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Analysis of PBGC's Proposed Variable-Rate Premium Changes

BY HAROLD J. ASHNER

On May 31, 2007, PBGC published a proposed rule[1] that would make important changes to its premium regulations. The primary purpose of the proposal is to implement provisions of the Pension Protection Act of 2006 (''PPA'') that overhaul the variable-rate premium (''VRP'') rules for 2008 and later plan years. However, there are other changes of significance to premium payers, including in particular a proposed explanation of when certain benefits are considered ''vested'' for purposes of determining unfunded vested benefits (''UVBs'').

PBGC's proposal comes on the heels of two other guidance documents on premiums it issued earlier this year:

■ *Technical update on effect of new current liability tables*. On Feb. 13, 2007, PBGC issued Technical Update 07-1 (''Effect of Treasury Mortality Tables on PBGC Requirements'') to provide guidance on how the Department of the Treasury's recent issuance of new mortality tables for determining current liability affects not only VRP determinations for the 2007 plan year, but also those PBGC reporting requirements that are tied to the 2007 VRP determinations.[2]

■ *Proposed rule on 2006 and 2007 statutory changes*. On Feb. 20, 2007, PBGC published a proposed rule that provides guidance (albeit only in proposed form) on the flat-rate premium increase that went into effect starting with the 2006 plan year, the new termination premium that went into effect for certain distress and involuntary terminations in or after 2006, and a new cap on the VRP for small employers that went into effect starting with the 2007 plan year.[3]

Much more premium guidance is still on the horizon. In addition to issuing final versions of its Feb. 20, 2007, and May 31, 2007, proposed rules, PBGC will be conducting a rulemaking to implement its newly granted PPA authority to pay interest on premium overpayments.[4]

[1] 72 Fed. Reg. 30308 (May 31, 2007).

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[2] Technical Update 07-1, which was issued (as noted) on Feb. 13, 2007, and revised on Feb. 15, 2007, is available at http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu15995.html. For a summary and analysis of this Technical Update, *see* ''PBGC Issues Guidance on Premium Changes'' by Harold J. Ashner, *Pension & Benefits Reporter* at pp. 564–71 (March 6, 2007).

[3] The proposed rule, published at 72 Fed. Reg. 7755, is available at http://www.pbgc.gov/docs/E7-2812.pdf. For a summary and analysis of this proposed rule, *see* ''PBGC Issues Guidance on Premium Changes'' by Harold J. Ashner, *Pension & Benefits Reporter* at pp. 564-71 (March 6, 2007).

[4] In a September 19, 2006, interview, PBGC's then-current Interim Director, Vincent K. Snowbarger, told BNA that PBGC would be issuing regulations in this area and noted the possibility that the regulations could provide for retroactive interest. *See* ''PBGC's Priorities Include Missing Participants and Interest on Overpayment of Premiums'' (No. 182, BNA *Pension & Benefits Daily*, Sept. 21, 2006). (Under PPA Section 406, PBGC is authorized to pay, ''subject to regulations prescribed by

This article focuses on PBGC's May 31, 2007, proposed rule and thus addresses primarily the PPA changes to the VRP rules that go into effect starting with the 2008 plan year.

I. Implementation of 2008 PPA Changes

In brief, the 2008 PPA changes to the VRP eliminate the full-funding limit exemption from the VRP—thereby subjecting many plans to the VRP for the first time—and redefine UVBs to coordinate with the new funding rules that (for most plans) also go into effect in 2008. UVBs will no longer be tied to the pre-PPA concept of ''unfunded current liability,'' and will instead be tied to the shortfall for the plan's new ''funding target.'' As under pre-PPA law, only vested benefits are to be taken into account and ''spot'' (rather than smoothed) interest rates are (at least in general) to be used to value the liabilities. However, in contrast to pre-PPA law, the value of the plan's assets is their fair market value rather than their (possibly smoothed) ''actuarial value.'' The statutory changes to the definition of UVBs raise several issues that PBGC addressed in its proposal.

