

## PENSION BENEFIT GUARANTY CORPORATION

### 29 CFR Part 2627

RIN 1212-AA77

#### Disclosure to Participants

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Proposed rule.

**SUMMARY:** The Pension Benefit Guaranty Corporation is proposing regulations to implement a new notice requirement under section 4011 of the Employee Retirement Income Security Act of 1974. Section 4011 requires plan administrators of certain underfunded plans to provide notice to plan participants and beneficiaries of the plan's funding status and the limits on the PBGC's guarantee.

**DATES:** Comments must be received on or before April 27, 1995.

**ADDRESSES:** Comments may be mailed to the Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005-4026, or delivered to Suite 340 at the above address. Comments will be available for public inspection at the PBGC's Communications and Public Affairs Department, Suite 240.

**FOR FURTHER INFORMATION CONTACT:** Harold J. Ashner, Assistant General Counsel, or Catherine B. Klion, Attorney, Office of the General Counsel, PBGC, 1200 K Street, NW., Washington, DC 20005-4026, 202-326-4024 (202-326-4179 for TTY and TDD).

**SUPPLEMENTARY INFORMATION:** On December 8, 1994, section 775 of the Retirement Protection Act of 1994 (subtitle F of title VII of the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994)) added section 4011 to ERISA. Under section 4011, a plan subject to the variable rate premium under section 4006(a)(3)(E) must provide a notice (the "Participant Notice") unless the plan meets one of the exemptions discussed below.

#### DRC Exception Test

A plan does not have to provide the Participant Notice for a plan year if it meets the DRC Exception Test in § 2627.3(b) for that plan year or the prior plan year. In general, a plan passes that test if it is exempt from making a deficit reduction contribution ("DRC") by reason of section 302(d)(9) of ERISA.

#### Prior Plan Year Option

The Participant Notice for a plan year must be provided during that plan year. Because in many cases the DRC is not

available until after the end of the plan year, § 2627.3(a) provides that the plan administrator may determine whether a Participant Notice is required for a plan year by applying the DRC Exception Test to that plan year or the prior plan year.

#### 1994 Plan Year

A plan administrator may test whether a Participant Notice is required for the 1995 plan year by applying the DRC Exception Test to the 1994 plan year. Because the exemption from the DRC under section 302(d)(9) applies only to post-1994 plan years, § 2627.3(b)(2) includes a rule for determining whether a plan meets the DRC Exception Test for the 1994 plan year: the plan must satisfy any requirement in section 302(d)(9)(D)(i) for any two of the plan years beginning in 1992, 1993, and 1994.

#### Special Relief Rules for Small Plans

##### 1995 Exemption

A plan that is exempt from the DRC for either the 1994 or 1995 plan year because it is a "small plan" under section 302(d)(6)(A) (100 or fewer participants) does not have to give the Participant Notice for the 1995 plan year (§ 2627.5(a)).

##### Small Plan DRC Exception Test

For a post-1995 plan year, a plan is not exempt from the Participant Notice requirement solely because it is a small plan. Like all plans, a small plan is exempt for a post-1995 plan year if it meets the DRC Exception Test for that plan year or the prior plan year. Because small plans do not ordinarily perform the calculations necessary to determine whether they are exempt from the DRC requirement, the proposed regulation provides several optional simplified rules that small plans may use in applying the DRC Exception Test.

First, § 2627.5(b)(1) provides that for purposes of applying the DRC Exception Test, a small plan may determine its funded current liability percentage (under section 302(d)(9)(C)) by using the beginning-of-plan-year market value of assets and the beginning-of-plan-year current liability for total benefits that it reports on Schedule B to Form 5500 (e.g., on the 1994 form, line 6c and column (3) of line 6d(iv)).

Second, § 2627.5(b)(2) includes a special rule for determining whether a small plan satisfies the requirements of section 302(d)(9)(D)(i) for a pre-1995 plan year. (This rule only affects Participant Notices for 1996, 1997, and 1998 plan years.) Under this special rule, a small plan satisfies those

requirements for a pre-1995 plan year if the ratio of the plan's assets (without subtracting any credit balance under section 302(b)) to its current liability (using the highest allowable interest rate under section 302(d)(7)(C)) for that plan year was at least 90 percent.

