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PBGC Moves Toward Mandatory E-Filing With New Regulations

By HAROLD J. ASHNER

On March 9, 2005, the Pension Benefit Guaranty Corporation issued two rules that are each “part of the [PBGC’s] ongoing implementation of the Government Paperwork Elimination Act and . . . consistent with the Office of Management and Budget’s directive to remove regulatory impediments to electronic transactions.”¹ The two rules go beyond simply “remov[ing] regulatory impediments” to e-filing with PBGC, focusing instead on requiring e-filing in certain cases. One is a final rule that requires e-filing of annual employer reports under Section 4010 of the Employee Retirement Income Security Act, and the other is a proposed rule that would require e-filing of premium information under ERISA Section 4007.

This article briefly summarizes the two rules, both of which are available on PBGC’s Web site at <http://www.pbgc.gov/laws/lawsregs/federalreg/NEWFR.HTM>.

¹ 70 Fed. Reg. 11540, 11592.

Harold J. Ashner is a partner with Keightley & Ashner LLP, a Washington, D.C.-based law firm that specializes in Pension Benefit Guaranty Corporation matters. He previously served as assistant general counsel for legislation and regulations at PBGC. He left PBGC in early 2005 to form Keightley & Ashner LLP with James J. Keightley, PBGC’s general counsel, and William G. Beyer, PBGC’s deputy general counsel. For further information, visit the firm’s Web site at <http://www.keightleyashner.com>.

Annual Employer Reporting of Financial and Actuarial Information

Section 4010 of ERISA and PBGC’s implementing regulations² require controlled groups that maintain plans with significant funding problems to file annual reports with PBGC containing certain financial and actuarial information. PBGC uses this information to monitor underfunding in the plans it insures and the financial condition of the employers maintaining those plans. In the preamble to the final rule, PBGC stated that the Section 4010 filing “plays a vital role in PBGC’s ability to protect participant and premium-payer interests.”³

Controlled Groups Subject to Employer Reporting. Employer reporting is required under ERISA Section 4010 if:

- The aggregate unfunded vested benefits (determined on a PBGC premium basis) of *all underfunded* plans maintained by the controlled group exceeds \$50 million;
- For any *one* of the controlled group’s plans, there are missed funding contributions exceeding \$1 million and the conditions for imposing an IRC § 412(n) lien have been met; or
- For any *one* of the controlled group’s plans, IRS has granted minimum funding waivers totaling in excess of \$1 million and any portion remains outstanding.

In the past, the employer reporting requirement affected a relatively small number of controlled groups. Unfortunately, recent years have seen significant growth in that number. PBGC had estimated in 2002

² 29 CFR Part 4010.

³ 70 Fed. Reg. 11540.

that 70 controlled groups would be required to file Section 4010 employer reports each year.⁴ But by the end of 2004, PBGC had updated its estimate to 400 controlled groups.⁵

New E-Filing Requirement. PBGC's March 9, 2005, final rule requires e-filing of Section 4010 annual employer reports starting with those due (for calendar-year filers) on April 15, 2005. The proposal had called for the e-filing to be done through a web-based application available on PBGC's Web site. That application, as currently structured, provides for a single user ID/password for each filing. Several of the public comments on PBGC's proposal⁶ objected to the requirement that a single person enter all of the filing data, citing both logistical difficulties and confidentiality concerns. In response, PBGC decided to allow filers, for the first filing year, to submit the required information as an attachment to an e-mail (in accordance with instructions on PBGC's Web site) as an alternative to using the web-based application. PBGC stated in the preamble to the final rule that it is looking into the feasibility of providing multiple passwords for purposes of reporting beyond the first year.⁷

A full explanation of the e-filing methodology, available at <http://www.pbgc.gov/laws/lawsregs/federalreg/FINRULE.HTM>, highlights as benefits of the web-based application that it "offers a secure website for submitting confidential information; reviews the filing and generates a list of omissions and inconsistencies prior to submission to ensure a filing is complete, thereby reducing the chance of an incomplete submission; and enables filers to access and modify information entered one year for a future year's filing." The web-based application walks the filer through a series of screens, prompting the filer to answer questions and to enter required information. Detailed instructions are available for those who want to take advantage of the first-year-only alternative of submitting an e-mail with attachments.

Other Changes. The final rule, in addition to requiring e-filing, makes several other changes. For example, starting with the filing due April 15, 2005, the annual report will have to include several items of additional information, including:

- a breakdown of the reported plan liabilities,
- specified information relating to current liability,
- a breakdown of consolidated financial information,
- identification of changes in the makeup of the controlled group,
- information about frozen plans, and
- a demonstration as to why a current filing is not required in the case of a filer for the previous year who claims to be exempt from the filing requirement this year.

