guaranteed benefits and estimated asset-funded benefits in a distress termination by adding new examples relating to the PPA changes. Under the proposed rule, plan administrators would continue to be allowed to use a simplified method in determining estimated asset-funded benefits, notwithstanding that this method does not account for the funding prioritization of other benefits in priority category 4 ahead of those of majority owners, and thus may result in overpaying majority owners who receive estimated benefits.
Policy Statement on PBGC Review of Multiemployer Plan Proposals for Alternative Terms and Conditions to Satisfy Withdrawal Liability

On April 4, 2018, PBGC issued a policy statement (83 Fed. Reg. 14524) to provide insight to the public on the information PBGC finds helpful and factors PBGC considers in reviewing multiemployer plan proposals for alternative terms and conditions to satisfy withdrawal liability as provided under ERISA Section 4224. PBGC provided the following general statement of its policy goal:

Generally, in evaluating a proposal to adopt alternative terms and conditions to satisfy withdrawal liability, PBGC looks to whether trustees have supported their conclusion that the proposed alternative terms and conditions would realistically maximize the collection of withdrawal liability and projected contributions, relative to the statutory rules. Ultimately, PBGC should see that the proposed alternative terms are in the interests of participants and beneficiaries and do not create an unreasonable risk of loss to the insurance program and are otherwise consistent with ERISA and PBGC's regulations. If PBGC finds that the proposed alternative terms and conditions may create an unreasonable risk of loss to plan participants and beneficiaries and to the multiemployer pension insurance program, PBGC engages with the plan trustees and their representatives to discuss possible modifications to mitigate that risk.

The policy statement also provided guidance on the information that PBGC would find helpful in evaluating a proposal to adopt alternative terms and conditions to satisfy withdrawal liability and on the factors PBGC considers in reviewing such proposals.

Issuance of Revised Standard and Distress Termination Forms and Instructions

On April 17, 2018, PBGC announced on its What's New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that OMB had approved minor revisions to PBGC’s standard and distress termination forms and instructions, and that the revised instructions are available on PBGC’s website. Key changes include a new option for submitting these filings by email and the ability to request a pre-filing consultation to determine if a distress filing application is warranted. In addition, because the rules related to missing participants differ depending on whether the plan termination date is before January 1, 2018, the post-distribution certifications (i.e., Forms 501 and 602, for standard and distress terminations respectively), were modified slightly so that they could be used for both pre-2018 and post-2017 terminations.

Notice of Changes to PBGC Disaster Relief

On July 2, 2018, PBGC published a Notice (83 Fed. Reg. 30991) announcing changes to the way it provides disaster relief. PBGC’s previous practice was to post a separate disaster relief announcement on its web site each time IRS posted a disaster relief news release that included filing extensions for the Form 5500, with the PBGC announcement copying the disaster, the disaster area, and the relief period from the IRS news release, but otherwise generally containing boilerplate language that was repeated in every announcement. Under the new approach, PBGC will provide disaster relief via a one-
time Disaster Relief Announcement (available at www.pbgc.gov/prac/other-guidance/Disaster-Relief) that will apply whenever IRS announces that it is granting tax relief that includes filing extensions for the Form 5500. As with the previous practice, there are exceptions to the general “IRS-based” relief (which are listed in the Announcement) and filers would be able to request relief on a case-by-case basis for the excepted filings or other actions not covered by the general relief.

The one-time Disaster Relief Announcement incorporates various changes and clarifications in the scope and availability of PBGC disaster relief. In particular:

- Previously, a late premium payment eligible for disaster relief and paid by the end of the relief period was treated as timely for purposes of assessing the late payment penalty, but not the applicable interest charge. Under the new approach, the premium payment due date is extended so that no late payment penalty or interest charges will be assessed for the disaster relief period.

