

Plan for Regulatory Review

This document sets forth the Pension Benefit Guaranty Corporation's plan for the review of its existing regulations, pursuant to Executive Order 13563 on Improving Regulation and Regulatory Review.

PBGC is implementing Executive Order 13563 by:

- Reconsidering several regulations PBGC had previously proposed.
- Beginning to make changes to provide for more extensive public participation in rulemaking by adding public hearings and other means to its process.

Background

The Pension Benefit Guaranty Corporation (PBGC) protects the pensions of about 44 million people in about 29,000 private defined benefit plans. PBGC pays benefits when the sponsors of those plans cannot. PBGC receives no funds from general tax revenues. All operations are financed by insurance premiums, investment income, assets from pension plans trusted by PBGC, and recoveries from the companies formerly responsible for the trusted plans.

To carry out these functions, PBGC issues regulations interpreting such matters as the termination process for defined benefit plans, establishment of procedures for premium payments, reporting and disclosure of actions by plans and their sponsors that may affect plan liability, and assessment and collection of employer liability.¹

On April 1, 2011, PBGC requested public comments on developing its preliminary plan. PBGC received comments from four organizations representing employers or pension professionals and a pension consulting firm.² After incorporating public comments and further internal feedback, PBGC developed a preliminary plan and made it available for public comment, including through www.regulations.gov, Facebook, and Twitter.³ PBGC did not receive further comments on the preliminary plan.

¹ PBGC's regulations are in 29 CFR Chapter XL.

² The Request is posted at www.pbgc.gov/Documents/2011-7805.pdf. Comments received are posted on PBGC's Web site at [www.pbgc.gov/Documents/reducing-regulatory-burden-comments\(5\).pdf](http://www.pbgc.gov/Documents/reducing-regulatory-burden-comments(5).pdf). Any additional comments will be posted as they are received.

³ The preliminary plan can be found at www.whitehouse.gov/files/documents/2011-regulatory-action-plans/PensionBenefitGuarantyCorporationPreliminaryRegulatoryReformPlan.pdf.

Principles

Despite the inherent complexity of pensions and of PBGC's activities, PBGC is committed to issuing simple, understandable, flexible, and timely regulations to help employers, practitioners, and participants. PBGC seeks to:

- Minimize administrative burdens on plans and participants.
- Simplify filing.
- Provide relief for small businesses and plans, and assist plans to comply with applicable requirements (i.e., by making its regulations easier to comply with and providing assistance and guidance to the regulated community, including through customer service calls, interpretive guidance documents, and meetings with plan administrators and service professionals).

PBGC's regulatory review plan is designed to ensure that PBGC's regulations remain consistent with these principles and to improve its regulatory program and processes. Many changes have occurred in the decades since PBGC was established and began its regulatory program, including new legislation, changes in technology, and shifts in the economy or relevant industries. PBGC's review of its regulations will take such changes into account in order to improve its regulations, always striving to find better alternatives. Further, to the extent practicable, PBGC will seek to rely on information sources, reporting mechanisms and performance standards that are already established and accepted by the regulated community, thereby reducing duplication and costs, as well as increasing regulatory coordination, simplicity, and flexibility.

Executive Order 13563 calls not for a single exercise, but for "periodic review of existing significant regulations," with close reference to empirical evidence. It explicitly states that "retrospective analyses, including supporting data, should be released online wherever possible." Consistent with the commitment to periodic review and to public participation, PBGC will continue to assess its existing regulations in accordance with the requirements of Executive Order 13563. PBGC welcomes public suggestions about appropriate reforms. Please send comments to regs.comments@pbgc.gov.

Priorities for Review

Regulations that are not consistent with these principles will be prioritized for review to determine whether they should be modified, streamlined, expanded, or repealed as appropriate. PBGC will also prioritize regulations for review based on the following criteria:⁴

- Regulations affected by a fundamental change since originally promulgated, including new legislation, changes in technology, and shifts in the economy or relevant industry.

