

## PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4000, 4001, 4043, 4204, 4206, and 4231

RIN 1212-AB06

### Reportable Events and Certain Other Notification Requirements

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule.

**SUMMARY:** In 2013, PBGC proposed to establish risk-based safe harbors that would exempt most companies and plans from many of its reportable events requirements and target reporting toward the minority of plan sponsors and plans presenting the most substantial risk of involuntary or distress termination. After holding a hearing on the proposal, and carefully considering the public's written and oral comments, PBGC is publishing this final rule to make the requirements of the sponsor risk-based safe harbor more flexible, make the funding level for satisfying the well-funded plan safe harbor lower and tied to the variable-rate premium, and add public company waivers for five events. The waiver structure under the final rule will further reduce unnecessary reporting requirements, while at the same time better targeting PBGC's resources to plans that pose the greatest risks to the pension insurance system. PBGC anticipates the final rule will exempt about 94 percent of plans and sponsors from many reporting requirements and result in a net reduction in reporting to PBGC. This rulemaking is a result of PBGC's regulatory review under Executive Order 13563.

**DATES:** Effective October 13, 2015. See Applicability in **SUPPLEMENTARY INFORMATION**.

#### FOR FURTHER INFORMATION CONTACT:

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#### SUPPLEMENTARY INFORMATION:

#### Executive Summary—Purpose of the Regulatory Action

This rule is needed to make reporting more efficient and effective, to avoid unnecessary reporting requirements, and to conform PBGC's reportable

events regulation to changes in the law. A better-targeted and more efficient reporting system helps preserve retirement plans.

PBGC's legal authorities for this action are section 4002(b)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), which authorizes PBGC to issue regulations to carry out the purposes of title IV of ERISA, and section 4043 of ERISA, which gives PBGC authority to define reportable events and waive reporting.

#### Executive Summary—Major Provisions of the Regulatory Action

##### *Changing the Waiver Structure*

Under the regulation's long-standing waiver structure for reportable events, which primarily focused on the funded status of a plan, PBGC often did not get reports it needed; at the same time, it received many reports that were unnecessary. This mismatch occurred because the old waiver structure was not well tied to the actual risks and causes of plan terminations, particularly the risk that a plan sponsor will default on its financial obligations, ultimately leading to an underfunded termination of its pension plan.

The final rule provides a new reportable events waiver structure that is more closely focused on risk of default than was the old waiver structure. Some reporting requirements that poorly identify risky situations—like those based on a supposedly modest level of plan underfunding—have been eliminated; at the same time, a new low-default-risk “safe harbor”—based on company financial metrics—is established that better measures risk to the pension insurance system. This sponsor safe harbor is voluntary and based on existing, readily-available financial information that companies already use for many business purposes.

With the low-default-risk safe harbor, PBGC is establishing a risk tolerance level for certain events faced by plans and plan sponsors that trigger reporting requirements so that PBGC can monitor and address situations that are most likely to pose problems to the pension insurance system. This reporting system is analogous to that used by an unsecured creditor in loan arrangements with a borrower so as to be alerted to important issues facing the borrower impacting its ability to meet its loan obligations.

The final rule also provides a safe harbor based on a plan's owing no variable-rate premium (VRP) (referred to as the well-funded plan safe harbor).<sup>1</sup>

<sup>1</sup> The old regulation provided a waiver in some circumstances generally based on 80 percent

Other waivers, such as public company, small plan, *de minimis* segment, and foreign entity waivers, have been retained in the final rule, and in many cases expanded, to provide additional relief to plan sponsors where the risk of an event to plans and the pension insurance system is low. With the expansion in the number of waivers available in the final rule, PBGC estimates that 94 percent of plans covered by the pension insurance system will qualify for at least one waiver of reporting for events dealing with active participant reductions, controlled group changes, extraordinary dividends, benefit liability transfers, and substantial owner distributions.

##### *Revised Definitions of Reportable Events*

The rule simplifies the descriptions of several reportable events and makes some event descriptions (*e.g.*, active participant reduction) narrower so that compliance is easier and less burdensome. One event is broadened in scope (loan defaults), and clarification of another event has a similar result (controlled group changes). These changes, like the waiver changes, are aimed at tying reporting burden to risk.

##### *Conforming to Changes in the Law*

The Pension Protection Act of 2006 (PPA) made changes in the law that affect the test for whether advance reporting of certain reportable events is required. This rule conforms the advance reporting test to the new legal requirements.

##### *Mandatory E-Filing*

The rule makes electronic filing of reportable events notices mandatory. This furthers PBGC's ongoing implementation of the Government Paperwork Elimination Act. E-filing is more efficient for both filers and PBGC and has become the norm for PBGC's regulated community.

