**Drafting Information**

The principal author of these regulations is Matthew P. Howard of the Office of the Associate Chief Counsel (Procedure and Administration).

**List of Subjects**

*26 CFR Part 1*

Income taxes, Reporting and recordkeeping requirements.

*26 CFR Part 54*

Pension excise taxes, Reporting and recordkeeping requirements.

**Proposed Amendments to the Regulations**

Accordingly, 26 CFR parts 1 and 54, are proposed to be amended to read as follows:

## PART 1—INCOME TAXES

**Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 * * *

**Par. 2.** Section 1.6081–2 is added to read as follows:

**§ 1.6081–2 Automatic extension of time to file certain returns filed by partnerships.**

[The text of proposed § 1.6081–2 is the same as the text of § 1.6081–2T(a) through (i) published elsewhere in this issue of the **Federal Register**].

**Par. 3.** Section 1.6081–6 is added to read as follows:

**§ 1.6081–6 Automatic extension of time to file estate or trust income tax return.**

[The text of proposed § 1.6081–6 is the same as the text of § 1.6081–6T(a) through (h) published elsewhere in this issue of the **Federal Register**].

## PART 54—PENSION EXCISE TAXES

**Par. 4.** The authority citation for part 54 is amended by adding an entry in numerical order to read in part as follows:

**Authority:** 26 U.S.C. 7805 * * *

Section 54.6081–1 also issued under authority of 26 U.S.C. 6081(a).

**Par. 5.** Section 54.6081–1 is added to read as follows:

**§ 54.6081–1 Automatic extension of time for filing returns for certain excise taxes under Chapter 43.**

(a) *In general.* An employer, other person or health plan that is required to file a return on Form 8928, ''Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code,'' will be allowed an automatic 6-month extension of time to file the return after the date prescribed for filing the return if the employer, other person or health plan files an application under this section in accordance with paragraph (b) of this section.

(b) *Requirements.* To satisfy this paragraph (b), an employer, other person or health plan must—

(1) Submit a complete application on Form 7004, ''Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns,'' or in any other manner prescribed by the Commissioner;

(2) File the application on or before the date prescribed for filing the return with the Internal Revenue Service office designated in the application's instructions; and

(3) Remit the amount of the properly estimated unpaid tax liability on or before the date prescribed for payment.

(c) *No extension of time for the payment of tax.* An automatic extension of time for filing a return granted under paragraph (a) of this section will not extend the time for payment of any tax due on such return.

(d) *Termination of automatic extension.* The Commissioner may terminate an automatic extension at any time by mailing to the estate or trust a notice of termination at least 10 days prior to the termination date designated in such notice. The Commissioner must mail the notice of termination to the address shown on the Form 7004 or to the estate or trust's last known address. For further guidance regarding the definition of last known address, see § 301.6212–2 of this chapter.

(e) *Penalties.* See section 6651 for failure to file a pension excise tax return or failure to pay the amount shown as tax on the return.

(f) *Effective/applicability date.* This section is applicable for applications for an automatic extension of time to file a return due under chapter 43, filed on or after the date final regulations are published in the **Federal Register**.

**Linda E. Stiff,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. E8–14901 Filed 6–30–08; 8:45 am]

BILLING CODE 4830–01–P

## PENSION BENEFIT GUARANTY CORPORATION

## 29 CFR Parts 4001, 4022, and 4044

**RIN 1212–AA98**

## Bankruptcy Filing Date Treated as Plan Termination Date for Certain Purposes; Guaranteed Benefits; Allocation of Plan Assets; Pension Protection Act of 2006

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Proposed rule.

**SUMMARY:** This is a proposed rule to implement section 404 of the Pension Protection Act of 2006. Section 404 amended Title IV of ERISA to provide that when an underfunded, PBGC-covered, single-employer pension plan terminates while its contributing sponsor is in bankruptcy, sections 4022 and 4044(a)(3) of ERISA are to be applied by treating the date the sponsor's bankruptcy petition was filed as the termination date of the plan. Section 4022 determines which benefits are guaranteed by PBGC, and section 4044(a)(3) determines which benefits are entitled to priority in ''priority category 3'' in the statutory hierarchy for allocating the assets of a terminated plan. Thus, under the 2006 amendments, when a plan terminates while the sponsor is in bankruptcy, the amount of benefits guaranteed by PBGC and the amount of benefits in priority category 3 are fixed at the date of the bankruptcy filing rather than at the plan termination date. This will, in most cases, reduce the amount of guaranteed benefits and the amount of benefits in priority category 3.

**DATES:** Comments must be submitted on or before September 2, 2008.

**ADDRESSES:** Comments 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.*

*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 Regulation Identifier Number for this rulemaking (RIN 1212–AA98). Comments received, including personal information provided, will be posted to *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, or Gail Sevin, Manager, Legislative and Regulatory Department; or James J. Armbruster, Assistant Chief Counsel, Office of Chief Counsel; 1200 K Street, NW., Washington, DC 20005–4026. Mr. Hanley and Ms. Sevin may be reached at 202–326–4024; Mr. Armbruster at 202–326–4020, extension 3068. (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 or 202–326–4020.)

**SUPPLEMENTARY INFORMATION:**

## Background

The Pension Benefit Guaranty Corporation (''PBGC'') administers the single-employer pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (''ERISA''). The program covers private-sector, single-employer defined benefit plans, which pay premiums to PBGC each year. Covered plans that are underfunded may terminate either in a distress termination under section 4041(c) of ERISA or in an involuntary termination (one initiated by PBGC) under section 4042 of ERISA. When such a plan terminates, PBGC typically is appointed statutory trustee of the plan, and becomes responsible for paying benefits in accordance with the provisions of Title IV.

The amount of benefits paid by PBGC under a terminated, trusteed plan is determined by several factors. The starting point is the plan itself: PBGC pays only those benefits that were provided under the plan and that have been earned by the participant under the plan terms.

But PBGC does not guarantee all benefits earned under a terminated plan. There are statutory and regulatory limits on PBGC's guarantee, which are discussed below. On the other hand, a participant may sometimes receive from PBGC more than his guaranteed benefits, if either the allocation under section 4044 of ERISA of the plan's assets or the allocation under section 4022(c) of PBGC's recoveries, or both, results in additional benefits being payable.

When a plan terminates, a termination date must be established in accordance with section 4048 of ERISA. If the plan is underfunded and terminates in a distress or involuntary termination, the termination date is the date agreed upon by the plan administrator and PBGC or, if they do not agree, the date set by a United States district court.

The termination date is a critical date for many purposes under Title IV of ERISA. For example, it is the date as of which a plan sponsor's liability to the PBGC for a terminated plan's unfunded benefit liabilities is determined under section 4062(b) of ERISA. Most relevant to this proposed regulation, the termination date—under prior law—was the date that governed the amount of benefits participants in the terminated plan would receive. The amount of benefits guaranteed by PBGC under section 4022 of ERISA and the amount of any additional benefits payable from the plan's assets under section 4044 or from PBGC's recoveries under section 4022(c) were all determined as of the termination date.

Many single-employer pension plans that terminate in a distress or involuntary termination do so while the plan sponsor is in bankruptcy. Indeed, two of the criteria for a distress termination are based on the sponsor's liquidating or reorganizing in bankruptcy. *See* ERISA section 4041(c)(2)(B)(i), (ii).

A persistent problem for the PBGC insurance program has been that the funded status of plans often deteriorates significantly while the plan sponsor is in bankruptcy. Many sponsors have failed to make minimum funding contributions to their plans during the bankruptcy, while the plan continues to pay retiree benefits as usual and employees continue to earn additional benefits. Because the termination date often comes after the sponsor has been in bankruptcy for some time, the result has been that PBGC's losses often increase substantially during the course of a bankruptcy proceeding.

Congress sought to address this problem in the Pension Protection Act of 2006 (''PPA 2006''), which the President signed into law on August 17, 2006. Section 404 of PPA 2006 provides generally that, if a PBGC-insured plan terminates while its contributing sponsor is in bankruptcy, PBGC's guarantees and the amount of benefits entitled to priority in ''priority category 3'' in the ERISA section 4044 allocation of the plan's assets are determined as of the date that the sponsor's bankruptcy petition was filed (the ''bankruptcy filing date'') rather than as of the termination date. This means, for example, that benefits earned by participants after the bankruptcy filing date are not guaranteed. The changes generally reduce the amount of benefits guaranteed by PBGC and the amount of benefits receiving priority treatment in the section 4044 asset allocation. By protecting PBGC from growth in its liabilities during bankruptcy proceedings, these changes reduce claims on PBGC's funds and thereby strengthen the PBGC insurance program. The changes are described more fully below.

PPA 2006 provided that the changes made by section 404 of PPA 2006 are effective for plan terminations that occur during the bankruptcy of the plan sponsor, if the bankruptcy filing date was on or after September 16, 2006 (the date that is 30 days after PPA's enactment). The terminations to which the changes apply are referred to in this preamble and in the proposed regulation as PPA 2006 bankruptcy terminations. Of course, if a plan's termination date is the same as the bankruptcy filing date, then the plan is unaffected by the changes made by section 404.

