

## PENSION BENEFIT GUARANTY CORPORATION

### 29 CFR Parts 4022, 4022B, 4044

RIN 1212-AA82

#### PBGC Benefit Payments

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule.

**SUMMARY:** The PBGC is amending its regulations to make several changes in how it pays benefits, including giving participants more choices of annuity benefit forms, clarifying (for certain purposes under Title IV of ERISA) what it means to be able to “retire” under plan provisions, and adding rules on who will get certain payments the PBGC owes to a participant at the time of death.

**EFFECTIVE DATE:** June 1, 2002. For a detailed discussion of applicability of the amendments, see the various Applicability sections in

#### SUPPLEMENTARY INFORMATION.

##### FOR FURTHER INFORMATION CONTACT:

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**SUPPLEMENTARY INFORMATION:** On December 26, 2000 (at 65 FR 81456), the PBGC published a proposed rule to address several issues under its regulations on Benefits Payable in Terminated Single-Employer Plans (part 4022), Aggregate Limits on Guaranteed Benefits (part 4022B), and Allocation of Assets in Single-Employer Plans (part 4044).

The PBGC received two comments on the proposed rule and is issuing the final regulation substantially as proposed.

#### Earliest PBGC Retirement Date

The earliest date a participant could “retire” under a plan can have several consequences under Title IV of ERISA:

- It can affect whether a participant’s benefit is in priority category 3 in the asset allocation scheme under ERISA section 4044 (which gives priority in the asset allocation upon plan termination to the benefits of persons who retired or could have retired three years before the plan’s termination date).
- It governs when a participant is first eligible to be placed in pay status by the PBGC.
- It is used as part of the methodology for determining the “expected

retirement age” assumption the PBGC uses to value a participant’s benefit. Determination of this date can affect not only the participant for whom the determination is made, but other participants, the employer, and premium payers. Whether an earlier or later date favors a particular interest depends on the facts and circumstances of the plan termination.

The PBGC has been making determinations about the earliest date a participant could “retire” under a plan on a case-by-case basis based on all the facts and circumstances. In many cases, the analysis is straightforward because the plan provides for early or normal retirement starting at a point (e.g., early retirement at age 55) that clearly would qualify as retirement. However, because plan designs have been evolving in recent years, the PBGC anticipates that case-by-case decision-making in this area will become increasingly difficult.

A growing number of plans have been offering consensual lump sums upon separation regardless of age (e.g., at age 23) and are therefore required to offer a qualified joint-and-survivor annuity commencing immediately. See Treas. Reg. § 1.417(e)-1(b). Some plans, such as cash balance plans, do not use the word “retirement,” even to describe a separation that commonly would be viewed as a retirement, while other plans specify “normal retirement age” as the age reached after five years of service.

The PBGC does not believe it would be appropriate to determine the earliest retirement date for PBGC purposes simply by looking at the availability of a consensual lump sum or immediate annuity or at plan labels. Doing so would treat any separation that gives rise to the availability of a consensual lump sum or immediate annuity as if it were a retirement. Among other things, this would give priority category 3 status to many participants who are not close to retirement, thereby significantly diluting priority category 3 protection for those persons Congress intended to protect. On the other hand, where a participant is old enough or has enough service, the PBGC believes that treating a separation as a retirement would be consistent with the statutory scheme.

To provide guidance and to reduce the need for case-by-case decision-making, the PBGC is introducing the concept of an “Earliest PBGC Retirement Date.” The Earliest PBGC Retirement Date for a participant will be the earliest date on which the participant could “retire” for certain purposes under Title IV of ERISA. If the participant’s “earliest annuity date” (the earliest date under plan provisions on

which the participant could separate from service with the right to receive an immediate annuity) is on or after the date the participant reaches age 55, the Earliest PBGC Retirement Date will be the “earliest annuity date.” However, if the participant’s “earliest annuity date” is before the date the participant reaches age 55, the Earliest PBGC Retirement Date will be the date the participant reaches age 55, unless the PBGC determines, under a facts-and-circumstances test, that the participant could retire on an earlier date. Under the facts-and-circumstances test, the PBGC will consider whether the participant could retire for purposes of ERISA section 4044(a)(3)(B). The proposed regulation provided that in making this determination, the PBGC would look at plan provisions, the age at which employees customarily retire (under the particular plan or in the particular company or industry, as appropriate), and all other relevant considerations.

Both commenters expressed concern about the application of the Earliest PBGC Retirement Date concept in plans where participants can separate from service with the right to receive an immediate annuity before reaching age 55.

One commenter stated that the Earliest PBGC Retirement Date “should not be used to restrict protections that workers enjoy under current rules.” The commenter went on to point out that many defined benefit plans permit benefit eligibility at a point earlier than age 55 that “clearly would qualify as a retirement for purposes of the statute.” The commenter suggested that the “PBGC should continue to permit the receipt of annuity benefits before age 55 when a plan provides for retirement earlier than age 55 and recognize pre-55 retirement eligibility in its determination of priority category 3 benefits.”

The PBGC intended the adoption of the “Earliest PBGC Retirement Date” concept as a way to simplify administration for the PBGC and clarify the rules for participants—not as a way to “restrict” the earliest date on which a participant would be considered to be eligible to “retire.” Indeed, this new concept will have no effect on the PBGC’s existing facts-and-circumstances approach for determining pre-age 55 retirement dates; rather it merely clarifies and codifies that approach. Therefore, the date a participant could first “retire” should never be later under the new regulation than under the PBGC’s existing facts-and-circumstances approach (although, for post-age 55

retirement dates, it may be earlier under the new concept).

The other commenter, expressing particular concern about airline pilots' plans, urged the PBGC "to adopt a special rule for plans covering participants who are legally required to retire before age 65." That commenter urged the PBGC to adopt a rule that the Earliest PBGC Retirement Date for a participant in such a plan will never be later than the date the participant reaches age 50, while retaining discretion to determine pre-age 50 Earliest PBGC Retirement Dates based on the facts and circumstances.

The PBGC recognizes the commenter's concern about airline pilots' plans but believes this concern can be addressed without changing the Earliest PBGC Retirement Date definition. The regulation provides for Earliest PBGC Retirement Dates before age 55 based on the PBGC's facts-and-circumstances analysis, taking into account (among other things) plan provisions and the age at which participants customarily retire. The PBGC recognizes that plans covering airline pilots generally provide for early retirement before age 55 (often subject to substantial service or age-and-service requirements and with subsidized benefits) and that airline pilots customarily retire at relatively early ages. In the case of a typical airline pilots' plan that provides for a normal retirement age of 60 and an early retirement age of 50 with 5 years of service, the PBGC generally would determine—under its facts-and-circumstances analysis—that a participant who has completed 5 years of service reaches his or her Earliest PBGC Retirement Date upon attaining age 50. If the plan instead had provided for early retirement before age 50, the PBGC would consider all the facts and circumstances (including the plan's normal retirement age and the age at which employees customarily retire in the airline industry) in determining whether to treat the date the participant reaches the plan's early retirement age as the participant's Earliest PBGC Retirement Date. The PBGC is adding a specific example to the final rule to illustrate its treatment of a typical airline pilots' plan.