- Previously, premium filers had to submit the premium form and payment owed (“the premium filing”) by the end of the relief period for disaster relief to apply. Under the new approach, where a filer is unable to submit, or anticipates difficulty in submitting, a premium filing by the end of the relief period, the filer would simply notify PBGC by the end of the period of the filer’s eligibility for disaster relief to apply, with late payment penalty and interest charges not beginning to accrue until after the end of the relief period. The same method of notification is available for filings other than premium filings covered by the general disaster relief.

- Previously, filers would need to apply for case-by-case disaster relief for late annual financial and actuarial information reporting under ERISA section 4010. Under the new approach, these filings fall under general relief.

- Previously, post-event notices of reportable events under ERISA section 4043 fell under general relief. Under the new approach, based on PBGC’s view that “certain of these filings involve time-sensitive information where there may be a high risk of substantial harm to participants or PBGC’s insurance program,” five categories of post-event filings (i.e., failure to make required contributions under $1 million, inability to pay benefits when due, liquidation, loan default, and insolvency or similar settlement) no longer fall under general relief, but may be appropriate for case-by-case relief.

- Formerly, where disaster relief was founded on problems getting information or assistance from a service provider, the provider’s operations must have been “directly affected” by the disaster. Under the new approach, PBGC stated that it is replacing “this vague standard” with “a clear standard that the service provider [must] be located in the disaster area,” and noted that this is “the same objective condition as for the person required to file.”

The changes are effective for disasters for which IRS issues a disaster relief notice on or after July 2, 2018.
**Proposed Rule on Terminated and Insolvent Multiemployer Plans and Duties of Plan Sponsors**

On July 16, 2018, PBGC issued a proposed rule (83 Fed. Reg. 32815) that would amend its multiemployer reporting, disclosure, and valuation regulations to reduce the number of actuarial valuations required for smaller plans terminated by mass withdrawal, add a valuation filing requirement and a withdrawal liability reporting requirement for certain terminated plans and insolvent plans, remove certain insolvency notice and update requirements, and reflect the repeal of the multiemployer plan reorganization rules. In particular, the proposed rule would:

- allow the plan sponsor of a multiemployer plan terminated by mass withdrawal to perform an actuarial valuation only every 5 years (rather than, as under the existing regulation, annually) if the present value of the plan's nonforfeitable benefits is $50 million or less;
- add a new requirement for plan sponsors of certain terminated or insolvent plans to file actuarial valuations with PBGC (with the same $50 million threshold to be used for determining whether the requirement applies annually or only every 5 years);
- allow a plan receiving financial assistance from PBGC to comply with the actuarial valuation requirement by filing alternative information if the present value of the plan's nonforfeitable benefits is $50 million or less;
- require plan sponsors of certain terminated or insolvent plans to file with PBGC information about withdrawal liability payments and whether any employers have withdrawn but have not yet been assessed withdrawal liability;
- eliminate outdated information included in notices that are required to be sent by a multiemployer plan terminated by mass withdrawal that is insolvent or is expected to be insolvent for a plan year, or by a multiemployer plan that is certified by the plan's actuary to be in critical status and that is expected to become insolvent under section 4245 of ERISA;
- require a plan to provide notices of insolvency if the plan sponsor determines the plan is insolvent in the current plan year or is expected to be insolvent in the next plan year; and
- eliminate the requirement to provide most annual updates to notices of insolvency benefit level.

**Announcement of New PBGC Staff Guidance Q&A Web Page**

On July 25, 2018, PBGC announced on its What’s New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that it had developed a new “Staff Responses to Practitioner Questions” web page (available at www.pbgc.gov/prac/staff-responses-prac-questions) that compiles PBGC staff responses to questions received from practitioners about Title IV requirements that may be of interest to other practitioners. The new web page can be accessed via the Other Guidance page.

The questions cover issues such as bankruptcy claims, liens arising from large missed contributions, premiums, guaranteed benefits, and reportable events. The new web page states that the interpretations “reflect the views of the staff of PBGC”; “are not rules, regulations, or statements of [PBGC]”; “do not necessarily contain a discussion of all material considerations necessary to reach the conclusions stated”; “are not binding due to their informal nature”; and “are intended as general guidance and should not be relied on as definitive.” The new web page also cautioned that “[t]here can be no assurance that the information presented in these interpretations is current, as the positions expressed may change without notice.”