## Overview of Proposed Regulatory Changes

The proposed regulation implements the statutory changes, described above, made by section 404 of PPA 2006. It would amend PBGC's regulations on Benefits Payable in Terminated Single-Employer Plans, 29 CFR part 4022; Termination of Single-Employer Plans, 29 CFR part 4041; and Allocation of Assets in Single-Employer Plans, 29 CFR part 4044. The amendments would establish rules for PPA 2006 bankruptcy terminations, the most important of which are:

- A participant's guaranteed benefit is based on the amount of his service and the amount of his compensation (if applicable) as of the bankruptcy filing date.
- The Title IV guarantee limits—the maximum guaranteeable benefit, the phase-in limit, and the accrued-at-normal limit—are all determined as of the bankruptcy filing date.
- Only benefits that are nonforfeitable as of the bankruptcy filing date are guaranteed. Thus, for example, early retirement subsidies and disability benefits to which a participant became entitled after the bankruptcy filing date are not guaranteed.
- Participants who retired under a subsidized early retirement benefit (or a disability or other benefit) to which they became entitled between the bankruptcy filing date and the termination date will continue in pay status, or may go into pay status if they are not already receiving a benefit, but the amount of

the benefit is reduced to reflect that the subsidy (or other benefit) is not guaranteed.

- The benefits in priority category 3 under section 4044(a) of ERISA are benefits in pay status, or that could have been in pay status, three years before the bankruptcy filing date, generally taking into account only benefit increases that were effective throughout the five-year period ending on the bankruptcy filing date.
- Benefits under section 4022(c) of ERISA are based on (among other things) the value of a plan's unfunded nonguaranteed benefits. Because section 404 of PPA 2006 has changed guaranteed benefits and benefits in priority category 3, the unfunded nonguaranteed benefits are changed and therefore the section 4022(c) benefits are also changed.
- Where a plan has more than one contributing sponsor and all contributing sponsors did not file for bankruptcy on the same date, PBGC determines the date to treat as the bankruptcy filing date, based on the facts and circumstances.

Although the bankruptcy filing date thus displaces a plan's termination date as the controlling date for certain purposes, the termination date continues to be important for other purposes. For example, although the monthly amount of benefits guaranteed and the monthly amount of benefits in priority category 3 will be determined by reference to the bankruptcy filing date, the value of those benefits is determined—as before PPA 2006—as of the plan's termination date. The value of a terminated plan's assets, too, is determined as of the termination date. Also, determinations under sections 4062(a) and (b) of ERISA of the parties liable for a plan's unfunded benefit liabilities and the amount of those liabilities are made as of the termination date.

The proposed regulation also makes some minor changes unrelated to PPA 2006. The discussion below describes in detail the proposed regulatory changes, as well as areas in which no change to the regulations is needed.

## Guaranteed Benefits

### *Prior Law*

PBGC's guarantee is limited, under section 4022(a) of ERISA, to nonforfeitable benefits under a terminated plan. Before PPA 2006, the crucial date for determining guaranteed benefits was the plan's termination date, established under section 4048 of ERISA. PBGC had to determine the amount of benefits participants had earned under the plan, and whether those benefits were nonforfeitable, as of the termination date.

In addition, PBGC's guarantee is subject to two important limitations under section 4022(b) of ERISA: the maximum guaranteeable benefit (sometimes referred to as the maximum guarantee limit or the maximum insurance limit) under section 4022(b)(3), and the phase-in limit under sections 4022(b)(1) and 4022(b)(7). The maximum guaranteeable benefit essentially places a ceiling, or cap, on the amount of a participant's guaranteed benefit. The maximum monthly guaranteeable benefit under section 4022(b)(3)(B) was $750 per month for a 65-year-old participant receiving a straight-life annuity in a plan that terminated in 1974. (The maximum guaranteeable benefit may be lower, under section 4022(b)(3)(A), depending on the participant's average monthly gross income, but this limitation rarely applies, and the discussion and examples in this regulation assume that it does not apply.) The $750 monthly figure is adjusted each year based on the contribution and wage base under the Social Security Act; for example, for a plan whose termination date was in 2005 the maximum monthly amount at age 65 payable as a straight-life annuity was $3,801.14. The maximum guaranteeable benefit for an individual participant depends on his age at the later of the plan's termination date or the date he begins receiving his benefit from PBGC, and on the form in which the benefit is paid. For example, the maximum guaranteeable benefit is lower if the participant begins receiving benefits from PBGC before age 65, or if the benefit form will provide a survivor benefit after the participant dies.

The phase-in limit under sections 4022(b)(1) and 4022(b)(7) of ERISA provides that PBGC's guarantee of a benefit increase resulting from amendment of an existing plan or adoption of a new plan is phased in over a five-year period. PBGC's guarantee is equal to the number of full years before the termination date that the increase was in effect, multiplied by 20% (or $20 per month, if greater). For example, a benefit increase that was in effect more than two years before the termination date but less than three years is 40% guaranteed (or $40 per month, if greater, but not more than the amount of the increase). A benefit increase is considered to be in effect from the later of the date the benefit increase was adopted or the date it became effective.

There is a third limitation on PBGC's guarantee that the agency adopted when it issued its initial guaranteed benefits regulation. (40 FR 43509, Sept. 22, 1975.) Under § 4022.21 of PBGC's regulation, PBGC's guarantee is generally limited to the amount of the participant's benefit payable as a straight-life annuity commencing at normal retirement age. This limit, often referred to as the ''accrued-at-normal'' limit, means that PBGC generally does not guarantee temporary supplemental benefits payable to a participant who retires before normal retirement age. Consider, for example, a participant who was entitled under his plan to receive $1,000 per month as a straight-life annuity starting at his normal retirement date but who could retire early under certain conditions with an unreduced benefit of $1,000 plus a supplement of $400 per month payable until age 62. If the participant retires early, PBGC generally will not guarantee more than $1,000 per month.

Before PPA 2006, the maximum guaranteeable benefit, the phase-in limit, and the accrued-at-normal limit were all calculated as of the termination date of a plan. Accordingly, before PPA 2006, a participant's guaranteed benefit would be the amount of the nonforfeitable plan benefit to which the participant was entitled as of the termination date, subject to the guarantee limits applicable as of that date.

### *PPA 2006 Changes*

Section 404 of PPA 2006 changed the way in which the amount of guaranteed benefits will be determined in PPA 2006 bankruptcy terminations. Section 404(a) of PPA 2006 added a new subsection (g) to section 4022 of ERISA. New section 4022(g) provides as follows:

> Bankruptcy Filing Substituted for Termination Date.—If a contributing sponsor of a plan has filed or has had filed against such person a petition seeking liquidation or reorganization in a case under title 11, United States Code, or under any similar Federal law or law of a state or political subdivision, and the case has not been dismissed as of the termination date of the plan, then this section shall be applied by treating the date such petition was filed as the termination date of the plan.

The ''section'' referred to is section 4022 of ERISA, which as explained above determines the amount of a participant's guaranteed benefit. Thus, for a plan that terminates while its contributing sponsor is in bankruptcy, section 4022(g) requires that a participant's guaranteed benefit be determined by treating the date the sponsor's bankruptcy petition was filed (the ''bankruptcy filing date'') as if it were the termination date of the plan.

This change has a number of important consequences. First, it means that a participant's guaranteed benefit can be no greater than the amount of his plan benefit as of the bankruptcy filing date. Even though the plan in many cases will have continued after the bankruptcy filing date and (in the absence of a plan freeze) participants will have continued to accrue benefits after that date, those post-bankruptcy accruals will not be guaranteed. Thus, under the change, a participant's guaranteed benefit will be calculated by reference to the amount of his service and the amount of his compensation (or the amount of the plan's benefit ''multiplier,'' depending on how the plan calculates benefits) as of the bankruptcy filing date.

Second, only benefits that were nonforfeitable as of the bankruptcy filing date will be guaranteed. For example, in a plan that has five-year ''cliff'' vesting, a participant with less than five years of service as of the bankruptcy filing date will have no guaranteed benefit, even if his benefit becomes vested by the section 4048 termination date. Similarly, if a participant becomes entitled to a disability retirement benefit or an early retirement subsidy after the bankruptcy filing date but before the termination date, that disability benefit or subsidy will not be guaranteed.

Third, the PBGC guarantee limits—the maximum guaranteeable benefit, the phase-in limit, and the accrued-at-normal limit—will all be determined as of the bankruptcy filing date. For example, if the sponsor's bankruptcy filing date is in 2008 and the plan's termination date is in 2010, the maximum guaranteeable benefit for all plan participants will be based on the 2008 limit. Also, an individual participant's maximum guaranteeable benefit will be based on his age and form of benefit as of the later of the bankruptcy filing date or the date he begins to receive his benefit. Similarly, the phase-in rule will be applied by counting the number of full years before the bankruptcy filing date that a benefit increase has been in effect. The accrued-at-normal limit, too, will be determined based on the facts as of the bankruptcy filing date.

The proposed rule would modify PBGC's regulations to reflect the changes described above for PPA 2006 bankruptcy terminations. In most cases, the proposed regulation simply provides that in a PPA 2006 bankruptcy termination, ''bankruptcy filing date'' is substituted for ''termination date'' each place that ''termination date'' appears in a specified section or paragraph of the regulation. The proposed regulation provides a number of examples to clarify what this means in various situations. The regulations are unchanged for plans to which the changes do not apply (non-PPA 2006 bankruptcy terminations).

**Aggregate Limit on Benefits Guaranteed**

Title IV of ERISA includes an additional limitation on PBGC's guarantee that applies only when a participant receives benefits under two or more trusteed plans. Section 4022B of ERISA provides that, in such a situation, the sum of the guaranteed benefits payable from PBGC funds with respect to all such plans may not exceed the maximum guaranteeable benefit payable ''as of the date of the last plan termination.''

PPA 2006 made no change to this provision. PBGC therefore proposes to make no change to part 4022B of its regulations, and proposes to calculate the aggregate limit, as previously, by reference to a participant's maximum guaranteeable benefit as of the section 4048 termination date of the latest-terminating plan.