⁴ If PBGC had regulations that were considered economically significant (under Executive Order 12866), these would be a priority.

- Regulations that have raised concerns with PBGC's regulated community.
- Regulations identified through internal surveys of PBGC departments.

PBGC will review a regulation as soon as practicable following a fundamental change in circumstances that affects the regulation or in response to comments from stakeholders or relevant operating Departments. Significant regulations will be reviewed at least every ten years.

PBGC will prioritize regulatory changes resulting from this review in the context of its broader regulatory agenda, which includes regulations to implement statutory changes.⁵ Thus, this review will supplement that agenda, rather than displace it.

Issues in Review

In reviewing a regulation, PBGC will compare the actual consequences of the regulation with the pre-promulgation projections and expectations about the regulation's effectiveness, costs, benefits, and burdens. In each case, PBGC will ask:

- Is the regulation effective?
 - Does it accomplish its stated goals?
 - What has been the actual burden?
 - Are there unintended beneficial or costly side effects?
- Are there better alternatives?

PBGC will consider the full range of distributive impacts, rather than focusing exclusively on impacts to a single community, as well as impacts on PBGC's broader regulatory program.

⁵ In particular, a proposed regulation to implement Pension Protection Act of 2006's expansion of PBGC's Missing Participants program (part 4050) is far along in development and expected to be issued in 2011.

Selection of Rules for Review

The Appendix lists regulations that PBGC is in the process of reviewing or intends to review in the near future. The list will be posted on PBGC's Web site (www.pbgc.gov) and updated from time to time as progress is made on review items and new items are selected for review. The initial list takes into account public comments on PBGC's April 1, 2011, Request and internal feedback. Where practicable, the list of rules for review will provide timeframes for completing review items.

Structure and Staffing

Review of PBGC regulations will be conducted by an inter-departmental working group consisting of representatives from relevant operational, legal, and policy departments. The review project will be led by PBGC's Deputy Director for Policy.

Coordination

Executive Order 13563 calls for greater harmonization and coordination within and across agencies. Accordingly, PBGC will review selected rules to analyze their impact on the pension termination insurance program and broader federal agency regulation of pensions. PBGC will coordinate its review with the other ERISA agencies (Department of Labor, Department of Treasury, Internal Revenue Service), its Board agencies (in addition to Labor and Treasury, the Department of Commerce), and the Office of Management and Budget.

Consultation and Public Participation

Executive Order 13563 calls for an "open exchange" of information among government officials, experts, stakeholders, and the public.

One commenter (an association of major employers that provide defined benefit plans) recommended that PBGC create a stakeholder advisory group that would meet regularly to review regulations and discuss other issues related to PBGC's impact on plan sponsors. PBGC already has a statutory Advisory Committee, which includes persons from various constituencies, including employers, employees, and the public. PBGC has begun consulting with the Advisory Committee to develop a useful role in regulatory activities, which PBGC anticipates will include review of both existing and prospective rules.

In addition, PBGC is changing its traditional practices for review of its regulations and wants to involve the public more often in that process. Accordingly PBGC will:

- Hold public hearings on major regulations, rather than relying solely on written comments. PBGC also plans to provide additional means for public involvement, including on-line town hall meetings, social media, and continuing opportunity for public comment on PBGC's Web site.

- Post this Plan for Regulatory Review on PBGC's Web site for public comment (including through www.regulations.gov, Facebook, and Twitter) and post comments.
- Include information on review of specific regulations in PBGC's semi-annual Regulatory Agenda and annual Statement of Regulatory and Deregulatory Priorities (both are available on www.reginfo.gov). PBGC plans to include an explanation of its review conclusions in information accompanying any such regulatory changes.

PBGC will review its regulatory review plan periodically or in response to public comment and make appropriate modifications as required to ensure its effectiveness.

The public is encouraged to submit comments on PBGC's review plan on an on-going basis as PBGC engages in its regulatory review or nominate rules to review. Please send comments to regs.comments@pbgc.gov.

