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 (at www.pbgc.gov/prac/forms). 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](http://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

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 information, 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 (available at www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee) 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).

The proposed form and instructions package would list the information and documents required for PBGC to make a coverage determination. Comments submitted on the proposed form and instructions package are available at www.pbgc.gov/prac/pg/other/guidance/paperwork-notices.

**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 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.

**Announcement of Expanded and Permanent Mediation Project**

On January 24, 2019, PBGC announced on its What’s New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that its Pilot Mediation Program is now permanent and that PBGC has added fiduciary breach cases to the categories of disputes covered by the program. Details about the Mediation Program are available at www.pbgc.gov/prac/other-guidance/pbgc-mediation-program.

**Update to PBGC Staff Guidance Q&A Web Page**

On January 29 and February 1, 2019, PBGC updated its “Staff Responses to Practitioner Questions” web page (available at www.pbgc.gov/prac/staff-responses-prac-questions), which compiles PBGC staff responses to questions received from practitioners about Title IV requirements that may be of interest to other practitioners. The updates provide additional information about guaranteed benefits, reportable events, and standard termination, and remove the Q&A about “reverse spinoffs” (discussed earlier in this report).
Proposed Rule on Simplified Methods for Computing Withdrawal Liability

On February 6, 2019, PBGC published a proposed rule (84 Fed. Reg. 2075) that would implement statutory changes under the Multiemployer Pension Reform Act of 2014 affecting the determination of a withdrawing employer’s liability under a multiemployer plan and annual withdrawal liability payment amount when the plan has had benefit reductions, benefit suspensions, surcharges, or contribution increases that must be disregarded. The proposed amendments would also provide simplified withdrawal liability methods.

Comments submitted in response to proposed rule are available at www.pbgc.gov/prac/pg/other/guidance/pending-proposed-rules.

Announcement of Pre-Filing Consultation Service for ERISA Section 4010 Filers

On March 29, 2019, PBGC announced on its What’s New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that it now offers a pre-filing consultation service for ERISA Section 4010 filers, especially first-time filers, looking for guidance on filing requirements. PBGC stated that its staff “will provide an overview of the process, share helpful tips on how to use the e-filing software, and provide insights on how to avoid common filing errors.” To schedule a pre-filing consultation, send an email to ERISA.4010@pbgc.gov or call (202)-326-4000 ext. 3075. Additional information about ERISA Section 4010 requirements is available on PBGC’s website at www.pbgc.gov/prac/reporting-and-disclosure/4010-reporting.

Final Rule on Terminated and Insolvent Multiemployer Plans and Duties of Plan Sponsors

On May 2, 2019, PBGC issued a final rule (84 Fed. Reg. 18715) that simplifies certain reporting and disclosures of plan information by terminated and/or insolvent multiemployer plans to PBGC and to plan participants and beneficiaries. The final rule is effective July 1, 2019. These changes include a new combined notice of insolvency and notice of insolvency benefit level as well as requirements to file actuarial valuation information and withdrawal liability information with PBGC. These new filing requirements are applicable for plan years ending after July 1, 2019.

Submission to OMB of Proposed Form for Requesting PBGC Coverage Determinations

On May 8, 2019, PBGC published a notice in the Federal Register (84 Fed. Reg. 20168) informing the public that it is requesting 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).
The proposed form and instructions package would list the information and documents required for PBGC to make a coverage determination.

PBGC noted that it had made some changes in response to comments on the notice (discussed earlier in this report) that had informed the public of PBGC’s intent to request OMB approval of this forms and instructions package. One such change of note was that, although PBGC cannot provide coverage determinations for plans that do not exist, the supporting statement submitted to OMB explains that, in limited situations, employers will be able to use the soon-to-be issued coverage forms to request an Opinion Letter about whether a plan in the process of being created is likely to be covered by PBGC.

Announcement of Revised Reportable Events and Large Unpaid Contributions Forms and Instructions

On May 8, 2019, PBGC announced on its What’s New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that OMB had approved revisions to PBGC’s ERISA Section 4043 forms and instructions (i.e., Forms 10, 10-Advance, and 200). With the revisions in place, all reportable event filings must include controlled group information, company financial information, 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”). The new forms and instructions can be found on PBGC’s Reportable Events & Large Unpaid Contributions webpage, and PBGC’s e-filing portal has been updated accordingly.