**Benefits Payable Under the Section 4044 Allocation**

*Prior Law*

PPA 2006 also made an important change to the allocation of a terminated plan's assets under section 4044 of ERISA. To understand this change, it is important to understand how the section 4044 allocation worked before the PPA 2006 amendment.

As noted above, a participant may receive more than his guaranteed benefit from PBGC, depending on the amount of the plan's assets and whether his benefits are entitled to priority under ERISA's allocation scheme. Section 4044 of ERISA specifies how a plan's assets are to be allocated among various classes of guaranteed and nonguaranteed benefits of participants. Part 4044 of PBGC's existing regulations provides detail about how assets and benefits are valued, and how the assets are allocated to the benefits. (Section 4022(c) of ERISA may provide additional benefits, as discussed below.)

The first step in the section 4044 allocation is to assign each participant's plan benefits to one or more of six ''priority categories'' that are described in paragraphs (1) through (6) of subsection 4044(a) of ERISA. Before PPA 2006, the benefits in each priority category were as follows:

*Priority category 1:* The portion of a participant's accrued benefit derived from the participant's voluntary contributions.

*Priority category 2:* The portion of a participant's accrued benefit derived from the participant's mandatory contributions.

*Priority category 3:* The portion of a participant's benefit that was in pay status as of the beginning of the three-year period ending on the termination date of the plan, or that would have been in pay status at the beginning of such three-year period if the participant had retired before the beginning of the three-year period. In either case, however, the benefits in this category are limited to the lowest annuity benefit payable under the plan provisions at any time during the five-year period ending on the termination date (*e.g.*, disregarding benefit increases in the five-year period).

*Priority category 4:* All other guaranteed benefits, and benefits that would be guaranteed but for the aggregate limit of section 4022B of ERISA and the stricter phase-in limit that applies to business owners.

*Priority category 5:* All other nonforfeitable benefits under the plan.

*Priority category 6:* All other benefits under the plan.

PBGC's regulations make a distinction between a participant's ''gross'' benefit in a priority category and his ''net'' benefit in that category (although the regulations do not use these terms). The gross benefit is the total amount of the participant's benefit that would be in a priority category, if benefits in higher priority (*i.e.*, lower numbered) categories were not subtracted. The net benefit is the amount in the priority category after subtracting amounts in higher priority categories. For example, a participant's net benefit in priority category 4 generally excludes any portion of his guaranteed benefit that was allocated to priority categories 2 or 3. *See* 29 CFR 4044.10(c). Descriptions of benefits in a priority category usually refer to the net benefits in that category, and the discussion below generally follows that usage, unless otherwise indicated.

Once the benefits of each participant have been assigned to the applicable priority category or categories, the benefits of all participants are valued, using the rules in PBGC's valuation regulation, 29 CFR part 4044, subpart B. The terminated plan's assets are also valued (at fair market value). The valuation of both the plan benefits and the plan assets is done as of the termination date.

After the plan benefits and assets are valued, the assets are ''poured through'' the priority categories, beginning with priority category 1. If the assets are sufficient to pay all benefits in priority category 1, then they pour into priority category 2, and so on until either all benefits in all categories have been covered or until the assets are insufficient to pay all benefits within a category. Where assets are insufficient to pay all benefits within a category, they are allocated among the benefits in that category according to the rules in part 4044 of PBGC's regulations.

It is important to note that benefits in priority category 3—which may or may not be guaranteed—come ahead of guaranteed benefits in priority category 4 in the section 4044 asset allocation. Thus, for example, if a terminated plan's assets are sufficient to cover all benefits in priority category 3, those benefits will be paid by PBGC, regardless of whether they are guaranteed.

*PPA 2006 Changes*

Section 404 of PPA 2006 made an important change to priority category 3 in the asset allocation, similar to the change to guaranteed benefits. Section 404(b) added a new subsection (e) to section 4044, which provides as follows:

> *Allocation of Assets Among Priority Groups in Bankruptcy Proceedings.*—If a contributing sponsor of a plan has filed or has had filed against such person a petition seeking liquidation or reorganization in a case under title 11, United States Code, or under any similar Federal law or law of a State or political subdivision, and the case has not been dismissed as of the termination date of the plan, then subsection (a)(3) shall be applied by treating the date such petition was filed as the termination date of the plan.

Subsection (a)(3) of section 4044 describes the benefits assigned to priority category 3. As explained above, before PPA 2006 the benefits in priority category 3 were the benefits that were in pay status as of the beginning of the three-year period ending on the termination date, or that would have been in pay status as of that date if the participant had retired—but based on the plan provisions during the five years before the termination date under which the benefit would be the least. *See* 29 CFR 4044.13. PBGC interprets new section 4044(e) to mean that these three-year and five-year periods are the three-year and five-year periods before the bankruptcy filing date rather than before the termination date. In other words, the benefits in priority category 3 will be benefits in pay status, or that could have been in pay status, three years before the bankruptcy filing date, but generally taking into account only benefit increases that were effective throughout the five-year period ending on the bankruptcy filing date. (The exception in § 4044.13(b)(5) for certain ''automatic'' benefit increases will apply to applicable benefit increases in the fourth and fifth years preceding the bankruptcy filing date.)

In addition, the changes made by PPA 2006 section 404(a) to the way guaranteed benefits are determined necessarily affect the gross benefits that are assigned to priority category 4. As explained above, the gross benefits assigned to priority category 4 are guaranteed benefits (and benefits that would be guaranteed but for the aggregate limit of section 4022B and the stricter phase-in limit that applies to business owners). Because section 404(a) of PPA 2006 has modified PBGC's guarantee, the gross benefits assigned to priority category 4 in a PPA 2006 bankruptcy termination are those benefits guaranteed under new section 4022(g), not the benefits that would be guaranteed absent that provision. In other words, the guaranteed benefits in priority category 4 will be the plan benefits that were both accrued and nonforfeitable as of the bankruptcy filing date, based on the guarantee limits as of that date. In addition, the PPA 2006 changes to benefits in priority category 3 necessarily affect the net benefits in priority category 4 as well; some guaranteed benefits that previously would have been in priority category 3 will now fall into priority category 4. The proposed rule reflects this treatment.

PPA 2006 did not amend the other priority categories of section 4044. Therefore, the gross amount of a participant's benefit in those categories will be unaffected by the changes discussed above. For example, the gross amount of a participant's benefit in priority category 5 is all of the participant's benefit that is nonforfeitable as of the plan's termination date. *See* ERISA section 4044(a)(5); 29 CFR 4044.15. Thus, a benefit that is not guaranteed because it was forfeitable as of the bankruptcy filing date will be treated as nonforfeitable for purposes of priority category 5 if the participant satisfied the conditions of entitlement to the benefit between the bankruptcy filing date and the plan's termination date.

The net amount of a participant's benefit in priority category 5, however, is necessarily affected by the changes to the benefits in priority categories 3 and 4. For example, benefits that are not guaranteed because they became nonforfeitable between the sponsor's bankruptcy filing date and the plan's termination date will not be in priority category 4 but will be in priority category 5. Thus, a participant in that situation will have a smaller guaranteed benefit in priority category 4 and therefore a larger net benefit in priority category 5. (Benefits in priority category 5 are divided into subcategories, based on whether they would have been payable based on the plan provisions in effect five years before the plan's termination date, or became payable due to subsequent plan amendments. *See* ERISA section 4044(b)(4) (before PPA 2006, section 4044(b)(3)); 29 CFR 4044.10(e). Because PPA 2006 did not amend this provision, PBGC interprets the five-year period in section 4044(b)(4) of ERISA—and in § 4044.10(e) of PBGC's regulation—as still being the five-year period before the termination date. No change in the regulation is needed to embody this interpretation.)

Like the change to the guarantee provisions, the PPA 2006 changes to the ERISA section 4044 asset allocation apply to PPA 2006 bankruptcy terminations—plan terminations occurring during a bankruptcy proceeding initiated on or after September 16, 2006.

The PPA 2006 changes, as explained above, require PBGC to determine the amount of a participant's monthly benefit in priority category 3 and priority category 4 by reference to the bankruptcy filing date rather than the termination date. Valuing benefits in the priority categories is a different matter. PBGC has always valued benefits and plan assets as of the plan's termination date, and section 4044(e) does not dictate a change to that approach for priority category 3. Although section 4044(e) might be read to suggest that a valuation should be done as of the bankruptcy filing date for purposes of priority category 3, PBGC believes that the better interpretation is that the valuation should still be done as of the termination date. Subsection (a)(3) of section 4044, which is to be ''applied'' by treating the bankruptcy filing date as the termination date, describes only the kind of benefits that fall into priority category 3, not the time or manner of valuing those benefits or plan assets.

Moreover, because the statutory change applies only to priority category 3, benefits and plan assets will still be valued as of the termination date for all other categories. Using a different valuation date for priority category 3 than for all the other priority categories would be complex to administer, difficult to explain to participants, and anomalous in its results. In the absence of a clear statutory mandate of that intricate approach, PBGC proposes to take the simpler and more coherent approach of valuing benefits and assets as of the termination date for all priority categories.

Accordingly, the proposed rule makes no change to PBGC's existing rules in this regard. Under § 4044.10(c), benefits in a trusteed plan will still be valued as of the termination date. The tables in Appendix D to part 4044 used to determine a participant's expected retirement age are also unchanged, and continue to be based on the year in which the plan's termination date occurs and on the facts as of the termination date. A terminated plan's assets, too, will still be valued as of the termination date under § 4044.3(b).

