

Dated: February 14, 2007.

**Kenneth C. Clayton,**

*Acting Administrator.*

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## PENSION BENEFIT GUARANTY CORPORATION

### 29 CFR Parts 4006 and 4007

RIN 1212-AB10

#### Premium Rates; Payment of Premiums; Flat Premium Rates, Variable-Rate Premium Cap, and Termination Premium; Deficit Reduction Act of 2005; Pension Protection Act of 2006

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Proposed rule.

**SUMMARY:** This is a proposed rule to amend PBGC's regulations on Premium Rates and Payment of Premiums to implement certain provisions of the Deficit Reduction Act of 2005 (Pub. L. 109-171) and the Pension Protection Act of 2006 (Pub. L. 109-280) that are effective beginning in 2006 or 2007. The provisions that would be implemented by this rule change the flat premium rate, cap the variable-rate premium in some cases, and create a new "termination premium" that is payable in connection with certain distress and involuntary plan terminations. This rule does not address other provisions of the Pension Protection Act of 2006 that deal with PBGC premiums.

**DATES:** Comments must be submitted on or before April 23, 2007.

**ADDRESSES:** Comments, identified by RIN number 1212-AB10, may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the Web site instructions for submitting comments.

- *E-mail:* [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov).

- *Fax:* 202-326-4224.

- *Mail or Hand Delivery:* Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005-4026.

All submissions must include the Regulatory Information Number for this rulemaking (RIN 1212-AB10). Comments received, including personal information provided, will be posted to [www.pbgc.gov](http://www.pbgc.gov). Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit

Guaranty Corporation, 1200 K Street, NW., Washington DC 20005-4026, or calling 202-326-4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4040.)

**FOR FURTHER INFORMATION CONTACT:** John H. Hanley, Director, Legislative and Regulatory Department; or Catherine B. Klion, Manager, or Deborah C. Murphy, Attorney, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington DC 20005-4026; 202-326-4024. (TTY/TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4024.)

#### SUPPLEMENTARY INFORMATION:

##### Background

Pension Benefit Guaranty Corporation (PBGC) administers the pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Pension plans covered by Title IV must pay premiums to PBGC. Section 4006 of ERISA deals with premium rates, and section 4007 of ERISA deals with the payment of premiums, including premium due dates, interest and penalties on premiums not timely paid, and persons liable for premiums.

On February 8, 2006, the President signed into law the Deficit Reduction Act of 2005, Pub. L. 109-171 (DRA 2005). Section 8101 of DRA 2005 amends section 4006 of ERISA. Section 8101(a) changes the per-participant flat premium rate for plan years beginning in 2006 from \$19 to \$30 for single-employer plans and from \$2.60 to \$8 for multiemployer plans and provides for inflation adjustments to the flat rates for future years. Section 8101(b) creates a new "termination premium" (in addition to the flat-rate and variable-rate premiums under section 4006(a)(3)(A) and (E) of ERISA) that is payable for three years following certain distress and involuntary plan terminations that occur after 2005.

On August 17, 2006, the President signed into law the Pension Protection Act of 2006, Pub. L. 109-280 (PPA 2006). Sections 401(b) and 402(g)(2)(B) of PPA 2006 make changes to the termination premium rules of DRA 2005. Section 405 of PPA 2006 amends section 4006 of ERISA to cap the variable-rate premium for plans of certain small employers beginning in 2007. (PPA 2006 also makes other changes affecting PBGC premiums that are not addressed in this rule.)

This rule would amend PBGC's regulations on Premium Rates (29 CFR Part 4006) and Payment of Premiums (29 CFR Part 4007) to conform to these requirements of DRA 2005 and PPA 2006 and to clarify how the requirements apply.

##### Flat-Rate Premium

Until the enactment of DRA 2005, the flat-rate premium had remained unchanged for single-employer plans since 1991 and for multiemployer plans since 1989. Section 8101(a) of DRA 2005 amends section 4006(a)(3)(A) of ERISA and adds new subparagraphs (F) and (G) to the end of section 4006(a)(3) of ERISA to raise the flat premium rates for 2006 for both single- and multiemployer plans and to provide for inflation indexing for future years.

##### Applicability

Before amendment by DRA 2005, section 4006(a)(3)(A) of ERISA provided (in part) that " \* \* \* the annual premium rate \* \* \* is \* \* \* in the case of a single-employer plan, for plan years beginning after December 31, 1990, an amount equal to the sum of \$19 plus the [per-participant variable-rate premium] under subparagraph (E) for each \* \* \* participant \* \* \*" Section 8101(a)(1)(A) of DRA 2005 changes " \$19 " to read " \$30. " Thus, the amended text of ERISA, read literally, makes it appear that the \$30 single-employer flat-rate premium applies to plan years beginning after 1990. However, section 8101(d)(1) of DRA 2005 (which does not amend ERISA) says that this change applies to plan years beginning after December 31, 2005. Accordingly, PBGC considers single-employer flat premium rates for plan years beginning before 2006 to be unaffected by DRA 2005.

##### Participant Count

Section 8101(a)(2)(A)(ii) of DRA 2005 adds a new clause (iv) to section 4006(a)(3)(A) of ERISA providing that the flat premium rate for a multiemployer plan for a post-2005 plan year is " \$8.00 for each individual who is a participant in such plan during the applicable plan year. " PBGC interprets this to mean that the participant count is to be taken as of the premium snapshot date described in the premium rates regulation and PBGC's premium instructions (generally the last day of the plan year preceding the premium payment year). This is consistent with PBGC's interpretation of the nearly identical language in existing section 4006(a)(3)(A)(i) of ERISA.

