

authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, 21 CFR part 172 is amended as follows:

**PART 172—FOOD ADDITIVES PERMITTED FOR DIRECT ADDITION TO FOOD FOR HUMAN CONSUMPTION**

■ 1. The authority citation for 21 CFR part 172 continues to read as follows:

**Authority:** 21 U.S.C. 321, 341, 342, 348, 371, 379e.

■ 2. Section 172.379 is added to subpart D to read as follows:

**§ 172.379 Vitamin D<sub>2</sub>.**

Vitamin D<sub>2</sub> may be used safely in foods as a nutrient supplement defined under § 170.3(o)(20) of this chapter in accordance with the following prescribed conditions:

(a) Vitamin D<sub>2</sub>, also known as ergocalciferol, is the chemical 9,10-seco(5Z,7E,22E)-5,7,10(19),22-ergostatetraen-3-ol. Vitamin D<sub>2</sub> is produced by ultraviolet irradiation of ergosterol isolated from yeast and is purified by crystallization.

(b) Vitamin D<sub>2</sub> meets the specifications of the *Food Chemicals Codex*, 6th ed. (2008), pp. 1013 and 1014, which is incorporated by reference. The Director of the **Federal Register** approves this incorporation by reference in accordance with 5 U.S.C

552(a) and 1 CFR part 51. You may obtain a copy from the United States Pharmacopeial Convention, 12601 Twinbrook Pkwy., Rockville, MD 20852 (Internet address: <http://www.usp.org>). You may inspect a copy at the Center for Food Safety and Applied Nutrition's Library, Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301-436-1071, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html).

(c) The additive may be used as follows:

Category of Food	Maximum Levels in Food (as Served)
Soy beverages	50 International Units (IU)/100 grams (g)
Soy beverage products	89 IU/100 g
Soy-based butter substitute spreads	330 IU/100 g
Soy-based cheese substitutes and soy-based cheese substitute products	270 IU/100 g

Dated: February 23, 2009.

**Leslye M. Fraser,**

*Director, Office of Regulations and Policy, Center for Food Safety and Applied Nutrition.*  
[FR Doc. E9-5549 Filed 3-13-09; 8:45 am]

**BILLING CODE 4160-01-S**

**PENSION BENEFIT GUARANTY CORPORATION**

**29 CFR Part 4001, 4010, and 4044**

**RIN 1212-AB09**

**Annual Financial and Actuarial Information Reporting; Pension Protection Act of 2006**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule.

**SUMMARY:** This is a final rule to amend PBGC's regulation on Annual Financial and Actuarial Information Reporting. The amendments implement the provisions of the Pension Protection Act of 2006, Public Law 109-280 (PPA 2006), which changed the standards for determining which persons are required to report under section 4010 (Authority to Require Certain Information) of the Employee Retirement Income Security Act of 1974 and made other changes to the reporting requirements. In addition

to providing guidance on implementing the PPA 2006 changes, the final rule waives reporting in certain cases for controlled groups with aggregate plan underfunding of \$15 million or less, modifies the standards for determining which plans are exempt from the actuarial information requirements, revises the actuarial information requirements to conform with other PPA 2006 changes, and provides other clarifications.

**DATES:** Effective April 15, 2009. (See Applicability in **SUPPLEMENTARY INFORMATION.**)

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

**SUPPLEMENTARY INFORMATION:**

**Background**

Pension Benefit Guaranty Corporation (PBGC) administers the pension insurance programs under Title IV of

the Employee Retirement Income Security Act of 1974 (ERISA). In order to give PBGC an opportunity to anticipate and attempt to minimize potential liabilities that may arise from the termination of significantly underfunded plans, ERISA section 4010 requires the reporting of actuarial and financial information by controlled groups with pension plans that have significant underfunding. That information is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) and may not be made public, except as may be relevant to any administrative or judicial action or proceeding.

Pursuant to ERISA section 4010, PBGC issued its initial regulation on Annual Financial and Actuarial Information Reporting in 1995 (29 CFR part 4010). The regulation specifies the items of identifying, financial, and actuarial information that filers must submit under ERISA section 4010. PBGC reviews the information that is filed and enters it into an electronic database for more detailed analysis. Computer-assisted analysis of this information helps PBGC to anticipate possible major demands on the pension insurance system and to focus PBGC resources on situations that pose the greatest risks to that system. Because other sources of information are usually

not as current as the ERISA section 4010 information, the ERISA section 4010 filing plays a major role in PBGC's ability to protect participant and premium-payer interests.

In March 2005, PBGC amended part 4010 to require electronic reporting and to make other less significant changes. Reporting is now accomplished through PBGC's secure e-4010 Web-based application.

### PPA 2006 Changes

On August 17, 2006, the President signed into law the Pension Protection Act of 2006, Public Law 109-280 (PPA 2006), which made numerous changes in the area of pension law, including changes to ERISA section 4010. Before its amendment by PPA 2006, ERISA section 4010(b) required reporting, in general, if: (1) The aggregate unfunded vested benefits of all plans maintained by members of a controlled group exceeded \$50 million, disregarding plans with no unfunded vested benefits (the "\$50 Million Gateway Test"); (2) the conditions specified in ERISA section 302(f) and section 412(n) of the Internal Revenue Code (Code) for imposing a lien for missed contributions exceeding \$1 million had been met with respect to any plan maintained by any member of the controlled group; or (3) the Internal Revenue Service (IRS) had granted minimum funding waivers in excess of \$1 million to any plan maintained by any member of the controlled group, and any portion of the waivers was still outstanding.

Section 505 of PPA 2006 amended ERISA section 4010(b)(1), replacing the \$50 Million Gateway Test with a test based on the funding target attainment percentage of each plan in the controlled group. As amended by PPA 2006, ERISA section 4010(b)(1) requires reporting if:

the funding target attainment percentage (as defined in subsection (d)) at the end of the preceding plan year of a plan maintained by the contributing sponsor or any member of its controlled group is less than 80 percent.<sup>1</sup>

This preamble refers to the new funding target attainment percentage test as the 80% FTAP Gateway Test.

<sup>1</sup> Filers with pre-PPA 2006 information years are reminded that PBGC regulations provide that if a filer for the immediately preceding information year is not required to file for the current information year, the filer must submit information, in accordance with the instructions on PBGC's Web site, <http://www.pbgc.gov>, demonstrating why a filing is not required for the current information year. This requirement will apply, for example, to a filer that was required to file for the information year ending on December 31, 2007, based on the \$50 Million Gateway Test, but that is not required to file for the information year ending on December 31, 2008, based on the new 80% FTAP Gateway Test.

Although PPA 2006 did not alter the substance of the other two gateway tests (found in paragraphs (b)(2) and (b)(3) of ERISA section 4010), it made other changes that affect these provisions. For instance, because PPA 2006 made changes to references in paragraph (b)(2), references in § 4010.4(a) (which describes who must file under part 4010) need to be amended. Similarly, PPA 2006 made changes to the minimum funding waiver provisions, which are referred to in part 4010.

Finally, PPA 2006 added ERISA sections 4010(d)(1) and 4010(e). ERISA section 4010(d)(1) lists three items that must be included in the information filers submit to PBGC.<sup>2</sup> ERISA section 4010(e) requires PBGC to submit to Congress an annual summary report of the information submitted to PBGC pursuant to ERISA section 4010.

On February 20, 2008 (at 73 FR 9243), PBGC published in the **Federal Register** a proposed rule to amend part 4010 of PBGC's regulations to implement the PPA 2006 changes and provide other guidance. PBGC received four public comments on the proposed rule, all from actuarial consulting firms. All of the commenters sought clarification of some of the proposal's provisions and three commenters requested that additional waivers from the section 4010 reporting requirements be granted in the final rule. The comments are discussed below with the topics to which they relate.

### Overview of Final Rule

This final rule amends part 4010 of PBGC's regulations to implement the change to ERISA section 4010(b)(1). In particular, this final rule provides guidance on how to determine whether reporting is required based on a plan's funding target attainment percentage. The final rule also makes conforming changes to address the PPA 2006 changes affecting the section 4010 reporting triggers based on the imposition of certain liens or on the granting of certain minimum funding waivers.

In conjunction with these changes, the final rule also: (1) Waives reporting in certain cases for controlled groups with aggregate underfunding of \$15 million or less; (2) modifies the standards for determining which plans are exempt from reporting actuarial information; (3) modifies the reporting requirements primarily to implement the PPA 2006 changes; (4) provides guidance on reporting requirements for

<sup>2</sup> ERISA section 4010(a), which was unaltered by PPA 2006, provides that filers must provide the information specified by PBGC in regulations.

sponsors of multiple employer plans; and (5) makes other clarifications. The final rule is applicable to information years beginning after 2007.

The final rule is nearly the same as the proposed rule, but there are a few differences. The key changes are that the final rule—

- Clarifies that for purposes of the gateway tests, only plans that are in existence on the last day of the information year and that are sponsored by persons who are members of the contributing sponsor's controlled group on the last day of the information year are counted;

- Clarifies that fair market value of the plan's assets, for purposes of part 4010 excludes contributions receivable (i.e., contributions received by the plan after the end of the plan year);

- Modifies the proposed rule reporting requirements for sponsors of multiple employer plans and provides for an alternative method of compliance for certain contributing sponsors of multiple employer plans; and

- Modifies the plan actuarial reporting requirements to require filers to report certain information regarding liens and outstanding minimum funding waivers.

- Modifies the proposed rule requirements for certain plans to which special funding rules apply.

A detailed discussion of the final rule follows.