**Benefits Payable Under Section 4022(c) of ERISA**

*Prior Law*

Under section 4022(c) of ERISA, PBGC pays additional benefits to participants and beneficiaries, beyond guaranteed benefits and benefits provided by the plan's assets. The amount of section 4022(c) benefits depends on PBGC's recoveries of unfunded benefit liabilities under section 4062 (or, in some circumstances, under sections 4063 or 4064). Sections 4062(a) and (b) of ERISA provide that, when a plan terminates in a distress termination or an involuntary termination, the contributing sponsor of the plan and all members of the contributing sponsor's controlled group are liable to PBGC for the ''total amount of the unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan.'' The amount of unfunded benefit liabilities, defined in section 4001(a)(18) of ERISA, is the excess of the value of the plan's benefit liabilities over the value of the plan's assets—*i.e.*, the amount of the shortfall in the plan's assets.

PBGC seeks to recover from contributing sponsors and members of their controlled groups as much as it can of terminated plans' unfunded benefit liabilities. A portion of those recoveries is paid to participants and beneficiaries of a terminated plan in accordance with the provisions of section 4022(c) of ERISA. Section 4022(c) provides for determination of a ''recovery ratio,'' which is then multiplied by the total value of the plan's unfunded nonguaranteed benefits to determine the total amount allocable to participants in the plan who have unfunded nonguaranteed benefits. It is allocated to those unfunded nonguaranteed benefits beginning in the section 4044 priority category where the plan's assets ran out, but none of it is allocated to guaranteed benefits—*i.e.*, this section 4022(c) allocation ''skips over'' guaranteed benefits in the priority categories.

The recovery ratio is described in section 4022(c)(3) of ERISA. For a large plan, it equals the value of PBGC's recovery of unfunded liabilities for that plan divided by the amount of that plan's unfunded benefit liabilities ''as of the termination date.'' For a small plan, the ratio is based on an average of PBGC's recoveries over a five-year period. For this purpose, a small plan is any plan in which the value of unfunded nonguaranteed benefits is equal to or less than $20 million. (Section 408 of PPA 2006 changed the five-year period over which the recovery ratio is determined for small plans; that change generally applies to plans in which termination was initiated on or after September 16, 2006.)

A plan's unfunded nonguaranteed benefits, as the term suggests, are those benefits that are neither funded by the plan's assets under the section 4044 allocation nor guaranteed by PBGC. (PBGC generally uses the term ''unfunded nonguaranteed benefits,'' because that term is more descriptive than ''outstanding amount of benefit liabilities,'' the term used in section 4001(a)(19) of ERISA.) Stated differently, the unfunded nonguaranteed benefits are the benefits lost by participants on account of their plan's termination, a portion of which is made up by the section 4022(c) allocation.

*PPA 2006 Changes*

New section 4022(g) instructs PBGC to apply section 4022 by treating the bankruptcy filing date as the plan's termination date. Section 4022(c), of course, is part of section 4022. PBGC interprets this statutory language, for section 4022(c) benefits, to mean that in determining a plan's unfunded nonguaranteed benefits, PBGC must take into account the changes to guaranteed benefits under new section 4022(g) and the changes to the asset allocation under new section 4044(e). For example, a benefit that became nonforfeitable between the bankruptcy filing date and the termination date is not guaranteed and thus (if not funded) is included in the unfunded nonguaranteed benefits.

The regulation also provides that, as in a non-PPA 2006 bankruptcy termination, PBGC will value the unfunded nonguaranteed benefits as of the termination date. For reasons similar to those explained above regarding priority category 3 benefits, PBGC believes that the statutory provision should not be interpreted to require a different valuation date for this purpose.

The proposed regulation similarly provides that the other elements that go into calculation of section 4022(c) benefits are unaffected by the PPA 2006 changes. The recovery ratio described in section 4022(c)(3)(A), as explained above, is based on PBGC's recoveries of unfunded benefit liabilities. Because that section provides that the denominator of the recovery ratio is the amount of the plan's unfunded benefit liabilities as of the termination date, one might conclude that in a PPA 2006 bankruptcy termination the unfunded benefit liabilities should be determined for this purpose as of the bankruptcy filing date. The proposed regulation does not adopt that approach. The numerator of the recovery ratio—PBGC's recoveries—is based on PBGC's statutory claim for unfunded benefit liabilities, which, under section 4062(b) of ERISA, must be determined as of the termination date. Because section 4062(b) was not amended by PPA 2006, PBGC's recoveries will still be based on that termination date-computed claim. PBGC believes that the general language of section 4022(g) should not be interpreted to require a separate determination of unfunded benefit liabilities to be made as of the bankruptcy filing date, when PBGC recoveries will be based on a determination of unfunded benefit liabilities as of the termination date. Thus, the amount of a plan's unfunded benefit liabilities, as in a non-PPA 2006 bankruptcy termination, will be determined based on the value of the plan's assets and benefit liabilities as of the termination date. *See* ERISA sections 4001(a)(18), 4062(b).

The proposed rule would add a new § 4022.51 to PBGC's regulations to incorporate the above interpretations. It provides, for example, that in computing section 4022(c) benefits in a PPA 2006 bankruptcy termination, the benefits included in a plan's unfunded nonguaranteed benefits take into account the provisions of sections 4022(g) and 4044(e) of ERISA, and the corresponding provisions of PBGC's regulations. The value of unfunded nonguaranteed benefits would be multiplied by the recovery ratio, as in a non-PPA 2006 bankruptcy termination, to determine the total dollar amount to be allocated for the plan. That dollar amount would be allocated to the unfunded nonguaranteed benefits of participants in the same manner as before PPA 2006, but the result of the allocation would be different because of the changes made by section 404 of PPA 2006 to guaranteed benefits and the benefits in priority category 3. For example, a benefit that would have been guaranteed under prior law but is not guaranteed under PPA 2006 and is not funded under the section 4044 allocation is an unfunded nonguaranteed benefit that might be paid under the section 4022(c) allocation.

**Other Issues**

*Reduction of Benefits to Title IV Levels*

In a distress termination, the plan administrator is required, beginning on the proposed termination date, to reduce benefits in pay status to the estimated levels payable under Title IV. *See* ERISA section 4041(c)(3)(D)(ii); 29 CFR 4041.42(c), 4022.61–4022.63. The proposed regulation provides that for any PPA 2006 bankruptcy termination, those estimated benefits are based on the rules described above relating to the bankruptcy filing date.

PPA 2006 did not change the provision in section 4041 of ERISA about when these benefit reductions are to be made. Accordingly, the proposed regulation does not change the rule in § 4041.42(c) of the regulations that the reductions are made beginning on the proposed termination date.

*Recoupment of Overpayments*

PBGC's current regulations provide that the agency recoups benefit overpayments if it determines that net benefits paid exceed the amount to which a participant is entitled under Title IV of ERISA. *See* 29 CFR 4022.81. For example, if a retiree is paid an estimated Title IV benefit of $3,050 per month while PBGC is processing the termination of the plan, and PBGC later determines that the participant is entitled to a Title IV benefit of only $3,000 per month, the agency generally recoups the net overpayment (the $50 difference times the number of months the benefit was overpaid) from future benefit payments. The amount recouped is determined by multiplying future benefit payments by a fraction the numerator of which is the net overpayment and the denominator of which is the present value of the benefit to which the participant is entitled under Title IV. The proposed regulation amends § 4022.82(a) to provide that the denominator is determined taking into account the changes to participants' benefits made by section 404 of PPA 2006.

In computing the net overpayment, the current regulations provide that PBGC takes into account only overpayments made on or after the latest of the proposed termination date, the termination date, or, if no notice of intent to terminate was issued, the date on which proceedings to terminate the plan are instituted pursuant to section 4042 of ERISA. *See* 29 CFR § 4022.81(c)(1). Thus, for example, in a case where a plan is terminated under section 4042 and the termination date is before the date on which PBGC initiated termination proceedings, PBGC does not recoup overpayments made before initiation of the termination proceedings even though those overpayments were made after (what later became) the termination date.

PBGC proposes not to make any change to this rule. Accordingly, as under prior law, in determining the amount to be recouped (or otherwise recovered, if there are no future benefits from which to recoup), PBGC will include only overpayments made on or after the latest of the proposed termination date, the termination date, or, if no notice of intent to terminate was issued, the date on which proceedings to terminate the plan are instituted pursuant to section 4042 of ERISA.

*Entry Into Pay Status*

As explained above, under new section 4022(g) of ERISA, PBGC will not guarantee a benefit that was forfeitable as of the bankruptcy filing date even it became nonforfeitable by the termination date. This includes, for example, a subsidized early retirement benefit to which a participant became entitled between the two dates.

Because the plan normally will have been ongoing as of the bankruptcy filing date, participants who became entitled to subsidized early retirement benefits or other benefits after the bankruptcy filing date but before the termination date may have retired and been put into pay status by the plan administrator. It would impose a hardship on such participants to take them out of pay status, likely depriving them of all or most of their retirement income.

To address this situation, the regulation proposes that participants who became entitled under their plan to subsidized early retirement benefits or other benefits between the bankruptcy filing date and the termination date will be continued in pay status or, if they are not already receiving a benefit, will be allowed to go into pay status. The amount of such a benefit, however, would be reduced to reflect that the subsidy is not guaranteed.