The preamble to the proposed rule contained examples of Earliest PBGC Retirement Dates. For the convenience of the public, the PBGC is moving those examples to the regulatory language and is adding, along with the new example dealing with a typical airline pilots' plan, an example dealing with plans that specify early retirement requirements and do not offer a

consensual lump sum or immediate annuity upon separation before those requirements are met.

The final rule also clarifies the following:

- *"Window" periods.* For purposes of determining a participant's Earliest PBGC Retirement Date, the PBGC will treat the participant as being able, under plan provisions, to separate from service with the right to receive an immediate annuity on a date before the plan's termination date only if eligibility for that immediate annuity continues through the earlier of the plan's termination date or the date the participant actually separates from service with the right to receive an immediate annuity and the participant satisfies the conditions for eligibility for that immediate annuity on or before the plan's termination date.
- *Benefit start dates.* For participants who had reached their Earliest PBGC Retirement Date before the beginning of the 3-year period ending on the plan's termination date, the PBGC will not exclude annuity benefits from priority category 3 protection merely because, under the plan's rules for starting benefit payments, the payments do not start until the next payment date (e.g., the first day of the first month following the date of separation).

Aside from these clarifications, the PBGC is issuing the final rules in this area with only structural and other editorial changes from the proposed regulation. For example, the PBGC is moving the definition of Earliest PBGC Retirement Date from part 4044 (where it was in the proposed regulation) to part 4022.

#### Applicability

The new definition will apply to benefits in plans with termination dates on or after June 1, 2002.

The new definition will also apply, for the purpose of determining when participants will first be able to receive retirement benefits in annuity form from the PBGC, to benefits not yet in pay status as of June 1, 2002, except that the new age-55 rule will not apply to any plan trustee by the PBGC before October 1, 1998. In plans trustee by the PBGC before October 1, 1998, the PBGC will continue to apply its facts-and-circumstances analysis (as clarified and codified in the new regulation), regardless of whether the participant is younger than age 55 or is age 55 or older. The PBGC is not applying the new age-55 rule to plans trustee by the PBGC before October 1, 1998, because doing so would require the PBGC to reopen determinations in thousands of plans (with little or no impact for the vast majority of participants), and therefore could significantly delay the PBGC's processing of new plans (i.e., those trustee on or after October 1, 1998).

#### Form of Payment by PBGC

The PBGC pays benefits to participants when an underfunded single-employer defined benefit plan terminates under Title IV of ERISA and the PBGC becomes trustee. If a participant's benefit is already in pay status, the PBGC continues to pay the benefit (subject to the limitations in Title IV of ERISA) in the form being paid. But for those participants whose benefits are not yet in pay status, the PBGC generally pays non-de minimis benefits (i.e., benefits with a lump-sum value exceeding \$5,000) in the form the plan would have paid in the absence of an election, typically a joint-and-50% spousal survivor annuity (for married participants) or a straight-life annuity (for unmarried participants and married participants who, with spousal consent, waive the joint-and-survivor annuity). If a married participant dies before entering pay status, the PBGC pays a qualified pre-retirement survivor annuity to the participant's spouse. The PBGC does not pay benefits in lump-sum form except in limited circumstances (primarily where it cashes out a de minimis benefit).

Many participants would welcome the PBGC's offering them choices of other annuity benefit forms and allowing them to designate non-spouse beneficiaries. With today's technology, it is now feasible for the PBGC to offer a menu of optional forms.

The PBGC intends to provide participants (and beneficiaries) whose benefits are not yet in pay status with more choices of annuity benefit forms, including a straight-life annuity, certain-and-continuous annuities with various periods certain, joint-and-survivor annuities with various survivor percentages, and a joint-and-survivor "pop-up" annuity. A participant who is married on the annuity starting date will need spousal consent to elect any of the optional forms. Either a married participant (with spousal consent) or an unmarried participant will be able to designate a non-spouse beneficiary to receive survivor benefits under any optional joint-life or other annuity form under which payments may continue after the participant's death.

The PBGC will determine the amount of the benefit in an optional form elected by a participant by first determining the annuity benefit that it would pay the participant under Title IV of ERISA. If the participant (regardless of marital status) elects to receive a joint-and-survivor optional form from the PBGC, the PBGC will start with the joint-and-survivor form that the plan would have paid to a married

participant in the absence of an election under the plan. If the participant (regardless of marital status) elects to receive a single-life optional form from the PBGC, the PBGC will start with the single-life form that the plan would have paid to an unmarried participant in the absence of an election under the plan. The PBGC will convert this starting benefit to the optional annuity form the participant or beneficiary chooses, using specified PBGC factors.

Both commenters commended the PBGC for proposing to offer a choice of optional annuity forms, and the PBGC is issuing the new rules in this area substantially as proposed.

The final regulation clarifies that the form under the plan that an unmarried person would be entitled to receive in the absence of an election is available not only to an unmarried participant but also to a married participant. It also clarifies that the PBGC may prescribe the time and manner for benefit elections to be made and spousal consents to be provided. It also clarifies that benefit forms cannot be changed once payment starts and simplifies and clarifies the rules governing permitted designees.

The final regulation also clarifies one technical issue that could arise in rare circumstances, *e.g.*, where the form the plan would have paid to a married participant in the absence of an election is highly subsidized and the participant (whether married or unmarried) elects an optional PBGC form with a smaller survivor annuity percentage. In these circumstances, the proposed regulation could have been read as requiring the PBGC to pay a greater monthly benefit to a participant in the form of a joint-and-survivor benefit than it would have paid the participant in the form of a straight life annuity. The final regulation clarifies that the PBGC will limit its payment to avoid this result. For example, assume the amount of a participant's benefit is \$1,000 a month in the form of a straight life annuity or \$980 a month in the form of a highly-subsidized joint-and-100% survivor annuity. Assume the participant elects a joint-and-50% survivor annuity. Using the specified conversion factors, the amount of the benefit in the form elected would be \$1,060 a month. The final rule clarifies that the PBGC would pay \$1,000 a month in such circumstances.

#### Applicability

The PBGC will make the optional benefit forms available where the first benefit payment is made on or after June 1, 2002.

Where the first benefit payment is made on or after May 1, 2002, and the participant or beneficiary has filed an application that does not include the new optional benefit forms, the PBGC may make the optional benefit forms available to that participant or beneficiary on or after June 1, 2002, by providing an opportunity to change the election within a reasonable time period. Until the end of that time period, the PBGC will not apply to that participant or beneficiary the new rule that once payment of a benefit starts, the benefit form cannot be changed. If the benefit form changes, the PBGC will make appropriate adjustments to the benefit amount.

#### *Certain Payments Owed Upon Death*

When a participant dies, the PBGC occasionally may have paid too much of the benefit or too little of the benefit that was due the participant during the participant's life. If the PBGC paid too much, there is an overpayment owed to the PBGC at the time of the participant's death. If the PBGC paid too little, there is an underpayment owed to the participant at the time of the participant's death. In either case, the PBGC needs to determine not only the amount of the overpayment or underpayment, but the person(s) it will seek to collect from or pay.