A. ''Premium Snapshot Date''—A New Approach

One of the most fundamental concepts in PBGC's existing pre-PPA premium regulatory structure is the use of a ''premium snapshot date'' to determine the number of participants for whom, and the amount of underfunding for which, the premium is to be paid.[5] In the vast majority of cases, the premium snapshot date for the ''premium payment year'' (*i.e.*, the plan year for which the premium is to be paid) is the last day of the *prior* plan year. (There are exceptions involving mergers, spinoffs, and new or newly covered plans.) The same premium snapshot date is used for both flat-rate and variable-rate premium determinations. Thus, the participants for whom the flat-rate premium is paid are the same participants whose vested benefits are taken into account in determining the amount of the variable-rate premium. This is about to change.

PPA did not amend the Title IV provision that bases the VRP on UVBs ''as of the close of the preceding plan year.''[6] However, it defined UVBs in a way that PBGC stated ''creates ambiguity about the date as of which UVBs are to be measured.''[7] The PPA definition of UVBs refers to a ''valuation date'' (for assets) and a ''plan year'' (for both assets and liabilities), but specifies neither whether the ''valuation date'' is to be determined under the funding rules or separately under the premium rules nor which plan year the reference is to (the premium payment year or the preceding plan year).[8] PBGC concluded—notwithstanding the above-noted provision in Title IV itself that explicitly requires the VRP to based on UVBs ''as of the close of the preceding plan year'' and that thereby at least arguably establishes a Title IV "valuation date" for UVBs— that the ''valuation date'' is to be determined *not* under Title IV, but instead under the funding rules (which require use of the first day of the plan year for large plans and permit the use of any day in the plan year for small plans[9]) and that the ''plan year'' whose valuation date is to control is the current one.

In proposing to use the ''valuation date'' for the premium payment year as the new ''snapshot'' date for determining UVBs, PBGC relied on the following considerations:[10]

- *Coordination with funding valuation date.* After noting that most premium filers use beginning-of-year valuations for funding purposes and that, under PPA, many will be required to do so, PBGC rejected an ''end-of-year'' valuation for VRP purposes: ''Although funding valuations don't themselves produce UVB numbers that can be used for VRP purposes, they involve the gathering of the same basic data for analysis, and the valuations are done in the same way, simply using different assumptions. It would be burdensome and impractical to require plans that must do funding valuations as of the first day of a plan year to do separate valuations as of the last day for VRP purposes.''

- *''Roll-forward'' difficulties.* PBGC also considered, but rejected, use of an end-of-prior-year snapshot date with UVBs based on a ''roll-forward'' of the prior plan year's beginning-of-year valuation results. Such an approach, according to PBGC, would be ''likewise burdensome and impractical,'' both because ''[i]nstructions for 'roll-forwards' would necessarily be complex, especially in light of the new 'segment rate' interest assumption under section 303(h)(2)(C) of PPA 2006 and section 4006(a)(3)(E)(iv) of ERISA,'' and because such valuations ''would tend to be inaccurate because correcting for the many changes in circumstances that can occur during the course of a year involves a significant element of estimation.''

- *Currency.* Finally, PBGC noted that a current year valuation ''reflects a plan's current funding status much better than basing it on a valuation done in the prior year, especially a valuation done as of the first day of the prior year.''

Interestingly, the proposed new snapshot date for determining a plan's UVBs would *not* apply when determining the plan's participant count for purposes of the flat-rate premium. There would be two snapshot dates: a ''UVB valuation date'' (generally the first day of the current plan year) and a ''participant count date'' (generally the last day of the preceding plan year). Thus, the term ''premium snapshot date'' would become a relic, and the participants for whom the flat-rate premium would be paid could differ, in some cases significantly, from the participants whose vested benefits would be taken into account in determining the amount of the variable-rate premium.

[PBGC],'' interest on premium overpayments for periods beginning not earlier than PPA's August 17, 2006, enactment date.) *See also* 72 Fed. Reg. 30308 (May 31, 2007) (noting that the PPA provision authorizing PBGC's payment of interest on refunds of overpaid premiums will be the subject of a rulemaking action).

[5] *See* 29 CFR §§ 4006.3(a), .4(a), .5(d), (e); *see also*, *e.g.*, 2007 Premium Payment Package at pp. 3–4, 23, and 31.

[6] ERISA Section 4006(a)(3)(E)(ii).

[7] 72 Fed. Reg. at 30309.