### Information Year

In the original proposed rule under ERISA section 4010 (60 FR 35308, Jul. 6, 1995), PBGC introduced the concept of "information year." The information year is the fiscal year, except that if two or more members of a controlled group have different fiscal years, the information year is the calendar year (§ 4010.5). In the preamble to that original proposed rule, PBGC explained that "information year" serves four purposes:

First, it will help persons determine which plan years and fiscal years to use to identify Filers. Second, it will help Filers determine whether a pension plan qualifies for a filing exemption. Third, it is used to identify the information to be submitted by a Filer. Fourth, it establishes the due date for submission of required information by a Filer. The regulation does not require a Filer to change its fiscal year or the plan year of any pension plan. Further, the regulation does not require a Filer to report financial information on any accounting period other than an existing fiscal year or to report actuarial information for any period other than the existing plan year of a pension plan. Generally, the Information Year is the fiscal year of the Filer. If all members of a controlled group do not report financial

information on the same fiscal year, the Information Year is the calendar year.

“Information year” has been integral to the process of reporting under ERISA section 4010 and PBGC finds no indication that PPA 2006 alters this. Therefore, under the final rule, reporting will continue to be based on the concept of “information year.” The final rule provides guidance for unusual situations, such as where the plan year and the information year differ.

The final rule clarifies how the ERISA section 4010 requirements apply to certain unusual plan year situations, such as when a plan has two plan years that end in the information year or has no plan year that ends in the information year. Under the final rule, the last plan year ending on or before the end of the information year is treated as the plan year that ends within the information year.

The final rule also clarifies that the gateway tests apply only to plans maintained as of the end of the information year and hence exclude plans no longer maintained by the controlled group as of the end of the information year. In addition, the final rule clarifies that when two or more members of a controlled group have different fiscal years, the determination of whether an entity is exempt from the ERISA section 4010 reporting requirements is made on the basis of a calendar year information year.

One commenter requested guidance on applying the information year rules to certain spinoffs, citing as an example the application of the 80% FTAP Gateway Test both to a plan created by a midyear spinoff from a pre-existing plan within the controlled group, and to the pre-existing plan, where the assets and liabilities at the pre-existing plan's valuation date include the assets and liabilities of the spinoff plan. Because section 4010 issues involving midyear spinoffs are infrequent and factually specific, PBGC believes they are better addressed on a case-by-case basis. Filers can obtain guidance on such issues by contacting PBGC's Department of Insurance Supervision and Compliance.

#### *Funding Target Attainment Percentage*

As discussed above, ERISA section 4010(b)(1), as amended by PPA 2006, requires reporting if the funding target attainment percentage at the end of the preceding plan year of a plan maintained by the contributing sponsor or any member of its controlled group is less than 80 percent. ERISA section 303(d)(2) and Code section 430(d)(2) provide that the “funding target attainment percentage” of a plan for a

plan year is the ratio (expressed as a percentage) which—

(A) The value of plan assets for the plan year (as reduced under subsection (f)(4)(B)), bears to

(B) The funding target of the plan for the plan year (determined without regard to subsection (i)(1)).

In accordance with ERISA section 303(g)(1) and Code section 430(g)(1), the value of plan assets and the funding target of a plan for a plan year are determined as of the valuation date of the plan for the plan year. Under ERISA section 303(g)(2) and Code section 430(g)(2), the valuation date for nearly all plans subject to ERISA section 4010 reporting will be the beginning of the plan year.<sup>3</sup> Thus, while ERISA section 4010(b)(1) refers to the funding target attainment percentage at the end of the preceding plan year, in nearly all cases both elements of the funding target attainment percentage must be calculated as of the beginning of the plan year. This creates an ambiguity with regard to the date as of which the funding target attainment percentage is to be calculated for purposes of ERISA section 4010(b)(1).

The final rule resolves this ambiguity by providing that the funding target attainment percentage (for purposes of the 80% FTAP Gateway Test) is determined as of the valuation date for the plan year ending within the information year—generally, the first day of the plan year that ends within the information year. Because plans will need to determine the funding target attainment percentage as of the valuation date for other purposes, measuring the funding target attainment percentage as of the valuation date for the 80% FTAP Gateway Test will be less burdensome on prospective filers than requiring a separate determination as of the end of the preceding plan year. In addition, using this measurement date will give controlled groups ample time to determine whether reporting is required pursuant to the 80% FTAP Gateway Test and to prepare the ERISA

<sup>3</sup> ERISA section 303(g)(2) and Code section 430(g)(3) provide that the valuation date of a plan for any plan year is the first day of the plan year, except that certain small plans may designate any date in the plan year to be the valuation date for the plan year and succeeding plan years. For this purpose, small plans are plans with 100 or fewer participants on each day of the plan year, when aggregated with all plans in the controlled group. Because PBGC will exclude controlled groups with under \$15 million in underfunding, plans that would be considered small plans for purposes of determining valuation dates would rarely be subject to reporting under part 4010. Therefore, the valuation date for nearly all plans subject to ERISA section 4010 reporting would be the beginning of the plan year.

section 4010 filing (if required) by the due date.

ERISA section 303(d)(2) and Code section 430(d)(2) provide that in determining the funding target attainment percentage of a plan for a plan year, plan assets are reduced by the amount of the prefunding balance and the funding standard carryover balance. Plan sponsors are permitted under ERISA section 303(f) and Code section 430(f) to make certain elections to use, increase, or reduce a prefunding balance or a funding standard carryover balance effective at the beginning of the plan year. Under PPA 2006, the Department of the Treasury (Treasury) is to provide guidance on the timing and manner of these elections. On August 31, 2007 (at 72 FR 50544), Treasury published a proposed rule on Benefit Restrictions for Underfunded Pension Plans that would provide such guidance. Treasury's proposed regulation would require that an election that affects the funding target attainment percentage for a plan year be made well before the due date for the ERISA section 4010 filing. If Treasury's final regulation retains this rule, filers will have no difficulty reflecting these elections in determinations of whether reporting is required under ERISA section 4010. However, if the final Treasury regulation allows a plan sponsor to make such an election after the due date for the ERISA section 4010 filing, PBGC would expect controlled groups to anticipate any such election when determining the funding target attainment percentage, regardless of when the election is made.

#### *Certain Plans To Which Special Funding Rules Apply*

There are three categories of plans to which special funding rules apply:

- **Delayed effective date plans**—Sections 104, 105, and 106 of PPA 2006 delay the effective date of the funding amendments for certain plans described in those sections, which in general deal with plans of rural cooperatives, plans affected by settlement agreements with PBGC, and plans of government contractors.
- **Frozen airline plans**—Section 402(b) of PPA 2006 provides alternate funding rules for frozen plans sponsored by commercial passenger airlines and airline caterers.
- **Non-frozen airline plans**—Section 402(a)(2) of PPA 2006, as amended by the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Public Law 110–28, provides funding relief for non frozen plans

sponsored by commercial passenger airlines and airline caterers.

The proposed regulation provided that sections 104, 105, 106, and 402 of PPA 2006 were generally to be disregarded for purposes of 4010 reporting. For example, under the proposed rule, the funding target attainment percentage underlying the 80% FTAP gateway test was to be determined as if these plans were not subject to alternate funding rules. The final regulation retains the proposed regulation requirement with respect to frozen airline plans and delayed effective date plans.

Plans subject to section 402(a)(2) of PPA 2006 (certain non-frozen plans of commercial passenger airlines and airline caterers) use a discount rate of 8.25 percent to determine their funding target for purposes of ERISA section 303 and IRC section 430 for ten years. Under the proposed regulation, this provision would not have affected the FTAP calculation for purposes of the 80% FTAP Gateway Test or reporting the FTAP if a filing is required. The final regulation does not address this issue. PBGC will provide additional guidance as appropriate.

With respect to delayed effective plans, the final regulation, like the proposed regulation, does not address the treatment of any credit balance in determining the FTAP for plans subject to those sections, in particular whether the credit balance is treated as if it were a carryover balance and thus subtracted from assets when determining the FTAP. PBGC is examining this issue as well and will provide additional guidance as appropriate.

The preamble to the proposed rule stated that where provisions of PPA sections 104, 105, 106 and 402 affected a required actuarial valuation reporting item, PBGC would expect that filers could, in consultation with PBGC, provide appropriately modified information instead of the information listed in § 4010.8(a)(11). PBGC is providing those modifications in the final regulation. In the case of a plan year for which the application of the new funding rules is deferred under PPA 2006 sections 104, 105, and 106, the requirements in connection with the actuarial valuation report are those that were in effect as of December 31, 2007 (since those requirements are tied to the same pre-PPA funding rules that such plans must use to determine their funding requirements). With respect to the frozen airline plans, which are subject to completely different funding rules, the final regulation provides that the requirements in connection with the actuarial valuation report are included

with the 4010 filing instructions on PBGC's Web site, [www.pbgc.gov](http://www.pbgc.gov). Because the funding relief for non-frozen airline plans follows the basic framework of the PPA 2006 funding rules and there is thus no need for special guidance, § 4010.8(a)(11) applies.

#### *Minimum Funding Waivers*

ERISA section 4010(b) requires section 4010 reporting if the IRS has granted minimum funding waivers in excess of \$1 million to any plan maintained by any member of the controlled group and as of the end of the plan year ending within the information year there is an outstanding balance on such waivers.

The minimum funding waiver will continue to be included for all five years of the amortization period unless the waiver amortization bases are reduced to zero pursuant to ERISA section 303(e)(5) and Code section 430(e)(5). The final regulation provides that funding waivers granted under ERISA section 302 and Code section 412 for a plan year before ERISA section 303 or Code section 430 became effective count for this purpose. This treatment of pre-PPA 2006 funding waivers is consistent with Treasury's proposed rule on Determination of Minimum Required Pension Contributions, 73 FR 20203 (Apr. 15, 2008) (see § 1.430(a)-1(h)(3)). However, regardless of what the final Treasury regulation provides, pre-PPA 2006 funding waivers will count for purposes of determining whether an ERISA section 4010 filing is required.

To simplify the regulation, the final rule eliminates the provision in the current regulation that provides that a minimum funding waiver is not outstanding under certain circumstances where an agreement requires the maintenance of a specific credit balance. PBGC found that this occurred infrequently. In those cases where it does occur, PBGC will consider waiving the ERISA section 4010 reporting requirement on a case-by-case basis under § 4010.11.