APPENDIX LIST OF RULES FOR REVIEW

Below is a list of rules PBGC selected for review consideration through 2012, with more specific timeframes indicated below where feasible.

Reportable Events. ERISA section 4043 requires that plan administrators and sponsors notify PBGC of the occurrence of certain events that may signal problems with a pension plan or business. In response to Executive Order 13563 and comments on its November 2009 proposed rule on Reportable Events,⁶ PBGC was already planning to re-propose this rule with an emphasis toward reducing the unnecessary burdens on employers and plans. PBGC is considering:

- Whether and to what extent it can take advantage of other existing reporting requirements and methods to avoid burdening companies and plans.
- How to implement industry's suggestion that different reporting requirements should apply in circumstances where the risk to PBGC is low or compliance is especially burdensome.

For fiscal year 2010, PBGC received 1,096 reportable event filings and estimates that the total burden for all respondents was 6,582 hours and \$ 2,303,700. PBGC expects that the new proposal would more effectively target troubled plans while reducing burden for healthy plans and sponsors. In addition to reporting burden, PBGC also is looking at ways to reduce the need to monitor events at all. PBGC plans to publish a new proposed rule in the fall of 2011.

ERISA section 4062(e). The statutory provision provides for reporting of and liability for certain substantial cessations of operations by employers that maintain single-employer plans. In light of industry comments, PBGC will also reconsider its 2010 proposed rule⁷ that would provide guidance on the applicability and enforcement of ERISA section 4062(e). In addition, PBGC will consider reducing the reporting burden and tying 4062(e) to risk through the same approaches being considered for reportable events.

Premiums. In recent years, the option of electing to use the alternative method to calculate the variable rate premium and related procedures have complicated some aspects of making premium filings. In some instances, plans and companies that failed to make necessary filings and payments in a timely and consistent way have asked PBGC to provide relief. In response to comments, PBGC has begun to review parts 4006 (Premium Rates) and 4007 (Payment of Premiums) to determine whether changes could be made, including:

- *Premium penalty relief.* PBGC has decided to automatically waive premium payment penalties that are assessed solely because a premium payment is late by seven calendar days. PBGC estimates that providing a waiver for such late premium penalties could

⁶ 74 Fed. Reg. 61247 (Nov. 23, 2009), <http://www.pbgc.gov/Documents/E9-28056.pdf>.

⁷ 75 Fed. Reg. 48283 (Aug. 10, 2010), <http://www.pbgc.gov/Documents/2010-19627.pdf>.

save plans and employers in the aggregate as much as \$400,000 annually. In the spirit of Executive Order 13563, PBGC is also considering revising its premium penalty policy to be more flexible in the case of clerical or administrative errors generally and is already taking steps in this direction. Such changes could remove undue penalty burdens on plan sponsors where there is minimal risk to the pension insurance system or intent to evade regulatory requirements.

- *Alternative premium funding target election relief.* In order to reduce the burden and actuarial fees associated with calculating the variable rate premium (VRP), PBGC's premium regulations allow a plan to elect to use the alternative premium funding target (APFT) to calculate its VRP and requires that such elections be filed with PBGC before the VRP due date. PBGC is aware that this regulatory provision has caused some difficulties for some filers. For example, some plans that used the APFT without having filed a valid election to do so asked PBGC to treat them as having made a valid election. PBGC provided limited relief for this type of situation in Technical Update 10-2.⁸ In response to comments, PBGC has been providing further relief as a matter of enforcement discretion.
- *Small plan due date.* The premium due date for plans with fewer than 100 participants is four months after year-end (April 30 for calendar year plans). One commenter said that some small plans with year-end valuation dates have difficulty meeting the filing deadline because such plans traditionally do not complete their actuarial valuation for funding purposes until after the premium due date. In light of this concern, PBGC will review part 4007 to determine whether changes could be made that would enable small plans to streamline their premium valuation procedures and thereby reduce actuarial fees. PBGC will consider several options (*e.g.*, extending the due date, permitting the use of prior-year data). PBGC expects any change with respect to the due date for small plans would require a regulatory change and therefore could first be effective for the 2013 plan year.
- *Voluntary correction program for new filers.* Periodically PBGC comes across situations where the plan administrator was not aware that the plan was covered by PBGC and therefore never paid premiums. PBGC will consider implementing a program addressing such situations under which premium payment penalties would be reduced or eliminated if such plans come forward and pay past premiums (and interest) within a specified timeframe. Such a program could encourage earlier compliance, thereby producing premium revenue more quickly, and reduce penalty costs for plan sponsors. PBGC expects to be able to implement this program by December 31, 2011.