[8] *See* ERISA Section 4006(a)(3)(E)(iii) (''the term 'unfunded vested benefits' means, for a plan year, the excess (if any) of . . . the funding target of the plan as determined under [ERISA Section 303(d)] for the plan year by only taking into account vested benefits and by using the interest rate described in [ERISA Section 4006(a)(3)(E)(iv)], over . . . the fair market value of plan assets for the plan year which are held by the plan on the valuation date'').

[9] *See* ERISA Section 303(g)(2).

[10] 72 Fed. Reg. at 30309.

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B. Determining Assets

The PPA definition of UVBs refers simply to ''the fair market value of plan assets for the plan year which are held by the plan on the valuation date.'' This language, although seemingly straightforward, nonetheless raises several interpretive issues.

■ *Exclusion of current-year contributions.* In the case of a small plan, the UVB valuation date for the premium payment year may be after the date one or more contributions have been made to the plan for the premium payment year. PBGC explained that, consistent with the treatment of such contributions under the funding rules,[11] the asset value must be determined by backing out those contributions, along with any interest thereon.[12]

■ *Inclusion of prior-year contributions.* In many cases, at least some contributions for the prior plan year (*e.g.*, the fourth quarterly and the ''catch-up'' contribution) will be made after the UVB valuation date for the premium payment year. Under the funding rules,[13] such contributions are taken into account (subject to an interest adjustment for post-2008 plan years) in determining assets. For VRP purposes, these contributions are also taken into account, but only if they are received by the plan by the date of the premium filing.[14]

■ *Use of funding interest rate.* The funding rules call for use of the ''effective interest rate'' in making the required interest adjustments for current-year and prior-year contributions. As a simplification, PBGC proposes that the same effective interest rates used for funding purposes, rather than the premium segment rates, be used when making these adjustments for VRP purposes. As a result, ''the adjustments do not have to be calculated twice (once for funding purposes and again for premium purposes), and plans can use for premium purposes a figure for the value of assets that they are expected to be entering in the annual report (Form 5500 series).''[15]

■ *Rejection of ''optional'' asset smoothing.* Although (as discussed later in this article) PBGC proposes to permit optional smoothing (consistent with the funding rules) of interest rates for purposes of valuing vested benefits, it has rejected optional smoothing (also consistent with the funding rules) of asset values as ''inconsistent with the statute,'' which (for VRP purposes) ''speaks explicitly of the 'fair market value' of assets.''[16]

■ *Use of unreduced assets.* As under the pre-PPA regulatory structure,[17] assets are not reduced by the amount of any credit balance (*i.e.*, under PPA, the prefunding and funding standard carryover balances).[18]

C. Determining Liabilities

Under PPA, the starting point for determining vested benefits for UVB purposes is the plan's ''funding target'' under the new funding rules. Then, to determine what the proposal refers to as the ''premium funding target,'' only vested benefits are taken into account and special premium segment rates (determined at least generally on a ''spot'' rather than a ''smoothed'' basis) are used to value those benefits. PBGC's proposal provides guidance on the treatment of accruals for the premium payment year, the ability under certain circumstances to use funding interest rates to value vested benefits, and (as discussed later in this article) the meaning of ''vested'' for purposes of determining UVBs.

1. Exclusion of Premium Payment Year Accruals

In the case of a small plan with a UVB valuation date after the beginning of the premium payment year, there could be benefit accruals for the premium payment year that would result in vested benefits as of that date. PBGC made clear that any such accruals are not taken into account in determining the premium funding target, noting that the funding rules[19] require—irrespective of the valuation date—that only benefits accrued as of the beginning of the plan year be taken into account.[20]

2. Optional Use of Funding Interest Rates

The PPA definition of UVBs requires use of an interest rate structure for valuing liabilities that differs from that used for funding purposes. PBGC proposes to permit filers to make an election (which would be irrevocable for five years) to base UVBs on the vested portion of the plan's funding target under the minimum funding rules. [21] The premium funding target determined based on such an election would be called the ''alternative premium funding target'' to distinguish it from the ''standard premium funding target'' that would be determined if such an election were not made.