### *Inflation Adjustments*

Section 8101(a)(1)(B) and (2)(B) of DRA 2005 add to section 4006(a)(3) of ERISA substantially identical new subparagraphs (F) and (G) providing for inflation adjustments to the \$30 and \$8 flat rates for plan years beginning after 2006. The adjustments are based on changes in the national average wage index as defined in section 209(k)(1) of the Social Security Act, with a two-year lag—for example, for 2007, it will be the 2005 index that will be compared to the baseline (the 2004 index). However, new subparagraphs (F) and (G) are written in such a way that the premium rate can never go down; if the change in the national average wage index is negative, the premium rate remains the same as in the preceding year. Also, under new subparagraphs (F) and (G), premium rates are rounded to the nearest whole dollar. PBGC interprets this to mean that if the adjustment formula would produce an unrounded premium rate of some number of dollars plus 50 cents, the premium rate will be rounded up.

### *Regulatory Provisions*

This rule would amend § 4006.3 of the premium rates regulation to reflect the changes to the flat-rate premium made by section 8101(a) of DRA 2005. Existing paragraphs (a)(1) and (a)(2) of § 4006.3 (setting forth the \$19 and \$2.60 flat rates) would be removed, and a cross-reference to new § 4006.3(c) would be provided instead. Paragraph (1) of new § 4006.3(c) provides pre-2006 rates (\$19 and \$2.60); paragraph (2) provides 2006 rates (\$30 and \$8); and paragraph (3) provides post-2006 rates (the greater of the preceding year's rate or the inflation-adjusted rate). The inflation adjustment is described in new § 4006.3(d).

### **Variable-Rate Premium**

Section 405 of PPA 2006 amends section 4006(a)(3)(E)(i) of ERISA and adds new subparagraph (H) to the end of section 4006(a)(3) to cap the variable-rate premium for certain plans, effective for plan years beginning after 2006.

### *Plans Covered*

Clause (i) of new section 4006(a)(3)(H) of ERISA says that the new variable-rate premium cap applies “[i]n the case of an employer who has 25 or fewer employees on the first day of the plan year.” But clause (ii) of new section 4006(a)(3)(H) of ERISA makes clear that the applicability of the new cap does not necessarily depend on the size of a single employer, but rather depends on the size of a plan's controlled group, that is, the aggregate size of “all

contributing sponsors and their controlled groups.” (See the definition of “controlled group” in § 4001.2 of PBGC's regulation on Terminology (29 CFR Part 4001), which provides that “[a]ny reference to a plan's controlled group means all contributing sponsors of the plan and all members of each contributing sponsor's controlled group”). Since a plan maintained by one contributing sponsor may or may not also be maintained by one or more other contributing sponsors that are not in the first sponsor's controlled group, the applicability of the cap must be determined plan by plan, not employer by employer.

### *Meaning of “employee”*

New section 4006(a)(3)(H) of ERISA does not give guidance as to the meaning of the term “employee.” PBGC proposes to define “employee” for this purpose by reference to section 410(b)(1) of the Internal Revenue Code, which deals with minimum coverage requirements for qualified plans and requires that employees be counted to evaluate the breadth of coverage of a plan. For this purpose, certain individuals may be counted as “employees” although they might not be considered common law employees of the employer—for example, affiliated service group employees (under Code section 414(m)) and leased employees (under Code section 414(n)). PBGC considers this approach appropriate to prevent an employer from qualifying for the cap by artificially lowering its employee count through the use of sophisticated business structuring devices. In addition, in order to ensure that all employees are counted, PBGC proposes that the employee count be determined without regard to Code section 410(b)(3), (4), and (5), which might be considered to exclude from the count collective bargaining employees, employees not meeting a plan's age and service requirements, and employees in separate lines of business.

### *Cap Amount*

Under new section 4006(a)(3)(H)(i) of ERISA, the per-participant variable-rate premium is capped at “\$5 multiplied by the number of participants in the plan as of the close of the preceding plan year.” PBGC interprets this to mean that the participant count is to be taken as of the premium snapshot date described in the premium rates regulation and PBGC's premium instructions (generally the last day of the plan year preceding the premium payment year). This is consistent with PBGC's interpretation of the nearly identical language in existing section 4006(a)(3)(E)(i) of ERISA. This

participant count is the same as the count used as a multiplier under section 4006(a)(3)(A)(i) of ERISA for purposes of both the flat- and variable-rate premiums. Thus, an eligible plan's total variable-rate premium is capped at an amount equal to \$5 multiplied by the square of the participant count.

### *Regulatory Provisions*

This rule would revise § 4006.3(b) of the premium rates regulation to reflect the new cap on the variable-rate premium added by section 405 of PPA 2006. The existing variable-rate premium is described in new paragraph (b)(1) of § 4006.3. The cap is described in new paragraph (b)(2); plans eligible for the cap in new paragraph (b)(3); and the meaning of the term “employee” in new paragraph (b)(4). Paragraph (b)(2) includes an example of the computation of the cap taken from page 95 of the Technical Explanation of H.R. 4, the “Pension Protection Act of 2006,” as Passed by the House on July 28, 2006, and as Considered by the Senate on August 3, 2006, Prepared by the Staff of the Joint Committee on Taxation (August 3, 2006) (<http://www.house.gov/jct/x-38-06.pdf>).

### **Termination Premium**

Section 8101(b) of DRA 2005 adds a new paragraph (7) to the end of section 4006(a) of ERISA, creating a new “termination premium” that applies only where certain distress and involuntary terminations occur and then only for three years. However, although only section 4006 of ERISA is amended, subparagraph (D) of new paragraph (7) in effect modifies section 4007 of ERISA as well. Sections 401(b) and 402(g)(2)(B) of PPA 2006 make changes to the termination premium rules of DRA 2005.