#### *Waiver for Controlled Groups With Aggregate Plan Underfunding not Exceeding \$15 Million*

The technical explanation of PPA 2006 prepared by the staff of the Joint Committee on Taxation<sup>4</sup> states: "It is intended that the PBGC may waive the [section 4010 filing] requirement in appropriate circumstances, such as in

the case of small plans." Similarly, PBGC seeks to balance the benefit it derives from annual reporting of financial and actuarial information with the burden reporting imposes on filers.

Based on its experience, PBGC has determined that controlled groups with aggregate plan underfunding of \$15 million or less present a level of risk and exposure to PBGC that is sufficiently low to warrant the waiver of reporting triggered solely by the 80% FTAP Gateway Test. Thus, under the proposed rule, persons that would be required to file solely because one or more plans are less than 80 percent funded would qualify for a waiver of reporting requirements if the aggregate "4010 funding shortfall" is less than \$15 million (disregarding plans with no 4010 funding shortfall). (This waiver is referred to in this preamble as the "\$15 million waiver.") The final rule defines a plan's 4010 funding shortfall as the funding shortfall under ERISA section 303(c)(4) and Code section 430(c)(4), but determined without regard to the credit balance reduction under ERISA section 303(f)(4)(B) and Code section 430(f)(4)(B). In developing this waiver, PBGC recognized that PPA 2006 requires PBGC to submit to Congress an annual summary report of ERISA section 4010 information submitted to PBGC and that any waiver would therefore also affect the information provided to Congress.

Three commenters expressed concerns about situations in which reporting would not be waived when the aggregate 4010 funding shortfall exceeds \$15 million and the only plans that are less than 80 percent funded are small plans. For example, a small plan that is less than 80 percent funded could trigger a reporting requirement for an entire controlled group even though the other, larger plans are funded well above the 80 percent level. These commenters offered a variety of ways the proposed \$15 million waiver could be modified to waive reporting for filers in such situations, including: (1) Excluding plans that are over 90 percent (or 95 percent) funded when determining the aggregate 4010 funding shortfall; (2) increasing the \$15 million threshold, and (3) waiving reporting if the 80% FTAP Gateway Test is failed only by one or more plans that meet PBGC's definition of an exempt plan under § 4010.8(c) (generally a plan with fewer than 500 participants) for purposes of reporting actuarial information, regardless of the aggregate 4010 funding shortfall amount. The fourth commenter did not express concern about situations in which reporting would not be waived when

<sup>4</sup> Joint Committee on Taxation, Technical Explanation of H.R. 4, the "Pension Protection Act of 2006," as passed by the House on July 26, 2006, and as considered by the Senate on August 3, 2006 (JCX-38-06), August 3, 2006.

the aggregate 4010 funding shortfall exceeds \$15 million and the only plans that are less than 80 percent funded are small plans, but did request that PBGC provide examples to clarify the application of the \$15 million waiver to controlled groups with both small and large plans. PBGC believes that this application of the \$15 million waiver is clear and that further clarification is unnecessary.

The final rule does not change the proposed \$15 million waiver. PBGC is more concerned about the dollar amount of underfunding than the funding percentage. In the case of a large plan, a funding percentage of 90 or 95 percent can represent hundreds of millions of dollars of underfunding. PBGC continues to believe that the \$15 million waiver reasonably balances the need for information and the burden of reporting, and that consistent with the technical explanation of PPA 2006 by the staff of the Joint Committee on Taxation, the waiver will generally exempt controlled groups maintaining only small plans from section 4010 reporting. Moreover, PBGC believes that the exemption from reporting actuarial information in § 4010.8(c) will minimize the potential reporting burdens for sponsors of small plans without impairing PBGC's ability to collect information on controlled groups with plans representing a large amount of underfunding and thereby representing significant financial exposure for PBGC.

PBGC believes that, in most of the situations about which the commenters expressed concern, a contributing sponsor could make additional, relatively nominal, contributions to the small plan to increase its funding percentage to 80 percent or merge the small plan into one of the better funded larger plans to avoid the reporting requirement. One commenter expressed concern that if a small plan with a funding percentage below 80 percent becomes part of a controlled group during the information year as a result of a business transaction, there might not be enough time to fund the plan up or merge it with a better funded plan so as to avoid the reporting requirement. This commenter suggested that reporting be waived if the only plan under the 80 percent funding threshold (1) meets PBGC's definition of an exempt plan for purposes of reporting actuarial information and (2) became a member of a controlled group as a result of a recent acquisition. PBGC is not adopting the commenter's suggestion. PBGC believes that situations in which a section 4010 filing is triggered solely by a small plan's becoming a member of a controlled group during the

information year will occur infrequently, and further can sometimes be avoided in the normal course of planning corporate transactions.

However, filers in such situations may contact PBGC's Department of Insurance Supervision and Compliance to discuss a waiver or extension under PBGC's discretionary authority (see § 4010.11).

As under the proposed rule, the \$15 million waiver does not apply if reporting is required for any reason other than having a plan with a funding target attainment percentage below 80 percent.

One commenter requested guidance as to whether an employer may apply the separate lines of business rules under the Code for purposes of determining whether this employer must file under section 4010. The separate lines of business rules under Code section 414(r), allow an employer to be treated as operating separate lines of business for purposes of meeting the minimum coverage requirements under Code section 410(b), if certain requirements are met. There is no nexus between the filing requirements under ERISA section 4010 and the nondiscrimination requirements under Code section 410(b). Accordingly, the separate lines of business rules under Code section 414 (r) have no bearing on the filing requirements of ERISA section 4010.

#### *Actuarial Information Reporting Requirements*

In addition to the requirements described in ERISA section 4010(a), which provides that filers must submit certain financial and actuarial information as prescribed by PBGC in regulations, ERISA section 4010(d), as amended by PPA 2006, specifies three items of actuarial information that are required to be filed with PBGC. That section provides that information filed under ERISA section 4010 must include:

(A) The amount of benefit liabilities under the plan determined using the assumptions used by the corporation [PBGC] in determining liabilities;

(B) The funding target of the plan determined as if the plan has been in at-risk status for at least 5 plan years; and

(C) The funding target attainment percentage of the plan.

The final rule provides detailed guidance on how to determine benefit liabilities for ongoing plans using the assumptions used by PBGC in determining liabilities. This determination is similar to that set forth in the current regulation under § 4010.8(d)(2). As with the current regulation, the final rule requires filers to use the assumptions prescribed by

§§ 4044.51 through 4044.57 of PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044). However, as explained below, in two respects the final regulation modifies or expands previous guidance (including informal guidance) given by PBGC or PBGC staff relating to certain assumptions not specified in §§ 4044.51 through 4044.57.

First, the final regulation provides that solely for purposes of determining the earliest retirement age (ERA) at valuation date and the unreduced retirement age (URA) to be used when determining expected retirement age (XRA), an active participant is to be treated as continuing in service after the end of the plan year. This provision modifies informal guidance provided by PBGC staff that future expected service should be disregarded when determining XRAs for ERISA section 4010 benefit liability calculations.<sup>5</sup> This modification eliminates an inconsistency between how filers compute benefit liabilities for ERISA section 4010 purposes and how PBGC calculates benefit liabilities as part of its plan monitoring functions. The main impact of this change on ERISA section 4010 filers is that they will need to make a one-time modification of their computer programs. The final rule includes examples demonstrating how XRA is calculated and applied in determining benefit liabilities.

Second, the final regulation provides that a filer may reflect pre-retirement decrements<sup>6</sup> other than mortality (such as turnover and disability) when determining benefit liabilities, subject to the following two requirements:

- If any pre-retirement decrements other than mortality are used to calculate benefit liabilities for a plan, all pre-retirement decrements used for minimum funding purposes for that plan must be used. For example, if a plan uses both termination and disability decrements to determine the minimum required contribution, the benefit liability must be determined either including or excluding both the termination and the disability decrements.

<sup>5</sup> Q&A 17 in the 2001 Blue Book and Q&A 19 in the 2002 Blue Book, available on PBGC's Web site, <http://www.pbgc.gov>. Blue Books are summaries of the questions and answers discussed at meetings between PBGC staff and representatives of the Enrolled Actuaries Program Committee in preparation for the annual Enrolled Actuaries Meetings. The summaries reflect the views of individual staff members and do not represent the official position of PBGC.

<sup>6</sup> "Pre-retirement decrement" is an actuarial term used to describe possible reasons an active participant might cease to be an active participant before retirement (e.g., termination, disability or death).

• Assumptions about the rate of incidence related to a pre-retirement decrement must be the same as those used to determine the funding target for minimum funding purposes.

This provision expands informal guidance provided by PBGC staff<sup>7</sup> and is consistent with common actuarial practice. Although the rules about pre-retirement decrements have not changed from the proposed regulation, the language describing these rules has been modified to address questions raised by a commenter. For example, the final regulation states the first requirement described above explicitly. In addition, language has been added to explain that different XRAs may apply for different pre-retirement decrements<sup>8</sup> and how the pre-retirement decrement rules apply in situations where there is no clear distinction between termination and retirement decrements, as may be the case with certain hybrid plans.

The final regulation also clarifies that the assumptions used to determine the minimum required contribution for the plan year ending within the filer's information year, other than assumptions for decrements, interest, and expenses, must be used when determining benefit liabilities. The types of assumptions in this category include form of payment, cost-of-living increases, and marital status.

In addition to providing detailed guidance on how to determine benefit liabilities,<sup>9</sup> the final rule reflects new requirements (under PPA 2006) to provide the funding target of the plan determined as if the plan has been in at-risk status for at least 5 plan years, and the funding target attainment percentage of the plan. The final rule requires filers to report whether the plan, at any time during the plan year, was subject to any of the limitations described in ERISA section 206(g) (e.g., funding-based limits on benefits and benefit accruals) and, if so, which limitations applied, when such limitations applied, and when such limitations were lifted (if applicable).