PBGC noted that the advantage of using the alternative premium funding target would be that, ''if the plan determined the vested portion of its funding target for purposes of the annual report (Form 5500 series) in a manner consistent with PBGC's rules, it could use the same number for premium purposes and thus avoid having to do a second calculation for premium purposes alone.''[22] The five-year commitment is designed to ''keep plans from calculating the premium funding target both ways each year and using the smaller number,'' and reflects the reason PBGC proposes to permit use of the alternative premium funding target—''to reduce not premiums but the burden of computing premiums.''[23]

Both the alternative premium funding target and the standard premium funding target take into account only vested benefits and are based on the same mortality and other assumptions—other than interest—used for funding purposes. As for interest, there are several areas of potential difference.

■ *''Smoothed'' vs. ''spot'' rates.* The funding target, and thus the alternative premium funding target, is generally based on interest rates that are averaged over a 24-month period.[24] The standard premium funding target substitutes spot rates for the smoothed PPA rates. [25]

■ *Availability of ''full yield curve'' option.* The funding target, and thus the alternative premium funding

[11] *See* ERISA Section 303(g)(4)(B).
[12] 72 Fed. Reg. at 30310.
[13] *See* ERISA Section 303(g)(4)(A).
[14] 72 Fed. Reg. at 30316 (proposed 29 CFR § 4006.4(c)).
[15] 72 Fed. Reg. at 30310.
[16] *Id.*
[17] *See* 29 CFR § 4006.4(b)(2)(iii).
[18] 72 Fed. Reg. at 30310.
[19] ERISA Section 303(d)(1).
[20] 72 Fed. Reg. at 30309–10.
[21] *Id.* at 30310.
[22] *Id.*
[23] *Id.*
[24] ERISA Section 303(h)(2)(D)(i).
[25] ERISA Section 4006(a)(3)(E)(iv).

target, may be based—where the plan sponsor so elects—on a full yield curve rather than the three segment rates.[26] The standard premium funding target requires use of the three segment rates, with no ability to make such an election (as is available under the funding rules ''[s]olely for purposes of determining the minimum required contribution under [ERISA Section 303]''[27]) to use the full yield curve. [28]

■ *Month for selection of interest rate.* The funding target, and thus the alternative premium funding target, is based on interest rates for the ''applicable month'' (which may be the month that contains the valuation date or any of the four preceding months).[29] The standard premium funding target is based on interest rates for the month preceding the month in which the premium payment year begins.[30] Thus, for example, in the case of a calendar-year plan for which the ''applicable month'' is the month that contains the valuation date, the funding interest rates for the 2008 plan year would be those for January 2008 and the premium interest rates for the same 2008 premium payment year would be those for December 2007.

■ *Applicability of 2008/2009 transition rule.* The funding target, and thus the alternative premium funding target, is based on interest rates that are subject to a transition rule—which phases into the new segment rates from the prior current liability rate—for plan years beginning in 2008 and 2009.[31] (The transition rule does not apply to plans that are first effective after December 31, 2007, or to plans for which the employer has elected not to have the rule apply.[32]) Although a literal reading of the relevant PPA provisions[33] could support an interpretation that the transition rule, where applicable under the funding rules, applies as well to the standard premium funding target, neither the preamble nor the proposed regulatory text makes clear PBGC's position on this issue. Interestingly, this same literal reading could result in PPA's substitution of ''spot'' rates for ''smoothed'' rates for premium purposes not applying to the portion of the transition rule that is based on the prior current liability rate. Hopefully the final rule will provide explicit guidance on the applicability of the transition rule for premium purposes.

D. Elimination of Flexibility in Determining UVBs

Aside from affording the option (subject to a five-year commitment) to use funding interest rates for valuing liabilities, PBGC's proposal would cut back significantly on the flexibility that the actuary has in determining UVBs.

Today the actuary can determine UVBs as of the last day of the prior plan year (the usual ''premium snapshot date'' under current rules) not only by performing a separate valuation as of that day,[34] or by relying on a one-day ''roll-back'' of the funding valuation performed as of the first day of the current plan year,[35] but also by relying on determinations made for funding purposes for the prior plan year that are due at or before the time the premium filing for the current plan year is due. One option is to rely on a ''roll-forward'' of the funding valuation performed (typically) as of the first day of the prior plan year;[36] another option is to use the alternative calculation method (''ACM''),[37] which requires certain adjustments to entries that are required to be reported on the Schedule B as of the first day of the prior plan year.