The PBGC recoups any overpayment made to a participant from the person who is receiving survivor benefits under any joint-and-survivor or other annuity form under which payments may continue after the participant's death. The PBGC pays any underpayment due the participant to that same person.

Under the PBGC's current policy, if the PBGC owes benefits to a participant at the time of the participant's death and the benefit is not in the form of a joint-and-survivor or other annuity under which payments may continue after the participant's death or although the benefit is in such a form payments do not continue after the participant's death, the PBGC pays the person(s) designated with the PBGC or by or under the plan to receive benefits owed to the participant at the time of the participant's death. If there is no such designation, the PBGC generally pays those benefits to the participant's estate. However, issuing checks to estates has created difficulties for families of deceased participants and has complicated the PBGC's efforts to distribute benefits owed to a deceased participant. The PBGC has found that, in most cases, the participant has no open estate, usually because no estate was probated but occasionally because the estate was closed by the time the

PBGC learns of the death and determines the amount of the underpayment.

To address these problems, the PBGC is adding new subpart F of part 4022, which governs who will receive benefits owed to a deceased participant where the benefit is not in the form of a joint-and-survivor or other annuity under which payments may continue after the participant's death or although the benefit is in such a form payments do not continue after the participant's death. Under these new rules, the PBGC will pay those benefits to the person(s) the participant designates with the PBGC to receive those benefits or "if the participant dies within 180 days after the PBGC becomes trustee of the participant's plan and has not made a designation with the PBGC—the person(s) designated by or under the plan. In all other cases, the PBGC will pay those benefits to the person(s) surviving the participant in the following order: spouse, children, estate, and next of kin.

This order of payment generally follows the order of payment for death benefits used by the Thrift Savings Plan (TSP), the retirement savings plan for federal employees. However, the PBGC is not adopting the TSP rules; rather it is establishing its own order-of-payment rules and therefore will be making its own interpretations of those rules. The PBGC notes that the order of payment generally conforms to state intestate law and believes, based on its experience, that it is also generally consistent with typical participant designations under a plan or will. The PBGC also expects that the benefit amounts that will be subject to the order-of-payment rules will in most cases be relatively small.

Under its existing regulation, the PBGC may pay any annuity benefits payable to an estate in a single installment if the estate so elects. The PBGC is amending the regulation to provide that, for purposes of discounting such annuity payments, it will use the federal mid-term rate (the same rate used for crediting interest for future periods on net underpayments of benefits).

The PBGC received no comments on its proposal relating to certain payments owed upon death and is issuing the new rules in this area with only clarifying and editorial changes from the proposed regulation. The final regulation clarifies that the new rules will apply to benefits the PBGC owes to any individual at the time of the individual's death (including benefits the PBGC owes because the plan owed them). Thus, the rules will apply not only to benefits the PBGC owes to a participant in a terminated

plan, but also to benefits the PBGC owes to a beneficiary (including an alternate payee) at the time of the beneficiary's death or to a designee or other payee under subpart F (e.g., a participant's next of kin) at the time of the designee or other payee's death.

The final regulation also clarifies that (1) in the case of an overpayment to a participant at the time of the participant's death, if the participant is not entitled to future annuity benefits as of the plan's termination date, the PBGC may seek repayment of the overpayment to the participant from the participant's estate, and (2) in the case of an underpayment to a participant at the time of the participant's death, if the person receiving survivor benefits is an alternate payee under a qualified domestic relations order, the PBGC will treat the benefit as if payments do not continue after the participant's death (i.e., the PBGC will pay the underpayment to the person determined under the rules in new subpart F).

The final regulation includes structural and other editorial changes from the proposed regulation designed to make the new rules easier to understand. For example, in the proposed regulation, subpart F covers situations in which a person dies without having received all required payments for future periods under a form of annuity promising that, regardless of a participant's death, there will be annuity payments for a certain period of time (e.g., a certain-and-continuous annuity) or until a certain amount is paid (e.g., a cash-refund annuity or installment-refund annuity), and there is no surviving beneficiary designated to receive such payments. In the final regulation, these situations are covered in new subpart G. The final regulation includes examples that show how the rules in subparts F and G will apply in various situations.

### Applicability

The new rules will apply in the case of any death on or after June 1, 2002.

### Entitlement Conditions Met on Termination Date

Under the existing benefit payment regulation (part 4022), entitlement to benefits often depends on whether certain conditions have been met *before* the plan's termination date. The PBGC is amending the regulation to provide for entitlement also where plan conditions relating to age, length of service, disability, or death are met *on* the plan's termination date. Under the existing regulation, the PBGC may find entitlement in such circumstances by exercising its discretion under

§ 4022.4(b) and has done so in a number of cases. Because there is virtually no risk of abuse resulting from manipulation of these events, the PBGC is amending the regulation to provide for entitlement in all such cases.

The PBGC is also making several related changes so that other determinations affecting guaranteed benefits take into account conditions through and including a plan's termination date: (1) An annuity payable under the terms of the plan on account of the total and permanent disability of a participant will be considered to be a "pension benefit" (and thus eligible to be guaranteed) in the case of a disability that began on or before the plan's termination date; (2) in applying the "accrued-at-normal" limitation (i.e., the limitation on guaranteed benefits to the dollar amount payable as a straight-life annuity commencing at normal retirement age), the PBGC will take into account a participant's credited service *through and including* the plan's termination date; and (3) the accrued-at-normal limitation will not apply to a survivor benefit payable as an annuity on account of the death of a participant that occurred before the participant retired and *on or before* the plan's termination date.

The PBGC received no comments on its proposal relating to entitlement conditions being met on the termination date and is issuing the new rules in this area without change from the proposed regulation.

### Applicability

The new rules will apply to benefits in any plan with a termination date on or after June 1, 2002.

### Aggregate Limits on Guaranteed Benefits

The PBGC is amending its regulation on Aggregate Limits on Guaranteed Benefits (part 4022B). Under the current regulation, when applying the limitation on guaranteed benefits in § 4022.22(b), the PBGC aggregates: (1) A person's benefits under two or more plans, (2) a person's benefits with respect to two or more participants, and (3) benefits with respect to one participant when more than one person is entitled to receive a benefit with respect to that participant).

Under this amendment the PBGC will not aggregate benefits with respect to two or more participants (the second type of aggregation above) when applying this limitation. For example, suppose a participant is entitled to a \$2,500 monthly benefit in her own right and another \$1,000 survivor benefit with respect to her deceased husband

who was covered under the same plan (or another PBGC-trusteed plan). Assume for simplicity the maximum guaranteeable monthly benefit is \$3,000. Under the current rule, the participant's total benefit is limited to a monthly benefit of \$3,000. Under the amendment, the participant will be entitled to the full \$3,500 benefit.

The PBGC is removing from part 4022B, as unnecessary, the language relating to the aggregation of benefits with respect to one participant when more than one person is entitled to receive a benefit with respect to that participant (the third type of aggregation above). (This is a nonsubstantive change; under § 4022.22, the PBGC will continue to aggregate such benefits.)

The PBGC received no comments on its proposal relating to the aggregate limits on guaranteed benefits and is issuing the new rules in this area without change from the proposed regulation.