The final rule includes two new plan actuarial information reporting requirements that were not included in the proposed rule. Filers must report—

• Whether a required installment or other required payment to the plan was

not made and, as a result, a lien described in ERISA section 303(k) and Code section 430(k) was triggered during the information year, and the required installment or other required payment was not made within ten days after its due date; and

• Whether IRS granted one or more minimum funding waivers totaling in excess of \$1 million, if any portion thereof is outstanding.

This information, which is readily available, will make it easier for PBGC to quickly determine and track the conditions that trigger ERISA section 4010 filings and easily identify situations involving liens or large waivers.

As with the current regulation, the final rule requires submission of the actuarial valuation report for the plan year ending within the filer's information year and specifies what information must be included in or attached to the report. The required items of information have been modified to better suit the new PPA 2006 funding structure. All of the required actuarial information is information that PBGC expects most actuaries would include in post-PPA 2006 valuation reports (e.g., target normal cost, information on shortfall amortization bases, information on funding assumptions, an age/service scatter). However, because the funding rules have changed so dramatically as a result of PPA 2006, and because Treasury regulations implementing the new funding rules are not yet final, the regulation's list of required items may exclude some relevant actuarial information. To allow PBGC to expand the list of required items as it gains more experience with the new funding requirements under PPA 2006, the final rule provides that the online instructions to PBGC's secure e-4010 Web-based application may require that additional items be included in (or attached to) the valuation report. PBGC expects that any additional items would be items typically required to be reported on the Form 5500 Schedule SB (defined benefit plan actuarial information).

Because some of the actuarial reporting requirements are geared to the new funding rules under PPA 2006, which generally are applicable to plan years beginning after 2007, the final regulation includes special rules for plan years beginning before 2008 in § 4010.8(h).

#### *Exempt Plans*

Section 4010.8(c) of PBGC's current regulation provides that actuarial information need not be reported for

plans with fewer than 500 participants, as of the end of the plan year ending within the filer's information year. (It also provides an exemption for certain overfunded plans.) One commenter noted that certain actuarial information is more easily obtained on a plan's valuation date, than as of the end of the plan year. In response to that comment, and based on further consideration by PBGC, the final rule allows participants to be counted on either date for this purpose.

Through means other than reporting under part 4010, such as through PBGC's early warning program (see Technical Update 00-3<sup>10</sup>) and reportable events notices, PBGC has discovered that a number of plans with fewer than 500 participants have significant underfunding and thereby represent significant financial exposure for PBGC. In such cases, PBGC needs actuarial information on these plans to properly evaluate its risk and exposure for the entire controlled group.

Therefore, PBGC is modifying the exemption from reporting actuarial information. Under the final rule, actuarial information is not required if (1) the plan has fewer than 500 participants as of the end of the plan year ending within the filer's information year or as of the valuation date for that plan year, and (2) the plan's 4010 funding shortfall does not exceed \$15 million. The 4010 funding shortfall is described above in the discussion of the \$15 million waiver.

The final rule retains the exemption in the current regulation from providing actuarial information for plans that have no unfunded benefits. For this purpose, unfunded benefits are determined in the same manner as for purposes of ERISA section 4010(d)(1), which requires the reporting of benefit liabilities using the assumptions used by PBGC. The only difference is that the filer will be allowed to use the retirement age assumptions used by the plan for that plan year for purposes of section 303 of ERISA (without regard to the at-risk assumptions of section 303(i) of ERISA) instead of the retirement age assumptions in § 4044.8(d)(2).

As under the current regulation, these exemptions from reporting actuarial information do not apply if the plan has a funding waiver or has been more than 10 days late with minimum funding contributions.

<sup>10</sup> Technical Updates are available on PBGC's Web site, <http://www.pbgc.gov>.

<sup>7</sup> Q&A 25 in the 2000 Blue Book.

<sup>8</sup> When valuing pre-retirement decrements, the XRA represents the assumed age at which benefits will commence.

<sup>9</sup> Although the final rule provides detailed guidance about how benefit liabilities are calculated for section 4010 reporting purposes, there are a few issues that are not addressed (e.g., how to value temporary supplements or lump sums). PBGC will provide additional guidance as appropriate upon request.

### *Special Rules for Multiple Employer Plans*

Although multiple employer plans are uncommon and only a handful have been subject to ERISA section 4010 reporting (a situation that is not expected to change under the new rules), PBGC has received a number of inquiries over the years on how the section 4010 requirements apply to contributing sponsors of multiple employer plans. In response to those inquiries, the proposed rule provided for reduced reporting for certain multiple employer plans and made several clarifications. The proposed rule generally provided that only information on employers that were among the 10 largest employers in terms of participants (for hourly plans) or contributions (for salaried plans) would need to be reported and that filers could provide actuarial information on multiple employer plans by reference if that information (for the same plan year) had been provided by another filer.

A commenter suggested that PBGC waive reporting for a contributing sponsor of a multiple employer plan if the sponsor's portion of the multiple employer plan liability is a *de minimis* amount and all other waiver conditions are met. In response to that comment, and based on further consideration by PBGC, the final rule provisions on multiple employer plans differ from those in the proposed rule.

The final rule provides an alternative method of compliance for certain sponsors of multiple employer plans. An eligible contributing sponsor (defined as a contributing sponsor of a multiple employer plan that would not be subject to reporting if the plan were disregarded in applying the gateway tests) satisfies the section 4010 requirements if any contributing sponsor of the plan provides a timely filing for an information year that coincides with or overlaps with the eligible contributing sponsor's information year. PBGC may request some or all of the information that would otherwise be required from the eligible contributing sponsor; PBGC will make such a request no earlier than the date the information would otherwise have been due. The eligible contributing sponsor must provide the requested information within 45 days after the date of the request.

For most multiple employer plans, the alternative method of compliance will have the effect of a full waiver of reporting for all but one of the contributing sponsors. The alternative method of compliance is simpler than the proposed rule provisions for

multiple employer plans and, unlike those provisions, will not require contributing sponsors to share information, much of which is confidential, with other controlled groups.

The final rule, like the proposed rule, clarifies that the entire 4010 funding shortfall of a multiple employer plan is counted when determining whether the \$15 million waiver applies to any employer that is a contributing sponsor of the multiple employer plan. However, a sponsor of a multiple employer plan that does not qualify for the \$15 million waiver may have its reporting requirement effectively waived under the alternative method of compliance discussed above.

The final rule requires any filer that is a contributing sponsor of a multiple employer plan to provide a list of all contributing sponsors to that plan. The final rule clarifies that with the exception of that list, a filer is not required to provide additional identifying or financial information for another contributing sponsor of the multiple employer plan if that other contributing sponsor is not a member of the filer's controlled group.

### *Other Changes*

The final rule includes an automatic one-day extension of the ERISA section 4010 reporting deadline for controlled groups whose 105-day reporting period includes February 29. This provision codifies a "leap year extension" of the ERISA section 4010 reporting deadline exemplified by Technical Updates 04-1 and 08-1.

The final rule also incorporates the provisions of Technical Update 96-3 that are still relevant in light of PPA 2006. Thus, Technical Update 96-3 is superseded with respect to information years beginning after 2007.

The final rule makes other clarifying, conforming, or editorial changes. Except as specifically discussed in this preamble, no substantive change is intended or should be inferred.

### *Transition Rules*

Under the final rule, the funding target attainment percentage (used for the 80% FTAP Gateway Test and reporting under § 4010.8) and the 4010 funding shortfall (used for the \$15 million waiver and the definition of exempt plans) are determined as of the valuation date for the plan year ending within the information year. These measurements are tied to provisions of PPA 2006 that apply only to plan years beginning after 2007. Thus, for plan years beginning in 2007 but ending in information years that begin after 2007,

these terms are not defined by statute. To address this situation, the proposed rule required that employers use surrogates for determining the funding target attainment percentage and the 4010 funding shortfall for plan years beginning before 2008. The surrogates provided under the proposed rule are as follows:

- The funding target attainment percentage surrogate is the ratio (expressed as a percentage) of the actuarial value of assets (reduced by any credit balance) to the current liability (determined using the highest permissible interest rate) for the 2007 plan year.<sup>11</sup> (A special rule applies in situations where a carryover balance is reduced in accordance with ERISA section 303(f) and Code section 430(f) as of the beginning of the 2008 plan year.)

- The 4010 funding shortfall surrogate is the excess, if any, of the plan's current liability (determined using the highest permissible interest rate) over the actuarial value of assets for the 2007 plan year.

One commenter suggested that in determining the funding target attainment percentage surrogate, that under certain circumstances, the actuarial value of assets not be reduced by the credit balance. The commenter requested that for plan years beginning in 2007, the funding target attainment percentage (FTAP) transition rule provide that assets not be reduced by the credit balance if the ratio of unreduced assets to liability is at least 90 percent. This would make the 4010 FTAP transition rule consistent with the transition rule in Treasury's proposed regulations under Code section 436.<sup>12</sup> IRC section 436(j)(3) provides a permanent exemption to the rule requiring assets be reduced by carryover and prefunding balances. The proposed Treasury regulations under Code section 436 incorporate this statutory exemption in its transition rule for plan years beginning in 2007. ERISA section 4010, however, does not provide any exception to the rule requiring that assets be reduced by carryover and prefunding balances. Accordingly, the final rule does not adopt the commenter's suggestion and PBGC's final rule retains the surrogates provided under the proposed rule:

<sup>11</sup> This surrogate is similar to a surrogate in Treasury's proposed rule on Benefit Restrictions for Underfunded Pension Plans, 72 FR 50544 (Aug. 31, 2007) and in Treasury's proposed rule on Determination of Minimum Required Pension Contributions, 73 FR 20203 (Apr. 15, 2008).

<sup>12</sup> Treasury's proposed rule on Benefit Restrictions for Underfunded Pension Plans, 72 FR 50544 (Aug. 31, 2007).