Third, § 2627.5(b)(3) provides a special rule that a small plan may use to adjust its current liability to reflect the difference between the top interest rate in the permissible interest rate corridor for the plan year and the interest rate the plan used. A small plan that chooses not to recalculate its current liability using the higher interest rate may adjust its current liability by decreasing the current liability by one percent for each tenth of a percentage point by which the top interest rate in the permissible corridor exceeds the interest rate the plan used.

For example, assume that a small plan's current liability as of January 1, 1996, is \$200,000, based on an interest rate of 7.43 percent. Assume further that the top rate in the corridor for the 1996 plan year is 8.17 percent. Because 8.17 exceeds 7.43 by 0.74, the current liability could be reduced by 7.4 percent to \$185,200 (92.6 percent of \$200,000).

#### New Plans

Section 2627.4 exempts new and newly-covered plans from the Participant Notice requirement for their first plan year of coverage by the PBGC insurance system.

#### Mergers, Consolidations, and Spinoffs

The PBGC invites comments on how to address DRC testing and other related issues where a plan has been involved in a merger, consolidation, or spinoff since the prior plan year.

#### Persons Entitled to Receive Notice

Section 2627.6 requires that the Participant Notice be issued to participants, beneficiaries, alternate payees, and any employee organization that represents participants for purposes of collective bargaining. Plan administrators may select, as the date for determining who is entitled to receive the Participant Notice for a plan year, any date between the last day of the prior plan year and the day on which the Participant Notice is due. A plan administrator may select the same or a different date for each plan year, as long as a change in dates between plan years does not exclude a substantial number of participants and beneficiaries.

#### Time Limit for Issuing Notice

Under § 2627.7, the plan administrator must provide the

Participant Notice for a plan year no later than two months after the deadline, including extensions, for filing the annual report (Form 5500 series) for the prior plan year (see 29 CFR 2520.104a-5(a)(2)). This is also the time limit for furnishing the summary annual report for the prior plan year (see 29 CFR 2520.104b-10(c)). Section 2627.7 allows the PBGC to extend the time limit for issuing the Participant Notice when the President of the United States declares that a major disaster exists.

#### **Manner of Issuing Notice**

Section 2627.8 requires plan administrators to issue the Participant Notice in a manner reasonably calculated to ensure actual receipt. Methods acceptable for furnishing the summary annual report are acceptable; plan administrators may not merely post the Participant Notice at worksite locations.

The plan administrator may issue the Participant Notice for a plan year together with another document, such as the summary annual report for the prior plan year, so long as the Participant Notice is in a separate document.

#### **Content of Notice**

Section 2627.9 requires that the Participant Notice include (1) certain identifying information, (2) information on the plan's funding status (the "Notice Funding Percentage," a statement that the funding level may be substantially lower if the plan terminates, identification of any plan years during the five immediately preceding plan years for which the IRS granted a minimum funding waiver, and identification of any plan years for which the plan has not received the minimum contribution required under section 302 of ERISA), and (3) information on the PBGC's guarantee (the nature of the guarantee, a summary of the types of benefits that are not guaranteed, and the limitations on the guarantee, e.g., the maximum benefit guaranteed). Participants must be informed that they can obtain additional information on the guarantee by requesting a PBGC booklet from Box YGP, Pueblo, Colorado 81009, and advised of the current price of the booklet. (The booklet will be available for \$1.25 beginning January 1, 1996. The PBGC anticipates that it will provide information on any future price increases.)

#### **Notice Funding Percentage**

The Notice Funding Percentage is the plan's "funded current liability

percentage," as that term is defined in section 302(d)(9)(C) of ERISA (i.e., assets are not reduced by any credit balance and the highest allowable interest rate is used). This is the same percentage that is used to determine whether the Participant Notice is required. The Participant Notice may include the Notice Funding Percentage for either the plan year for which the Participant Notice is issued or for the prior plan year. A small plan may determine its funded current liability percentage for a plan year using the simplified rules in the Small Plan DRC Exception Test.