One item of additional information that PBGC had proposed to require but dropped in the final rule related to "exempt entities" in the controlled group (generally, those entities that fall below specified de minimis financial thresholds). Under the existing regulation, filers need not submit either identifying or financial information about exempt entities. The proposed rule would

have required filers to submit identifying information about exempt entities. Several of the public comments voiced significant concerns about the undue burden of doing so where, as is not uncommon, a controlled group has a large and ever-changing group of exempt entities which, even collectively, have minimal value. In response, PBGC dropped the requirement, relying instead on its ability to obtain this identifying information upon request "when circumstances dictate."⁸

The final rule also modifies the rules for determining whether aggregate unfunded vested benefits exceed \$50 million. The focus of the modification is on the "optional assumptions" (an interest rate of 100 percent of the annual yield for 30-year Treasuries, the fair market value of the plan's assets, and specified mortality tables) for performing that calculation. These assumptions tend to produce smaller unfunded vested benefits than do the regular PBGC premium assumptions, and thus serve to exempt a number of controlled groups from the Section 4010 employer reporting requirement.

PBGC had proposed to eliminate use of these optional assumptions starting with the filings due April 15, 2005, because: (1) they had been added to the regulation in 1996 "because it was expected that the optional assumptions shortly would become the standards that would apply for calculating the variable rate premium" (no longer a valid expectation); and (2) in PBGC's view, "reporting for this purpose is warranted if the \$50 million Section 4010 gateway test is reached using the general rule [under PBGC's premium regulation] for determining unfunded vested benefits."⁹

In response to comments expressing concern about the limited time available before the April 15, 2005, filing deadline for those controlled groups that would be required to report for the first time as a result of this change, PBGC decided to retain the optional assumptions for one more year. Thus, they will be available for the filings due April 15, 2005, but will disappear beginning with the filings due April 15, 2006.

Reporting of Premium Information

Under ERISA Sections 4006 and 4007 and PBGC's implementing regulations,¹⁰ the plan administrator of each plan covered by PBGC's insurance program is required to file certain premium information and to submit the required premium payment. Under PBGC's existing regulations and policies, the premium information is generally submitted in paper form along with a paper check, although an optional electronic application has been available beginning with filings for the 2004 plan year.

PBGC's March 9, 2005, proposed rule would require e-filing of premium information starting with the 2006 plan year for large plans (those with 500 or more participants, as determined for premium purposes for the 2005 plan year), with all plans subject to the requirement starting with the 2007 plan year. Under the proposal, PBGC would have the discretion to grant a plan administrator an exemption from the e-filing requirement upon a showing of good cause. There would be no requirement for electronic payment, nor would information requested in connection with a premium compliance review need to be submitted electronically.

⁴ 67 Fed. Reg. 8830 (Feb. 26, 2002).

⁵ 69 Fed. Reg. 77679 (Dec. 28, 2004).

⁶ *Id.*

⁷ 70 Fed. Reg. 11540, 11542.

⁸ *Id.* at 11541.

⁹ *Id.* at 11542.

¹⁰ 29 CFR Parts 4006 and 4007.

PBGC stated in the preamble to the proposed rule that it “expects electronic premium filing to be no more burdensome than paper filings for filers generally.”¹¹

Reason for Change. PBGC explained that the change to mandatory e-filing is needed to improve processing of premium filings, noting that “the capture of data from paper premium forms and its translation into electronic data files is an imperfect process that inevitably gives rise to errors that can be difficult and burdensome to detect and correct. These errors cause problems for both PBGC and premium filers, because they can lead to the issuance of improper bills for premiums that have in fact been paid, to delays in the processing of refund requests, to erroneous filing histories, etc.”¹² PBGC noted that its existing optional web-based premium e-filing application, My Plan Administration Account (“MyPAA”), “streamlines the premium filing process for users, and . . . makes PBGC’s processing of premium filings faster and more accurate,” concluding that “it has the potential to reduce the number of erroneous bills, to speed up refund processing, and in general to improve significantly PBGC’s ability to perform its pre-

mium collection functions while enhancing service to premium payers.”¹³

Integration with Private-Sector Software. The vast majority of premium filings are currently prepared using private-sector vendor or proprietary software, typically by an outside actuary or other pension practitioner. Relatively few filers have tried MyPAA yet, in large part because MyPAA is not yet integrated with the private-sector software commonly used. PBGC is planning to create another premium e-filing method, to be operational in mid-2005, that will allow those who use private-sector software to simply upload the data to PBGC through PBGC’s website.¹⁴ Thus, by the time premium e-filing would become mandatory for large plans in 2006, practitioners would be able to satisfy the e-filing requirement using the same private-sector software they currently use.

Public Comments. Comments on the proposed rule must be received by May 9, 2005.

Consistent with the e-focus of the proposed rule, comments may be submitted electronically through the PBGC’s Web site, <http://www.pbgc.gov/regs>.

¹¹ 70 Fed. Reg. 11592, 11593.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*