Although the surrogates described above have not changed from those in the proposed rule, PBGC has modified the regulatory language to describe the methodology explicitly rather than by reference to Treasury rules.

#### Applicability

Section 505(e) of PPA 2006 provides that the amendments made by section 505 apply with respect to “years beginning after 2007.” This applicability provision of PPA 2006 uses the term “year” rather than “plan year,” although the term “plan year” appears in other applicability provisions in PPA 2006. PBGC interprets this section of PPA 2006 to mean that the amendments apply to any information year beginning after 2007. Therefore, these rules apply to information years beginning after 2007.

Technical Update 07–2 provides guidance regarding the application of these rules for information years beginning in 2007. In the rare case of a short information year beginning in 2008 (for example, an information year beginning on January 1, 2008, and ending on March 31, 2008), the filer should contact PBGC to obtain a reporting extension.

#### Compliance With Rulemaking Guidelines

##### Executive Order 12866

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

##### Regulatory Flexibility Act

PBGC certifies under section 605(b) of the Regulatory Flexibility Act that the amendments in this final rule will not have a significant economic impact on a substantial number of small entities. This final rule implements statutory changes made by Congress. It provides guidance on how to determine whether reporting under ERISA section 4010 is required and what to report. Furthermore, PBGC is providing an exemption for controlled groups that have total plan underfunding of \$15 million or less. Accordingly, as provided in section 605 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), sections 603 and 604 do not apply.

##### Paperwork Reduction Act

The information requirements relating to reporting under ERISA section 4010 have been approved by the Office of

Management and Budget under the Paperwork Reduction Act (OMB control number 1212–0049, expires March 31, 2012).

#### List of Subjects

##### 29 CFR Part 4001

Pensions.

##### 29 CFR Part 4010

Pension insurance, Pensions, Reporting and recordkeeping requirements.

##### 29 CFR Part 4044

Pension insurance, Pensions.

■ For the reasons given above, PBGC is amending 29 CFR parts 4001, 4010, 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, three new definitions are added in alphabetical order, to read as follows:

##### § 4001.2 Definitions.

\* \* \* \* \*

*Earliest retirement age at valuation date* means the later of: a participant’s age on his or her birthday nearest to the valuation date, or the participant’s attained age as of his or her Earliest PBGC Retirement Date (as determined under § 4022.10 of this chapter).

\* \* \* \* \*

*Expected retirement age (XRA)* means the age, determined in accordance with §§ 4044.55 through 4044.57 of this chapter, at which a participant is expected to begin receiving benefits when the participant has not elected, before the allocation date, an annuity starting date. This is the age to which a participant’s benefit payment is assumed to be deferred for valuation purposes. An XRA is equal to or greater than the participant’s earliest retirement age at valuation date but less than his or her normal retirement age.

\* \* \* \* \*

*Unreduced retirement age (URA)* means the earlier of the normal retirement age specified in the plan or the age at which an unreduced benefit is first payable.

\* \* \* \* \*

#### PART 4010—ANNUAL FINANCIAL AND ACTUARIAL INFORMATION REPORTING

■ 3. The authority citation for part 4010 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1310.

#### § 4010.1 [Amended]

■ 4. Section 4010.1 is amended by removing the words “the PBGC under section 4010 of ERISA” and adding in their place the words “PBGC under ERISA section 4010”; and by removing the last sentence of the section.

■ 5. In § 4010.2:

■ a. In the introductory text, the words “controlled group, ERISA, fair market value” are removed and the words “controlled group, earliest retirement age at valuation date, ERISA, expected retirement age (XRA), fair market value” are added in their place, and the words “and plan year” are removed and the words “plan year, and unreduced retirement age (URA)” are added in their place.

■ b. The definitions of “exempt entity,” “exempt plan,” “filer,” and “information year” are amended by removing the words “of this part” where they appear once in each definition.

■ c. The definition of “exempt entity” is amended by removing the word “who” and adding in its place the word “that”; by removing the word “whom” and adding in its place the word “which”; and by removing the figures “4010.4(d)” and adding in their place the figures “4010.4(c)”.

■ d. The definition of “information year” is amended by removing the words “the year” and adding in their place the words “the information year”.

■ e. Four new definitions are added in alphabetical order, to read as follows:

##### § 4010.2 Definitions.

\* \* \* \* \*

*At-risk status* means, with respect to a plan for a plan year, at-risk status as defined in ERISA section 303(i)(4) and Code section 430(i)(4).

\* \* \* \* \*

*Funding target* means, with respect to a plan for a plan year, the funding target as provided under ERISA section 303(d)(1) and Code section 430(d)(1) determined as of the valuation date for the plan year.

*Funding target attainment percentage* means, with respect to a plan for a plan year, the funding target attainment percentage as determined under § 4010.4(b) for the plan year.

\* \* \* \* \*

*Valuation date* means, with respect to a plan for a plan year, the valuation date as determined under ERISA section 303(g)(2) and Code section 430(g)(2).

■ 6. In § 4010.3, paragraph (a) is revised to read as follows:

##### § 4010.3 Filing requirement.

(a) *General.* Except as provided in § 4010.8(c) (relating to exempt plans)



and except where one or more waivers under § 4010.11 apply, each filer must submit to PBGC annually, on or before the due date specified in § 4010.10, all information specified in § 4010.6(a) with respect to all members of a controlled group and all plans maintained by members of the filer's controlled group. Under § 4000.3(b) of this chapter, except as otherwise provided by PBGC, the information must be submitted electronically in accordance with the instructions on PBGC's Web site, <http://www.pbgc.gov>.

\* \* \* \* \*

■ 7. Section 4010.4 is amended to read as follows:

**§ 4010.4 Filers.**

(a) *General.* A contributing sponsor of a plan and each member of the contributing sponsor's controlled group on the last day of the information year is a filer with respect to an information year (unless exempted under paragraph (c) of this section) if—

(1) For any plan (including an exempt plan) maintained by the members of the contributing sponsor's controlled group on the last day of the information year, the funding target attainment percentage for the plan year ending within the information year is less than 80 percent;

(2) Any member of the controlled group fails to make a required installment or other required payment to a plan and, as a result, the conditions for imposition of a lien described in ERISA section 303(k) and Code section 430(k) have been met during the information year, and the required installment or other required payment is not made within ten days after its due date; or

(3) Any plan maintained by a member of the controlled group has been granted one or more minimum funding waivers under ERISA section 302(c) and Code section 412(c) totaling in excess of \$1 million, and as of the end of the plan year ending within the information year, any portion thereof is still outstanding.

(b) *Funding target attainment percentage—(1) General.* Except as provided in paragraph (b)(3) of this section, the funding target attainment percentage for a plan for a plan year equals the funding target attainment percentage as provided under ERISA section 303(d)(2) and Code section 430(d)(2) determined as of the valuation date for the plan year.

(2) *Prefunding balance and funding standard carryover balance elections.* For purposes of determining the funding target attainment percentage for a plan for the plan year, prefunding balances and funding standard carryover

balances must reflect any elections (or deemed elections) under ERISA section 303(f) and Code section 430(f) that affect the value of such balances as of the beginning of the plan year, regardless of when the elections (or deemed elections) are made.

(3) *Transition rule for plan years beginning before 2008.* For plan years beginning before 2008, the funding target attainment percentage for a plan for the plan year is determined as the fraction (expressed as a percentage), the numerator of which is the net transition plan assets determined under paragraph (b)(4) of this section, and the denominator of which is the plan's current liability determined using the highest rate of interest allowable under Code section 412(l)(7) as of the valuation date for the 2007 plan year.

(4) *Net transition plan assets—(i) In general.* Net transition plan assets for purposes of paragraph (b)(3) of this section are equal to plan assets as determined under paragraph (b)(4)(ii) of this section reduced by any credit balance in accordance with paragraph (b)(4)(iii) of this section.

(ii) *Determination of assets.* Plan assets under this paragraph (b)(4)(ii) are determined under Code Section 412(c)(2) as in effect for the plan year beginning in 2007, except that the value of plan assets before subtracting the plan's funding standard account credit balance described in paragraph (b)(4)(iii) of this section can neither be less than 90 percent of the fair market value of plan assets nor greater than 110 percent of the fair market value of plan assets on the valuation date for that plan year.

(iii) *Subtraction of credit balance.* If a plan has a funding standard account credit balance as of the valuation date for the plan year beginning in 2007, that balance is subtracted from the asset value described in paragraph (b)(4)(ii) of this section as of that valuation date.

(iv) *Effect of funding standard carryover balance reduction for 2008 plan year.* Notwithstanding paragraph (b)(4)(iii) of this section, if, for the plan year beginning in 2008, the employer has made an election to reduce some or all of the funding standard carryover balance as of the first day of that year in accordance with ERISA section 303(f) and Code section 430(f), then the present value (determined as of the valuation date for the plan year beginning in 2007 using the valuation interest rate for that plan year) of the amount so reduced is not treated as part of the funding standard account credit balance when that balance is subtracted from the asset value under paragraph (b)(4)(iii) of this section.

(c) *Exempt entities.* A person is an exempt entity for an information year if the conditions of paragraphs (c)(1) through (4) of this section are satisfied.

(1) The person is not a contributing sponsor of a plan (other than an exempt plan) as of the last day of the information year.

(2) The person has revenue for its fiscal year ending within the controlled group's information year that is five percent or less of the revenue of the person's controlled group for the fiscal year(s) ending within the information year.

(3) The person has annual operating income for the fiscal year ending within the controlled group's information year that is no more than the greater of—

(i) Five percent of the controlled group's annual operating income for the fiscal year(s) ending within the information year, or

(ii) \$5 million.

(4) The person has net assets at the end of the fiscal year ending within the controlled group's information year that is no more than the greater of—

(i) Five percent of the controlled group's net assets at the end of the fiscal year(s) ending within the information year, or

(ii) \$5 million.