A plan's funded current liability percentage will not necessarily reflect the plan's funding level if the plan were to terminate. Different actuarial assumptions are used to calculate current liability and termination liability. In addition, the PBGC's experience is that a plan's funding level often drops just prior to termination. In the interest of consistency and administrative simplicity, the PBGC proposes to base the Notice Funding Percentage on the plan's funded current liability percentage.

#### **Model Notice**

The Appendix includes a Model Participant Notice as an example of a Participant Notice that meets the requirements of the proposed rule.

#### **Foreign Language Requirements**

As in the case of the summary annual report (29 CFR 2520.104b-10(e)), when specified numbers or percentages of participants are literate only in the same non-English language, the plan administrator is required to provide them with a Participant Notice that prominently displays a legend, in their common foreign language, offering them assistance in that language.

#### **Relationship to 70 Percent Disclosure Requirement**

The plan administrator of a plan that is less than 70 percent funded must disclose the plan's funding percentage in the annual report and the summary annual report (sections 103(d)(11) and 104(b)(3) of ERISA). The Department of Labor has advised the PBGC that if a plan administrator provides the Participant Notice under section 4011, the Department of Labor will treat the plan administrator as having complied with the requirement to disclose the plan's funding percentage (for the prior plan year) in the summary annual report. (The plan administrator still will be required to disclose the plan's funding percentage in the annual report.)

#### **Penalties for Non-Compliance**

Failure to issue a Participant Notice in accordance with the requirements of this part would constitute a violation of title IV of ERISA. The PBGC may remedy violations of notification requirements by assessing a penalty under section 4071. Section 4071 authorizes the agency to assess a penalty, payable to the PBGC, against a plan administrator who fails, within the specified time limit, to provide any Participant Notice, or who omits material information from a Participant Notice. (The penalty may not exceed \$1,000 for each day for which the failure continues.)

If a plan administrator issues a Participant Notice for the 1995 plan year that meets the requirements of this proposed rule, the PBGC will not assess section 4071 penalties based on a failure to comply with any different requirements of a final rule implementing section 4011.

#### **Effective Date**

The Participant Notice requirement applies for plan years beginning on or after January 1, 1995.

#### **E.O. 12866 and the Regulatory Flexibility Act**

The PBGC has determined that this action is not a "significant regulatory action" under the criteria set forth in Executive Order 12866. The provisions in this proposed rule will implement policy decisions made by Congress in imposing a participant notice requirement. They reflect the PBGC's interpretation of the statutory standards and prescribe the time, form, and manner of issuance of the required notice.

Under section 605(b) of the Regulatory Flexibility Act, the PBGC certifies that, if adopted, this proposed rule will not have a significant economic impact on a substantial number of small entities. Accordingly, as provided in section 605 of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), sections 603 and 604 do not apply.

Small plans are exempt from the Participant Notice requirement for the 1995 plan year. For subsequent plan years, neither the cost of determining whether a plan is subject to the Participant Notice requirement nor the cost of preparing and issuing the Participant Notice is expected to be significant for a substantial number of small entities. The proposed regulation contains special rules designed to simplify the Participant Notice requirement for small plans.

**List of Subjects—29 CFR Part 2627**

Employee benefit plans, Pension insurance, Pensions.

For the reasons set forth above, the PBGC proposes to amend subchapter C, chapter XXVI of 29 CFR by adding a new part 2627 to read as follows:

**PART 2627—DISCLOSURE TO PARTICIPANTS**

Sec.

- 2627.1 Purpose and scope.
- 2627.2 Definitions.
- 2627.3 Notice requirement.
- 2627.4 Exemption for new and newly-covered plans.
- 2627.5 Small plan rules.
- 2627.6 Persons entitled to notice.
- 2627.7 Time of notice.
- 2627.8 Manner of issuance of notice.
- 2627.9 Form of notice.