### *Termination Dates Covered*

Section 8101(d)(2)(A) of DRA 2005 (which does not amend ERISA) restricts the new termination premium to “plans terminated after December 31, 2005.” (Section 401(b)(1) of PPA 2006 repeals new section 4006(a)(7)(E) of ERISA, added by DRA 2005, which provided that the termination premium would not apply “with respect to any plan terminated after December 31, 2010.”)

Section 8101(d)(2)(B) of DRA 2005 further restricts the application of the new termination premium in certain bankruptcy situations. If a plan “is terminated during the pendency of any bankruptcy reorganization proceeding under chapter 11 of title 11, United States Code (or under any similar law of a State or political subdivision of a State),” the new premium does not

apply “if the proceeding is pursuant to a bankruptcy filing occurring before October 18, 2005.” Under section 402(g)(2)(B)(ii) of PPA 2006, this limitation does not apply to an “eligible plan” under section 402(c)(1) of PPA 2006 (generally a plan of a commercial passenger airline or airline catering service) while a funding election under section 402(a)(1) of PPA 2006 is in effect for the plan.

These time restrictions on the applicability of the new premium turn on when a plan is “terminated.” PBGC believes that the most natural reading of these provisions is that the date to look to is the termination date under section 4048 of ERISA. Focusing on the section 4048 termination date is also consistent with other provisions of DRA 2005 and implementing regulations discussed below.

#### *Types of Terminations Covered*

Under new section 4006(a)(7)(A) of ERISA, the termination premium applies where “there is a termination of a single-employer plan under clause (ii) or (iii) of section 4041(c)(2)(B) [of ERISA] or section 4042 [of ERISA].” Section 4041(c) of ERISA provides for distress terminations; ERISA section 4042 provides for involuntary terminations.

Under ERISA section 4041(c)(1), a distress termination of a plan may occur only if each contributing sponsor and each member of any contributing sponsor’s controlled group meets one of the “distress tests” in clauses (i), (ii), and (iii) of section 4041(c)(2)(B). The tests are that the person is the subject of a bankruptcy liquidation proceeding (clause (i)), that the person is the subject of a bankruptcy reorganization proceeding (clause (ii)), or that the person is suffering business hardship (clause (iii)).

Although typically all contributing sponsors and controlled group members meet the same distress test, that is not required for a distress termination under section 4041(c). Thus, while terminations where all contributing sponsors and controlled group members meet the test in clause (i) seem to be excluded from applicability of the termination premium, it is not clear from the statutory language whether the termination premium is to apply to terminations where one or more contributing sponsors and/or controlled group members meet the clause (i) test but others meet the tests in clauses (ii) and/or (iii). Examples of such situations would be where there are two contributing sponsors, one liquidating and one reorganizing; where the sole contributing sponsor is liquidating but

there are controlled group members that are reorganizing; and where the sole contributing sponsor is reorganizing but the controlled group members are liquidating.

The statutory language provides no basis for distinguishing among these examples or others that might be cited. All contributing sponsors and controlled group members are liable for plan underfunding under ERISA section 4062 and (as discussed below) for the termination premium (if it applies), and they must all satisfy one or another distress test under ERISA section 4041(c)(2)(B) for a distress termination to take place. This suggests that all these entities should be considered responsible as a group for the consequences of plan termination and that the fact that one entity among several is liquidating should not shield the others from liability. PBGC thus interprets new section 4006(a)(7)(A) of ERISA as applying the termination premium in any distress termination case where at least one contributing sponsor or controlled group member meets the distress test in either clause (ii) or (iii) of section 4041(c)(2)(B) (i.e., is not liquidating).

#### *Payors*

Section 4007(a) of ERISA places responsibility for paying PBGC premiums on the “designated payor” of a plan, and section 4007(e)(1)(A) of ERISA identifies the designated payor of a single-employer plan as the contributing sponsor or plan administrator. However, new section 4006(a)(7)(D)(i)(II) of ERISA, as added by section 8101(b) of DRA 2005, provides that notwithstanding section 4007, the designated payor of the new termination premium is “the person who is the contributing sponsor as of immediately before the termination date.” It thus appears that the designated payor is to be identified as of the day before the termination date under section 4048 of ERISA. Similarly, this rule provides for identification of members of the contributing sponsor’s controlled group (which are jointly and severally liable for premiums under section 4007(e)(2) of ERISA) as of the same day.

#### *Participants*

Under new section 4006(a)(7)(A) of ERISA, the termination premium is based on the number of “participants in the plan immediately before the termination date.” It thus appears that participants are to be counted—for purposes of computing the termination premium—as of the day before the termination date under section 4048 of

ERISA (the same day on which the contributing sponsor and controlled group members are determined). Section 4006.6 of the premium rates regulation already includes a definition of “participant” (which is used in computing the flat-rate premium), and DRA 2005 suggests no reason to depart from that definition for purposes of the termination premium.

#### *Due Dates*

The termination premium is payable each year for three years. Under new section 4006(a)(7)(D)(i)(I) of ERISA, as added by section 8101(b) of DRA 2005, the new premium is due within 30 days after the beginning of each of three “applicable 12-month periods,” which are in turn described in new section 4006(a)(7)(C). New section 4006(a)(7)(C)(i)(I) provides that in general, the first applicable 12-month period starts with “the first month following the month in which the termination date occurs.” (From this it is evident that calendar months are meant.) Under new section 4006(a)(7)(C)(i)(II), the second and third applicable 12-month periods are simply the two 12-month periods that follow the first applicable 12-month period.