Announcement of Proposed ERISA Section 4062(e) Form Series

On May 15, 2019, PBGC published a notice in the Federal Register (84 Fed. Reg. 21840) informing the public that it intends to request that OMB approve, under the Paperwork Reduction Act, a new a form series and instructions to be used when fulfilling notification requirements under ERISA Section 4062(e) (relating to substantial cessations of operations and elections to make additional annual contributions to satisfy the resulting liability). The proposed form series and instructions list the information and documents required to notify PBGC of: (1) a substantial cessation of operations (Form 4062(e)-01); (2) an election to make additional annual contributions (Form 4062(e)-02); (3) payment of an additional contribution, termination of obligation for future contributions, or receipt of funding waiver from the IRS (Form 4062(e)-03); and (4) failure to pay an additional contribution (Form 4062(e)-04).

Proposed Rule on Miscellaneous Corrections, Clarifications, and Improvements

On June 27, 2019, PBGC issued a proposed rule (84 Fed. Reg. 30666) that would make clarifications, corrections and improvements to four of its regulations. The major provisions of the proposed rule would amend PBGC’s regulations on:
• Reportable Events and Certain Other Notification Requirements, by eliminating possible duplicative reporting of active participant reductions, clarifying when a liquidation event occurs and providing additional examples for active participant reduction, liquidation, and change in controlled group events;

• Annual Financial and Actuarial Information Reporting, by eliminating a requirement to submit individual financial information for each controlled group member, adding a new reporting waiver and clarifying others, and providing guidance on assumptions for valuing benefit liabilities for cash balance plans;

• Termination of Single-Employer Plans, by providing more time to submit a complete PBGC Form 501 in the standard termination process; and

• Premium Rates, by expressly stating that a plan does not qualify for the variable rate premium exemption for the year in which it completes a standard termination if it engages in a spinoff in the same year, clarifying the participant count date special rule for transactions (e.g., mergers and spinoffs), and by modifying the circumstances under which the premium is prorated for a short plan year resulting from a standard termination.

Comments submitted on the proposed rule are available at www.pbgc.gov/prac/pg/other/guidance/pending-proposed-rules.

Announcement of Issuance of New Form for Requesting PBGC Coverage Determinations

On July 9, 2019, PBGC announced on its What’s New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that OMB had approved a new forms and instructions package (discussed earlier in this report) to be used by a plan administrator or plan sponsor to request a PBGC coverage determination. The instructions explain that, in limited circumstances, under a one-year pilot program, employers may also use the form to request an Opinion Letter about whether a plan in the process of being created is likely to be covered by PBGC. PBGC’s Coverage webpage (www.pbgc.gov/prac/other-guidance/insurance-coverage) has been updated accordingly.

Announcement of Clarification to Guidance on Mergers and Transfers Between Multiemployer Plans

On July 15, 2019, PBGC announced on its What’s New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that it had posted (at www.pbgc.gov/prac/pg/other/guidance/final-rules#mergers) a clarification to the preamble of its September 14, 2018, final rule (83 Fed. Reg. 46642) to implement its authority to facilitate mergers of multiemployer pension plans. The clarification relates to the second example of how a plan can demonstrate that financial assistance is necessary to mitigate the adverse effects of the merger on the merged plan’s ability to remain solvent. This example in the preamble states that, “while not a threshold, a possible demonstration may be based on stochastic modeling showing that the merged plan’s probability of insolvency within 30 years of the merger exceeds 65% without the requested financial assistance.” (See 83 FR 46642, at 46647 column 3). PBGC stated that the percentage in this example should be 35% (not 65%).
Submission to OMB of ERISA Section 4062(e) Form Series

On July 25, 2019, PBGC published a notice in the Federal Register (84 Fed. Reg. 35890) informing the public that it is requesting that OMB approve, under the Paperwork Reduction Act, a new form series and instructions to be used when fulfilling notification requirements under ERISA Section 4062(e) (relating to substantial cessations of operations and elections to make additional annual contributions to satisfy the resulting liability). The proposed form series and instructions list the information and documents required to notify PBGC of: (1) a substantial cessation of operations (Form 4062(e)-01); (2) an election to make additional annual contributions (Form 4062(e)-02); (3) payment of an additional contribution, termination of obligation for future contributions, or receipt of funding waiver from the IRS (Form 4062(e)-03); and (4) failure to pay an additional contribution (Form 4062(e)-04).