The ability to rely on a ''roll-forward'' is not being carried forward in this proposal, presumably for the reasons stated by PBGC (as detailed earlier in this article) in connection with its proposal to use the valuation date for the premium payment year as the UVB valuation date. And the ACM would also become a thing of the past:[38]

> PBGC's proposal does not include an ''alternative calculation method'' for rolling forward prior year values to the current year. The alternative calculation method (ACM) in Sec. 4006.4(c) of the current premium rates regulation was instituted when much actuarial valuation work was done using hand calculators and tables of factors. High-speed, high-memory computers are now the norm for handling both data and mathematical computations. Actuarial valuations are thus much faster now. Furthermore, the segment rate methodology for valuing benefits does not lend itself to the kind of formulaic transformation process exemplified by the existing ACM. PBGC accordingly believes that an alternative calculation method is both unnecessary and impracticable under PPA 2006.

Thus, under the proposal, the actuary would have to rely on a valuation as of the valuation date for the premium payment year without any apparent ability to rely instead on an earlier valuation with adjustments. As a result, notwithstanding the generally accelerated demands PPA places on the actuary (*e.g.*, regarding benefit restrictions), there will be cases in which the actuary would have to make determinations for premium purposes long before corresponding determinations are needed (or at least available in final form) for funding or other purposes. Indeed, in the case of some small plans, the valuation date for determining UVBs would come after the due date for payment of the VRP based on that UVB determination. The proposal attempts to address these timing problems through a series of adjustments to the existing due date structure (as discussed in the next section of this article).

E. Due Date Changes

The use of the valuation date for the premium payment year as the UVB valuation date, when coupled with the elimination of the actuary's ability to rely on an earlier valuation with adjustments, would make it difficult for at least some plans to meet PBGC's premium deadlines as they exist under the pre-PPA regulatory structure. PBGC stated that it ''expects that most plans that are required (or choose) to do funding valuations as of the beginning of the plan year (and whose UVB

[26] ERISA Section 303(h)(2)(D)(ii).
[27] *Id.*
[28] ERISA Section 4006(a)(3)(E)(iv).
[29] ERISA Section 303(h)(2)(E).
[30] ERISA Section 4006(a)(3)(E)(iv).
[31] ERISA Section 303(h)(2)(G)(i), (ii).
[32] ERISA Section 303(h)(2)(G)(iii), (iv).
[33] ERISA Sections 303(h)(2)(C), (D), (G), 406(a)(3)(E)(iv).
[34] 29 CFR § 4006.4(a).
[35] 29 CFR § 4006.4(a)(2).

[36] *See* 29 CFR § 4006.4(a)(1); *see also* Q&A 2 of the 2002 Enrolled Actuaries Meeting Blue Book, available at http://www.pbgc.gov/docs/2002bluebook.pdf (providing, among other things, that the ''roll-forward'' must ''reflect the experience gains and losses for the period from the earlier date to the premium snapshot date'').
[37] 29 CFR § 4006.4(c).
[38] 72 Fed. Reg. at 30310.

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valuation date is thus the first day of the premium payment year) will be able to determine their UVBs by the VRP due date currently provided for in PBGC's premium payment regulation'' (*i.e.*, for calendar-year plans, October 15 of the premium payment year). However, PBGC also clearly recognizes that some due date relief is needed: ''[T]here are some circumstances that can make timely determination of the VRP difficult or impossible: For example, use of a valuation date after the beginning of the plan year (applicable to small plans only) or difficulty in collecting data (*e.g.*, because of the occurrence of unusual events during the preceding year).''[39]

Under the proposal,[40] the due date (and related penalty) rules would differ depending on the size of the plan, based on the required participant count for the plan year preceding the premium payment year, with three size categories: small plans (fewer than 100 participants), mid-size plans (100–499 participants), and large plans (500 or more participants). Small plans would get more time to file, and mid-size and large plans would have the ability to make estimated VRP filings by the current VRP due date and then follow up with adjusted final filings without penalty.

PBGC noted that the 100-participant break-point that would be used to qualify for ''small plan'' treatment only ''approximates'' the break-point in PPA to qualify for the ability to use a valuation date other than at the beginning of the plan year,[41] and therefore that some plans that have this ability may not qualify for small-plan relief under the proposal. Nevertheless, PBGC concluded that ''there is enough flexibility in the due date rules for large and mid-size plans to make premium filing manageable in most cases even for plans with valuation dates after the beginning of the plan year,'' and pointed out that, ''[i]n unusual cases, where a plan with a valuation date late in the year finds itself in the large or mid-size category, PBGC has authority to waive late premium penalties.''

