Practical Pointers on PBGC Premiums

Enrolled Actuaries Meeting
March 29, 2006 • Washington, D.C.

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Overview

- Flat-rate premium
- Variable-rate premium
- Mergers and spinoffs
- New and newly-covered plans
- Reporting and disclosure consequences

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Overview (Cont.)

- Premium audits
- Penalties and interest
- Premium billings and collections
- Premium refunds

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Flat-Rate Premium

- Unique PBGC definition of "participant"
  - Count *only* if plan has benefit liabilities
  - Drop after one-year break in service under plan rules
  - Drop based on "irrevocable commitment" once liability transfers to insurer (*before* certificate is issued)
  - Multiple beneficiaries of deceased participant = one participant
- So always distinguish between plan "participant" and PBGC premium "participant"!

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Flat-Rate Premium (Cont.)

- Don’t just use Form 5500 participant count, which may include:
  - Participants with no benefit liabilities (*e.g.*, part-timers)
  - Participants beyond plan break-in service period (up to 5 consecutive 1-year breaks)
  - Participants with irrevocable commitments but no certificates
  - Several beneficiaries instead of one participant
  - Participants counted as of non-premium snapshot date

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Flat-Rate Premium (Cont.)

- Use “deemed cashouts” of terminated non-vested participants to reduce participant count
  - Watch out for timing of deemed cashouts near EOY
  - Amend plan to make clear that termination date = cashout date
  - Watch out for timing of “real” cashouts to avoid PBGC challenge to timing of “deemed” cashouts
- Pay out “real” cashouts and consensual lump sums near EOY promptly to avoid annuity starting date arguments

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Flat-Rate Premium (Cont.)

- Consider carve-outs of certain participant groups through irrevocable commitments
- Drop "unlocatable" participant where "reasonable belief" of no living participant/beneficiary entitled to benefits
- Avoid paying flat-rate premium for small part of benefit
  - Problem: plan purchases irrevocable commitment for retiree benefits but grants ad hoc COLA payable from plan assets
  - Solution: purchase irrevocable commitment for COLA before premium snapshot date

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Flat-Rate Premium (Cont.)

- Don't pay twice for the same participant!
  - If employee transfers from hourly plan to salaried plan, put *entire* benefit in salaried plan
  - Be sure to pay once for deceased participant, even if multiple beneficiaries are entitled to benefits
  - Ditto re participant and alternate payee — pay once!

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Variable-Rate Premium

- Fund up to FFL exemption where cost-effective
- Consider designating “grace-period” contributions to prior year
  - Goal: reduce UVBs and/or meet FFL exemption
  - Watch out for missed quarterlies (need cash in plan)!
- Consider reflecting irrevocable commitments in funding (and therefore UVB) calculations

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Variable-Rate Premium (Cont.)

- If considering standard termination near year-end, set current year date as proposed termination date
- Have benefit increase take effect at BOY rather than at/near EOY

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Variable-Rate Premium (Cont.)

- Drop any non-vested benefits
  - Focus on whether entitlement met as of premium snapshot date
    - "30 & out" benefits don't count until 30 is reached!
    - Disability benefits don't count until the individual is disabled!
  - Non-411(d)(6) benefits that can be amended out of the plan?
- Drop benefit attributable to "unlocatable" participant/beneficiary based on:
  - "Reasonable belief" of no living participant/beneficiary entitled to benefits, *or*
  - Forfeiture provision (even if participant counts for flat-rate!)

Variable-Rate Premium (Cont.)

- Always run general rule *and* ACM (unless at $0 UVBs)!
- Factors affecting ACM vs. general rule results include:
  - Last year's events/trends (count for ACM only if "significant event" and large plan, but always count for general rule)
    - Poor "ordinary course" investment experience doesn't count!
    - No way to count *favorable* events/trends under ACM!
  - Effect of ACM's age 50 average age assumption
  - Effect of ACM's 7% accrual assumption

Variable-Rate Premium (Cont.)