Appendix to part 2627

**Authority:** 29 U.S.C. 1302(b)(3), 1311.

**§ 2627.1 Purpose and scope.**

(a) *Purpose.* This part prescribes rules and procedures for complying with the requirements of section 4011 of the Act.

(b) *Scope.* This part applies for any plan year beginning on or after January 1, 1995, with respect to any single-employer plan that is covered by section 4021 of the Act.

**§ 2627.2 Definitions.**

For purposes of this part:

*Act* means the Employee Retirement Income Security Act of 1974, as amended.

*Participant* has the meaning in § 2617.2 of this chapter.

*Participant Notice* means the notice required pursuant to section 4011 of the Act and this part.

*Plan administrator* means the administrator, as defined in section 4001(a)(1) of the Act.

**§ 2627.3 Notice requirement.**

(a) *General.* Except as provided in §§ 2627.4 and 2627.5(a), a plan is subject to the Participant Notice requirement for a plan year if—

(1) A variable rate premium is payable for the plan under section 4006(a)(3)(E) of the Act and part 2610 of this chapter for that plan year; and

(2) The plan does not meet the Deficit Reduction Contribution (“DRC”) Exception Test in paragraph (b) of this section (which may be applied using the Small Plan DRC Exception Test rules in § 2627.5(b), where applicable) for that plan year or for the prior plan year.

(b) *DRC Exception Test.* (1) *Basic rule.* A plan meets the DRC Exception Test for a plan year if it is exempt from the requirements of section 302(d) of the Act for that plan year by reason of

section 302(d)(9), without regard to the small plan exemption in section 302(d)(6)(A).

(2) *1994 plan year.* A plan satisfies the DRC Exception Test for the 1994 plan year if, for any two of the plan years beginning in 1992, 1993, and 1994 (whether or not consecutive), the plan satisfies any requirement of section 302(d)(9)(D)(i) of the Act.

(c) *Penalties for non-compliance.* If a plan administrator fails to provide a Participant Notice within the specified time limit or omits material information from a Participant Notice, the PBGC may assess a penalty under section 4071 of the Act of up to \$1,000 a day for each day that the failure continues.

**§ 2627.4 Exemption for new and newly-covered plans.**

A plan (other than a plan resulting from a consolidation or spinoff) is exempt from the requirement to provide a Participant Notice for the first plan year for which the plan must pay premiums under part 2610 of this chapter.

**§ 2627.5 Small plan rules.**

(a) *1995 plan year exemption.* A plan that is exempt from the requirements of section 302(d) of the Act for the 1994 or 1995 plan year by reason of section 302(d)(6)(A) is exempt from the Participant Notice requirement for the 1995 plan year.

(b) *Small Plan DRC Exception Test.* In determining whether the Participant Notice requirement applies for a plan year beginning after 1995, the plan administrator of a plan that is exempt from the requirements of section 302(d) of the Act by reason of section 302(d)(6)(A) for the plan year being tested may use any one or more of the following rules in determining whether the plan meets the DRC Exception Test for that plan year:

(1) *Use of Schedule B data.* For any plan year for which the plan is exempt from the requirements of section 302(d) of the Act by reason of section 302(d)(6)(A), provided both of the following adjustments are made—

(i) The market value of the plan's assets as of the beginning of the plan year (as required to be reported on Form 5500, Schedule B) may be substituted for the actuarial value of the plan's assets as of the valuation date; and

(ii) The plan's current liability for all participants' total benefits as of the beginning of the plan year (as required to be reported on Form 5500, Schedule B) may be substituted for the plan's current liability as of the valuation date.

(2) *Pre-1995 plan year 90 percent test.* A plan that is exempt from the

requirements of section 302(d) of the Act for a pre-1995 plan year by reason of section 302(d)(6)(A) satisfies the requirements of section 302(d)(9)(D)(i) for that pre-1995 plan year if the ratio of its assets to its current liability for that plan year is at least 90 percent. For this purpose, the plan's assets are valued without subtracting any credit balance under section 302(b) of the Act, and its current liability is determined using the highest interest rate allowable for the plan year under section 302(d)(7)(C).