(d) *Transition rule; failure to make required contribution; minimum funding waiver.* For plan years beginning before 2008, where the reference is made in paragraph (a)(2) of this section to "ERISA section 303(k) and Code section 430(k)" a reference to "ERISA section 302(f)(1)(A) and (B) and Code section 412(n)(1)(A) and (B)" shall apply in its place, and where the reference is made in paragraph (a)(3) of this section to "ERISA section 302(c) and Code section 412(c)" a reference to "ERISA section 303 and Code section 412(d)" shall apply in its place as those provisions are in effect for plan years beginning before 2008.

(e) *Minimum funding waiver—(1) General.* For purposes of § 4010.4(a)(3), a portion of the minimum funding waiver for a plan is considered outstanding unless prior to the plan year ending within the information year the statutory amortization period has ended, or, as of the valuation date for the plan year ending within the information year, the amortization bases are deemed to be reduced to zero pursuant to ERISA section 303(e)(5) and Code section 430(e)(5).

(2) *Example.* Company A sponsors Plan X, which received a minimum funding waiver of \$700,000 for the plan year ending December 31, 2004, and another waiver of \$500,000 for the plan year ending December 31, 2008. Assume

that the amortization bases of the waivers are not reduced to zero pursuant to ERISA section 303(e)(5) and Code section 430(e)(5), and the waivers are therefore outstanding for the full five-year statutory amortization period. Also, assume Company A has a calendar information year. For the 2009 information year, Company A must report under ERISA section 4010. However, for the 2010 information year, Company A, assuming no other obligation to report under ERISA section 4010, is not required to report.

(f) *Certain plans to which special funding rules apply.* The provisions of sections 104, 105, 106, and 402(b) of the Pension Protection Act of 2006, Public Law 109-280 (dealing with plans of certain rural cooperatives, certain plans affected by settlement agreements with PBGC, certain plans of government contractors, and certain frozen plans of commercial passenger airlines and airline caterers), are disregarded for purposes of this part, except that these provisions are taken into account in determining the information to be submitted under § 4010.8(i) of this part (in connection with the actuarial valuation report).

■ 8. In § 4010.5:

- a. Paragraph (b) is amended by removing the words “shall be” and adding in their place the word “is”.
- b. The heading of paragraph (c)(1) is removed and paragraph (c)(1) is redesignated as paragraph (c) with the heading “*Controlled group members with different fiscal years.*”.
- c. Redesignated paragraph (c) is amended by removing the words “shall be” and adding in their place the word “is” and by adding to the end of the paragraph the following new sentence: “(If any two members of the controlled group report financial information on the basis of different fiscal years, the determination of whether an entity is an exempt entity is based on a calendar year information year for purposes of this paragraph (c) and § 4010.4(c).)”.
- d. Paragraph (c)(2) is removed.
- e. New paragraphs (d) and (e) are added to read as follows:

**§ 4010.5 Information year.**

\* \* \* \* \*

(d) *Examples.* The following examples illustrate the rule in paragraph (c) of this section.

(1) *Example 1.* Companies A and B are the only members of the same controlled group, and both are contributing sponsors to nonexempt plans. Company A has a July 1 fiscal year, and Company B has an October 1 fiscal year. The information year is the calendar year. Company A’s financial

information with respect to its fiscal year ending June 30, 2009, and Company B’s financial information with respect to its fiscal year ending September 30, 2009, must be submitted to the PBGC following the end of the 2009 calendar year information year.

(2) *Example 2.* The facts are the same as in Example 1 except that Company B is not a contributing sponsor of a plan and would be an exempt entity using the calendar year as the information year. Because Company B is an exempt entity based on a calendar year information year, it is excluded when determining the information year. Thus, the information year is the July 1 fiscal year. Note that Company B is an exempt entity even if it would not be exempt based on the July information year.

(3) *Example 3.* The facts are the same as in Example 2 except that Company B would not be an exempt entity using the calendar year information year but would be exempt based on an information year that is the July 1 fiscal year. Since Company B is not exempt based on a calendar year information year, it may not be excluded when determining the information year. Therefore, the information year is the calendar year and Company B is not an exempt entity.

(e) *Special rules for certain plan years.* If a plan maintained by the members of the contributing sponsor’s controlled group has two plan years that end in the information year or has no plan year that ends in the information year, the last plan year ending on or immediately before the end of information year is deemed to be the plan year ending within the information year.

■ 9. In § 4010.6:

- a. Paragraph (a)(1) is amended by removing the words “the controlled group” and adding in their place the words “the filer’s controlled group”.
- b. Paragraphs (a)(1) and (a)(2) are amended by removing the words “the PBGC’s website” (which appear once in each paragraph) and adding in their place the words “PBGC’s Web site, <http://www.pbgc.gov>”.
- c. Paragraphs (b) and (c) are amended by removing the words “the PBGC” (which appear once in each paragraph) and adding in their place the word “PBGC”.

■ 10. In § 4010.7:

- a. Paragraphs (a) introductory text and (b) introductory text are amended by removing the words “the PBGC’s website” (which appear once in each paragraph) and adding in their place the words “PBGC’s Web site, <http://www.pbgc.gov>”; and by removing the

words “controlled group” (which appear once in each paragraph) and adding in their place the words “filer’s controlled group”.

- b. Paragraph (a)(1)(ii) is amended by adding the word “and” after the semicolon at the end of the paragraph.
- c. Paragraph (a)(2) is amended by removing the words “date immediately preceding the date” and adding in their place the words “day before”.
- d. Paragraph (b)(1)(iii) is amended by removing the words “since the beginning of the filer’s information year” and adding in their place the words “during the filer’s information year”.
- e. Paragraph (b)(1)(iv) is amended by removing the words “had not been maintained” and adding in their place the words “was not maintained”; and by removing the word “and” after the semicolon at the end of the paragraph.
- f. Paragraph (b)(1)(v) is amended by adding the word “and” after the semicolon at the end of the paragraph.
- g. Paragraph (b)(2) is amended by removing the words “maintaining the plan” and adding in their place the words “maintaining the plan (if applicable)”; and by removing the words “paragraph (b)(1) as of the date immediately preceding that date” and adding in their place the words “paragraph (b)(1) of this section as of the day before that date”.
- h. New paragraph (b)(1)(vi) is added to read as follows:

**§ 4010.7 Identifying information.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(vi) In the case of a multiple employer plan, a list of the contributing sponsors as of the end of the plan year ending within the filer’s information year, including the name, employer identification number, contact information, fiscal year, and a statement as to whether each contributing sponsor is a publicly-traded company; and

\* \* \* \* \*

■ 11. Section 4010.8 is revised to read as follows:

**§ 4010.8 Plan actuarial information.**

(a) *Required information.* Except as provided elsewhere in this part, for each plan (other than an exempt plan) maintained by any member of the filer’s controlled group, each filer is required to provide, in accordance with the instructions on PBGC’s Web site, <http://www.pbgc.gov>, the following actuarial information determined (except as specified below) as of the end of plan year ending within the filer’s information year—

(1) The number of—

(i) Retired participants and beneficiaries receiving payments,

(ii) Terminated vested participants, and

(iii) Active participants;

(2) The fair market value of the plan's assets (excluding any contributions received after year-end);

(3) The amount of benefit liabilities under the plan, setting forth separately the amount of the liabilities attributable to retired participants and beneficiaries receiving payments, terminated vested participants, and active participants, determined, for this purpose in accordance with paragraph (d) of this section;

(4) A description of the actuarial assumptions used to determine the benefit liabilities in paragraph (a)(3) of this section;

(5) The funding target (as of the valuation date) for the plan year ending within the information year determined in accordance with ERISA section 303(i) and Code section 430(i) as if the plan had been in at-risk status for a consecutive period of at least five plan years;

(6) The funding target attainment percentage (as of the valuation date) for the plan year ending within the information year;

(7) The adjusted funding target attainment percentage as defined in ERISA section 206(g)(9)(B) and Code section 436(j)(2) for the plan year ending within the information year;

(8) Whether the plan, at any time during the plan year, was subject to any of the limitations described in ERISA section 206(g) and Code section 436, and, if so, which limitations applied, when such limitations applied, and when (if applicable) they were lifted;

(9) Whether a required installment or other required payment to the plan was not made, and, as a result, a lien described in ERISA section 303(k) and Code section 430(k) was triggered during the information year, and the required installment or other required payment was not made within ten days after its due date;

(10) Whether any portion of the total minimum funding waiver(s) in excess of \$1 million granted with respect to such plan is outstanding;

(11) A copy of the actuarial valuation report for the plan year ending within the filer's information year that contains or is supplemented by the following information for that plan year—

(i) The funding target calculated pursuant to ERISA section 303 without regard to subsection 303(i)(1) (and Code section 430 without regard to subsection 430(i)(1)), setting forth separately the

value of the liabilities attributable to retirees and beneficiaries receiving payment, terminated vested participants, and active participants (showing vested and nonvested benefits separately);

(ii) A summary of the actuarial assumptions and methods used for purposes of ERISA section 303 and Code section 430, including the form of payment and benefit commencement date assumptions for all active and deferred vested participants not yet receiving benefits, information on how lump sums are valued (for plans that provide lump sums other than *de minimis* lump sums), and any changes in those assumptions and methods since the previous valuation and the justifications for such changes.