Announcement of Proposed Changes to Premium Filing Instructions for 2020 Plan Years

On August 1, 2019, PBGC published a notice in the Federal Register (84 Fed. Reg. 37694) informing the public that it intends to request that OMB approve, under the Paperwork Reduction Act, changes to the premium filing requirements first effective for the 2020 plan year. These changes relate only to the risk-transfer and final filing questions. A document showing what those questions and related instructions would look like if approved is available on PBGC’s website at www.pbgc.gov/sites/default/files/revised-premium-filing-items-per-60-day-notice.pdf. PBGC noted that it also intends to update the premium rates and make conforming, clarifying, and editorial changes to the premium filing instructions.

Issuance of ERISA Section 4062(e) Form Series

On September 18, 2019, PBGC announced on its What’s New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that OMB had approved its new ERISA Section 4062(e) Form Series and that the following new forms are available for use at www.pbgc.gov/prac/forms: (1) Form 4062(e)-01 (to notify PBGC of a substantial cessation of operations), (2) Form 4062(e)-02 (to notify PBGC of an election to make additional annual contributions), (3) Form 4062(e)-03 (to notify PBGC of a payment of an additional contribution, termination of obligation for future contributions, or receipt of funding waiver from the IRS, and (4) Form 4062(e)-04 (to notify PBGC of a failure to pay an additional contribution). The instructions for use of these forms are available at www.pbgc.gov/sites/default/files/form-4062-e-instructions.pdf.

Proposed Rule on Lump Sum Payment Assumptions

On September 30, 2019, PBGC issued a proposed rule (84 Fed. Reg. 51490) that would modify the assumptions PBGC uses to determine de minimis lump sum benefits in PBGC-trusteed terminated single-employer defined benefit pension plans and would provide a fixed set of “immediate and deferred” interest rates for use by those private-sector plans that use PBGC’s legacy rates to determine lump sums. Specifically, under the proposed rule:

- For purposes of determining lump sum benefits in PBGC-trusteed terminated single-employer defined benefit plans, PBGC would adopt the interest and mortality assumptions from Section 417(e)(3) of the Code. PBGC stated that it “expects that the proposed
changes to adopt the interest and mortality assumptions specified in section 417(e)(3) of the Code would have a minimal effect on participants and beneficiaries of plans it trustees because . . . PBGC uses these assumptions only for purposes of determining de minimis lump sum amounts,” and further noted that “because the interest and mortality changes would generally have offsetting effects, the net impact would be small.”

- PBGC would discontinue its monthly publication of the legacy lump sum interest rates (in Appendix C to 29 CFR Part 4022) that some private-sector plans use to determine lump sum benefits and instead provide for a final rate set (i.e., an immediate rate of 1.5% for discounting benefits for the period between the annuity starting date and each future payment date and a deferred rate of 4% for discounting benefits during the period leading up to the annuity starting date) for valuation dates on or after the effective date of a final rule. PBGC solicited comments “on which private-sector plans use these rates and for what purpose, and whether setting the legacy interest rates at [the fixed levels as proposed] would cause any undue burden,” and on “whether other entities (e.g., insurance companies) use [PBGC’s] legacy interest rates and for what purpose.”

Proposed Rule on Benefit Payments and Allocation of Assets


- Clarify that PBGC’s rules on payment of a lump sum are unaffected by election of a lump-sum distribution before plan termination.
- Change wording that refers to the dollar amount currently subject to cashout by statute ($5,000) so it refers instead to the statutory provision that specifies that dollar amount.
- Clarify that a de minimis benefit of a participant who dies after plan termination will be paid as an amount due a decedent, not as a qualified preretirement survivor annuity.
- Clarify that benefits will be paid to estates only as lump sums.
- Clarify that accumulated mandatory employee contributions may not be withdrawn if benefits are in pay status when a plan becomes trustee.
- Clarify that the form of benefit in pay status when a plan becomes trustee will not be changed.
- Clarify that pre-trusteeship partial distributions are considered in determining benefits.
• Require that fair market value or fair value, as appropriate, be used for purposes of valuing assets to be allocated to participants’ benefits and in determining employer liability and net worth.