*Sufficiency for Guaranteed Benefits*

In a distress termination, the plan's enrolled actuary must certify, among other things, whether the plan is sufficient for guaranteed benefits as of the proposed termination date and as of the proposed distribution date. ERISA section 4041(c)(2)(A). In making those determinations, the actuary must take into account nonguaranteed benefits to which the plan's assets must be allocated under section 4044—notably, nonguaranteed benefits in priority category 3. PBGC must determine whether it agrees that the plan is sufficient for guaranteed benefits. ERISA section 4041(c)(3)(A). If PBGC agrees that the plan is sufficient for guaranteed benefits, it so notifies the plan administrator and the administrator then proceeds to distribute the plan's assets and carry out the termination of the plan. ERISA section 4041(c)(3)(B)(ii). One purpose of the determinations under section 4041 of the plan's sufficiency for guaranteed benefits is to avoid PBGC trusteeship of a plan that has enough assets to pay all the benefits that PBGC would pay if it took over the plan. (Any additional benefits that may be payable under section 4022(c) of ERISA are not considered for purposes of whether a plan is sufficient for guaranteed benefits.)

The proposed regulation provides that in a PPA 2006 bankruptcy termination, the determination of sufficiency for guaranteed benefits is made taking into account the amendments made by section 404 of PPA 2006. That is, the plan actuary and PBGC should determine sufficiency for guaranteed benefits based on whether, as of the termination date and the distribution date, the plan has sufficient assets to pay the benefits that are guaranteed as of the bankruptcy filing date and the benefits that are in priority category 3 as of three years before the bankruptcy filing date (based generally on the plan provisions as of five years before the bankruptcy filing date). It would make little sense to treat as insufficient for guaranteed benefits—and thus require PBGC to trustee—a plan that has enough assets to provide all the benefits that PBGC would pay if it became statutory trustee of the plan.

*Amendment of Definition of Basic-Type Benefit*

PBGC's regulations define the term ''basic-type benefit'' in § 4001.2 to mean any benefit that is guaranteed under part 4022 or that would be guaranteed if the guarantee limits in §§ 4022.22 through 4022.27 (primarily the maximum guaranteeable benefit and the phase-in limit) did not apply. A ''nonbasic-type benefit'' is any benefit provided by a plan other than a basic-type benefit. The effect of this distinction is to treat temporary supplements, which as explained above are generally not guaranteed due to the accrued-at-normal limitation in § 4022.21, as nonbasic-type benefits. Nonbasic-type benefits are treated differently from basic-type benefits in the section 4044 allocation. *See, e.g.*, §§ 4044.10(c) and 4044.12.

If no change were made to the definition of basic-type benefit in a PPA 2006 bankruptcy termination, benefits that accrued, or to which a participant otherwise became entitled, between the sponsor's bankruptcy filing date and the plan's termination date would become nonbasic-type benefits (because they would not be guaranteed but not due to the limitations in §§ 4022.22 through 4022.27) and thus subject to the different treatment currently accorded temporary supplements. Such benefits would, absent this regulatory change, receive less favorable treatment in priority category 5, a technical result that PBGC believes was not intended by the statutory change. Not amending the regulation would also require PBGC to follow the more complex allocation procedures in part 4044 for nonbasic-type benefits even where a plan has no temporary supplements. Accordingly, the proposed regulation would modify the definition of ''basic-type benefits'' to provide that benefits not guaranteed solely because they accrued or became nonforfeitable, or the participant became entitled to them, after the bankruptcy filing date will be considered basic-type benefits. This change to the regulatory definition of basic-type benefits requires a conforming change to § 4044.14 of the regulations, to ensure that these nonguaranteed benefits are not placed in priority category 4, which (with limited exceptions for benefits of business owners and of participants in more than one terminated plan) is reserved for guaranteed benefits.

*Determination of the Bankruptcy Filing Date*

Section 404 of PPA 2006 requires treating the date that a contributing sponsor of a plan has filed or has had filed against it ''a petition seeking liquidation or reorganization in a case under title 11, United States Code, or under any similar Federal law or law of a state or political subdivision'' as the termination date of the plan, for the purposes discussed above. The proposed regulation uses the term ''bankruptcy filing date'' to describe the date when a bankruptcy petition has been filed, and PBGC does not anticipate difficulty determining what that date is in most cases.

However, three situations may arise in which there could be ambiguity about the bankruptcy filing date. The first involves conversion of a bankruptcy case—for example, where a bankruptcy case began with the filing of a petition for reorganization under Chapter 11 of the Bankruptcy Code but was later converted to a liquidation case under Chapter 7. The proposed regulation clarifies that, in such a situation, the date of the original bankruptcy petition is the bankruptcy filing date. This is consistent with section 348 of the Bankruptcy Code, which provides that conversion of a case from one chapter to another under the Bankruptcy Code does not change the date of the filing of the petition.

The second situation involves plans that have more than one contributing sponsor. Section 404 of PPA 2006 applies where a plan terminates during the bankruptcy proceeding of ''a'' contributing sponsor of a plan. Although most terminating single-employer plans have only a single contributing sponsor, some plans have more than one contributing sponsor. If a plan with multiple contributing sponsors terminates during the sponsors' bankruptcy proceedings and if the various sponsors all filed for bankruptcy on the same date, the proposed regulation provides that that date is the bankruptcy filing date.

However, if the various contributing sponsors filed for bankruptcy on different dates, or if not all of them have filed for bankruptcy, it is not obvious what date should be treated as the bankruptcy filing date. PBGC believes that it would be impracticable to use more than one bankruptcy filing date in determining benefits under a single plan. But PBGC also believes that it would be unwise to attempt to establish a mechanical rule on what date to use that would apply in all cases. The proposed regulation therefore provides that, where a plan has more than one contributing sponsor and not all sponsors filed for bankruptcy on the same date, PBGC will determine the date to treat as the bankruptcy filing date for determining guaranteed benefits and benefits in priority category 3. PBGC's determination will be based on all the relevant facts and circumstances, which may include such things as the size of the various contributing sponsors, the relative amounts of their minimum required contributions to the plan, the amount of time between bankruptcy filing dates, and the expectations of participants regarding continuation of the plan.

The third situation involves liquidation or reorganization cases that are filed, not under the U.S. Bankruptcy Code, but under a ''similar * * * law of a state or political subdivision.'' Some states have insolvency statutes similar to the U.S. Bankruptcy Code and include provisions similar to 11 U.S.C. 301(a), 302(a), and 303(b) under which a case is commenced by the filing of a petition in court. The date on which such a petition is filed would be treated as the bankruptcy filing date under the proposed rule. Other, perhaps more informal, proceedings, such as assignments for the benefit of creditors, may have different procedures for commencing cases, which may vary from state to state. For such proceedings, PBGC would make case-by-case determinations on what date is most analogous to the date of the filing of a bankruptcy petition and would treat that date as the bankruptcy filing date.

*Changes Unrelated to PPA 2006*

A few minor changes unrelated to the PPA 2006 amendments are proposed. For example, in §§ 4022.4(a)(1), 4044.2, and 4044.13, the proposed regulation would change the words ''date of termination'' or ''date of plan termination'' to ''termination date'' to conform to the current phrasing in section 4048(a) of ERISA. The proposed regulation would amend § 4022.4 to codify PBGC's practice of allowing a participant who has elected an optional annuity form of benefit (not a lump sum) at any time up until the date that PBGC is appointed statutory trustee of the plan to receive his benefit in that form, even if it is not one of the PBGC optional forms under § 4022.8(c) of the regulations. The proposed regulation would also correct the reference in § 4022.22 to the provision of the Internal Revenue Code defining ''earned income''; the definition has been moved from section 911(b) to section 911(d)(2) of the Code since PBGC's original regulation was adopted.

A new § 4022.62(b)(5) has been added to clarify that the rules in § 4022.62(b), which generally apply to the calculation of estimated benefits pending PBGC's determination of final benefits, do not override the requirements of subparts A or B of part 4022 with respect to the requirements for a benefit to be guaranteed by PBGC.

**Coordination With Other PPA 2006 Amendments**

Section 404 was only one of a number of provisions of PPA 2006 that affect the determination of benefits under Title IV. PBGC's regulations therefore must coordinate the various provisions, where necessary. Below is a description of certain PPA 2006 amendments that interrelate with the changes made by section 404.

*Shutdown Benefits and Other Unpredictable Contingent Event Benefits*

One situation requiring coordination involves section 403 of PPA 2006, which added new section 4022(b)(8) to the guarantee provisions of Title IV. Section 4022(b)(8) provides a special phase-in rule for shutdown benefits and other ''unpredictable contingent event benefits.'' In cases to which that provision applies, PBGC is to apply the phase-in rules of section 4022 as if a plan amendment had been adopted on the date that the unpredictable contingent event occurred. For example, in a case in which new section 4022(g) does not apply, if an unpredictable contingent event occurred more than two years but less than three years before the termination date, this would mean that the guarantee of a benefit increase arising from the unpredictable contingent event would be 40% phased in.

But if section 4022(g) also applies to such a case, PBGC believes that, as with other benefit increases, the five-year phase-in period must be measured by reference to the bankruptcy filing date, not the termination date. Thus, continuing the above example, if the sponsor's bankruptcy filing date were one year before the plan's termination date, then the guarantee of the unpredictable contingent event benefit would be only 20% rather than 40% phased in, because the unpredictable contingent event would have occurred more than one year but less than two years before the bankruptcy filing date. Section 4022(b)(8) applies to benefits that become payable as a result of an unpredictable contingent event that occurs after July 26, 2005.

PBGC intends to issue a separate proposed rule to implement section 4022(b)(8).