But new section 4006(a)(7)(C)(ii) of ERISA defers the beginning of the first applicable 12-month period (and thus the due dates) in certain bankruptcy reorganization cases. This deferral rule comes into play where “the requirements of subparagraph (B) [of new section 4006(a)(7) of ERISA] are met in connection with the termination of the plan \* \* \*.” (Section 401(b)(2) of PPA 2006 corrected an erroneous reference to “subparagraph (B)(i)(I)” in new section 4006(a)(7)(C)(ii) of ERISA.) Subparagraph (B) of new section 4006(a)(7)(B) of ERISA defers the applicability of the termination premium for distress or involuntary plan terminations that occur when bankruptcy reorganization proceedings are pending for terminations “under section 4041(c)(2)(B)(ii) [of ERISA] or under section 4042 [of ERISA].” Following the same reasoning discussed above regarding new section 4006(a)(7)(A) of ERISA (the general termination premium applicability provision), PBGC concludes that the bankruptcy reorganization deferral provision in new section 4006(a)(7)(B) of ERISA is meant to apply to a distress termination only when at least one contributing sponsor or controlled group member satisfies the bankruptcy reorganization test in section 4041(c)(2)(B)(ii).

In order for the due date deferral rule in new section 4006(a)(7)(C)(ii) of

ERISA to apply, the requirements of subparagraph (B) of section 4006(a)(7) of ERISA must be met “with respect to 1 or more persons described in such subparagraph” (that is, one or more persons must be reorganizing in bankruptcy as described in subparagraph (B)). If so, then the first applicable 12-month period begins with “the first month following the month which includes the earliest date as of which each such person is discharged or dismissed in the case described in such clause [sic] in connection with such person.” (The only clause mentioned in section 4006(a)(7)(C)(ii) of ERISA is clause (i)(I) of section 4006(a)(7)(C), which describes the first applicable 12-month period that applies if the special bankruptcy rule does not. Thus the reference to “such clause” appears to be intended to refer to “such subparagraph”—that is, subparagraph (B)—and PBGC so interprets the reference.)

However, although subparagraph (B) of new section 4006(a)(7) of ERISA describes a case—a bankruptcy case—it does not describe a person. The only person mentioned in subparagraph (B) is “such person,” with no cross-reference to another place where the person is described. Nonetheless, it seems clear that the person referred to must be a person that has a relationship to both the plan and the bankruptcy proceeding mentioned in subparagraph (B). Subparagraph (B) contains parenthetical language that is essentially identical to parenthetical language that appears in section 4041(c)(2)(B)(ii) of ERISA (which describes the bankruptcy reorganization test for distress terminations). In section 4041(c)(2)(B)(ii), the words “such person” in the parenthetical language refer to a contributing sponsor or member of a contributing sponsor’s controlled group. PBGC infers that “such person” in new section 4006(a)(7)(B) of ERISA is meant to refer likewise to a contributing sponsor of the terminated plan or member of a contributing sponsor’s controlled group—determined with the designated payor provision in new section 4007(a)(7)(D)(i)(II) as of the day before the termination date under section 4048 of ERISA.

This inference is supported by the observation that these same persons—contributing sponsors and controlled group members—are the persons liable for the termination premium. It appears that Congress’ intent was to defer the due date for the termination premium until the persons liable to pay it were not in bankruptcy proceedings. Accordingly, where the special

bankruptcy rule for due dates applies, it is necessary to identify every contributing sponsor and controlled group member that was involved in bankruptcy reorganization proceedings on the termination date and determine the date when each one left bankruptcy—through dismissal of or discharge from the proceeding—or ceased to exist. (If an entity ceases to exist, its failure to emerge from bankruptcy should not postpone the termination premium due date.) Under new section 4006(a)(7)(C)(ii), the first applicable 12-month period for the termination will then begin with the calendar month that next begins following the last such date.

One due date issue not addressed by the statute is that the agreement or court action establishing a plan’s termination date under ERISA section 4048 may occur well after the termination date so established. Where a termination date is thus “retroactively” set, one or more statutory due dates for the termination premium may already have passed when the termination date becomes known. Thus, termination premium payments could be overdue before it was determined that they were owed.

In cases of that kind, PBGC considers it appropriate to provide that where the termination date is set retroactively, the first applicable 12-month period does not begin immediately after the month in which the termination date falls, but rather begins immediately after the month in which the termination date is established. Where the special bankruptcy rule for due dates applies, this rule would come into play if the termination date was established after all contributing sponsors and controlled group members were out of bankruptcy reorganization proceedings, and would defer the beginning of the first applicable 12-month period until immediately after the month in which the termination date was established.

#### *Other Bankruptcy Issues*

The parenthetical language in new section 4006(a)(7)(B) of ERISA—“(or a case described in section 4041(c)(2)(B)(i) filed by or against such person has been converted, as of such date, to such a case in which reorganization is sought)” —shows that Congress focused on the fact that bankruptcy proceedings can be converted back and forth between liquidation and reorganization proceedings. But neither section 4006(a)(7)(B) nor section 4006(a)(7)(C)(ii) (which describes the special first applicable 12-month period) mentions conversion of a reorganization case to a liquidation case as being sufficient to trigger the

beginning of the first applicable 12-month period. It thus appears that even after such a conversion, the first applicable 12-month period would be postponed until the (liquidation) bankruptcy proceeding were dismissed or the contributing sponsor or controlled group member discharged. This could be of significance where there were other persons liable for the termination premium that were not (or were no longer) in bankruptcy.