**Proposed Rule on Administrative Review of Agency Determinations**

On October 4, 2019, PBGC issued a proposed rule (84 Fed. Reg. 53084) that would amend its regulation on Rules for Administrative Review of Agency Decisions (29 CFR Part 4003). That regulation provides for two types of review: (1) a reconsideration process, under which aggrieved persons generally raise their concerns and make their cases directly to a higher-level official within the same department that issued the initial determination; and (2) an appeals process, where the decisionmaker reviewing the initial determination is not within the same department that issued the initial determination, but rather is the PBGC Appeals Board. The Appeals Board is located within PBGC’s Office of General Counsel and provides (either by a three-member panel or by an individual member of the Appeals Board) an independent review of the initial determination.

The major provisions of the proposed rule would:

• Subject all PBGC coverage determinations to appeal. (Under the existing regulation, initial determinations that a plan is covered are subject to the reconsideration process, and initial determinations that a plan is not covered are subject to the appeals process.)

• Subject all determinations concerning the allocation of a trusteed plan’s assets upon plan termination to appeal, except for determinations concerning the distribution of residual assets, which would remain subject to reconsideration.

• Clarify that, consistent with PBGC’s long-standing practice, when PBGC makes an initial determination effective on the date of issuance, a person aggrieved by the initial determination has no right to request reconsideration or to file an appeal.

• Clarify where to send a request for an extension of time to appeal or to request reconsideration.

• Clarify that persons seeking administrative review may request information in PBGC’s possession by using PBGC’s procedures for requests under the Freedom of Information Act and the Privacy Act.

**Announcement of 2020 Premium Rates**

On October 11, 2019, PBGC updated its Premium Rates webpage (www.pbgc.gov/prac/prem/premium-rates.html) to show the following rates for plan years beginning in 2020: a per-participant flat-rate premium of $83 for single-employer plans and $30 for multiemployer plans, and a variable-rate premium (applicable only to single-employer plans) of $45 per $1,000 of unfunded vested benefits (UVBs), subject to a cap of $561 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.
Technical Update 19-1: Financial Information Reporting Waiver

On October 16, 2019, PBGC issued Technical Update 19-1: “4010 Financial Information Reporting Waiver” to waive the requirement (subject to certain conditions) to report member-specific financial information under 29 CFR 4010.9(b)(2). Under PBGC’s regulation on Annual Financial and Actuarial Information Reporting (29 CFR Part 4010), certain financial information (audited or, if unavailable, unaudited financial statements, or Federal tax returns if no financial statements are available) must be included with a 4010 filing for each member of the filer’s controlled group (excluding exempt entities). However, if the financial information of a non-exempt member is combined with the information of other members in consolidated financial statements, in lieu of the foregoing information, a filer may submit (or, if publicly available, provide information to PBGC about where to find) the consolidated financial statements and also report revenues, operating income, and net assets separately for each non-exempt member included in the consolidated financial statements.

In this Technical Update, PBGC is waiving the requirement in § 4010.9(b)(2) to provide the foregoing member-specific financial information for filers whose ultimate parent is not a foreign entity. For filers whose ultimate parent is a foreign entity, the requirement to report § 4010.9(b)(2) information is waived if filers provide consolidated financial statements for U.S. controlled group members as an attachment to their filing (or federal tax returns if consolidated financial statements are not available), in addition to any other financial information required to be included with the filing.

Announcement of 2020 Maximum Guarantee

On October 24, 2019, PBGC announced on its What’s New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that it had updated the Maximum Monthly Guarantee Tables (available at www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee) for 2020. The maximum guaranteeable monthly benefit for a plan that terminates in 2020 (or, where the termination results from a bankruptcy, where the bankruptcy petition date is in 2020) is $5,812.50 (increased from $5,607.95 for 2019) in the form of a life annuity beginning at age 65.

Submission to OMB of 2020 Premium Forms and Instructions

On October 30, 2019, PBGC published a notice in the Federal Register (84 Fed. Reg. 58181) informing the public that it is requesting that OMB approve, under the Paperwork Reduction Act, a modified collection of information under PBGC’s regulation on Payment of Premiums. As part of the request, PBGC stated that it is incorporating the following modifications in its premium forms and instructions for 2020 plan year filings:

- Plans offering a lump sum window will have to separately report the number of participants in pay status who were offered and elected a lump sum in addition to the related current requirement with respect to participants not in pay status.