### Applicability

The new rules will apply to benefit determinations that become effective on or after June 1, 2002.

### Compliance With Rulemaking and Paperwork Reduction Act Guidelines

The Office of Management and Budget has determined that this final rule is a "significant regulatory action" and has therefore reviewed the final rule under Executive Order 12866.

The PBGC certifies under section 605(b) of the Regulatory Flexibility Act that this final rule will not have a significant economic impact on a substantial number of small entities. Virtually all of the changes in the final rule will affect only the PBGC and persons who receive benefits from the PBGC. The only change that could affect small entities is the application of the Earliest PBGC Retirement Date to the "expected retirement age" assumption under the PBGC's valuation regulation. Although this change potentially could affect employer liability, in most cases, the results of a valuation will match the results under the PBGC's current regulation. In those cases where the valuation results do not match, the differences generally will not be significant. Thus, the change will not have a significant economic impact on a substantial number of entities of any size. Accordingly, sections 603 and 604 of the Regulatory Flexibility Act do not apply.

This rule contains information collection requirements. The Office of Management and Budget has approved this information collection, including the implementing forms and

instructions, under the Paperwork Reduction Act of 1995. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

**List of Subjects in 29 CFR Parts 4022, 4022B, and 4044**

Pension insurance, Pensions.

For the reasons set forth above, the PBGC is amending parts 4022, 4022B, and 4044 of 29 CFR chapter LX as follows:

**PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS**

1. The authority citation for Part 4022 continues to read as follows:

**Authority:** 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

**§ 4022.4 [Amended]**

2. Amend paragraph (a)(3) of § 4022.4 by adding the words “(or on or before the termination date, in the case of a requirement that a participant attain a particular age, earn a particular amount of service, become disabled, or die)” after the words “Except for a benefit described in paragraph (a)(2) of this section, before the termination date”, and the words “(prior to or on such date, in the case of a requirement that a participant attain a particular age, earn a particular amount of service, become disabled, or die)” after the words “the right to receive the benefit prior to such date”.

**§ 4022.6 [Amended]**

3. Amend paragraph (a) of § 4022.6 by adding the words “on or” before the words “before the termination date”.

\* \* \* \* \*

4. Amend § 4022.7 by revising paragraphs (b)(1) and (d) to read as follows:

**§ 4022.7 Benefits payable in a single installment.**

(b)(1) *Payment in lump sum.*

Notwithstanding paragraph (a) of this section:

(i) *In general.* If the lump sum value of a benefit (or of an estimated benefit) payable by the PBGC is \$5,000 or less and the benefit is not yet in pay status, the benefit (or estimated benefit) may be paid in a lump sum.

(ii) *Annuity option.* If the PBGC would otherwise make a lump sum payment in accordance with paragraph (b)(1)(i) of this section and the monthly benefit (or the estimated monthly benefit) is equal to or greater than \$25 (at normal retirement age and in the

normal form for an unmarried participant), the PBGC will provide the option to receive the benefit in the form of an annuity.

(iii) *Election of QPSA lump sum.* If the lump sum value of annuity payments under a qualified preretirement survivor annuity (or under an estimated qualified preretirement survivor annuity) is \$5,000 or less, the benefit is not yet in pay status, and the participant dies after the termination date, the benefit (or estimated benefit) may be paid in a lump sum if so elected by the surviving spouse.

(iv) *Payments to estates.* The PBGC may pay any annuity payments payable to an estate in a single installment without regard to the threshold in paragraph (b)(1)(i) of this section if so elected by the estate. The PBGC will discount the annuity payments using the federal mid-term rate (as determined by the Secretary of the Treasury pursuant to section 1274(d)(1)(C)(ii) of the Code) applicable for the month the participant died based on monthly compounding.

\* \* \* \* \*

(d) *Determination of lump sum amount.* For purposes of paragraph (b)(1) of this section—

(1) *Benefits disregarded.* In determining whether the lump-sum value of a benefit is \$5,000 or less, the PBGC may disregard the value of any benefits the plan or the PBGC previously paid in lump-sum form or the plan paid by purchasing an annuity contract, the value of any benefits returned under paragraph (b)(2) of this section, and the value of any benefits the PBGC has not yet determined under section 4022(c) of ERISA.

(2) *Actuarial assumptions.* The PBGC will calculate the lump sum value of a benefit by valuing the monthly annuity benefits payable in the form determined under § 4044.51(a) of this chapter and commencing at the time determined under § 4044.51(b) of this chapter. The actuarial assumptions used will be those described in § 4044.52, except that—

(i) *Loading for expenses.* There will be no adjustment to reflect the loading for expenses;

(ii) *Mortality rates and interest assumptions.* The mortality rates in appendix A to this part and the interest assumptions in appendix B to this part will apply; and

(iii) *Date for determining lump sum value.* The date as of which a lump sum value is calculated is the termination date, except that in the case of a subsequent insufficiency it is the date described in section 4062(b)(1)(B) of ERISA.

5. Add § 4022.8 to subpart A to read as follows:

**§ 4022.8 Form of payment.**

(a) *In general.* This section applies where benefits are not already in pay status. Except as provided in § 4022.7 (relating to the payment of lump sums), the PBGC will pay benefits—

(1) In the automatic PBGC form described in paragraph (b) of this section; or

(2) If an optional PBGC form described in paragraph (c) of this section is elected, in that optional form.

(b) *Automatic PBGC form.*

(1) *Participants.*

(i) *Married participants.* The automatic PBGC form with respect to a participant who is married at the time the benefit enters pay status is the form a married participant would be entitled to receive from the plan in the absence of an election.

(ii) *Unmarried participants.* The automatic PBGC form with respect to a participant who is unmarried at the time the benefit enters pay status is the form an unmarried person would be entitled to receive from the plan in the absence of an election.

(2) *Beneficiaries.*

(i) *QPSA beneficiaries.* The automatic PBGC form with respect to the spouse of a married participant in a plan with a termination date on or after August 23, 1984, who dies before his or her benefit enters pay status is the qualified preretirement survivor annuity such a spouse would be entitled to receive from the plan in the absence of an election. The PBGC will not charge the participant or beneficiary for this survivor benefit coverage for the time period beginning on the plan's termination date (regardless of whether the plan would have charged).

(ii) *Alternate payees.* The automatic PBGC form with respect to an alternate payee with a separate interest under a qualified domestic relations order is the form an unmarried participant would be entitled to receive from the plan in the absence of an election.

(c) *Optional PBGC forms.*

(1) *Participant and beneficiary elections.* A participant may elect any optional form described in paragraphs (c)(4) or (c)(5) of this section. A beneficiary described in paragraph (b)(2) of this section (a QPSA beneficiary or an alternate payee) may elect any optional form described in paragraphs (c)(4)(i) through (c)(4)(iv) of this section.

(2) *Permitted designees.* A participant or beneficiary, whether married or unmarried, who elects an optional form with a survivor feature (e.g., a 5-year certain-and-continuous annuity or, in

the case of a participant, a joint-and-50%-survivor annuity) may designate either a spouse or a non-spouse beneficiary to receive survivor benefits. An optional joint-life form must be payable to a natural person or (with the consent of the PBGC) to a trust for the benefit of one or more natural persons.