Section 8101(d)(2)(B) of DRA 2005 (which, as discussed above, excludes from the termination premium terminations that occur during the pendency of bankruptcy reorganization proceedings pursuant to a filing before October 18, 2005) says nothing about the persons involved in such proceedings. Following the reasoning above, PBGC concludes that section 8101(d)(2)(B) is intended to apply only where the subject of a pending bankruptcy proceeding is a contributing sponsor of the terminated plan or a member of a contributing sponsor’s controlled group (and that these persons are to be identified as of the day before the termination date under section 4048 of ERISA). Section 8101(d)(2)(B) also does not mention conversion of a bankruptcy case from a liquidation proceeding to a reorganization, as new section 4006(a)(7)(B) of ERISA does. But the language of section 8101(d)(2)(B) is consistent with the interpretation that—like section 4006(a)(7)(B)—it covers bankruptcy proceedings begun as liquidation proceedings and converted to reorganization proceedings before the termination date under section 4048 of ERISA.

#### *Termination Premium Rate*

Under new section 4006(a)(7) of ERISA as added by section 8101(b) of DRA 2005, the termination premium is \$1,250 per participant per year for three years. But under section 402(g)(2)(B) of PPA 2006 (which does not amend ERISA), the rate is increased from \$1,250 to \$2,500 where a commercial passenger airline or airline catering service elects funding relief (an extended underfunding amortization period and lenient assumptions for valuing liabilities) for a frozen plan under section 402(a)(1) of PPA 2006, if the plan terminates during the first five years of the funding relief period, unless the Secretary of Labor determines that the termination resulted from extraordinary circumstances such as a terrorist attack or other similar event.

#### *Regulatory Provisions*

This rule would add a new § 4006.7 to the premium rates regulation

providing that the amount of the termination premium with respect to each applicable 12-month period is the premium rate (generally \$1,250) times the number of participants, determined as of the day before the termination date, with a cross-reference from § 4006.3 (where the flat and variable premium rates are set forth). New § 4006.7(b) also explains the circumstances in which the termination premium rate is \$2,500 rather than \$1,250. In addition, the rule would add a new § 4007.13 to the premium payment regulation (with a cross-reference from § 4006.7), where the rest of the provisions about the termination premium are found.

New § 4007.13 contains provisions specific to the termination premium, and it supplements provisions in existing sections of Part 4007 that also apply to the termination premium. Section 4007.13(a) describes when the termination premium applies; § 4007.13(d), (e), and (f) deal with due dates; § 4007.13(g) deals with what persons are liable for the termination premium. The provisions on these three topics reflect the discussions above.

Section 4007.13(b) makes each contributing sponsor and controlled group member (determined as of the day before the termination date under section 4048 of ERISA) responsible for filing required termination premium information and payments, and (where there is more than one such person) provides that any one can file on behalf of all of them. This provision ensures that, so long as there is at least one person still in existence that is liable for the termination premium, there will be at least one identifiable entity with responsibility to file. This provision is similar to § 4010.3 of PBGC's regulation on Annual Financial and Actuarial Information Reporting (Part 4010 of PBGC's regulations) and § 4043.3(a) of PBGC's regulation on Reportable Events and Certain Other Notification Requirements (Part 4043 of PBGC's regulations). Thus, only a single filing of the premium and required premium information is required, but if it is not timely made, PBGC could seek enforcement against any or all contributing sponsors and controlled group members.

Section 4007.13(c) provides for a discretionary "facts-and-circumstances" penalty for failure to pay the termination premium timely, instead of the automatic 1 percent or 5 percent penalty that applies to late payment of flat- and variable-rate premiums under § 4007.8(a). PBGC wants to preserve flexibility in penalizing failures to pay the new premium in full and on time

while it gains experience with the new premium. The penalty is limited to 100 percent of the amount of termination premium not timely filed.

In addition, this rule would amend several sections in the existing premium payment regulation to eliminate inconsistencies or potential inconsistencies between existing language in those sections and the termination premium provisions.

#### Technical Changes

PBGC is taking this opportunity to make some technical changes (unrelated to DRA 2005 or PPA 2006) to its regulations on Premium Rates and Payment of Premiums.

Section 4006.3 of the premium rates regulation refers to basic benefits guaranteed under section 4022(a) of ERISA (which relates only to single-employer plans) and omits mention of section 4022A(a) of ERISA (which relates to multi-employer plans). This rule would add a reference to section 4022A(a).

Section 4007.11(d) of the premium payment regulation states that where proration of the flat- and variable-rate premiums is available under § 4006.5(f) of the premium rates regulation, the un-prorated premium must be paid in full (even if the plan would be entitled to a refund). This provision is anachronistic: PBGC now permits payment of the prorated amount under § 4006.5(f), rather than requiring that a filer pay the un-prorated amount and request a refund. This rule would remove the outdated provision.

Section 4007.11(e) of the premium payment regulation permits PBGC to return improper filings and consider them not made. PBGC is not exercising this authority, and the provision is unnecessary; PBGC has authority to assess penalties under ERISA section 4071 for failure to submit material information under the premium payment regulation. This rule would remove § 4007.11(e).

#### Applicability

The regulatory changes made by this rule to implement the provisions of section 8101 of DRA 2005 would apply (as section 8101 of DRA 2005 does) to plan years beginning after 2005 and to terminations with termination dates after 2005 (subject to the special rule for bankruptcies filed before October 18, 2005). The regulatory changes made by this rule to implement the provisions of section 405 of PPA 2006 would apply (as section 405 of PPA 2006 does) to plan years beginning after 2006.

#### Compliance With Rulemaking Guidelines

The PBGC has determined, in consultation with the Office of Management and Budget, that this proposed rule is a "significant regulatory action" under Executive Order 12866. The Office of Management and Budget, therefore, has reviewed the rule under Executive Order 12866.