- The reporting period for risk transfer activity (lump sum windows and annuity purchases) will be changed from the period falling between 60 days before the prior filing and 60 days before the current filing to the prior premium payment year.
For a plan that reports that a premium filing will be the last filing for the plan and checks the “cessation of covered status” box as the reason (in which case the plan is required to provide an explanation as to why coverage has ceased, as a result of which PBGC typically contacts the plan to verify that coverage has ceased), the instructions will state that, if the plan has not already done so, it should request a coverage determination from PBGC.

PBGC stated that it “also is updating the premium rates and making conforming, clarifying, and editorial changes to the premium filing instructions.” Included among these other changes are instructions that track a number of the provisions PBGC proposed to add to its premium regulation in its June 27, 2019, Proposed Rule on Miscellaneous Corrections, Clarifications, and Improvements (discussed earlier in this report). In particular, PBGC is including instructions for situations that result in the Participant Count Date being the first day of the premium payment year instead of the last day of the prior premium payment year, as well as instructions with respect to the impact on premiums of a non-de minimis beginning-of-year transfer of assets and liabilities from one plan to another plan.

**Announcement of Intent to Modify Reportable Events and Form 200 Filing Requirements**

On November 5, 2019, PBGC published a notice in the Federal Register (84 Fed. Reg. 59660) informing the public that it intends to request that OMB approve, under the Paperwork Reduction Act, a modified collection of information (relating to Form 10, Form 10-Advance, and Form 200) under PBGC’s regulation on Reportable Events and Certain Other Notification Requirements (29 CFR Part 4043). In particular:

- **Form 10:** For a “failure to make required contributions” reportable event, if a payment was made to satisfy a missed contribution, the filer would have to submit documentation of that payment (e.g., a copy of the cancelled check or wire transfer).

- **Form 200:** The current Form 200 requires filers to report the due date of the required payment that triggered the notification to PBGC and to calculate the cumulative amount of unpaid balances. PBGC is proposing to modify the form to include a separate field showing the payment amount that triggered the notification in order to better track missed contributions and identify the amount by which liens associated with missed contributions must be updated.

- **Form 10, Form 10-Advance, and Form 200:** Currently, Form 10, Form 10-A, and Form 200 must be filed electronically, either by using the 4043 module of PBGC’s e-filing portal, or by emailing a completed form and any required attachments to post-event.report@pbgc.gov. PBGC is proposing to eliminate the email option for filings due after September 30, 2021, so that, starting in October 2021, these filings would have to be submitted via PBGC’s e-filing portal.
Issuance of 2020 Maximum Guarantee Table for Lump Sum Benefit Restrictions

On November 7, 2019, PBGC posted the 2020 table (available at www.pbgc.gov/prac/mortality-retirement-and-pv-max-guarantee/present-guarantee.html#2020) 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.

Notice of Approval of Alternative Arbitration Procedure

On December 10, 2019, PBGC published a Notice of Approval of Alternative Arbitration Procedure (84 Fed. Reg. 67484). PBGC stated that it was approving, effective January 1, 2020, a request from the American Arbitration Association for approval of an alternative arbitration procedure (“AAA Rules”). The AAA Rules address, among other things, arbitration initiation fees, apportionment of fees, and the arbitrator selection process.

Modification of PBGC Premiums for CSEC Plans

The Setting Every Community Up for Retirement Enhancement Act of 2019 (“SECURE”) was enacted on December 20, 2019, as part of the Further Consolidated Appropriations Act, 2020 (Pub. L. 116-94). Among many other changes, the SECURE Act modified PBGC premium requirements for cooperative and small employer charity (“CSEC”) plans. (CSEC plans are subject to funding rules that differ from those that are generally applicable to single-employer defined benefit plans, but were subject to the generally applicable PBGC premium requirements before the SECURE Act was enacted.) In particular, for CSEC plans:

- The flat-rate premium is $19 per participant.
- The variable-rate premium is $9 per $1,000 of unfunded vested benefits.
- The plan’s unfunded vested benefits (as determined for purposes of the variable rate premium) is the excess of:
  
  (1) the plan’s “funding liability” under ERISA Section 306(j)(5)(C) (which applies for purposes of determining whether the plan is to be treated as being in “funding restoration status”) by only taking into account vested benefits; over
  
  (2) the fair market value of the plan’s assets.

These modified PBGC premium requirements apply to plan years beginning after December 31, 2018.