(3) *Spousal consent.* In the case of a participant who is married at the time the benefit enters pay status, the election of an optional form or the designation of a non-spouse beneficiary is valid only if the participant's spouse consents.

(4) *Permitted optional single-life forms.* The PBGC may offer benefits in the following single-life forms:

- (i) A straight-life annuity;
- (ii) A 5-year certain-and-continuous annuity;
- (iii) A 10-year certain-and-continuous annuity;
- (iv) A 15-year certain-and-continuous annuity; and

(v) The form an unmarried person would be entitled to receive from the plan in the absence of an election.

(5) *Permitted optional joint-life forms.* The PBGC may offer benefits in the following joint-life forms:

- (i) A joint-and-50%-survivor annuity;
- (ii) A joint-and-50%-survivor—"pop-up" annuity (*i.e.*, where the participant's benefit "pops up" to the unreduced level if the beneficiary dies first);
- (iii) A joint-and-75%-survivor annuity; and
- (iv) A joint-and-100%-survivor annuity.

(6) *Determination of benefit amount; starting benefit.* To determine the amount of the benefit in an optional PBGC form—

(i) *Single-life forms.* In the case of an optional PBGC form under paragraph (c)(4) of this section, the PBGC will first determine the amount of the benefit in the form the plan would pay to an unmarried participant in the absence of an election.

(ii) *Joint-life forms.* In the case of an optional PBGC form under paragraph (c)(5) of this section, the PBGC will first determine the amount of the benefit in the form the plan would pay to a married participant in the absence of an election. For this purpose, the PBGC will treat a participant who designates a non-spouse beneficiary as being married to a person who is the same age as that non-spouse beneficiary.

(7) *Determination of benefit amount; conversion factors.* The PBGC will convert the benefit amount determined under paragraph (c)(6) of this section to the optional form elected, using PBGC factors based on—

(i) *Mortality.* Unisex mortality rates that are a fixed blend of 50 percent of the male mortality rates and 50 percent of the female mortality rates from the 1983 Group Annuity Mortality Table as prescribed in Rev. Rul. 95-6, 1995-1 C.B. 80 (Internal Revenue Service Cumulative Bulletins are available from the Superintendent of Documents, Government Printing Office, Washington, DC 20402); and

(ii) *Interest.* An interest rate of six percent.

(8) *Determination of benefit amount; limitation.* The PBGC will limit the benefit amount determined under paragraph (c)(7) of this section to the amount of the benefit it would pay in the form of a straight life annuity under paragraph (c)(4)(i) of this section.

(9) *Incidental benefits.* The PBGC will not pay an optional PBGC form with a death benefit (*e.g.*, a joint-and-50%-survivor annuity) unless the death benefit would be an "incidental death benefit" under 26 CFR 1.401-1(b)(1)(i). If the death benefit would not be an "incidental death benefit," the PBGC may instead offer a modified version of the optional form under which the death benefit would be an "incidental death benefit."

(d) *Change in benefit form.* Once payment of a benefit starts, the benefit form cannot be changed.

(e) *PBGC discretion.* The PBGC may make other optional annuity forms available subject to the rules in paragraph (c) of this section.

6. Add § 4022.9 to subpart A to read as follows:

#### **§ 4022.9 Time of payment; benefit applications.**

(a) *Time of payment.* A participant may start receiving an annuity benefit from the PBGC (subject to the PBGC's rules for starting benefit payments) on his or her Earliest PBGC Retirement Date as determined under § 4022.10 of this subchapter or, if later, the plan's termination date.

(b) *Elections and consents.* The PBGC may prescribe the time and manner for benefit elections to be made and spousal consents to be provided.

(c) *Benefit applications.* The PBGC is not required to accept any application for benefits not made in accordance with its forms and instructions.

7. Add § 4022.10 to subpart A to read as follows:

#### **§ 4022.10 Earliest PBGC Retirement Date.**

The Earliest PBGC Retirement Date for a participant is the earliest date on which the participant could retire under plan provisions for purposes of section 4044(a)(3)(B) of ERISA. The Earliest

PBGC Retirement Date is determined in accordance with this § 4022.10. For purposes of this § 4022.10, "age" means the participant's age as of his or her last birthday (unless otherwise required by the context).

(a) *Immediate annuity at or after age 55.* If the earliest date on which a participant could separate from service with the right to receive an immediate annuity is on or after the date the participant reaches age 55, the Earliest PBGC Retirement Date for the participant is the earliest date on which the participant could separate from service with the right to receive an immediate annuity.

(b) *Immediate annuity before age 55.* If the earliest date on which a participant could separate from service with the right to receive an immediate annuity is before the date the participant reaches age 55, the Earliest PBGC Retirement Date for the participant is the date the participant reaches age 55 (except as provided in paragraph (c) of this section).

(c) *Facts and circumstances.* If a participant could separate from service with the right to receive an immediate annuity before the date the participant reaches age 55, the PBGC will make a determination, under the facts and circumstances, as to whether the participant could retire under plan provisions for purposes of section 4044(a)(3)(B) of ERISA on an earlier date. If the PBGC determines, under the facts and circumstances, that the participant could retire under plan provisions for those purposes on an earlier date, that earlier date is the Earliest PBGC Retirement Date for the participant. In making this determination, the PBGC will take into account plan provisions (*e.g.*, the general structure of the provisions, the extent to which the benefit is subsidized, and whether eligibility for the benefit is based on a substantial service or age-and-service requirement), the age at which employees customarily retire (under the particular plan or in the particular company or industry, as appropriate), and all other relevant considerations. Neither a plan's reference to a separation from service at a particular age as a "retirement" nor the ability of a participant to receive an immediate annuity at a particular age necessarily makes the date the participant reaches that age the Earliest PBGC Retirement Date for the participant. The Earliest PBGC Retirement Date determined by the PBGC under this paragraph (c) will never be earlier than the earliest date the participant could separate from

service with the right to receive an immediate annuity.

(d) *Examples.* The following examples illustrate the operation of the rules in paragraphs (a) through (c) of this section.

(1) *Normal retirement age.* A plan's normal retirement age is age 65. The plan does not offer a consensual lump sum or an immediate annuity upon separation before normal retirement age. The Earliest PBGC Retirement Date for a participant who, as of the plan's termination date, is age 50 is the date the participant reaches age 65.

(2) *Early retirement age.* A plan's normal retirement age is age 65. The plan specifies an early retirement age of 60 with 10 years of service. The plan does not offer a consensual lump sum or an immediate annuity upon separation before early retirement age. The Earliest PBGC Retirement Date for a participant who, as of the plan's termination date, is age 55 and has completed 10 years of service is the date the participant reaches age 60.

(3) *Separation at any age.* A plan's normal retirement age is age 65. The plan specifies an early retirement age of 60 but offers an immediate annuity upon separation regardless of age. The Earliest PBGC Retirement Date for a participant who, as of the plan's termination date, is age 35 is the date the participant reaches age 55, unless the PBGC determines under the facts and circumstances that the participant could "retire" for purposes of ERISA section 4044(a)(3)(B) on an earlier date, in which case the participant's Earliest PBGC Retirement Date would be that earlier date.