PBGC certifies under section 605(b) of the Regulatory Flexibility Act that the amendments in this rule will not have a significant economic impact on a substantial number of small entities. This rule implements statutory changes made by Congress. It provides guidance on how to calculate, pay, and substantiate the premiums prescribed by statute and imposes no significant burden beyond the burden imposed by statute. Furthermore:

- The statutorily imposed increase in the flat-rate premium is at most \$11 per participant per year, which does not constitute a significant economic impact where a plan has a small number of participants. Although the flat-rate premium will increase as the number of participants increases, the economic impact of the flat-rate premium relative to the size of the entity will remain fairly constant and will not be significant for a substantial number of entities of any size.

- The statutorily imposed cap on the variable-rate premium will save qualifying plans money. The rule simply interprets the statutory provisions.

- The statutorily imposed termination premium will not affect a substantial number of entities of any size.

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.

The information requirements relating to the flat-rate and variable-rate premiums have been approved by the Office of Management and Budget under the Paperwork Reduction Act (OMB control number 1212-0009, expires April 30, 2008).

PBGC is submitting the information requirements relating to the termination premium to the Office of Management and Budget for review and approval under the Paperwork Reduction Act. Copies of PBGC's request may be obtained free of charge by contacting the Disclosure Division of the Office of the General Counsel of PBGC, 1200 K Street, NW., Washington, DC 20005, 202-326-4040.

PBGC needs this information to identify the plan for which a termination premium is paid to PBGC,

to verify the determination of the premium, and to identify the persons liable for the premium.

PBGC expects that it will receive termination premium filings from about 30 contributing sponsors or controlled group members annually and that the total annual burden of the collection of information will be about 40 hours and \$264,000.

Comments on the paperwork provisions under this proposed rule should be mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Pension Benefit Guaranty Corporation, Washington, DC 20503. Although comments may be submitted through April 23, 2007, the Office of Management and Budget requests that comments be received on or before March 22, 2007 to ensure their consideration. Comments may address (among other things)—

- Whether the proposed collection of information is needed for the proper performance of PBGC's functions and will have practical utility;
- The accuracy of PBGC's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancement of the quality, utility, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

#### List of Subjects

##### 29 CFR Part 4006

Pension insurance, Pensions.

##### 29 CFR Part 4007

Penalties, Pension insurance, Pensions, Reporting and recordkeeping requirements.

For the reasons given above, PBGC is amending 29 CFR parts 4006 and 4007 as follows.

#### PART 4006—PREMIUM RATES

1. The authority citation for part 4006 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1306, 1307.

2. In § 4006.3:

a. The introductory text is amended by removing the words “§ 4006.5 (dealing with exemptions and special

rules)” and adding in their place the words “§ 4006.5 (dealing with exemptions and special rules) and § 4006.7 (dealing with premiums for certain terminated single-employer plans)”; and by removing the words “section 4022(a)” and adding in their place the words “section 4022(a) or section 4022A(a)”.

b. Paragraph (a) introductory text is amended by removing the words “multiplied by—” and adding in their place the words “multiplied by the applicable flat premium rate determined under paragraph (c) of this section.”.

c. Paragraphs (a)(1) and (a)(2) are removed.

d. Paragraph (b) is revised, and new paragraphs (c) and (d) are added, to read as follows:

#### § 4006.3 Premium rate.

\* \* \* \* \*

(b) *Variable-rate premium.*

(1) *In general.* Subject to the limitation in paragraph (b)(2) of this section, the variable-rate premium is \$9 for each \$1,000 of a single-employer plan's unfunded vested benefits, as determined under § 4006.4.

(2) *Cap on variable-rate premium.* If a plan is described in paragraph (b)(3) of this section for the premium payment year, the variable-rate premium does not exceed \$5 multiplied by the square of the number of participants in the plan on the last day of the plan year preceding the premium payment year. For example, if the number of participants in the plan on the last day of the plan year preceding the premium payment year is 20, the variable-rate premium does not exceed \$2,000 ( $5 \times 20^2 = 5 \times 400 = \$2,000$ ).

(3) *Plans eligible for cap.* A plan is described in this paragraph (b)(3) for the premium payment year if the aggregate number of employees of all employers in the plan's controlled group on the first day of the premium payment year is 25 or fewer.

(4) *Meaning of “employee.”* For purposes of paragraph (b)(3) of this section, the aggregate number of employees is determined in the same manner as under section 410(b)(1) of the Code, taking into account the provisions of section 414(m) and (n) of the Code, but without regard to section 410(b)(3), (4), and (5) of the Code.

(c) *Applicable flat premium rate.* The applicable flat premium rate is:

- (1) For a premium payment year beginning before 2006—
  - (i) For a single-employer plan, \$19, and
  - (ii) For a multiemployer plan, \$2.60.
- (2) For a premium payment year beginning in 2006—

(i) For a single-employer plan, \$30, and

(ii) For a multiemployer plan, \$8.

(3) For a premium payment year beginning after 2006, the greater of—

(i) The applicable flat premium rate for plan years beginning in the calendar year preceding the calendar year in which the premium payment year begins, or

(ii) The adjusted flat rate determined under paragraph (d) of this section for the premium payment year.

(d) *Adjusted flat rate.* The adjusted flat rate for a premium payment year beginning after 2006 is determined by—

(1) Multiplying the applicable flat premium rate for 2006 by the ratio of—

(i) The national average wage index (as defined in section 209(k)(1) of the Social Security Act) for the first of the two calendar years preceding the calendar year in which the premium payment year begins, to

(ii) The national average wage index (as so defined) for 2004; and

(2) Rounding the result to the nearest multiple of \$1 (rounding up any unrounded result that equals some whole number of dollars plus 50 cents).