1. Small Plans

For small plans, the VRP would be due on the last day of the sixteenth month that begins on or after the first day of the premium payment year (for calendar-year plans, on April 30 of the year following the premium payment year). To avoid requiring small plans to make two filings per year, PBGC would use this same date as the due date for the flat-rate premium. Along similar lines, in the interest of simplicity, the later due date would apply to all small plans, including multiemployer plans (which are not subject to the VRP) and small plans that qualify for an exemption from the VRP.

2. Mid-Size Plans

For mid-size plans, the flat-rate and variable-rate premium due date would remain as it is under the current regulatory structure: the 15th day of the tenth month that begins on or after the first day of the premium payment year (October 15th for calendar-year plans). However, ''in recognition of the possibility that circumstances might make a final UVB determination by the due date difficult or impossible,'' the proposal would ''permit estimated VRP filings and . . . provide a penalty-free 'true-up' period to correct an erroneous VRP estimate.'' To qualify for this penalty relief, the estimate paid by the VRP due date would have to meet certain requirements, and the ''true-up'' payment would have to be paid by the small-plan due date. Interest would still be due to the extent the correct VRP payment was not made by the VRP due date.

The estimate would have to be based on a *final* asset value and a ''reasonable estimate of the plan's premium funding target for the premium payment year that takes into account the most current data available to the plan's enrolled actuary and is determined in accordance with generally accepted actuarial principles and practices.'' The estimate of the premium funding target would have to be certified by the enrolled actuary and would be subject to PBGC audit. PBGC pointed out that, because the asset figure must be a final figure, the penalty relief would be lost if the asset figure is incorrect, whether the mistaken figure was higher or lower than the correct figure. However, PBGC made clear that it would consider a request for an appropriate penalty waiver in such a situation, and would consider such facts and circumstances as ''the reason for the mistake, whether assets were over- or understated, and, if assets were overstated, the extent of the overstatement.''

3. Large Plans

For large plans, the due date (and related penalty) rules would be the same as for mid-size plans, except that large plans would be subject (as they are under the pre-PPA regulatory structure) to the requirement to pay the flat-rate premium early in the premium payment year (by February 28 for calendar-year plans), subject to a revised version of the existing ''safe-harbor'' rules that apply to the common situation where the payment made by that early date is an estimate.

F. Changes to Special VRP Rules

PBGC's pre-PPA regulations contain a number of special VRP rules that provide for exemptions or otherwise vary what is ordinarily required. The most significant special rule in PBGC's regulations, the full-funding limit exemption from the VRP,[42] has been statutorily eliminated and thus would likewise be eliminated from PBGC's regulation. PBGC proposes as well to eliminate three other special rules—which ''represent compromises between the need for accuracy in the determination of the VRP and the reporting of VRP data on the one hand and the need to reduce the burden of compliance on the other''—because they ''have lost their justification'':

- *Small well-funded plan rule.* Small plans (those with fewer than 500 participants for the premium payment year) are not required to report their UVBs if they provide an actuarial certification that they have no UVBs.[43] This special rule is to be eliminated.
- *Large plan accrued benefit rule.* Large plans (those with 500 or more participants for the premium payment year) may report (and compute their VRP on the basis of) accrued rather than vested benefits.[44] This special rule is to be eliminated.
- *Funding interest rate rule.* A plan may value benefits (for UVB purposes) using the funding interest rate

[39] *Id.*
[40] *Id.* at 30310–12.
[41] ERISA Section 303(g)(2)(B).
[42] 29 CFR § 4006.5(a)(5).
[43] 29 CFR § 4006.5(a)(1).
[44] 29 CFR § 4006.5(b).

if that rate is lower than the premium interest rate.[45] This special rule is to be eliminated.