(4) *Age 50 retirement common.* A plan's normal retirement age is age 60. The plan specifies an early retirement age of 50 but offers an immediate annuity upon separation regardless of age. The Earliest PBGC Retirement Date for a participant who, as of the plan's termination date, is age 35 is the date the participant reaches age 55, unless the PBGC determines under the facts and circumstances that the participant could retire for purposes of ERISA section 4044(a)(3)(B) on an earlier date, in which case the Earliest PBGC Retirement Date would be that earlier date. For example, if it were common for participants to retire at age 50, the PBGC could determine that the participant's Earliest PBGC Retirement Date would be the date the participant reached age 50.

(5) *"30-and-out" benefit.* A plan's normal retirement age is age 65. The plan offers an immediate annuity upon separation regardless of age and a fully-subsidized annuity upon separation

with 30 years of service. The Earliest PBGC Retirement Date for a participant who, as of the plan's termination date, is age 48 and has completed 30 years of service is the date the participant reaches age 55, unless the PBGC determines under the facts and circumstances that the participant could retire for purposes of ERISA section 4044(a)(3)(B) on an earlier date, in which case the participant's Earliest PBGC Retirement Date would be that earlier date. In this example, the PBGC generally would determine under the facts and circumstances that the participant's Earliest PBGC Retirement Date is the date the participant completed 30 years of service.

(6) *Typical airline pilots' plan.* An airline pilots' plan has a normal retirement age of 60. The plan specifies an early retirement age of 50 (with 5 years of service). The Earliest PBGC Retirement Date for a participant who, as of the plan's termination date, is age 48 and has completed five years of service would be the date the participant reaches age 55, unless the PBGC determines under the facts and circumstances that the participant could retire for purposes of ERISA section 4044(a)(3)(B) on an earlier date, in which case the participant's Earliest PBGC Retirement Date would be that earlier date. In this example, the PBGC generally would determine under the facts and circumstances that the participant's Earliest PBGC Retirement Date is the date the participant reaches age 50. If the plan instead had provided for early retirement before age 50, the PBGC would consider all the facts and circumstances (including the plan's normal retirement age and the age at which employees customarily retire in the airline industry) in determining whether to treat the date the participant reaches the plan's early retirement age as the participant's Earliest PBGC Retirement Date.

(e) *Special rule for "window" provisions.* For purposes of paragraphs (a), (b), and (c) of this section, the PBGC will treat a participant as being able, under plan provisions, to separate from service with the right to receive an immediate annuity on a date before the plan's termination date only if—

(1) Eligibility for that immediate annuity continues through the earlier of—

(i) The plan's termination date; or

(ii) The date the participant actually separates from service with the right to receive an immediate annuity; and

(2) The participant satisfies the conditions for eligibility for that immediate annuity on or before the plan's termination date.

8. Amend § 4022.21 as follows:

a. In paragraph (a)(2)(i), remove the words "before the plan terminates and before the participant retired" and add in their place the words "on or before the plan's termination date and before the participant retired".

b. Revise paragraph (d) to read as follows:

**§ 4022.21 Limitations; in general.**

\* \* \* \* \*

(d) The PBGC will not guarantee a joint-life annuity benefit payable to other than—

(1) Natural persons; or

(2) A trust or estate for the benefit of one or more natural persons.

9. Amend § 4022.25 by revising paragraphs (c) and (d) as follows:

**§ 4022.25 Five-year phase-in of benefit guarantee for participants other than substantial owners.**

\* \* \* \* \*

(c) *Computation of years.* In computing the number of years a benefit increase has been in effect, each complete 12-month period ending on or before the termination date during which such benefit increase was in effect constitutes one year.

(d) *Multiple benefit increases.* In applying the formula contained in paragraph (b) of this section, multiple benefit increases within any 12-month period ending on or before the termination date and calculated from that date are aggregated and treated as one benefit increase.

\* \* \* \* \*

10. Add paragraph (d) to § 4022.81 to read as follows:

**§ 4022.81 General rules.**

\* \* \* \* \*

(d) *Death of participant.*

(1) *Benefit overpayments.* If the PBGC determines that, at the time of a participant's death, there was a net overpayment to the participant—

(i) *Future annuity payments.* If the participant was entitled to future annuity payments as of the plan's termination date, the PBGC will (except as provided in paragraph (a) of this section) recoup the overpayment from the person (if any) who is receiving survivor benefits under the annuity.

(ii) *No future annuity payments.* If the participant was not entitled to future annuity benefits as of the plan's termination date, the PBGC may seek repayment of the overpayment from the participant's estate.

(2) *Benefit underpayments.* If the PBGC determines that, at the time of a participant's death, there was a net underpayment to the participant—

(i) *Future annuity payments.* If the benefit is in the form of a joint-and-survivor or other annuity under which payments may continue after the participant's death, the PBGC will pay the underpayment to the person who is receiving survivor benefits; for this purpose, if the person receiving survivor benefits is an alternate payee under a qualified domestic relations order, the PBGC will treat the benefit as if payments do not continue after the participant's death (see paragraph (d)(2)(ii) of this section).

(ii) *No future annuity payments.* If the benefit is not in the form of a joint-and-survivor or other annuity (e.g., a certain-and-continuous annuity) under which payments may continue after the participant's death or although the benefit is in such a form payments do not continue after the participant's death (i.e., in the case of a joint-and-survivor annuity, the person designated to receive survivor benefits predeceased the participant or, in the case of another annuity under which payments may continue after the participant's death the participant died with no payments owed for future periods), the PBGC will pay the underpayment to the person determined under the rules in §§ 4022.91 through 4022.95.

11. Add subpart F to part 4022 to read as follows:

## Subpart F—Certain Payments Owed Upon Death

Sec.

4022.91 When do these rules apply?  
 4022.92 What definitions do I need to know for these rules?  
 4022.93 Who will get benefits the PBGC may owe me at the time of my death?  
 4022.94 What are the PBGC's rules on designating a person to get benefits the PBGC may owe me at the time of my death?  
 4022.95 Examples.

### § 4022.91 When do these rules apply?

(a) *Types of benefits.* Provided the conditions in paragraphs (b) and (c) of this section are satisfied, these rules (§§ 4022.91 through 4022.95) apply to any benefits we may owe you (including benefits we owe you because your plan owed them) at the time of your death, such as a payment of a lump-sum benefit that we calculated as of your plan's termination date but have not yet paid you or a back payment to reimburse you for monthly underpayments. We may owe you benefits at the time of your death if—

(1) You are a participant in a terminated plan;  
 (2) You are a beneficiary (including an alternate payee) of a participant; or

(3) You are a designee or other payee (e.g., a participant's next of kin) under these rules, as explained in § 4022.93.