PBGC stated that it intends to update this web page periodically as additional questions arise.

**PBGC Staff Guidance on “Reverse Spinoffs”**

As part of the guidance in the new “Staff Responses to Practitioner Questions” web page (discussed immediately above), PBGC staff addressed a question that it had received several times in recent months about whether a two-step transaction, called a “reverse spinoff,” is an acceptable strategy for avoiding certain premium payments.

The “reverse spinoff” transaction entails a plan, late in a plan year, spinning off most of its participants to a new plan that is virtually identical to the old plan, leaving only a small group of retirees in the old plan, with the (now small) old plan undergoing a fast-track standard termination and completing the resulting final distribution by the end of the plan year. The question PBGC was facing was whether such a transaction would result in the old plan being exempt from the variable-rate premium for its final full plan year (based on a PBGC regulation that exempts a plan from the variable-rate premium for a plan year if the plan completes a standard termination during the plan year), and in the new plan paying only a prorated portion of the variable-rate premium (and of the flat-rate premium) for its first short plan year (based on a PBGC regulation that provides for a prorated premium for an initial short plan year of a plan created as a result of a spinoff).

The guidance, after noting that, in the circumstances just described, “the benefits of the vast majority of the participants who were in the plan at the beginning of the year have not been fully funded or paid in full, and PBGC coverage is still in effect for these participants,” stated as follows:

> The federal common law under ERISA and cases that look to the substance and not the form of a transaction suggest that this two-step transaction, and similar types of transactions, should be disregarded and premiums assessed as if such transaction had not occurred. We are especially skeptical of this strategy because it seems plausible that some plans could engage in this sort of two-step transaction year after year.
PBGC Modifications to 2018 Premium Filing Instructions (Impacting “Reverse Spinoffs”)

On September 4, 2018, PBGC announced on its What's New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that it had modified the Comprehensive Premium Filing Instructions for 2018 Plan Years “to provide information about a recent change to the premium payment instructions and, in response to questions PBGC has received, to clarify the applicability of a variable-rate premium exemption for plans closing out during the year.”

- The change to the premium payment instructions (at p. 2 of the modified instructions) relates to where and how to send premium payments.
- The clarification of the applicability of that variable-rate premium exemption (at p. 35 of the modified instructions) states that the exemption from the variable-rate premium that applies to a plan that makes a final distribution of assets in a standard termination during the premium payment year requires that “by year end, benefits for participants covered by the plan on the UVB Valuation Date will be distributed in accordance with PBGC’s standard termination regulation (29 CFR Part 4041) and PBGC coverage of such benefits will cease.” This interpretation would result in the exemption not applying in the case of a “reverse spinoff” as described earlier in this report, as most participants who were covered by the plan on the UVB valuation date would have thereafter been spun off to the new plan, with their benefits not distributed as part of the standard termination of the old (now small) plan and with PBGC coverage of their benefits continuing under the new spun off plan.

Final Rule on Mergers and Transfers Between Multiemployer Plans

On September 14, 2018, PBGC issued a final rule (83 Fed. Reg. 46642) to implement statutory changes under the Multiemployer Pension Reform Act of 2014 (MPRA) affecting mergers of multiemployer plans under title IV of ERISA and to reorganize and update PBGC's existing regulation on Mergers and Transfers Between Multiemployer Plans.

On June 6, 2016, PBGC had published a proposed rule (81 Fed. Reg. 36299) to amend this regulation to implement MPRA’s changes to section 4231 of ERISA and to reorganize and update provisions of the regulation to reflect other changes in the law. The final rule adopts the proposed changes implementing MPRA, with some modifications in response to public comments, and also adopts some of the proposed changes updating and reorganizing the existing regulation. However, “to allow more consideration of the concerns raised by the public comments, PBGC is not adopting its proposed changes to provisions of the existing regulation related to plan solvency.”