Information Penalty Policy. PBGC is considering amending its regulation on Rules for Administrative Review of Agency Decisions (part 4003) to cover information penalties under ERISA section 4071 and part 4071 (as PBGC proposed to do in 2001). This would make the process for assessing and reviewing information penalties more transparent and consistent with other agency determinations. In addition, pending a more comprehensive review of its current

⁸ www.pbgc.gov/res/other-guidance/tu/tu10-2.html.

information penalty policy,⁹ PBGC is considering updating its current policy to include mitigating factors. PBGC will consider other changes to the policy to improve its compliance program, taking into account the circumstances of small businesses. These changes could potentially encourage compliance and reduce compliance costs. PBGC expects to complete this review by December 31, 2011.

ERISA section 4010. In response to several comments, PBGC has begun reviewing part 4010 (Annual Financial and Actuarial Information Reporting) and the related e-filing application to see how it can reduce burden while preserving its ability to receive critical information. PBGC is considering waiving reporting for plans that must file 4010 information solely on the basis of either a statutory lien resulting from missed required contributions of over one million dollars or outstanding funding waivers exceeding the same amount. In 2009 and 2010, less than eight percent of 4010 filers were required to report based on these two filing tests. For 2010, there were 18 such filers; that number is expected to increase slightly in 2011. Further, PBGC can obtain some information similar to that reported under section 4010 from other sources, such as reportable events filings. Waiving reporting based on these two tests would reduce the compliance and cost burden on plan sponsors. For example, a plan sponsor relieved of 4010 reporting might save between six and 24 hours annually from the need to identify controlled group members and preparing financial information submissions. Further, such plan sponsors might save approximately \$17,000 in actuarial costs (depending in part on whether they were first time filers). Based on 2010 data, the aggregate actuarial cost savings for all plans could be over \$310,000. In addition, as discussed below, some of the changes under consideration to part 4044 would also reduce burden for 4010 filers. Finally, PBGC is also considering other changes to section 4010 reporting that would further reduce burden for financially sound companies, by taking into account company financial health and targeting reporting more closely to the risk of plan termination; such changes might require legislative action.

Changes in other regulations to improve plan and PBGC administration. PBGC will review selected aspects of parts 4022 (Benefits payable in terminated single-employer plans), 4044 (Allocation of assets in single-employer plans), Subchapter I (Withdrawal Liability for Multiemployer Plans) and Subchapter J (Insolvency, Reorganization, Termination, and Other Rules Applicable to Multiemployer Plans) to eliminate obsolete provisions, simplify language, and fill in gaps where guidance would be helpful to the public and the relevant operating departments, including:

- *Streamlining benefit valuation process.* PBGC will review selected aspects of subpart B of CFR part 4044 (Valuation of benefits and assets) to streamline the process of valuing benefits. In particular, PBGC will consider changing the methodology for determining the age at which participants start receiving benefits, with the goal of simplifying the process and reflecting actuarial best practices in light of technological advancements. This would reduce the burden of complying with ERISA section 4010 and the Internal Revenue Code section 414(l) safe harbor rules related to plan spin-offs.

⁹ 60 Fed. Reg. 36837 (Jul. 18, 1995), www.pbgc.gov/documents/071895.pdf.