In explaining its proposal to eliminate these special rules,[46] all of which were created by PBGC regulation in 1988, PBGC noted that it ''needs accurate data about UVBs and assets—now as in 1988—to verify the correctness of the reported VRP and for financial projections,'' and that, ''whereas the cost of determining this information 20 years ago could be very significant, because much actuarial valuation work was done using hand calculators and tables of factors, valuations are now computerized and thus cost less.'' PBGC concluded that its ''need for accurate data now outweighs the burden of determining and reporting the data,'' and stated that ''[t]he elimination of these three special rules reflects that change in the balance between need and burden.''

At the same time it proposes to eliminate these special rules, PBGC proposes to add two new relief rules:

- *Alternative premium funding target rule.* As discussed earlier in this article, PBGC would allow filers to elect (subject to a five-year commitment) to base UVBs on the ''alternative premium funding target,'' under which funding interest rates would be used to value vested benefits for premium purposes.
- *VRP cap rule.* Plans of small employers that qualify for the cap on the VRP[47] would not have to report their UVBs if they pay the full capped amount.

G. Plans with Deferred PPA Effective Dates

PPA Sections 104, 105, and 106 defer the effective date of the new funding rules for certain plans of cooperatives, certain plans affected by settlement agreements with PBGC, and certain plans of government contractors, and PPA Section 402 applies special funding rules to certain plans of commercial passenger airlines and airline caterers. PBGC noted that these deferrals and special rules do not affect the applicability of the PPA changes to the VRP. Under the proposal, these plans would determine UVBs in the same manner as all other plans, *i.e.*, as if the general PPA funding rules applied to them.[48]

II. PBGC Interpretation of 'Vested'

Although there was no change in PPA to the rule that only ''vested'' benefits are taken into account in determining UVBs for VRP purposes, PBGC took the opportunity presented by this proposed rule to state its views on when certain benefits are considered vested for this purpose. After noting its belief that ''there is some uncertainty among pension practitioners as to the meaning of the term 'vested' as used in ERISA section 4006(a)(3)(E),'' and ''with a view to reducing uncertainty and promoting consistency in the VRP determination process,'' PBGC proposed to ''explain—for premium purposes only—when certain benefits are considered vested'':[49]

> The proposal would specify two circumstances that do not prevent a benefit of a participant from being vested for premium purposes. One circumstance is that the benefit is not protected under Code section 411(d)(6) and thus may be eliminated or reduced by the adoption of a plan amendment or by the occurrence of a condition or event (such as a change in marital status). PBGC considers such a benefit to be vested (if the other conditions of entitlement have been met) so long as the benefit has not actually been eliminated or reduced. The other circumstance—applicable to certain benefits payable upon a participant's death—is that the participant is living. The benefits to which this would apply are (1) a qualified pre-retirement survivor annuity, (2) a post-retirement survivor annuity such as the annuity paid after a participant's death under a joint and survivor or certain and continuous option, and (3) a benefit that returns a participant's accumulated mandatory employee contributions. PBGC considers such benefits to be vested (if the other conditions of entitlement have been met) notwithstanding that the participant is alive.

The preamble and related regulatory text do not cite any authority or provide a rationale for PBGC's position that a non-protected benefit that may be (but has not yet been) amended out of a plan at the option of the employer—and that the participant therefore has no assurance of receiving—is vested for purposes of the VRP where the other conditions for entitlement have been met. Similarly, no cited authority or stated rationale supports the position that the value of a qualified pre-retirement survivor annuity would be included in the value of vested benefits, notwithstanding that this value assumes that the employer will not amend the plan to begin charging for the benefit. There is also no indication in the proposal as to whether and, if so, how PBGC's proposed interpretation of what is vested for VRP purposes would apply to pre-2008 premium payment years in the context of audits, penalties, and refund requests. It may be that the final rule will provide further insight as to the basis and reach of PBGC's proposed explanation.

III. Recordkeeping and Audit Changes

PBGC proposes to ''clarify and strengthen'' its recordkeeping and audit rules,[50] presumably in recognition of the recently legislated significant increases in the flat-rate premium for all plans and in the variable-rate premium for many plans.