3. New § 4006.7 is added to read as follows:

#### § 4006.7 Premium rate for certain terminated single-employer plans.

(a) The premium under this section (“termination premium”) applies to a DRA 2005 termination described in § 4007.13 of this chapter.

(b) The amount of the premium under this section that is payable with respect to each applicable 12-month period (as described in § 4007.13 of this chapter) is the number of participants in the plan, determined as of the day before the termination date under section 4048 of ERISA, multiplied by the termination premium rate. In general, the termination premium rate is \$1,250. However, the termination premium rate is \$2,500 for an “eligible plan” under section 402(c)(1) of the Pension Protection Act of 2006 (dealing with certain plans of commercial passenger airlines and airline catering services) while an election under section 402(a)(1) of the Pension Protection Act of 2006 (dealing with alternative funding schedules) is in effect for the plan if the plan terminates during the five-year period beginning on the first day of the first applicable plan year (as defined in section 402(c)(2) of that Act) with respect to the plan, unless the Secretary of Labor determines that the plan terminated as a result of extraordinary circumstances such as a terrorist attack or other similar event.

(c) The premium under this section is in addition to any other premium under this part.

(d) See § 4007.13 of this chapter for further rules about termination premiums.

#### PART 4007—PAYMENT OF PREMIUMS

4. The authority citation for part 4007 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1303(a), 1306, 1307.

5. Section 4007.3 is amended by removing the words “The plan administrator” and adding in their place the words “Subject to the provisions of § 4007.13, the plan administrator”; and by removing “§ 4007.11” and adding in its place the words “this part”.

6. In § 4007.7, paragraph (a) is amended by removing “§ 4007.11” and adding in its place the words “this part”.

7. In § 4007.8:

a. Paragraph (a) introductory text is amended by removing the words “If any premium payment due” and adding in their place the words “Subject to the provisions of § 4007.13, if any premium payment due”; and by removing “§ 4007.11” and adding in its place the words “this part”.

b. Paragraph (a)(1)(i) is amended by removing the word “plan’s”.

c. Paragraph (a)(1) introductory text is revised to read as follows:

#### § 4007.8 Late payment penalty charges.

(a) *Penalty charge.* \* \* \*

(1) *Penalty rate; in general.* Except as provided in paragraph (a)(2) of this section, the penalty rate is—

\* \* \* \* \*

8. In § 4007.9, paragraph (a) is amended by removing the words “by a plan administrator”; and by removing the words “that plan’s” and adding in their place the words “a plan’s”.

9. In § 4007.10:

a. Paragraph (a)(1) is amended by removing the words “plan administrator” and adding in their place the words “designated recordkeeper under paragraph (a)(3) of this section”.

b. Paragraph (a)(2) is amended by removing the words “The plan administrator” and adding in their place the words “A designated recordkeeper”.

c. Paragraph (b) is amended by removing the words “for any premium payment year”.

d. Paragraph (c)(1) is amended by removing the words “The plan administrator” and adding in their place the words “A designated recordkeeper”.

e. Paragraph (c)(2) is amended by removing the words “the plan administrator” and adding in their place the words “a designated recordkeeper”.

f. Paragraph (c)(2)(ii) is amended by removing the words “plan administrator” and adding in their place the words “designated recordkeeper”.

g. New paragraph (a)(3) is added to read as follows:

#### § 4007.10 Recordkeeping; audits; disclosure of information.

(a) *Retention of records to support premium payments.*

\* \* \* \* \*

(3) *Designated recordkeepers.*

(i) With respect to the flat-rate and variable-rate premiums described in § 4006.3 of this chapter, the plan administrator is the designated recordkeeper.

(ii) With respect to the premium for certain terminated single-employer plans described in § 4006.7 of this chapter, each person who was a contributing sponsor of such a plan, or was a member of a contributing sponsor’s controlled group, as of the day before the plan’s termination date is a designated recordkeeper.

\* \* \* \* \*

10. In § 4007.11:

a. Paragraph (a) introductory text is amended by removing the words “The premium filing due date for small plans” and adding in their place the words “For flat-rate and variable-rate premiums, the premium filing due date for small plans”.

b. Paragraph (a)(3) introductory text is amended by removing the words “the premium form or forms and payment or payments for the short plan year shall be filed by” and adding in their place the words “the due date or dates for the flat-rate premium and any variable-rate premium for the short plan year are”; and by removing the words “for the premium forms and payments”.

c. Paragraph (c) introductory text is amended by removing the words “the premium form and all premium payments due for the first plan year of coverage of any new plan or newly covered plan shall be filed on or before” and adding in their place the words “the due date for the flat-rate premium and any variable-rate premium for the first plan year of coverage of any new plan or newly covered plan shall be”.

d. Paragraph (d) is amended by removing the words “to file the forms or forms prescribed by this part and to pay any premiums due” and adding in their place the words “to make flat-rate and (as applicable) variable-rate premium filings and payments under this part”; and by removing the last sentence of the paragraph (beginning “The entire \* \* \*” and ending “\* \* \* § 4006.5(f).”).

e. Paragraph (e) is removed.

11. In § 4007.12, paragraph (a) is amended by removing the words “to file the applicable forms and to submit the premium payment” and adding in their place the words “to make flat-rate and variable-rate premium filings and payments under this part”; and by removing the words “liable for premium payments” and adding in their place “liable for flat-rate and variable-rate premium payments”.