- Annual Valuation Requirement for Terminated but not Insolvent Multiemployer Plans.* When a multiemployer plan terminates, the plan must perform an annual valuation of the plan's assets and benefits under ERISA sections 4041A.24(a) and 4281.11(a). The plan's initial valuation following termination is necessary to determine the plan's total unfunded vested benefits that need to be allocated to withdrawn employers and to determine whether the plan needs to eliminate benefits that are not eligible for the PBGC guarantee under ERISA section 4022A(b). But if all the benefits are eligible for the PBGC guarantee, the cost of such annual valuations does not provide sufficient benefit in terms of the improvement in accuracy of data with respect to small plans. Furthermore, under ERISA section 4041A.12(e), PBGC has authority to require updated valuations from terminated plans. Based on its regulatory review, PBGC has decided that annual valuations continue to be necessary for large plans (based on net PBGC liability), but are not necessary for smaller plans. For smaller plans, PBGC has decided that valuations are necessary at least every five years, but not more frequently than every three years. Accordingly, PBGC plans to amend § 4041A.12(e) to specify the timing for updated valuations depending on the size of the plan. Based on PBGC's experience, the cost of annual valuations in recent years ranges from \$10,000 to \$90,000 for terminated plans (both large and small plans), with an average cost of between \$20,000 and \$25,000 per year per plan. Thus, PBGC anticipates that a plan that would be eligible for relief would incur these costs once every three to five years rather than every year. PBGC is not planning to change the current rules for insolvent multiemployer plans.
- Withdrawal liability rules.* PBGC plans to review the withdrawal liability rules under ERISA sections 4203 through 4221 to determine whether some provisions may be eliminated as obsolete, if language can be simplified, and whether there are gaps where guidance would be helpful to the public and the relevant operating departments.
- Notices of insolvency and of insolvency benefit level.* Terminated multiemployer plans that determine that they will be insolvent for a plan year must file a series of notices and updates to notices under §§ 4281.43 through 4281.46. These notice requirements can be detrimental to plan participants because they may use up assets that would be available to pay plan benefits. With respect to PBGC, the cost of such notices far exceeds any tangible benefits. The overwhelming majority of terminated multiemployer plans that become insolvent will remain insolvent. Participants will receive the initial notice of insolvency informing them that their benefits will be reduced to the PBGC guarantee. Subsequent notices and updates for terminated plans provide little additional value to PBGC or the participants and beneficiaries of the plans. Thus, PBGC plans to review these notice requirements to determine whether they should be revised or eliminated.
- Filing requirements for mergers of multiemployer plans.* Multiemployer plans are prohibited from merging unless, among other things, they file certain information with PBGC. Such mergers do not pose any increase in the risk of loss to PBGC or to plan participants. These filing requirements increase administrative costs to PBGC and plans and create an unnecessary burden in completing the merger. Thus, PBGC plans to review the filing requirements for multiemployer mergers where a compliance determination is not requested to determine whether they should be revised to require only a notice to

PBGC of the merger 30 days before the effective date. The current reporting requirements would remain in effect where a compliance determination is requested.

These steps could have the effect of reducing the overall burden on plan sponsors in determining how to comply with the applicable rules. Eliminating certain provisions may reduce the time and cost spent identifying items plan sponsors need to comply with. Simplifying language and developing guidance to fill in gaps could reduce the amount of time and cost spent on interpreting rule provisions. Improving PBGC administration allows PBGC to better allocate resources.

Elimination of obsolete regulation. PBGC removed part 4011 (Disclosure to Participants) from its regulations, since that regulation does not apply to plan years beginning on or after January 1, 2007.¹⁰ The elimination of this regulation will reduce the amount of time and cost spent on identifying items that plan sponsors need to comply with.

¹⁰ 76 Fed. Reg. 45403 (Jul. 29, 2011), www.pbgc.gov/documents/2011-19182.pdf.