(3) *Interest rate adjustment.* If the interest rate used to calculate current liability for a plan year is less than the highest rate allowable for the plan year under section 302(d)(7)(C) of the Act, the current liability may be reduced by one percent for each tenth of a percentage point by which the highest rate exceeds the rate so used.

**§ 2627.6 Persons entitled to receive notice.**

The plan administrator must provide the Participant Notice to each person who is a participant, a beneficiary of a deceased participant, an alternate payee (as defined in section 206(d)(3)(K) of the Act), or an employee organization that represents any group of participants for purposes of collective bargaining. To determine who is a person that must receive the Participant Notice, the plan administrator may select any date during the period beginning with the last day of the previous plan year and ending with the day on which the Participant Notice for the plan year is due, provided that a change in the date from one plan year to the next does not exclude a substantial number of participants and beneficiaries.

**§ 2627.7 Time of notice.**

The Participant Notice for a plan year must be issued no later than two months after the deadline for filing the annual report for the previous plan year (see § 2520.104a-5(a)(2) of this title). When the President of the United States declares that, under the Disaster Relief Act of 1974, as amended (42 U.S.C. 5121, 5122(2), 5141(b)), a major disaster exists, the PBGC may extend the due date for providing the Participant Notice by up to 180 days.

**§ 2627.8 Manner of issuance of notice.**

The Participant Notice shall be issued by using measures reasonably calculated to ensure actual receipt by the persons entitled to receive it. It may be issued together with another document, such as the summary annual report required under section 104(b)(3) of the Act for the prior plan year, but must be in a separate document.

**§ 2627.9 Form of notice.**

(a) *General.* The Participant Notice shall be written in a manner calculated to be understood by the average plan participant and not to mislead recipients. The Model Participant Notice in the Appendix of this part (when properly completed) is an example of a Participant Notice meeting the requirements of this section.

(b) *Content.* The Participant Notice shall include—

(1) Identifying information (the name of the plan and the contributing sponsor, the employer identification number of the contributing sponsor, the plan number, the plan year for which the notice is given, and the name, address, and telephone number of the plan administrator and of the individual(s) who can answer questions about the plan's funding);

(2) The Notice Funding Percentage for the plan year, determined in accordance with paragraph (c) of this section;

(3) A statement that the funding level of the plan may be substantially lower if the plan terminates;

(4) If the plan has been granted a minimum funding waiver under section 303 of the Act for any of the five plan years immediately preceding the plan year and the amortization base established as a result thereof has not (as of the end of the prior plan year) been reduced to zero, a statement identifying each such plan year and an explanation of a minimum funding waiver;

(5) If the plan has not received the minimum contribution required under section 302 of the Act for any prior plan year, a statement identifying each such plan year;

(6) A summary of plan benefits guaranteed by the PBGC, with an explanation of the limitations on such guarantee; and

(7) A statement that further information about the PBGC's guarantee may be obtained by requesting the booklet "Your Guaranteed Pension" from Box YGP, Pueblo, Colorado 81009, along with the current price of the booklet.

(c) *Notice Funding Percentage.*

(1) *General Rule.* The Notice Funding Percentage that must be included in the Participant Notice for a plan year is the "funded current liability percentage" (as that term is defined in section 302(d)(9)(C) of the Act) for that plan year or the prior plan year.

(2) *Small plans.* A plan that is exempt from the requirements of section 302(d) of the Act for a plan year by reason of section 302(d)(6)(A) may determine its funded current liability percentage for

that plan year using the Small Plan DRC Exception Test rules in § 2627.5(b).

(d) *Additional information.* The plan administrator may include in the Participant Notice a statement that a plan's underfunding will not necessarily lead to its termination and that the risk of benefit loss in the event of its termination depends on its funding level and the financial condition of the companies responsible for its funding. The plan administrator may include in the Participant Notice any other information not required by paragraph (b) of this section only if it is in a separate document.