*Commercial Airlines*

Another provision that raises coordination issues is PPA 2006 section 402(g)(2)(A), which added new section 4022(h) to Title IV. Section 4022(h) modifies the guarantee and asset allocation rules primarily for plans of commercial airlines that make an election under section 402(a)(1) of PPA 2006 (relating to special minimum funding rules) and that terminate within 10 years of such election. Section 4022(h) provides that when those conditions are met, section 4022 is to be applied by treating the first day of the first applicable plan year (for the special airline funding rules) as the termination date of the plan. It also provides generally that the plan's assets are to be allocated first to the benefits that would have been guaranteed but for this provision (*i.e.*, ahead of benefits in all other priority categories under section 4044). Section 4022(h) applies to plan years ending after August 17, 2006.

The proposed regulation does not address implementation of section 4022(h) or how it interrelates with the amendments made by section 404 of PPA 2006. PBGC intends to do so in a future rulemaking.

*Substantial Owner Benefits*

Section 407 of PPA 2006 amended section 4022(b)(5) of ERISA, which previously provided a special phase-in rule for PBGC's guarantee of the benefits of ''substantial owners,'' who were generally defined as those owning more than 10% of the business. Under the amendment, a special phase-in rule applies only to benefits of ''majority owners,'' generally defined as those owning 50% or more of the business. The amendment also completely revamped the way in which the special phase-in rule works. Previously, the substantial owner phase-in rule was used *in lieu* of the usual phase-in rule for benefits of substantial owners. The new majority owner phase-in rule, by contrast, applies *in addition* to the usual phase-in rule, but the additional limitation looks back only 10 years rather than 30 years. Finally, section 407 of PPA 2006 amended section 4044 of ERISA to change the treatment in priority category 4 of benefits subject to the majority owner phase-in. These section 407 amendments are effective for distress terminations in which notices of intent to terminate are provided on or after January 1, 2006, and for involuntary terminations in which notices of determination are provided on or after January 1, 2006.

The proposed regulation does not address implementation of these changes or how they interrelate with the amendments made by section 404 of PPA 2006. PBGC intends to do so in a future rulemaking.

**Applicability**

Section 404(c) of PPA 2006 provided that the changes made by section 404 apply to any plan whose termination date occurs while bankruptcy proceedings are pending with respect to the contributing sponsor of the plan, if the bankruptcy proceedings were initiated on or after September 16, 2006. Bankruptcy proceedings are pending, for this purpose, if the contributing sponsor has filed or has had filed against it a petition seeking liquidation or reorganization in a case under title 11, United States Code, or under any similar Federal law or law of a State or political subdivision, and the case has not been dismissed as of the termination date of the plan. Accordingly, the proposed regulation, which implements the statutory changes, likewise applies to terminations occurring during a bankruptcy proceeding of the contributing sponsor that was initiated on or after September 16, 2006.

**Compliance With Rulemaking Guidelines**

*E.O. 12866*

PBGC has determined, in consultation with the Office of Management and Budget, that this rule is a ''significant regulatory action'' under Executive Order 12866. The Office of Management and Budget has therefore reviewed this notice under E.O. 12866. Pursuant to section 1(b)(1) of E.O. 12866 (as amended by E.O. 13422), PBGC identifies the following specific problems that warrant this agency action: Section 404 of the Pension Protection Act of 2006 made significant changes to provisions of Title IV of ERISA relating to the guarantee of benefits under section 4022 and the allocation of a terminated plan's assets under section 4044. The proposed rule implements those statutory changes and, as described in this preamble, clarifies the implications of those changes in areas where there might be ambiguity in the absence of a regulation. The proposed rule provides guidance to participants and beneficiaries of terminated plans about their benefits paid by PBGC; it will also assist PBGC staff in making benefit determinations. Except for a few minor housekeeping items described above under ''Changes Unrelated to PPA 2006,'' the proposed rule is limited to implementing and clarifying the changes made by section 404.

*Regulatory Flexibility Act*

PBGC certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the amendments in this proposed regulation would not have a significant economic impact on a substantial number of small entities. The amendments implement and in some cases clarify statutory changes made in PPA 2006; they do not impose new burdens on entities of any size. Virtually all of the statutory changes affect only PBGC and persons who receive benefits from PBGC. Accordingly, as provided in section 605 of the Regulatory Flexibility Act, sections 603 and 604 do not apply.

**List of Subjects**

*29 CFR Part 4001*

Pensions.

*29 CFR Part 4022*

Pension insurance, Pensions, Reporting and recordkeeping requirements.

*29 CFR Part 4044*

Pension insurance, Pensions.

For the reasons given above, PBGC proposes to amend 29 CFR parts 4001, 4022, and 4044 as follows.

## PART 4001—TERMINOLOGY

1. The authority citation for part 4001 continues to read as follows:

**Authority:** 29 U.S.C. 1301, 1302(b)(3).

2. In § 4001.2:

a. Amend the definition of ''*basic-type benefit*'' by adding at the end: ''In a PPA 2006 bankruptcy termination, it also includes a benefit accrued by a participant, or to which a participant otherwise became entitled, on or before the plan's termination date but that is not guaranteed solely because of the provisions of §§ 4022.3(b) or 4022.4(c).''

b. Amend the definition of ''*sufficient for guaranteed benefits*'' by adding at the end: ''In a PPA 2006 bankruptcy termination, the determination whether a plan is sufficient for guaranteed benefits is made taking into account the limitations in sections 4022(g) and 4044(e) of ERISA (and corresponding provisions of these regulations). The determinations of which benefits are guaranteed and which benefits are in priority category 3 under section 4044(a)(3) of ERISA are made by reference to the bankruptcy filing date, but the present values of those benefits are determined as of the proposed termination date and the date of distribution.''

c. Add two new definitions in alphabetical order to read as follows:

### § 4001.2 Definitions.

* * * * *

''*Bankruptcy filing date* means the date on which a petition commencing a case under the United States Bankruptcy Code is filed, or the date on which any similar filing is made commencing a case under any similar Federal law or law of a state or political subdivision, with respect to the contributing sponsor of a plan, if such case has not been dismissed as of the termination date of the plan. If a bankruptcy petition is filed under one chapter of the United States Bankruptcy Code, or under one chapter or provision of any such similar law, and the case is converted to a case under a different chapter or provision of such Code or similar law (for example, a Chapter 11 reorganization case is converted to a Chapter 7 liquidation case), the date of the original petition is the bankruptcy filing date. If such a plan has more than one contributing sponsor: (a) If all contributing sponsors entered bankruptcy on the same date, that date is the bankruptcy filing date; (b) if all contributing sponsors did not enter bankruptcy on the same date (or if not all contributing sponsors have filed for bankruptcy), PBGC will determine the date that will be treated as the bankruptcy filing date based on all the facts and circumstances, including but not limited to the relative sizes of the contributing sponsors, the relative amounts of their minimum required contributions to the plan, and the expectations of participants regarding continuation of the plan.

* * * * *

*PPA 2006 bankruptcy termination* means a plan termination to which section 404 of the Pension Protection Act of 2006 applies. Section 404 of the Pension Protection Act of 2006 applies to any plan termination in which the termination date occurs while bankruptcy proceedings are pending with respect to the contributing sponsor of the plan, if the bankruptcy proceedings were initiated on or after September 16, 2006. Bankruptcy proceedings are pending, for this purpose, if a contributing sponsor has filed or has had filed against it a petition seeking liquidation or reorganization in a case under title 11, United States Code, or under any similar Federal law or law of a State or political subdivision, and the case has not been dismissed as of the termination date of the plan.''

* * * * *

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

3. 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.

4. Immediately preceding subpart A, add the following note:

**Note:** PBGC has not yet amended part 4022 to reflect certain changes made by the Pension Protection Act of 2006, Public Law 109–280. Those changes include Section 402(g)(2)(A) of PPA 2006 added section 4022(h) to ERISA, which modifies the Title IV guarantee and asset-allocation rules primarily for plans of certain commercial airlines. Section 403 of PPA 2006 added section 4022(b)(8) to ERISA, which provides a special rule for the phase-in of PBGC's guarantee of shutdown benefits and other ''unpredictable contingent event benefits''. Section 407 of PPA 2006 amended section 4022(b)(5) of ERISA to change the rules for the phase-in of PBGC's guarantee of the benefits of business owners. Section 408 of PPA 2006 amended section 4022(c)(3)(B)(ii) of ERISA to change the five-year period used for averaging PBGC's recoveries in computing benefits under section 4022(c). PBGC intends to amend part 4022 at a later date to conform it to current statutory provisions.

### § 4022.2 [Amended]

5. In § 4022.2, amend the first paragraph by removing the words ''annuity, Code'' and adding in their place ''annuity, bankruptcy filing date, Code''; and by removing the words ''plan year, proposed termination date'' and adding in their place ''plan year, PPA 2006 bankruptcy termination, proposed termination date''.

6. In § 4022.3:

a. Redesignate paragraphs (a), (b), and (c) as paragraphs (1), (2), and (3).

b. Designate the introductory text as paragraph (a), and add a new heading ''*General.*''

c. Add new paragraph (b) to read as follows:

### § 4022.3 Guaranteed benefits.

(a) *General.* * * *

(b) *PPA 2006 bankruptcy termination.*

(1) *Substitution of bankruptcy filing date.* In a PPA 2006 bankruptcy termination, ''bankruptcy filing date'' is substituted for ''termination date'' each place that ''termination date'' appears in paragraph (a) of this section.

(2) *Examples.*

(i) *Vesting.* A plan provides for 5-year ''cliff'' vesting—*i.e.*, benefits become 100% vested when the participant completes five years of service; before the five-year mark, benefits are 0% vested. The contributing sponsor of the plan files a bankruptcy petition on November 15, 2006. The plan terminates with a termination date of December 4, 2007, and PBGC becomes statutory trustee of the plan. A participant had four years and six months of service at the bankruptcy filing date and became vested in May 2007. None of the participant's benefit is guaranteed because the benefit was not nonforfeitable as of the bankruptcy filing date.