- *Broad interpretation of ''records'' to be retained.* The proposal makes clear PBGC's broad interpretation of the ''records'' that must be retained. Under the proposal, such records ''include, but are not limited to, plan documents; participant data records; personnel and payroll records; actuarial tables, worksheets, and reports; records of computations, projections, and estimates; benefit statements, disclosures, and applications; financial and tax records; insurance contracts; records of plan procedures and practices; and any other records, whether in written, electronic, or other format, that are relevant to the determination of the amount of any premium required to be paid or any premium-related information required to be reported.'' Moreover, the proposal would expand the two examples in the existing regulation of who may have prepared the records that are required to be retained—enrolled actuaries and insurance carriers—by adding as additional examples plan sponsors and employers required to contribute to a plan for their employees. And the proposal revises the

[45] 29 CFR § 4006.4(b)(1).
[46] 72 Fed. Reg. at 30312.
[47] This VRP cap, added by the Deficit Reduction Act of 2005, was the subject of a previous PBGC rulemaking referenced at note 3, *supra*.
[48] 72 Fed. Reg. at 30313.
[49] *Id.* at 30312–13.
[50] *Id.* at 30313.

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regulatory language so that the required records would be those supporting the amount of premiums *required* to be paid and the premium-related information *required* to be reported, rather than just what was *actually* paid or reported.

■ *Requirement for ''system'' support.* Under the proposal, where a premium or premium-related information is determined through the use of a manual or automated system, PBGC could require that the operation of the system be demonstrated so that its effectiveness, and the reliability of the results produced, can be assessed.

■ *Establishment of ''presumed'' UVBs.* The current PBGC regulation provides that, where, in PBGC's judgment upon audit, the plan's records fail to establish the number of participants for whom premiums must be paid, PBGC may rely on data it obtains from other sources (including IRS and DOL) to ''presumptively establish[ ]'' the participant count.[51] Under the proposal, PBGC's ability to ''presumptively establish'' would apply not only to the participant count, but also to the plan's UVBs.

■ *Faster ''on-site'' record production.* The proposal makes clear that the 45 days permitted for producing records under PBGC's existing regulations[52] applies only to records sent to PBGC. For records audited on-site, PBGC expects production ''much more promptly.'' (The proposed revised regulatory language provides that such records be made available ''promptly upon request.''[53])

■ *Faster record submission.* Under its current regulation, PBGC can shorten the time period for providing record information ''where it determines that collection of unpaid premiums (or any associated interest or penalties) would otherwise be jeopardized.''[54] The proposal would authorize shorter response times in broader circumstances, *i.e.*, ''where the interests of PBGC may be prejudiced by delay—such as where PBGC has reason to fear that records might be destroyed or manipulated.''

[51] 29 CFR § 4007.10(b).
[52] 29 CFR § 4007.10(c).
[53] 72 Fed. Reg. at 30318 (proposed 29 CFR § 4007.10(c)(1)).
[54] 29 CFR § 4007.10(c)(3).

IV. Other Non-PPA Changes

The proposal would make several other non-PPA-related changes, including the following:

■ *Premium effective date for new and newly covered plans.* The proposal would amend PBGC's regulations to make clear that the first day of a new plan's first premium payment year is the effective date of the plan, thereby ''obviate[ing] the need for plan administrators to choose between the effective date and the adoption date as the first day of the plan year for premium filing.''[55]

■ *Enforcement of e-filing requirements.* With the requirement to e-file premium information fully in place,[56] PBGC appears to be ready to make sure filers comply. The proposal would amend PBGC's regulations to provide explicitly that, ''[u]nless an exemption applies, filing on paper or in any other manner other than by a prescribed electronic filing method does not satisfy the requirement to file,'' and that ''[f]ailure to file electronically as required is subject to a penalty under ERISA section 4071.'' Thus, even a timely and complete paper filing may not protect the filer from the assessment of penalties.

V. Comments on Proposed Rule

Comments on PBGC's proposed rule must be submitted on or before July 30, 2007. For instructions on the methods available for commenting, see the preamble to the proposed rule at http://edocket.access.gpo.gov/2007/pdf/E7-10412.pdf.

VI. Conclusion

PBGC premium rules continue to undergo significant change, with dollar consequences that are on the rise for many plans. Understanding not only the PPA statutory changes slated to go into effect starting with the 2008 plan year, but also PBGC's proposed implementing and other changes to its regulations, will greatly help the practitioner in providing affected clients with the advice they need.

[55] 72 Fed. Reg. at 30313.
[56] *See* 71 Fed. Reg. 31077 (June 1, 2006).