This final rule makes one major and numerous minor changes to the PBGC regulation. The major change is the addition of procedures and information requirements for a voluntary request for a facilitated merger to implement MPRA's changes to section 4231 of ERISA.
Final Rule on Owner-Participant Changes to Guaranteed Benefits and Asset Allocation

On October 3, 2018, PBGC issued a final rule (83 Fed. Reg. 49799) that addresses certain changes made by the Pension Protection Act of 2006 (“PPA”) to the phase-in and asset allocation rules under Sections 4022 and 4044 of ERISA. Special provisions within these sections apply to participants who have certain ownership interests in their plan sponsors. PPA made changes to these provisions by replacing the phase-in limitation on guaranteed benefits that applied to substantial owners under pre-PPA law with a new phase-in limitation that applies to majority owners, and by amending the asset allocation rules to prioritize funding of all other benefits in priority category 4 ahead of those benefits that would be guaranteed but for the new, owner-participant limitation under PPA. PBGC stated that it has been operating in accordance with the amended PPA provisions since they became effective.

The final rule, in addition to conforming PBGC’s regulations to these PPA changes, amends PBGC’s regulations governing the determination of estimated guaranteed benefits and estimated asset-funded benefits in a distress termination by adding new examples relating to the PPA changes. Under the final rule, plan administrators continue to be allowed to use a simplified method in determining estimated asset-funded benefits, notwithstanding that this method does not account for the funding prioritization of other benefits in priority category 4 ahead of those of majority owners, and thus may result in overpaying majority owners who receive estimated benefits.

PBGC received no comments on its March 7, 2018, proposed version of this final rule (discussed earlier in this report). The final regulation is the same as the proposed regulation, with two exceptions: (1) PBGC added clarifying language to its benefit payment regulation concerning PPA 2006 bankruptcy terminations; and (2) PBGC did not adopt a proposed amendment to its regulation on Termination of Single-Employer Plans (29 CFR part 4041) that would have changed the definition of “majority owner” for the limited purpose of determining which individuals are permitted to elect an alternative treatment of their benefits under that regulation.

Posting of Enhanced 4062(e) Web Page

On October 11, 2018, PBGC expanded and modified the information on its website relating to the “downsizing” liability that may arise under ERISA Section 4062(e) (as amended by Public Law 113-235) when an employer ceases operations at a facility under ERISA section 4062(e). The revised web page (www.pbgc.gov/prac/reporting-and-disclosure/erisa-section-4062-e) provides basic information about 4062(e), answers to frequently asked questions, and information on reporting to PBGC.

Announcement of Proposed Increase in Reportable Events Information Requirements

On October 12, 2018, PBGC published a notice in the Federal Register (83 Fed. Reg. 51713) informing the public that it is requesting that OMB extend its approval, under the Paperwork Reduction Act, of the collection of information requirements under PBGC’s regulation on Reportable Events and Certain Other Notification Requirements (29 CFR
Part 4043). As part of the request, PBGC proposes to require that all reportable event filings include controlled group information, company financial statements, and the plan’s actuarial valuation report. None of these three types of information was previously required for two reportable events categories (“active participant reduction” and “distribution to a substantial owner”); neither controlled group information nor the plan’s actuarial valuation report were previously required for one reportable events category (“extraordinary dividend or stock redemption”); and the plan’s actuarial valuation report was not previously required for two reportable events categories (“transfer of benefit liabilities” and “change in contributing sponsor or controlled group”).

Announcement of 2019 Premium Rates

On October 12, 2018, PBGC updated its Premium Rates webpage (www.pbgc.gov/prac/prem/premium-rates.html) to show the following rates for plan years beginning in 2019: a per-participant flat-rate premium of $80 for single-employer plans and $29 for multiemployer plans, and a variable-rate premium (applicable only to single-employer plans) of $43 per $1,000 of unfunded vested benefits (UVBs), subject to a cap of $541 times the number of participants. For plans sponsored by small employers (those with 25 or fewer employees on an aggregated controlled group basis), a lower cap may apply.