(b) *Payments do not continue after death.* These rules apply only if payments do not continue after your death. (If payments continue after your death, we will make up any underpayment to you at the time of your death under the rule in § 4022.81(d)(2)(i) by paying it to the person who is entitled to receive those continuing payments.) Payments do not continue after your death if—

(1) Your benefit is not in the form of a joint-and-survivor or other annuity under which payments may continue after your death (e.g., a certain-and-continuous annuity);

(2) Your benefit is in the form of a joint-and-survivor annuity and the person designated to receive survivor benefits died before you; or

(3) Your benefit is in the form of another type of annuity under which payments may continue after your death (e.g., a certain-and-continuous annuity) but you die with no payments owed for future periods.

(c) *Time of death.* These rules apply only if you die—

(1) On or after the date we take over your plan (as trustee); or

(2) Before the date we take over your plan, to the extent that, by that date, the plan administrator has not paid all benefits owed to you at the time of your death.

(d) *Effect of plan or will.* These rules apply even if there is a contrary provision in a plan or will.

### § 4022.92 What definitions do I need to know for these rules?

You need to know three definitions from § 4001.2 of this chapter (PBGC, person, and plan) and the following definitions:

“We” means the PBGC.

“You” means the person to whom we may owe benefits at the time of death.

### § 4022.93 Who will get benefits the PBGC may owe me at the time of my death?

(a) *In general.* Except as provided in paragraphs (b) and (c) of this section (which explain what happens if you die before the date we take over your plan or within 180 days after the date we take over your plan), we will pay any benefits we owe you at the time of your death to the person(s) surviving you in the following order—

(1) *Designee with the PBGC.* The person(s) you designated with us to get any benefits we may owe you at the time of your death. See § 4022.94 for information on designating with us.

(2) *Spouse.* Your spouse. We will consider a person to whom you are

married to be your spouse even if you and that person are separated, unless a decree of divorce or annulment has been entered in a court.

(3) *Children.* Your children and descendants of your deceased children.

(i) *Adopted children.* In determining who is a child or descendant, an adopted child is treated the same way as a natural child.

(ii) *Child dies before parent.* If one of your children dies before you, any of your grandchildren through that deceased child will equally divide that deceased child's share; if one of your grandchildren through that deceased child dies before that deceased child, any of your great-grandchildren through that deceased grandchild will equally divide that deceased grandchild's share; and so on.

(4) *Parents.* Your parents. A parent includes an adoptive parent.

(5) *Estate.* Your estate, provided your estate is open.

(6) *Next of kin.* Your next of kin in accordance with applicable state law.

(b) *Pre-trusteeship deaths.* If you die before the date we take over your plan and, by that date, the plan administrator has not paid all benefits owed to you at the time of your death, we will pay any benefits we owe you at the time of your death to the person(s) designated by or under the plan to get those benefits (provided the designation clearly applies to those benefits). If there is no such designation, we will pay those benefits to your spouse, children, parents, estate, or next of kin under the rules in paragraphs (a) (2) through (a)(6) of this section.

(c) *Deaths shortly after trusteeship.* If you die within 180 days after the date we take over your plan and you have not designated anyone with the PBGC under paragraph (a)(1) of this section, we will pay any benefits we owe you at the time of your death to the person(s) designated by or under the plan to get those benefits (provided the designation clearly applies to those benefits) before paying those benefits to your spouse, children, parents, estate, or next of kin under the rules in paragraphs (a) (2) through (a)(6) of this section.

### § 4022.94 What are the PBGC's rules on designating a person to get benefits the PBGC may owe me at the time of my death?

(a) *When you may designate.* At any time on or after the date we take over your plan, you may designate with us who will get any benefits we owe you at the time of your death.

(b) *Change of designee.* If you want to change the person(s) you designate with us, you must submit another designation to us.

(c) *If your designee dies before you.*

(1) *In general.* If the person(s) you designate with us dies before you or at the same time as you, we will treat you as not having designated anyone with us (unless you named an alternate designee who survives you). Therefore, you should keep your designation with us current.

(2) *Simultaneous deaths.* If you and a person you designated die as a result of the same event, we will treat you and that person as having died at the same time, provided you and that person die within 30 days of each other.

**§ 4022.95 Examples.**

The following examples show how the rules in §§ 4022.91 through 4022.94 apply. For examples on how these rules apply in the case of a certain-and-continuous annuity, see § 4022.104.

At the time of his death, Charlie was receiving payments under a joint-and-survivor annuity. Charlie designated Ellen to receive survivor benefits under his joint-and-survivor annuity. We underpaid Charlie for periods before his death. At the time of his death, we owed Charlie a back payment to reimburse him for those underpayments.

(a) *Example 1: where surviving beneficiary is alive at participant's death.* Ellen survived Charlie. As explained in § 4022.91(b), because Ellen is entitled to survivor benefits under the joint-and-survivor annuity, we would pay Ellen the back payment.

(b) *Example 2: where surviving beneficiary predeceases participant.* Ellen died before Charlie. As explained in §§ 4022.91(b) and 4022.93, because benefits do not continue after Charlie's death under the joint-and-survivor annuity, we would pay the back payment to the person(s) Charlie designated to receive any payments we might owe him at the time of his death. If Charlie did not designate anyone to receive those payments or his designee died before him, we would pay the back payment to the person(s) surviving Charlie in the following order: spouse, children, parents, estate and next of kin.

12. Add subpart G to part 4022 to read as follows:

**Subpart G—Certain-and-Continuous and Similar Annuity Payments Owed for Future Periods After Death**

Sec.

4022.101 When do these rules apply?

4022.102 What definitions do I need to know for these rules?

4022.103 Who will get benefits if I die when payments for future periods under a certain-and-continuous or similar annuity are owed upon my death?

4022.104 Examples.

**§ 4022.101 When do these rules apply?**

(a) *In general.* These rules (§§ 4022.101 through 4022.104) apply only if you die—

(1) *Required payments for future periods.* Without having received all required payments for future periods under a form of annuity promising that, regardless of a participant's death, there will be annuity payments for a certain period of time (e.g., a certain-and-continuous annuity) or until a certain amount is paid (e.g., a cash-refund annuity or installment-refund annuity);

(2) *No surviving beneficiary.* Without a surviving beneficiary designated to receive the payments described in paragraph (a)(1) of this section; and

(3) *Time of death.*

(i) On or after the date we take over your plan (as trustee); or

(ii) Before the date we take over your plan, to the extent that, by that date, the plan administrator has not paid any required payments for future periods.

(b) *Effect of plan or will.* These rules apply even if there is a contrary provision in a plan or will.

(c) *Payments owed at time of death.* See §§ 4022.91 through 4022.95 for rules that apply to benefits we may owe you at the time of your death, such as a correction for monthly underpayments.

**§ 4022.102 What definitions do I need to know for these rules?**

You need to know three definitions from § 4001.2 of this chapter (PBGC, person, and plan) and the following definitions:

“We” means the PBGC.

“You” means the person who might die—

(1) Without having received all required payments for future periods under a form of annuity promising that, regardless of a participant's death, there will be annuity payments for a certain period of time (e.g., a certain-and-continuous annuity) or until a certain amount is paid (e.g., a cash-refund annuity or installment-refund annuity); and

(2) Without a surviving beneficiary designated to receive the payments described in paragraph (1) of this definition.