(iii) The effective interest rate (as defined in ERISA section 303(h)(2)(A) and Code section 430(h)(2)(A));

(iv) The target normal cost calculated pursuant to ERISA section 303 without regard to subsection 303(i)(2) (and Code section 430 without regard to subsection 430(i)(2));

(v) For the plan year and each of the four preceding plan years, a statement as to whether the plan was in at-risk status for that plan year;

(vi) In the case of a plan that is in at-risk status, the target normal cost calculated pursuant to ERISA section 303 and Code section 430 as if the plan has been in at-risk status for five consecutive years;

(vii) The value of the plan's assets (reflecting any averaging method) as of the valuation date and the fair market value of the plan's assets as of the valuation date;

(viii) The funding standard carryover balance and the prefunding balance (maintained pursuant to ERISA section 303(f)(1) and Code section 430(f)(1)) as of the beginning of the plan year and a summary of any changes in such balances in the past year (e.g., amounts used to offset the minimum funding requirement, amounts reduced in accordance with any elections under ERISA section 303(f)(5) and Code section 430(f)(5), interest credited to such balances, and excess contributions used to increase such balances);

(ix) A list of amortization bases (shortfall and waiver) under ERISA section 303 and Code section 430, including the year each base was established, the original amount, the installment amount, and the remaining balance at the beginning of the plan year;

(x) An age/service scatter for active participants including average compensation information for pay-related plans and average account

balance information for hybrid plans presented in a format similar to that described in the instructions to Schedule SB of the Form 5500;

(xi) Expected disbursements (benefit payments and expenses) during the plan year;

(xii) A summary of the principal eligibility and benefit provisions on which the valuation of the plan was based (and any changes to those provisions since the previous valuation), along with descriptions of any benefits not included in the valuation, any significant events that occurred during the plan year, and the plan's early retirement factors; in the case of a plan that provides lump sums, other than *de minimis* lump sums, the summary must include information on how annuity benefits are converted to lump sum amounts (e.g., whether early retirement subsidies are reflected); and

(xiii) Any other similar information as specified in instructions on PBGC's Web site, <http://www.pbgc.gov>; and

(12) A written certification by an enrolled actuary that, to the best of his or her knowledge and belief, the actuarial information submitted is true, correct, and complete and conforms to all applicable laws and regulations, provided that this certification may be qualified in writing, but only to the extent the qualification(s) are permitted under 26 CFR 301.6059-1(d).

(b) *Alternative compliance for plan valuation report.* If any of the information specified in paragraph (a)(11) of this section is not available by the date specified in § 4010.10(a), a filer may satisfy the requirement to provide such information by—

(1) Including a statement, with the material that is submitted to PBGC, that the filer will file the unavailable information by the alternative due date specified in § 4010.11(b), and

(2) Filing such information (along with a certification by an enrolled actuary under paragraph (a)(12) of this section) with PBGC by that alternative due date.

(c) *Exempt plan.* The actuarial information specified in this section is not required with respect to a plan if the plan satisfies the conditions in paragraph (c)(1) through (3).

(1) The plan—

(i) Has fewer than 500 participants as of the end of the plan year ending within the information year or as of the valuation date for that plan year and has a 4010 funding shortfall (as defined in § 4010.11(c)) for the plan year ending within the information year that is not in excess of \$15 million, or

(ii) Has benefit liabilities as of the end of the plan year ending within the filer's

information year, (determined in accordance with paragraph (d) of this section) equal to or less than the fair market value of the plan's assets.

(2) The plan has received, by or within ten days after the due dates, all required installments or other payments required to be made during the information year under ERISA sections 302 and 303 and Code sections 412 and 430.

(3) The plan has no outstanding minimum funding waivers (as described in § 4010.4(a)(3)) as of the end of the plan year ending within the information year.

(d) *Value of benefit liabilities.* The value of a plan's benefit liabilities at the end of a plan year must be determined using the plan census data described in paragraph (d)(1) of this section and the actuarial assumptions and methods described in paragraph (d)(2) or, where applicable, (d)(3) of this section.

(1) *Census data*—(i) *Census data period.* Plan census data must be determined (for all plans for any information year) either as of the end of the plan year or as of the beginning of the next plan year.

(ii) *Projected census data.* If actual plan census data are not available, a plan may use a projection of plan census data from a date within the plan year. The projection must be consistent with projections used to measure pension obligations of the plan for financial statement purposes and must give a result appropriate for the end of the plan year for these obligations. For example, adjustments to the projection process are required where there has been a significant event (such as a plan amendment or a plant shutdown) that has not been reflected in the projection data.

(2) *Actuarial assumptions and methods.* The value of benefit liabilities must be determined using the following rules in paragraphs (d)(2)(i) through (iv) of this section:

(i) *Assumptions included in §§ 4044.51 through 4044.57.* Interest, expenses, mortality and retirement assumptions must be as prescribed in §§ 4044.51 through 4044.57 of this chapter.

(ii) *Assumptions not included in §§ 4044.51 through 4044.57.* Assumptions for decrements other than mortality and retirement (such as turnover or disability) used to determine the minimum required contribution under ERISA section 303 and Code section 430 for the plan year ending within the filer's information year may be used, but only if all such assumptions are used. For plans where there is no distinction between

termination and retirement assumptions, any termination/retirement rates at ages after the Earliest PBGC Retirement Date (as defined in § 4022.10 of this chapter) must be treated as retirement rates and replaced by expected retirement ages; termination/retirement rates at ages below the Earliest PBGC Retirement Date must be treated as pre-retirement decrements. Assumptions used to determine the minimum required contribution for the plan year ending within the filer's information year, other than assumptions for decrements, interest, and expenses (e.g., form of payment, cost-of-living increases, marital status), must be used.

(iii) *Benefits to be valued.* Benefits to be valued include all benefits earned or accrued under the plan as of the end of the plan year ending within the information year and other benefits payable from the plan including, but not limited to, ancillary benefits and retirement supplements, regardless of whether such benefits are protected by the anti-cutback provisions of Code section 411(d)(6).

(iv) *Future service.* Future service expected to be accrued by an active participant in an ongoing plan during future employment (based on the assumptions used to determine benefit liabilities) must be included in determining the earliest and unreduced retirement ages used to determine the expected retirement age and in determining an active participant's entitlement to early retirement subsidies and supplements at the expected retirement age. See the examples in paragraph (e) of this section.

(3) *Special actuarial assumptions for exempt plan determination.* Solely for purposes of determining whether a plan is an exempt plan for an information year, the value of benefit liabilities may be determined by substituting for the retirement age assumptions in paragraph (d)(2) of this section the retirement age assumptions used by the plan for the plan year ending within the information year for purposes of section 303 of ERISA without regard to the at-risk assumption of subsection 303(i) of ERISA and Code section 430 without regard to the at-risk assumption of subsection 430(i).

(e) *Examples.* The following examples demonstrate how XRA is determined and applied for purposes of determining benefit liabilities under paragraph (d) of this section:

(1) *Example 1.* (i) *Facts.* Plan X has a normal retirement age of 65, but allows benefits to commence as early as age 55 for participants who complete at least 10 years of service before termination.

Early retirement benefits are reduced for participants with fewer than 25 years of service. Employee A is an active participant who is age 40 and has completed 5 years of service. Assume the "medium" XRA look-up table applies, and that for purposes of § 4010.8(d), the filer has decided not to take pre-retirement decrements other than mortality table into account as permitted under § 4010.8(d)(2)(i).

(ii) *Determination of XRA.* If A continues working, the earliest age A could start receiving benefit is age 55. Therefore, A's earliest retirement age at valuation (ERA) is 55. Because the earliest that A can receive an unreduced benefit is when A completed 25 years of service (at age 60), A's URA is age 60. Under the medium XRA look-up table, A's XRA is 58.

(iii) *Determination of Benefit Liabilities.* The benefit liability is the present value of A's benefit accrued as of the measurement date assuming A retires at age 58 and elects to have benefits commence immediately. Since A will not be eligible to receive unreduced benefits at that time, the accrued benefit is reduced in accordance with the plan's early retirement reduction provisions, including any subsidies to which A will be entitled under the assumption that A works until age 58.

(2) *Example 2.* Employee B is also an active participant in plan X and is age 40 with 15 years of service. B will complete 25 years of service at age 50. However, because the plan does not allow for benefit commencement before age 55, B's ERA, URA and thus, XRA are all age 55. The benefit liability is the present value of B's benefit accrued as of the measurement date assuming B retires at age 55 and elects to commence benefits immediately. Since B will be eligible to receive an unreduced benefit at that time, the full unreduced benefit amount is valued.

(3) *Example 3*—(i) *Facts.* Assume the same facts as in Example 1, except that for purposes of § 4010.8(d), the filer has decided to take pre-retirement decrements other than mortality into account as permitted under § 4010.8(d)(2)(i). Assume the only pre-retirement decrement other than mortality is turnover. The plan's turnover rates go from age 21 to age 54, and the retirement rates go from age 55 to age 65.

(ii) *Determination of XRA.* If A terminates employment at or before age 45, A will not be eligible to receive benefits until age 65. Therefore, the portion of Employee A that is assumed to terminate before age 45 has an ERA, URA, and XRA of age 65. The portion

of A that remains in service to age 45, after the application of the applicable turnover decrements, and then terminates at or after age 45, but before age 55, will be entitled to receive a reduced benefit as early as 55. Therefore, the portion of A that is assumed to terminate during this period has an ERA of 55, a URA of 65 and an XRA of 60. Since the turnover rates stop at age 55, the portion of A that remains in service to age 55 is assumed to remain in service until the XRA for that portion of A. For that portion of A, the ERA is 55, the URA is 60 and the XRA is 58. (For purposes of § 4010.8(d), the plan's assumed retirement rates are replaced by XRAs.)

(iii) *Determination of benefit liabilities.* The benefit liability of A is the sum of the present value of A's full accrued benefit at age 65 for the portion of A that terminates between age 40 and age 45, the present value of A's accrued benefit reduced for commencement at age 60 for the portion of A that terminates between age 45 and age 54, and the present value of A's accrued benefit reduced for commencement at age 58 for the portion of A that remains employed until age 55.

(4) *Example 4.* Assume the same facts as in Example 3, except that Employee B, the sole active participant, is age 40 with 15 years of service. The portion of B that is assumed to terminate before age 50 would be entitled to receive a reduced benefit as early as age 55 or an unreduced benefit at age 65. That portion of B has an ERA of 55, a URA of 65, and an XRA of 60. The benefit liability for that portion of B is the present value of B's benefit accrued as of the measurement date assuming B commences a reduced benefit at age 60. The portion of B that survives to age 50 would be entitled to receive an unreduced benefit as early as age 55. That portion of B has an ERA, URA and XRA of 55. The benefit liability for this portion of B is the present value of B's benefit accrued as of the measurement date assuming B retires and commences unreduced payments at age 55.