Announcement of 2019 Maximum Guarantee

On October 22, 2018, PBGC issued a press release announcing that it had updated the Maximum Monthly Guarantee Tables for 2019. The maximum guaranteeable monthly benefit for a plan that terminates in 2019 (or, where the termination results from a bankruptcy, where the bankruptcy petition date is in 2019) is $5,607.95 (increased from $5,420.45 for 2018) in the form of a life annuity beginning at age 65.

Posting of Reportable Events Reference Sheet for Small Plans

On October 26, 2018, PBGC posted a newly-created reference tool to help practitioners when advising plan administrators and plan sponsors of small plans (those with 100 or fewer participants) about reportable events. The tool, which is in the form of a checklist and is available at www.pbgc.gov/sites/default/files/reportable-events-reference-sheet-small-business.pdf, refers the reader to guidance on PBGC’s website (www.pbgc.gov/prac/reporting-and-disclosure/reportable-events) on filing requirements, including due dates and whether a waiver from reporting is available.

Issuance of 2019 Maximum Guarantee Table for Lump Sum Benefit Restrictions

On October 31, 2018, PBGC posted the 2019 table (available at www.pbgc.gov/prac/mortality-retirement-and-pv-max-guarantee/present-guarantee.html#2019) to be used by single-employer plans that are between 60 and 80 percent funded, and that therefore may not pay lump sums or other accelerated distribution forms to the extent the payment exceeds the lesser of: (1) 50 percent of the amount that would be paid absent the restriction, or (2) the present value of PBGC’s maximum guarantee computed under PBGC guidance.
Announcement of Proposed Form for Requesting PBGC Coverage Determinations

On December 4, 2018, PBGC published a notice in the Federal Register (83 Fed. Reg. 62629) informing the public that it intends to request that OMB approve, under the Paperwork Reduction Act, a new forms and instructions package to be used by a plan administrator or plan sponsor to request a PBGC coverage determination. The proposed form would highlight the four plan types for which coverage determinations are most frequently requested:

- church plans as listed in ERISA section 4021(b)(3) of ERISA;
- plans that are established and maintained exclusively for the benefit of plan sponsors’ substantial owners as listed in ERISA section 4021(b)(9);
- plans covering, since September 2, 1974, no more than 25 active participants that are established and maintained by professional services employers as listed in ERISA section 4021(b)(13); and
- Puerto Rico-based plans within the meaning of ERISA section 1022(i)(1).


Issuance of 2019 Premium Filing Forms and Instructions

On December 13, 2018, PBGC announced on its What's New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that OMB had approved its Comprehensive Premium Filing Instructions for 2019 Plan Years (including the illustrative form) and that those instructions are available on PBGC's website. Among the key changes (in addition to reflecting the new premium rates for 2019, as discussed earlier in this report) are the inclusion of information about the process by which plan administrators may certify the filing manually instead of electronically, revised instructions to reflect PBGC’s streamlined disaster relief process (as discussed earlier in this report), and an expansion of PBGC's list of common filing errors.

PBGC Final Rule on Adjustment of Civil Penalties

On December 28, 2018, PBGC issued a final rule (83 Fed. Reg. 67073) to amend its regulations, in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and OMB memorandum M-19-04, to make an annual adjustment, as required by law, to the maximum penalty amounts provided for in sections 4071 and 4302 of ERISA. The new maximum amounts, applicable to penalties assessed after December 28, 2018, are $2,194 per day (up from $2,140 per day) for section 4071 penalties and $292 per day (up from $285 per day) for section 4302 penalties. When it

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announced this final rule on December 28, 2018, on its What's New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm), PBGC stated as follows:

Although the maximum penalty is increasing, it is uncommon for PBGC to assess this amount. The agency's goal is to encourage compliance. In most cases, when PBGC does assess an information penalty, it is for an amount significantly less than the maximum permitted.