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PBGC Proposes to Require E-Filing of Section 4010 Employer Reports

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On December 28, 2004, the PBGC published a proposed rule (69 Fed. Reg. 77679) modifying its regulation on employer reporting under ERISA Section 4010. Although these reporting requirements generally apply only to large employers, they can apply to mid-size and small employers as well. In brief, the proposed rule would:

- Require information to be filed electronically in a standardized format;
- Require the filing of certain additional items of supporting information;
- Require a filer for the previous year who does not believe a filing is required for the current year to demonstrate why there is no current filing requirement;
- Modify the rules for calculating a plan's unfunded vested benefits when determining whether employer reporting is required; and
- Remove the requirement that a power of attorney accompany a filing made by a person other than a filer.

The proposed rule would apply starting with calendar year filers reporting about the 2004 (calendar) information year, for whom the filing deadline is April 15, 2005.

▲ Background

Under Section 4010 of ERISA, controlled groups maintaining plans with significant funding problems must file annual reports with the PBGC containing certain financial and actuarial information. These Section 4010 reports are of key importance to the PBGC in its efforts to monitor plan underfunding and the financial status of the responsible employers.

A contributing sponsor or controlled group member must file a Section 4010 employer report if:

- The aggregate unfunded vested benefits (on a PBGC premium basis) of *all* underfunded plans maintained by the controlled group exceed \$50 million;
- For *any* plan maintained by the controlled group, there are missed contributions exceeding \$1 million and the

conditions for imposing an IRC §412(n) lien are met; *or*

- For *any* plan maintained by the controlled group, IRS has granted minimum funding waivers totaling in excess of \$1 million and any portion remains outstanding.

The number of controlled groups subject to this requirement has increased dramatically in the past few years; as recently as 2002, the PBGC estimated that 70 controlled groups file these reports each year, but in the preamble to its December 28, 2004, proposed rule, the PBGC's estimate had climbed to 400 controlled groups.

The PBGC's existing regulation implementing Section 4010, which specifies the items of identifying, financial and actuarial information that filers must submit, does not require e-filing or prescribe a form to be used.

▲ Required E-Filing

The preamble notes that the submission of the required information in a non-standard format makes the information harder to use, restricts the PBGC's ability to perform electronic data analysis and in general results in unnecessary delays. To better protect participant and premium-payer interests, the PBGC is proposing to require electronic filing of Section 4010 information in a standardized format (except as otherwise provided by the PBGC). A summary of the proposed e-filing methodology—a secure Web-based application that walks the filer through various screens and prompts the filer to enter required information—is available on the PBGC's Web site at <http://www.pbgc.gov/laws/lawsregs/federalreg/proprule.htm>.

▲ Additional Supporting Information Requirements

Under the proposal, filers would have to submit certain additional supporting information. The preamble states that, because “[t]he additional information is typically already collected, prepared and maintained by filers, the new requirement . . . imposes very little additional burden.” The

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proposed rule builds in the flexibility for the PBGC to require, through instructions on its Web site, modifications in the format of the information or submission of additional information that relates to the specific information described in the regulation.

- *Breakdown of reported liabilities.* Filers are currently required to provide information about a plan's benefit liabilities on a PBGC termination basis, but are not required to break it down by participant category, nor must they provide the number of participants in each category. Under the proposal, submission of the breakdown and participant count information would be required "to enable the PBGC to better estimate plan liabilities by reflecting the impact of the passage of time and any change in plan assumptions or provisions."
- *Additional actuarial valuation report information.* Filers are currently required to provide a copy of the actuarial valuation report "that contains or is supplemented by" certain information that is listed in the regulation. Under the proposal, that list would be expanded to include specified information relating to current liability.
- *Identification of actuarial assumptions.* The proposed rule would require filers to specify each of the assumptions used for purposes of reporting benefit liabilities under Section 4010, as a check to ensure use of the mandated assumptions.
- *Exempt entity information.* The existing regulation does not require the submission of either identifying or financial information about exempt entities. (An "exempt entity" is a controlled group member that is not a contributing sponsor of a nonexempt plan and that falls below certain *de minimis* financial thresholds.) The proposed rule would require the submission of identifying information for exempt entities and make clear that additional information about exempt entities must be submitted upon written request by the PBGC.
- *Exempt plan information.* The existing regulation requires the submission of identifying information for exempt plans, but does not explicitly require the submission of actuarial information about them. (An "exempt plan" is one that has fewer than 500 participants or that is fully funded for benefit liabilities on a PBGC basis, and that has no missed contributions over 10 days in arrears or outstanding funding waivers.) The proposed rule would make clear that additional information about exempt plans must be submitted upon written request by the PBGC.
- *Breakdown of consolidated financial statement information.* Under the existing regulation, in the case

- of a controlled group with consolidated financial statements, filers are required to provide a breakdown of revenue, operating income and net assets only for contributing sponsors (other than exempt entities). The proposed rule would require this breakdown for all controlled group members (other than exempt entities).
- *Identification of controlled group changes.* The proposed rule would require filers to report which controlled group members joined or left the controlled group during the information year (generally, the controlled-group-wide fiscal year).
- *Frozen plan information.* The proposed rule would require filers to identify the plans that are frozen and the nature of the freeze (*e.g.*, service is frozen; pay is not).

▲ Demonstration by Previous Filer of Exemption

The proposed rule would require any filer who was required to file for the previous year but not for the current year to demonstrate to the PBGC that a filing is not currently required. The preamble explains that the new requirement would enable the PBGC to ascertain quickly those previous filers who do not need to file for the current year and may prevent inadvertent failures to file, thereby preventing the assessment of penalties or at least reducing their amount.

▲ \$50 Million Unfunded Vested Benefits Test

The existing regulation allows filers to calculate unfunded vested benefits for purposes of determining whether Section 4010 reporting is required using a set of optional assumptions (an interest rate of 100% of the annual yield for 30-year Treasury securities, the fair market value of plan assets and specified mortality tables). The PBGC is proposing to eliminate use of these optional assumptions. In addition, the PBGC is proposing to clarify that, when determining unfunded vested benefits for these Section 4010 purposes, only those contributions made by the earlier of the filing date or due date of the Section 4010 report may be taken into account.

▲ Power of Attorney Requirement

The existing regulation requires the submission of a signed power of attorney whenever a person other than a filer makes the submission. The PBGC is proposing to simplify the process by eliminating this requirement as unnecessary. The requirement for a certification by the enrolled actuary would remain, regardless of who submits the filing.

▲ Public Comments

Comments on the proposed rule (<http://www.pbgc.gov/laws/lawsregs/federalreg/122804.pdf>) are due January 27, 2005.