(f) *Multiple employer plans.* If, with respect to a multiple employer plan, the actuarial information required under this section 4010 for the plan year ending within the filer's information year has been filed under part 4010 by another filer, the filer may include this actuarial information by reference. The filer must report the name, EIN and plan number of the multiple employer plan and the name of the other filer that submitted this information.

(g) *Previous filing for plan year.* If the actuarial information for the plan year as required under this § 4010.8 has been

submitted by the filer in a previous 4010 submission, the filing may include that actuarial information by reference to the previous submission.

(h) *Special rules for plan years beginning before 2008.* For plan years beginning before 2008:

(1) The requirements of paragraphs (a) (5) through (8) of this section do not apply.

(2) The references in paragraph (a)(9) of this section to ERISA section 303(k) and Code section 430(k) are replaced with references to sections of ERISA and the Code, as in effect before amendment by the Pension Protection Act of 2006, Public Law 109-280.

(3) Instead of the requirement of paragraph (a)(11) of this section, the actuarial valuation report requirements in § 4010.8(a)(5) in effect as of December 31, 2007, apply.

(i) *Plans subject to special funding rules under sections 104, 105, 106 and 402(b) of the Pension Protection Act of 2006.* Instead of the requirements of paragraph (a)(11) of this section:

(1) In the case of a plan year for which the application of new funding rules is deferred for a plan under sections 104, 105, and 106 of the Pension Protection Act of 2006, Pub. L. 109-280 (dealing with plans of certain rural cooperatives, certain plans affected by settlement agreement with PBGC, and certain plans of government contractors), the requirements in § 4010.8(a)(5) (in connection with the actuarial valuation report) in effect as of December 31, 2007, apply to the plan.

(2) In the case of a plan year for which a plan is subject to section 402(b) of the Pension Protection Act of 2006, Public Law 109-280 (dealing with certain frozen plans of commercial passenger airlines and airline caterers), the plan must meet the requirements in connection with the actuarial valuation report in accordance with instructions on PBGC's Web site, <http://www.pbgc.gov>.

#### § 4010.9 [Amended]

■ 12. In § 4010.9:

■ a. Paragraph (a) is amended by removing the words "the PBGC's Web site" and adding in their place the word "PBGC's Web site, <http://www.pbgc.gov>"; and by removing the words "controlled group member" and adding in their place the words "member of the filer's controlled group".

■ b. Paragraph (c) is amended by removing the words "within 15 days after they are prepared" adding in their place the words "within 15 days after they are prepared, if they are prepared" and by removing the words "audited

and unaudited financial statements" and adding in their place the words "audited and unaudited financial statements, if prepared".

■ c. Paragraph (d) is amended by removing the words "the PBGC" where they appear three times and adding in their place each time the word "PBGC".

#### § 4010.10 [Amended]

■ 13. In § 4010.10:

■ a. Paragraphs (a), (b), (c), and (d) are amended by removing the words "the PBGC" wherever they appear and adding in their place the word "PBGC".

■ b. Paragraphs (c), (d), and (e) are amended by removing the words "The PBGC" wherever they appear and adding in their place the word "PBGC".

■ c. Paragraph (a) is amended by removing the word "shall" and adding in place the word "must"; and by adding the following new sentence at the end of the paragraph: "The filing deadline is extended to the 106th date after the close of the filer's information year if the 105-day reporting period includes February 29."

■ 14. Section 4010.11 is revised to read as follows:

#### § 4010.11 Waivers and extensions.

(a) *Aggregate funding not in excess of \$15 million.* Unless reporting is required by § 4010.4(a)(2) or (a)(3), reporting is waived for a person (that would be a filer if not for the waiver) for an information year if, for the plan year ending within the information year, the aggregate 4010 funding shortfall for all plans (including any exempt plans) maintained by the person's controlled group (disregarding those plans with no 4010 funding shortfall) does not exceed \$15 million.

(b) *Other waiver authority.* PBGC may waive the requirement to submit information with respect to one or more filers or plans or may extend the applicable due date or dates specified in § 4010.10 of this part. PBGC will exercise this discretion in appropriate cases where it finds convincing evidence supporting a waiver or extension; any waiver or extension may be subject to conditions. A request for a waiver or extension must be filed in writing with PBGC at the address provided in § 4010.10(c) no later than 15 days before the applicable due date specified in § 4010.10 of this part, and must state the facts and circumstances on which the request is based.

(c) *4010 funding shortfall for waivers and exemptions—(1) General.* Except as provided in paragraph (c)(2) of this section, a plan's 4010 funding shortfall for a plan year equals the funding shortfall as provided under ERISA

section 303(c)(4) and Code section 430(c)(4) determined as of the valuation date for the plan year, except that the value of plan assets is determined without regard to the reduction under ERISA section 303(f)(4)(B) and Code section 430(f)(4)(B) (dealing with reduction of assets by the amount of refunding and funding standard carryover balances).

(2) *Transition rule for plan years beginning before 2008.* For plan years beginning before 2008, a plan's 4010 funding shortfall for a plan year equals the excess, if any, of the plan's current liability over the value of plan assets. For this purpose, both current liability and plan assets are determined in the manner provided in § 4010.4(b)(3), except that assets are not reduced by the credit balance in the funding standard account.

(3) *Multiple employer plans.* For purposes of § 4010.8(c) and paragraph (a) of this section, the entire 4010 funding shortfall of any multiple employer plan of which the filer or any member of the filer's controlled group is a contributing sponsor is included.

■ 15. Sections 4010.12, 4010.13, and 4010.14 are redesignated as §§ 4010.13, 4010.14, and 4010.15.

■ 16. New § 4010.12 is added to read as follows:

**§ 4010.12 Alternative method of compliance for certain sponsors of multiple employer plans.**

(a) *In general.* Subject to paragraph (b) of this section, an eligible contributing sponsor (as defined in paragraph (c) of this section) of a multiple employer plan satisfies the requirements of this part for an information year if any contributing sponsor of the multiple employer plan provides a timely filing under this part for an information year that coincides with or overlaps with the eligible contributing sponsor's information year.

(b) *PBGC request for additional information.* PBGC may request some or all of the information that would otherwise be required under this part from an eligible contributing sponsor that uses the alternative method of compliance in this section. PBGC will make such a request no earlier than the date the information would otherwise have been due. The eligible contributing sponsor must provide the requested information no later than 30 days after PBGC makes the request. The requested information need not be submitted electronically.

(c) *Eligible contributing sponsor.* For purposes of this section, an eligible contributing sponsor of a multiple employer plan is a contributing sponsor

that would not be subject to reporting if the plan were disregarded in applying the gateway tests in § 4010.4(a).

**§ 4010.13 [Amended]**

■ 17. Redesignated § 4010.13 is amended by removing the words "section 4010(c) of ERISA" and adding in their place the words "ERISA section 4010(c)"; by removing the words "the PBGC" and adding in their place the word "PBGC"; and by removing the word "shall" and adding in its place the word "will".

**§ 4010.14 [Amended]**

■ 18. Redesignated § 4010.14 is amended by removing the words "section 4071 of ERISA" and adding in their place the words "ERISA section 4071"; by removing the words "the PBGC" and adding in their place the word "PBGC"; and by removing the words "The PBGC" and adding in their place the word "PBGC".

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

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

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

**§ 4044.2 [Amended]**

■ 20. In § 4044.2:

■ a. In the introductory text, the words "distribution date, ERISA, fair market value" are removed and the words "distribution date, earliest retirement age at valuation date, ERISA, expected retirement age (XRA), fair market value" are added in their place and the words "termination date, and" are removed and the words "termination date, unreduced retirement age (URA), and" are added in their place.

■ b. The definitions of "earliest retirement age at valuation date", "expected retirement age (XRA)", and "unreduced retirement age (URA)" are removed.

Issued in Washington, DC, this 12th day of March 2009.

**Vincent K. Snowbarger,**  
*Acting Director, Pension Benefit Guaranty Corporation.*

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

**Judith R. Starr,**  
*Secretary, Board of Directors, Pension Benefit Guaranty Corporation.*

[FR Doc. E9-5741 Filed 3-13-09; 8:45 am]

**BILLING CODE 7709-01-P**

**PENSION BENEFIT GUARANTY CORPORATION**

**29 CFR Parts 4022 and 4044**

**Allocation of Assets in Single-Employer Plans; Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Valuing and Paying Benefits**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule.

**SUMMARY:** Pension Benefit Guaranty Corporation's regulations on Allocation of Assets in Single-Employer Plans and Benefits Payable in Terminated Single-Employer Plans prescribe interest assumptions for valuing and paying certain benefits under terminating single-employer plans. This final rule amends the asset allocation regulation to adopt interest assumptions for plans with valuation dates in the second quarter of 2009 and amends the benefit payments regulation to adopt interest assumptions for plans with valuation dates in April 2009. Interest assumptions are also published on PBGC's Web site (<http://www.pbgc.gov>).

**DATES:** Effective April 1, 2009.

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

**SUPPLEMENTARY INFORMATION:** PBGC's regulations prescribe actuarial assumptions—including interest assumptions—for valuing and paying plan benefits of terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions are intended to reflect current conditions in the financial and annuity markets.

These interest assumptions are found in two PBGC regulations: the regulation on Allocation of Assets in Single-Employer Plans (29 CFR Part 4044) and the regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR Part 4022). Assumptions under the asset allocation regulation are updated quarterly; assumptions under the benefit payments regulation are updated monthly. This final rule updates the assumptions under the asset allocation regulation for the second quarter (April through June) of 2009 and updates the