**§ 4022.103 Who will get benefits if I die when payments for future periods under a certain-and-continuous or similar annuity are owed upon my death?**

If you die at a time when payments are owed for future periods under a form of annuity promising that, regardless of a participant's death, there will be annuity payments for a certain period of time (e.g., a certain-and-continuous annuity) or until a certain

amount is paid (e.g., a cash-refund annuity or installment-refund annuity), and there is no surviving beneficiary designated to receive such payments, we will pay the remaining payments to the person determined under the rules in § 4022.93.

**§ 4022.104 Examples.**

The following examples show how the rules in §§ 4022.101 through 4022.103 and 4022.91 through 4022.94 apply in the case of a certain-and-continuous annuity.

(a) *C&C annuity with no underpayment.* At the time of his death, Charlie was receiving payments (in the correct amount) under a 5-year certain-and-continuous annuity. Charlie designated Ellen to receive any payments we might owe for periods after his death (but did not designate an alternate beneficiary to receive those payments in case Ellen died before him). Charlie died with three years of payments remaining.

(1) *Example 1: where surviving beneficiary predeceases participant.* Ellen died before Charlie. As explained in §§ 4022.103 and 4022.93, we would pay the remaining three years of payments to the person(s) surviving Charlie in the following order: spouse, children, parents, estate and next of kin.

(2) *Example 2: where surviving beneficiary dies during certain period.* Ellen survived Charlie and lived another year. We pay Ellen one year of payments. As explained in §§ 4022.103 and 4022.93, we would pay the remaining two years of payments to the person Ellen designated to receive any payments we might owe for periods after Ellen's death. If Ellen did not designate anyone to receive those payments or her designee died before her, we would pay the remaining year of payments to the person(s) surviving Ellen in the following order: spouse, children, parents, estate, next of kin.

(b) *C&C annuity with underpayment.* At the time of his death, Charlie was receiving payments under a 5-year certain-and-continuous annuity. Charlie designated Ellen to receive any payments we might owe for periods after his death. We underpaid Charlie for periods before his death. At the time of his death, we owed Charlie a back payment to reimburse him for those underpayments.

(1) *Example 3: where participant dies during certain period.* Charlie died with three years of payments remaining. Ellen survived Charlie and lived at least another three years. We pay Ellen the remaining three years of payments. As explained in § 4022.91(b), because Ellen is entitled to survivor benefits under the certain-and-continuous annuity, we would pay Ellen the back payment for the underpayments to Charlie (and for any underpayments to Ellen).

(2) *Example 4: where participant and surviving beneficiary die during certain period.* Charlie died with three years of payments remaining. Ellen survived Charlie and lived another year. We paid Ellen one year of payments. Ellen designated Jean to receive any payments we might owe for periods after Ellen's death. Jean survived Ellen and lives at least another two years. We

pay Jean the remaining two years of payments. As explained in § 4022.91(b), because Jean is entitled to survivor benefits under the certain-and-continuous annuity, we would pay Jean the back payment for the underpayments to Charlie (and for any underpayments to Ellen).

(3) *Example 5: where participant dies after certain period.* Charlie died after receiving seven years of payments. As explained in §§ 4022.91(b) and 4022.93, because benefits do not continue after Charlie's death under the certain-and-continuous annuity, we would pay the back payment to the person(s) Charlie designated to receive any payments we might owe him at the time of his death in case he died after the end of certain period. If Charlie did not designate anyone to receive those payments or his designee died before him, we would pay the back payment to the person(s) surviving Charlie in the following order: spouse, children, parents, estate and next of kin.

## PART 4022B—AGGREGATE LIMITS ON GUARANTEED BENEFITS

13. The authority citation for part 4022B is added to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1322B.

14. Revise § 4022B.1 to read as follows:

### § 4022B.1 Aggregate payments limitation.

(a) *Benefits with respect to two or more plans.* If a person (or persons) is entitled to benefits payable with respect to one participant in two or more plans, the aggregate benefits payable by PBGC from its funds is limited by § 4022.22 of this chapter (without regard to § 4022.22(a)). The PBGC will determine the limitation as of the date of the last plan termination.

(b) *Benefits with respect to two or more participants.* The PBGC will not aggregate the benefits payable with respect to one participant with the benefits payable with respect to any other participant (e.g., if an individual is entitled to benefits both as a participant and as the spouse of a deceased participant).

## PART 4044—ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS

15. The authority citation for Part 4044 continues to read as follows:

**Authority:** 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

### § 4044.2 [Amended]

16. In § 4044.2(b), amend the definition of *Earliest retirement age at valuation date* by removing the words "earliest age at which the participant can retire under the terms of the plan" and adding in their place the words "participant's attained age as of his or her Earliest PBGC Retirement Date (as determined under § 4022.10 of this chapter)".

17. Revise § 4044.13 to read as follows:

### § 4044.13 Priority category 3 benefits.

(a) *Definition.* The benefits in priority category 3 are those annuity benefits that were in pay status before the beginning of the 3-year period ending on the termination date, and those annuity benefits that could have been in pay status (then or as of the next payment date under the plan's rules for starting benefit payments) for participants who, before the beginning of the 3-year period ending on the termination date, had reached their Earliest PBGC Retirement Date (as determined under § 4022.10 of this chapter based on plan provisions in effect on the day before the beginning of the 3-year period ending on the termination date). Benefit increases that were effective throughout the 5-year period ending on the termination date, including automatic benefit increases during that period to the extent provided in paragraph (b)(5) of this section, shall be included in determining the priority category 3 benefit. Benefits are primarily basic-type benefits, although nonbasic-type benefits will be included if any portion of a participant's priority category 3 benefit is not guaranteeable under the provisions of subpart A of part 4022 and § 4022.21 of this chapter.

(b) *Assigning benefits.* The annuity benefit that is assigned to priority category 3 with respect to each participant is the lowest annuity that was paid or payable under the rules in paragraphs (b)(2) through (b)(6) of this section.

(1) *Eligibility of participants and beneficiaries.* A participant or beneficiary is eligible for a priority category 3 benefit if either of the following applies:

(i) The participant's (or beneficiary's) benefit was in pay status before the beginning of the 3-year period ending on the termination date.

(ii) Before the beginning of the 3-year period ending on the termination date, the participant was eligible for an annuity benefit that could have been in pay status and had reached his or her Earliest PBGC Retirement Date (as determined in § 4022.10 of this chapter, based on plan provisions in effect on the day before the beginning of the 3-year period ending on the termination date). Whether a participant was eligible to receive an annuity before the beginning of the 3-year period shall be determined using the plan provisions in effect on the day before the beginning of the 3-year period.

(iii) If a participant described in either of the preceding two paragraphs died during the 3-year period ending on the date of the plan termination and his or her beneficiary is entitled to an annuity, the beneficiary is eligible for a priority category 3 benefit.

Issued in Washington, DC, this 2nd day of April, 2002.

**Elaine L. Chao,**

*Chairman, Board of Directors, Pension Benefit Guaranty Corporation.*

Issued on the date set forth above pursuant to a resolution of the Board of Directors authorizing its Chairman to issue this final rule.

**James J. Keightley,**

*Secretary, Board of Directors, Pension Benefit Guaranty Corporation.*

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