(ii) *Subsidized early retirement benefit.* The facts regarding the plan are the same as in Example (i), but the plan also provides that a participant may retire from active employment with a subsidized (*i.e.*, not actuarially reduced) early retirement benefit if he is at least age 55 and has completed 10 years of service. A participant was age 55 and had nine years and six months of service at the bankruptcy filing date. The participant continued working for another six months, then retired as of June 1, 2007, and immediately began receiving from the plan a subsidized early retirement benefit. The subsidized early retirement benefit is not guaranteed by PBGC because it was not nonforfeitable on the bankruptcy filing date. PBGC will continue paying the participant a benefit, but it will guarantee only that portion of the participant's benefit that does not include the subsidy. PBGC would also allow a similarly situated participant who had not started receiving a benefit before PBGC became trustee of the plan to begin receiving a benefit, but in an amount that does not include the subsidy.

(iii) *Accruals after bankruptcy filing date.* The facts regarding the plan are the same as in Example (i). A participant has a vested, accrued benefit of $500 per month as of the bankruptcy filing date. At the plan's termination date, the participant has a vested, accrued benefit of $512 per month. His guaranteed benefit is limited to $500 per month, the accrued, nonforfeitable benefit as of the bankruptcy filing date.

7. In § 4022.4:

a. Amend paragraph (a)(1) by removing ''date of the termination'' and adding in its place ''termination date''.

b. Amend paragraph (a)(3) by removing ''; or'' at the end.

c. Amend paragraph (a)(4) by adding ''; or'' at the end.

d. Revise paragraph (a)(2) and add new paragraph (c) to read as follows:

**§ 4022.4 Entitlement to benefit.**

(a) * * *

(2) The benefit is an annuity form of payment that the participant or beneficiary elected before the termination date of the plan or, if later, the date on which PBGC became statutory trustee of the plan.

* * * * *

(c) In a PPA 2006 bankruptcy termination, ''bankruptcy filing date'' is substituted for ''termination date'' each place that ''termination date'' appears in paragraphs (a)(1) and (a)(3) of this section.

8. In § 4022.6:

a. Amend paragraph (a) by removing ''provided in paragraph (b) of'' and adding in its place ''otherwise provided in''.

b. Add new paragraph (d) to read as follows:

**§ 4022.6 Annuity payable for total disability.**

* * * * *

(d) *PPA 2006 bankruptcy termination.* In a PPA 2006 bankruptcy termination, ''bankruptcy filing date'' is substituted for ''termination date'' in paragraph (a) of this section.

9. In § 4022.21:

a. Amend paragraph (a)(1) by removing ''(b), (c) and (d)'' in the first sentence and adding in its place ''(b), (c), (d), and (e).''

b. Add new paragraph (e) to read as follows:

**§ 4022.21 Limitations; in general.**

* * * * *

(e) *PPA 2006 bankruptcy termination.* In a PPA 2006 bankruptcy termination, ''bankruptcy filing date'' is substituted for ''termination date'' each place that ''termination date'' appears in paragraph (a)(1) of this section. Example: A plan provides for normal retirement at age 65. If a participant terminates employment at or after age 55 with 25 years of service, the plan will pay an unreduced early retirement benefit, plus a temporary supplement of $400 per month until the participant reaches age 62. There are no recent benefit increases subject to the phase-in limitation. When the plan's contributing sponsor files a bankruptcy petition in 2008, a participant who is still working has a vested, accrued benefit of $1,500 per month (as a straight-life annuity) and has satisfied the age and service requirements for the unreduced early retirement benefit. The participant retires eight months later, when his vested, accrued benefit is $1,530 per month (as a straight-life annuity). He elects to receive his benefit as a 50% joint-and-survivor annuity, and begins receiving a total benefit of $1,777: his $1,530 accrued benefit, reduced by 10% for the survivor benefit, plus the $400 temporary supplement. The plan terminates six months later, during the sponsor's bankruptcy. From the termination date until the participant reaches age 62, PBGC will guarantee $1,500: the $1,500 accrued benefit (as a straight-life annuity) as of the bankruptcy filing date, reduced to $1,350 to reflect the 10% reduction for the survivor benefit, plus $150 of the temporary supplement that, in combination with the $1,350, does not exceed the $1,500 accrued-at-normal limit. When the participant reaches age 62, his guaranteed benefit is reduced to $1,350, because under plan provisions the temporary supplement ceases at that time.

10. Revise § 4022.22 to read as follows:

**§ 4022.22 Maximum guaranteeable benefit.**

(a) *In general.* Subject to section 4022B of ERISA and part 4022B of this chapter, and except as provided in paragraph (b) of this section, benefits payable with respect to a participant under a plan shall be guaranteed only to the extent that such benefits do not exceed the actuarial value of a benefit in the form of a life annuity payable in monthly installments, commencing at age 65 equal to the lesser of—

(1) One-twelfth of the participant's average annual gross income from his employer during either his highest-paid five consecutive calendar years in which he was an active participant under the plan, or if he was not an active participant throughout the entire such period, the lesser number of calendar years within that period in which he was an active participant under the plan; or

(2) $750 multiplied by the fraction x/$13,200 where ''x'' is the Social Security contribution and benefit base determined under section 230 of the Social Security Act in effect at the termination date of the plan.

(b) *PPA 2006 bankruptcy termination.* In a PPA 2006 bankruptcy termination—

(1) The five-year period described in paragraph (a)(1) of this section shall not include any calendar years that end after the bankruptcy filing date.

(2) ''Bankruptcy filing date'' is substituted for ''termination date of the plan'' in paragraph (a)(2) of this section. Example: A contributing sponsor files a bankruptcy petition in 2007. The sponsor's plan terminates in a distress termination with a termination date in 2008. PBGC will compute participants' maximum guaranteeable benefits based on the amount determined under paragraph (a)(2) of this section for 2007 ($4,125.00 as a straight-life annuity starting at age 65).

(c) *Gross income.* For purposes of paragraph (a)(1) of this section—

(1) Gross income means ''earned income'' as defined in section 911(d)(2) of the Code, determined without regard to any community property laws.

(2) If the plan is one to which more than one employer contributes, and during any calendar year the participant received gross income from more than one such contributing employer, then the amounts so received shall be aggregated in determining the participant's gross income for the calendar year.

11. In § 4022.23, add new paragraph (g) to read as follows:

**§ 4022.23 Computation of maximum guaranteeable benefits.**

* * * * *

(g) *PPA 2006 bankruptcy termination.* In a PPA 2006 bankruptcy termination, ''bankruptcy filing date'' is substituted for ''termination date'' each place that ''termination date'' appears in paragraphs (c), (d), and (f) of this section. Example: The contributing sponsor of a plan files a bankruptcy petition in July 2007, and the sponsor's plan terminates in a PBGC-initiated termination with a termination date in July 2008. At the bankruptcy filing date:

- Participant A was age 64 and receiving a benefit from the plan in the form of a 10-year certain-and-continuous annuity, with 4 years remaining in the certain period.
- Participant B was age 60 and 6 months and was still working; he began receiving a benefit from the plan in the form of a 50% joint-and-survivor annuity when he turned 61 in January 2008. His spouse was the same age as he.
- Participant C was age 59 and was still working; he began receiving a straight-life annuity from the PBGC in July 2010 when he was 62 years old.

In accordance with § 4022.22(b)(2), PBGC computes the maximum guaranteeable monthly benefit for Participants A, B, and C based on the amount determined under section 4022.22(a)(2) for 2007. (The gross income-based limitation in § 4022.22(a)(1) does not apply to any of these participants.) Participant A's maximum guaranteeable monthly benefit is $3,759.25 [$4,125.00 × .93 (7% reduction for a benefit starting at age 64) × .98 (2% reduction for a certain-and-continuous annuity with 4 years remaining in the certain period)]. Participant B's maximum guaranteeable monthly benefit is $2,673.00 [$4,125.00 × .72 (28% reduction for a benefit starting at age 61) × .90 (10% reduction due to the 50% joint-and-survivor feature)]. Participant C's maximum guaranteeable monthly benefit is $3,258.75 [$4,125.00 × .79 (21% reduction for a benefit starting at age 62)].

12. In § 4022.24, add new paragraph (f) to read as follows:

**§ 4022.24 Benefit increases.**

* * * * *

(f) *PPA 2006 bankruptcy termination.* In a PPA 2006 bankruptcy termination, ''bankruptcy filing date'' is substituted for ''termination date'' each place that ''termination date'' appears in paragraphs (a) and (c) of this section.

13. In § 4022.25, add new paragraph (f) to read as follows:

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

* * * * *

(f) *PPA 2006 bankruptcy termination.* In a PPA 2006 bankruptcy termination, ''bankruptcy filing date'' is substituted for ''termination date'' each place that ''termination date'' appears in paragraphs (c) and (d) of this section. Example: A plan amendment that was adopted and effective in February 2007 increased a participant's benefit by $300 per month. The contributing sponsor of the plan filed a bankruptcy petition in March 2009 and the plan has a termination date in April 2010. PBGC's guarantee of the participant's benefit increase is limited to $120 ($300 × 40%), because the increase was made more than 2 years but less than 3 years before the bankruptcy filing date.

14. In the heading for Subpart C, remove ''Unfunded Nonguaranteed Benefits [RESERVED]'' and add in its place ''Section 4022(c) Benefits.''