12. New § 4007.13 is added to read as follows:

#### § 4007.13 Premiums for certain terminated single-employer plans.

(a) *Applicability.*

(1) *In general.* This section applies where there is a “DRA 2005 termination” of a plan. Subject to paragraph (a)(2) of this section, there is a DRA 2005 termination where a single-employer plan’s termination date under section 4048 of ERISA is after 2005 and either—

(i) The plan terminates under section 4042 of ERISA, or

(ii) The plan terminates under section 4041(c) of ERISA and at least one contributing sponsor or member of a contributing sponsor’s controlled group meets the requirements of section 4041(c)(2)(B)(ii) or (iii) of ERISA.

(2) *Plans terminated during reorganization proceedings.* Except as provided in paragraph (a)(3) of this section, a DRA 2005 termination of a plan does not occur where as of the plan’s termination date under section 4048 of ERISA—

(i) A bankruptcy proceeding has been filed by or against any person that was a contributing sponsor of the plan on the day before the plan’s termination date or that was on that day a member of any controlled group of which any such contributing sponsor was a member,

(ii) The proceeding is pending as a reorganization proceeding under chapter 11 of title 11, United States Code (or under any similar law of a State or political subdivision of a State),

(iii) The person has not been discharged from the proceeding, and

(iv) The proceeding was filed before October 18, 2005.

(3) *Special rule for certain airline-related plans.* Paragraph (a)(2) of this section does not apply to an “eligible plan” under section 402(c)(1) of the Pension Protection Act of 2006 (dealing with certain plans of commercial passenger airlines and airline catering services) while an election under section 402(a)(1) of the Pension Protection Act of 2006 (dealing with alternative funding schedules) is in effect for the plan.

(4) *Termination premium.* A premium as described in § 4006.7 of this chapter is payable to PBGC with respect to a DRA 2005 termination each year for three years after the termination (the "termination premium").

(b) *Filing requirements; method of filing.* Notwithstanding § 4007.3, in the case of a DRA 2005 termination of a plan, each person that was a contributing sponsor of the plan on the day before the plan's termination date or that was on that day a member of any controlled group of which any such contributing sponsor was a member is responsible for filing prescribed termination premium information and payments. Any such person may file on behalf of all such persons.

(c) *Late payment penalty charges.* Notwithstanding § 4007.8(a), if any required termination premium payment is not filed by the due date under paragraph (d) of this section, PBGC may assess a late payment penalty charge based on the facts and circumstances, subject to waiver under § 4007.8(b), (c), (d), or (e). The charge will not exceed the amount of termination premium not timely filed.

(d) *Due dates.* Notwithstanding § 4007.11, the due date for the termination premium is the 30th day of each of three applicable 12-month periods. The three applicable 12-month periods with respect to a DRA 2005 termination of a plan are—

(1) *First applicable 12-month period.* Except as provided in paragraph (e) or (f) of this section, the period of 12 calendar months beginning with the first calendar month following the calendar month in which occurs the plan's termination date under section 4048 of ERISA, and

(2) *Subsequent applicable 12-month periods.* Each of the first two periods of 12 calendar months that immediately follow the first applicable 12-month period.

(e) *Certain reorganization cases.*

(1) This paragraph (e) applies with respect to a DRA 2005 termination of a plan if the conditions in both paragraph (e)(2) and paragraph (e)(3) of this section are satisfied.

(2) The condition of this paragraph (e)(2) is that either—

(i) The plan terminates under section 4042 of ERISA, or

(ii) The plan terminates under section 4041(c) of ERISA and at least one contributing sponsor or member of a contributing sponsor's controlled group meets the requirements of section 4041(c)(2)(B)(ii) of ERISA.

(3) The condition of this paragraph (e)(3) is that as of the plan's termination date under section 4048 of ERISA—

(i) A bankruptcy proceeding has been filed by or against any person that was a contributing sponsor of the plan on the day before the plan's termination date or that was on that day a member of any controlled group of which any such contributing sponsor was a member,

(ii) The proceeding is pending as a reorganization proceeding under chapter 11 of title 11, United States Code (or under any similar law of a State or political subdivision of a State), and

(iii) The person has not been discharged from the proceeding.

(4) If this paragraph (e) applies with respect to a DRA 2005 termination of a plan, then except as provided in paragraph (f) of this section, the first applicable 12-month period with respect to the plan is the period of 12 calendar months beginning with the first calendar month following the calendar month in which occurs the earliest date when, for every person that was a contributing sponsor of the plan on the day before the plan's termination date under section 4048 of ERISA, or that was on that day a member of any controlled group of which any such contributing sponsor was a member, either—

(i) There is not pending any bankruptcy proceeding that was filed by or against such person and that was, as of the plan's termination date under section 4048 of ERISA, a reorganization proceeding under chapter 11 of title 11, United States Code (or under any similar law of a State or political subdivision of a State), or

(ii) The person has been discharged from any such proceeding, or

(iii) The person no longer exists.

(f) *Retroactive plan termination date.* If a plan's termination date under section 4048 of ERISA is in the past when it is established by agreement or court action as described in section 4048 of ERISA, then the first applicable 12-month period for determining the due dates of the termination premium begins with the later of—

(1) The first calendar month following the calendar month in which the termination date is established by agreement or court action as described in section 4048 of ERISA, or

(2) The first calendar month specified in paragraph (d)(1) of this section or (if paragraph (e) of this section applies) paragraph (e)(4) of this section.

(g) *Liability for termination premiums.* In the case of a DRA 2005 termination of a plan, each person that was a contributing sponsor of the plan on the day before the plan's termination date, or that was on that day a member of any controlled group of which any such contributing sponsor was a member, is jointly and severally liable for termination premiums with respect to the plan.

Issued in Washington, DC, this 13th day of February, 2007.

**Vincent K. Snowbarger,**

*Interim Director, Pension Benefit Guaranty Corporation.*

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