(e) *Foreign languages.* In the case of a plan that (as of the date selected under § 2627.6) covers the numbers or percentages specified in § 2520.104b-10(e) of this title of participants literate only in the same non-English language, the plan administrator shall provide those participants an English-language Participant Notice that prominently displays a legend, in their common non-English language, offering them assistance in that language, and clearly setting forth any procedures participants must follow to obtain such assistance.

*Appendix to Part 2627*

Paragraph A is an example of a Participant Notice that satisfies the requirements of § 2627.9 when the required information is filled in (subject to §§ 2627.9(d)-(e), where applicable). Paragraph B is a table of maximum guaranteed benefits (which the PBGC will update yearly).

**A. Model Participant Notice**

Notice to Participants of [Plan Name, EIN, PN] Sponsored by [Contributing Sponsors] [Plan Year 19XX]

We are required by law to provide you with information on the funding level of your defined benefit pension plan and the benefits guaranteed by the Pension Benefit Guaranty Corporation (PBGC), a U.S. government agency.

**Your Plan's Funding**

Your plan has [INSERT NOTICE FUNDING PERCENTAGE] percent of the funds needed for benefits promised to employees and retirees. Experience has shown that the funding level may be substantially lower if the plan terminates.

A plan's funding and the financial condition of a company must be considered when determining the potential risk of benefit loss.

(Include the following paragraph only if the plan has been granted a funding waiver in any of the previous five plan years.)

Your plan received a funding waiver for [List any of the five previous plan years for which a funding waiver was granted]. If a company is experiencing temporary financial

hardship, the Internal Revenue Service may grant a funding waiver that permits the company to delay contributions that fund the pension plan.

(Include the following sentence only if the plan has not received a minimum contribution required from the employer.)

Your plan has not received the minimum contribution required from the employer for [LIST APPLICABLE PLAN YEARS].

**PBGC Guarantees**

The fact that a plan is underfunded does not mean that it will terminate. If this does occur, the PBGC guarantees all pension benefits for most people. However, some people may lose some benefits.

*The PBGC pays pension benefits, up to certain maximum limits.*

- The maximum guaranteed benefit is [INSERT FROM TABLE] per month or [INSERT FROM TABLE] per year for a 65-year-old person in a plan that terminates in [INSERT APPLICABLE YEAR].

- The maximum benefit may be reduced for an individual who is younger than age 65. For example, it is [INSERT FROM TABLE] per month or [INSERT FROM TABLE] per year for an individual who starts receiving benefits at age 55.

- The maximum benefit will also be reduced when a benefit is provided for a survivor.

*The PBGC does not guarantee certain types of benefits.*

- The PBGC does not guarantee benefits for which you do not have a vested right when a plan terminates, usually because you have not worked enough years for the company.

- Benefit increases and new benefits that have been in place for less than a year are not guaranteed. Those that have been in place for less than 5 years are only partly guaranteed.

- Early retirement payments that are greater than payments at normal retirement age may not be guaranteed. For example, a supplemental benefit that stops when you become eligible for Social Security may not be guaranteed.

- Benefits other than pension benefits, such as health insurance, life insurance, death benefits, vacation pay, or severance pay are not guaranteed.

- The PBGC does not pay lump sums exceeding \$3,500.

**Where To Get More Information**

Your plan administrator is [Name], [Title], at [Business Address and Phone Number]. If you would like more information about the funding of your plan, contact [Name], [Title], at [Business Address and Phone Number].

For more information about PBGC and the benefits it guarantees, you may request a copy of "Your Guaranteed Pension" for \$1.25 by writing to Box YGP, Pueblo, Colorado 81009. ["Your Guaranteed Pension" will not be available until January 1, 1996.]

**B. Table of Maximum Guaranteed Benefits**

If a plan terminates in—	The maximum guaranteed benefit for an individual starting to receive benefits at the age listed below is the amount (monthly or annual) listed below:			
	Age 65		Age 55	
	Monthly	Annual	Monthly	Annual
1995 .....	\$2,573.86	\$30,886.32	\$1,158.24	\$13,898.88

Issued in Washington, DC, this 20th day of March 1995.

**Martin Slate,**

*Executive Director, Pension Benefit Guaranty Corporation.*

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