15. Add new § 4022.51 to Subpart C to read as follows:

**§ 4022.51 Determination of section 4022(c) benefits in a PPA 2006 bankruptcy termination.**

(a) *Amount of unfunded nonguaranteed benefits.* For purposes of this section, and subject to paragraph (b), a plan's amount of unfunded nonguaranteed benefits means the plan's outstanding amount of benefit liabilities, as defined in section 4001(a)(19) of ERISA, determined as of the plan's termination date. A plan's amount of unfunded nonguaranteed benefits is multiplied by the applicable recovery ratio to determine the aggregate amount to be allocated with respect to participants of the plan under section 4022(c)(1) of ERISA.

(b) *Benefits included in unfunded nonguaranteed benefits.* For purposes of computing benefits under section 4022(c) of ERISA in a PPA 2006 bankruptcy termination, unfunded nonguaranteed benefits are benefits under a plan as of the plan's termination date that are neither guaranteed by PBGC (taking into account section 4022(g) of ERISA) nor funded by the plan's assets (taking into account section 4044(e) of ERISA).

(c) *Determination of recovery ratio.* In a PPA 2006 bankruptcy termination, the recovery ratio under section 4022(c) of ERISA is determined as follows. The numerator is based on PBGC's recoveries under section 4062, 4063, or 4064, valued as of the plan's (or plans') termination date (or dates). The denominator of the recovery ratio is based on the amount of unfunded benefit liabilities, as defined in section 4001(a)(18) of ERISA, as of the plan's (or plans') termination date (or dates).

16. In § 4022.61:

a. Amend paragraph (c) by removing ''4022.22(b)'' and adding in its place ''4022.22(a)(2)'' and by adding at the end: ''In a PPA 2006 bankruptcy termination, the maximum guaranteeable benefit is determined as of the bankruptcy filing date, in accordance with §§ 4022.22(b) and 4022.23(g) of this part.''

b. Amend paragraph (f) introductory text by removing '':'' and adding in its place ''.'' and by adding at the end ''(For examples addressing issues specific to a PPA 2006 bankruptcy termination, see §§ 4022.21(e), 4022.22(b), and 4022.23(g).)''.

17. In § 4022.62:

a. Amend paragraph (b)(1) by adding at the end: ''In a PPA 2006 bankruptcy termination:''

b. Amend paragraph (b)(2) by adding at the end: ''In a PPA 2006 bankruptcy termination, the plan administrator shall use the participant's age as of the benefit commencement date and his or her service and compensation as of the bankruptcy filing date.''.

c. Redesignate paragraph (e) as paragraph (f).

d. Amend the newly redesignated paragraph (f) introductory text by removing '':'' and adding in its place ''.'' and by adding at the end: ''(For an example addressing issues specific to a PPA 2006 bankruptcy termination, see § 4022.25(f).)''.

e. Add new paragraphs (b)(1)(i), (b)(1)(ii), (b)(5), and (e) to read as follows:

**§ 4022.62 Estimated guaranteed benefits.**

* * * * *

(b) * * *

(1) * * *

(i) If the participant was also in pay status as of the bankruptcy filing date, the plan administrator shall use the participant's age and benefit payable under the plan as of the bankruptcy filing date.

(ii) If the participant was not in pay status as of the bankruptcy filing date, the plan administrator shall use the participant's age as of the benefit commencement date and his or her service and compensation as of the bankruptcy filing date.''

* * * * *

(5) Nothing in this paragraph (b) overrides the provisions of subparts A and B of part 4022 with respect to the requirements necessary for a benefit to be guaranteed by PBGC.

* * * * *

(e) *PPA 2006 bankruptcy termination.* In a PPA 2006 bankruptcy termination, ''bankruptcy filing date'' is substituted for ''proposed termination date'' each place that ''proposed termination date'' appears in paragraph (c) of this section.

18. In § 4022.63:

a. Redesignate paragraph (c)(1) as paragraph (c)(1)(i) and redesignate paragraph (c)(2) as paragraph (c)(1)(ii).

b. Redesignate the introductory text of paragraph (c) as paragraph (c)(1) and add a new heading ''*In general.*''

c. In paragraph (e), amend Example 1 by adding a new paragraph at the end:

*PPA 2006 bankruptcy termination.* In a PPA 2006 bankruptcy termination, the methodology would be the same, but ''bankruptcy filing date'' would be substituted for ''proposed termination date'' each place that ''proposed termination date'' appears in the example, and the numbers would change accordingly.

d. Add new paragraphs (b)(3) and (c)(2) to read as follows:

**§ 4022.63 Estimated title IV benefits.**

* * * * *

(b)* * *

(3) *PPA 2006 bankruptcy termination.* In a PPA 2006 bankruptcy termination, ''bankruptcy filing date'' is substituted for ''proposed termination date'' in the first sentence of paragraph (b)(2) of this section.

(c) *In general.* * * *

(2) *PPA 2006 bankruptcy termination.* In a PPA 2006 bankruptcy termination, ''bankruptcy filing date'' is substituted for ''proposed termination date'' each place that ''proposed termination date'' appears in paragraph (c)(1) of this section.

* * * * *

19. In § 4022.82:

a. Amend paragraph (a)(1) by redesignating the second sentence as paragraph (a)(1)(i), and add a new heading ''*Non-PPA 2006 bankruptcy termination*'' and by redesignating the third sentence as paragraph (a)(1)(iii) and add a new heading ''*Facts and circumstances.*''

b. Amend the newly redesignated (a)(1)(iii) by removing ''The PBGC may, however, utilize'' and adding in its place ''PBGC may use''.

c. Add new paragraph (a)(1)(ii) to read as follows:

**§ 4022.82 Method of recoupment.**

(a) * * *

(1) * * *

(i) *Non-PPA 2006 bankruptcy termination.****

(ii) *PPA 2006 bankruptcy termination.* PBGC will determine the amount of benefit payable with respect to the participant under title IV of ERISA taking into account the limitations in sections 4022(g) and 4044(e) (and corresponding provisions of these regulations), and will determine the present value of that amount as of the termination date, using PBGC interest rates and factors in effect on the termination date.

(iii) *Facts and circumstances.** * *

* * * * *

20. In Appendix D to Part 4022, amend the introductory text by removing ''§ 4022.22(b)'' and adding in its place ''§ 4022.22(a)(2)'', and by replacing '':'' with a ''.'', and by adding a sentence at the end to read as follows: ''In a PPA 2006 bankruptcy termination, the applicable year is the calendar year in which the bankruptcy filing date occurred.''

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

21. The authority citation for part 4044 continues to read as follows:

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

22. In the Note before subpart A:

a. In the second sentence, remove ''in the PBGC's'' and add in its place ''in other provisions of the PBGC's''.

b. After the second sentence, add a sentence to read as follows: ''In addition, the Pension Protection Act of 2006 has made a number of significant changes, including changes to the treatment in priority category 4 of benefits of owners, and changes to the valuation of PBGC recoveries of liabilities under section 4062(c) of ERISA.''

23. In § 4044.2:

a. Amend paragraph (a) by removing ''annuity, basic-type benefit'' and adding in its place ''annuity, bankruptcy filing date, basic-type benefit'' and by removing ''plan administrator, single-employer plan'' and adding in its place ''plan administrator, PPA 2006 bankruptcy termination, single-employer plan''.

b. In paragraph (b), amend the definition of ''valuation date'' by removing ''date of termination'' and adding in its place ''termination date''.

24. In § 4044.10(b), add the phrase '', but, in a PPA 2006 bankruptcy termination, subject to the limitations in sections 4022(g) and 4044(e) of ERISA (and corresponding provisions of these regulations)'', at the end of the last sentence.

25. In § 4044.13, add new paragraph (c) to read as follows:

**§ 4044.13 Priority category 3 benefits.**

* * * * *

(c) *PPA 2006 bankruptcy termination.* In a PPA 2006 bankruptcy termination, ''bankruptcy filing date'' is substituted for ''termination date'' and ''date of the plan termination'' each place that ''termination date'' and ''date of the plan termination'' appear in paragraphs (a) and (b) of this section. In paragraph (b)(5), ''the bankruptcy filing date'' is substituted for ''termination'' in the phrase ''during the fourth and fifth years preceding termination.'' Example: A plan provides for normal retirement at age 65 and has only one early retirement benefit: a subsidized early retirement benefit for participants who terminate employment on or after age 60 with 20 years of service. These plan provisions have been unchanged since 1990. The contributing sponsor of the plan files a bankruptcy petition in June 2008, and the plan terminates during the bankruptcy with a termination date in September 2010. A participant retired in July 2007, at which time he was age 60 and had 20 years of service, and began receiving the subsidized early retirement benefit. The participant has no benefit in priority category 3, because he was not eligible to retire three or more years before the June 2008 bankruptcy filing date.

26. Amend § 4014.14 by removing ''basic-type benefits that do not exceed the guarantee limits set forth in subpart B of part 4022 of this chapter'' and adding in its place ''guaranteed benefits''.

Issued in Washington, DC, this day of June, 2008.

**Vincent K. Snowbarger,**

*Acting Director, Pension Benefit Guaranty Corporation.*

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## DEPARTMENT OF VETERANS AFFAIRS

## 38 CFR Part 21

**RIN 2900–AM91**

## Vocational Rehabilitation and Employment Program—Duty To Assist

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** This document proposes to amend the vocational rehabilitation and employment regulations of the Department of Veterans Affairs (VA) concerning VA's responsibility to provide notification regarding information or evidence needed for an individual to substantiate a claim for vocational rehabilitation benefits and services, and regarding applicable time periods. VA's duty to assist claimants in substantiating their claims for benefits is expanded by The Veterans Claims Assistance Act of 2000, and is