- Be careful with general rule "roll-forward" of *last year's* 1/1 valuation
  - PBGC guidance: must reflect experience gains/losses
  - May cover more than just "significant events"
- Be careful with general rule *current year* 1/1 valuation option — back out material changes
  - Changed in methods (*e.g.*, AVA to FMV)
  - Changes in assumptions (*e.g.*, retirement decrements)
  - Changes in plan provisions, population, etc.

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Mergers and Spinoffs

- Duplicate and gap premiums
  - Duplicate premiums in all mid-year spinoffs
  - Duplicate premiums in some mid-year mergers
    - Example: Plan B (with October 1 plan year) merges into calendar year Plan A on December 1
  - Gaps in premiums in some mid-year mergers
    - Example: Calendar year Plan A merges into Plan B (with October 1 plan year) on December 1
  - Choose the date and the survivor carefully!

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Mergers and Spinoffs (Cont.)

- Watch out for timing of changes in plan year vs. mergers!
  - PBGC gives prorated refund (or credit) for change in plan year duplication, but not for merger duplication
  - If merger and start of new plan year coincide, PBGC denies refund

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Mergers and Spinoffs (Cont.)

- Protect FFL exemption in mergers and spinoffs
  - PBGC guidance provides relief for certain BOY/EOY mergers/spinoffs by clarifying which "history" to use
  - No guidance for mid-year transactions
  - For 1/1 merger of calendar and fiscal year plan, treat calendar plan as survivor to fit within guidance

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New and Newly-Covered Plans

- Retroactively adopted new plan: choose wisely!
  - Can select either adoption date or effective date as:
    - Premium snapshot date
    - First day of plan year for premium proration purposes
    - First day of plan year for due date determination purposes
  - Must make same choice for all three purposes
  - If no past service credit, choose effective date
  - If past service credit, run the numbers

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New and Newly-Covered Plans (Cont.)

- New plans without past service credit pay no premium for first year, but must file information!
- Newly covered plans have “history” (for FFL exemption, ACM) only if subject to IRC § 412 last year

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Reporting and Disclosure Consequences

- Premium determination can affect:
  - $50M gateway test under ERISA § 4010
  - VRP test for Participant Notice under ERISA § 4011
  - Various waivers and extensions under ERISA § 4043(a) (post-event reporting of reportable events)
  - $50M and 90% triggers under ERISA § 4043(b) (advance reporting of reportable events)
- Advise client of premium-related reporting/disclosure consequences resulting from contribution choice

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Premium Audits

- Keep those records for 6 years!
  - Tie flat-rate count to particular participants
  - Document VRP determinations (e.g., asset valuations, actuarial worksheets)
  - Document reasons for:
    - Significant year-to-year changes
    - Significant differences from AVR, Form 5500
  - Keep “static” e-record for each year!
- On “gray” areas, be prepared to challenge, request reconsideration, let courts decide

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Penalties and Interest

- Take advantage of 1%/5% penalty policy
  - Try to correct potential underpayments ASAP, *before* PBGC issues written notice, to get 1% rate
  - But if payment is mailed same day PBGC issues (*e.g.*, electronic or fax) notice, you still get 1% rate
- No need to include penalty waiver request with late payment
- Penalty waiver requests — consult 2001 *proposed* policy (because PBGC staff tends to follow it)

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Premium Billings and Collections

- Read those bills carefully
  - Multiple plan year bills may have multiple errors
  - Focus on penalty calculations and movement of charges and credits from one plan year to another
  - Prepare your own calculation based on review of premium filings and payments, then compare!

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Premium Refund Claims

- Be sure to provide required "explanation" (for refund claims of over $500)
- Watch out for 6-year statute of limitations!
  - PBGC generally treats request as timely if *filed with PBGC* before statute runs
  - But if PBGC ultimately disagrees that refund is owed, statute of limitations is available to PBGC as defense
  - PBGC tolling agreements may be unenforceable
  - Bottom line: make request *well before* statute runs, and be prepared to file suit *before* statute runs

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For Further Information . . . .

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