#### Background

The Pension Benefit Guaranty Corporation (PBGC) administers the pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Section 4043 of ERISA requires that PBGC be notified of the occurrence of certain “reportable events.” The statute provides for both post-event and

funding on a premium basis. However, in PBGC's experience, that test was inadequate, as it was passed by many plans that underwent distress or involuntary terminations. See *Well-Funded Plan Safe Harbor* below. A safe harbor based on paying no VRP, in contrast, is consistent with a Congressional determination of the level of underfunding that presents risk to the pension insurance system.

advance reporting.<sup>2</sup> PBGC's regulation on Reportable Events and Certain Other Notification Requirements (29 CFR part 4043) implements section 4043.

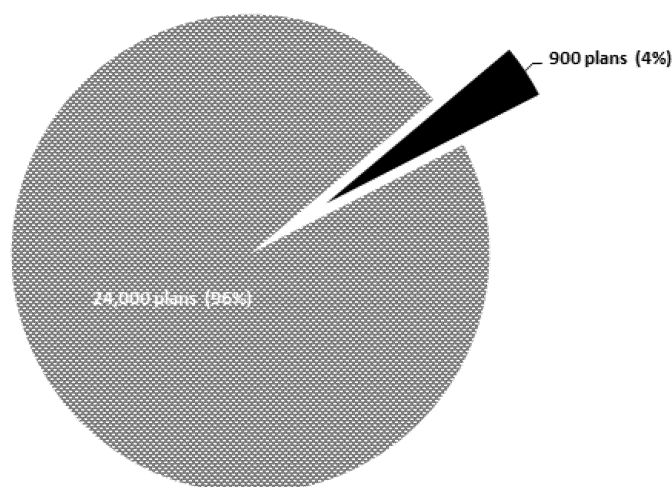
Reportable events include such plan events as missed contributions, insufficient funds, and large pay-outs, and such sponsor events as loan defaults and controlled group changes—events that may present a risk to a sponsor's ability to continue a plan. When PBGC has timely information about a reportable event, it can take steps to encourage plan continuation—

for example, by exploring alternative funding options with the plan sponsor—or, if plan termination is called for, to maximize recovery of the shortfall from all possible sources.<sup>3</sup> Without timely information about a reportable event, PBGC typically learns that a plan is in danger only when most opportunities for protecting participants and the pension insurance system have been lost. The regulation does however, include a system of waivers and extensions to ease reporting burdens where the circumstances surrounding

some events may make reporting unnecessary or where the PBGC has other ways to obtain needed information. The regulation (both the old regulation and the new regulation<sup>4</sup>) also provides that PBGC may grant waivers and extensions on a case-by-case basis.

Reportable events are rare and reporting is often waived. As a result, each year, on average only 4 percent of plans experience an event *and* are required to report it; even fewer are required to report Category 1 events.<sup>5</sup>

Figure 1: Actual Reporting of Events:



Note: Average annual filings in fiscal years 2012-2014; assumes each event is filed by a unique plan - actual experience suggests some plans experience multiple events.

Although the impact of the reportable events regulation on any company or plan or on the pension community as a whole is very small, a reportable events notice is potentially very important to PBGC, the pension insurance system, and participants of affected plans.<sup>6</sup>

#### 2009 Proposed Rule

On November 23, 2009 (at 74 FR 61248), PBGC published in the **Federal Register** for notice and comment a proposed rule (the 2009 proposal) that eliminated most automatic waivers. The

proposal reflected PBGC's concern that it was not receiving reports of significant events because the existing automatic waivers were too broadly applicable.

PBGC received comments from actuaries, pension consultants, and organizations representing employers and pension professionals. The public comments on the 2009 proposal uniformly opposed the proposed elimination of most waivers. Commenters said that without the waivers, reporting would be required for

events that posed little risk to PBGC and said that the increase in the public's burden of compliance would outweigh the benefit to the pension insurance system of the additional reporting. They also expressed concern that the proposed changes to the rule would discourage employers from continuing to maintain pension plans covered by Title IV. Several commenters urged PBGC to rethink and repropose the rule to address issues raised by the comments.

<sup>2</sup> Except as otherwise noted, this preamble discusses post-event reporting only.

<sup>3</sup> For example, alerts from recent reportable events notices of missed contribution events have allowed PBGC to timely intervene to protect plan assets and participant benefits. In one such case, PBGC's involvement ensured that there was no interruption in benefits when PBGC ultimately terminated the plan. In a second case, PBGC's monitoring of the plan as a result of the reportable event filing ensured that there were sufficient funds from the sale of a business to complete a standard termination. In a third case, PBGC's early

intervention provided an opportunity to examine options with the plan sponsor to continue the plan. As another example, a reportable event notice of an active participant reduction event led to a negotiated settlement with the plan sponsor that resulted in an additional \$400,000 contribution to the plan. When the sponsor later filed for bankruptcy, PBGC took over the plan with a smaller amount of unfunded liabilities than if the contribution from the settlement had not been made.

<sup>4</sup> For ease of reference, the preamble refers to the regulation as it exists before this final rule becomes

applicable as the "old regulation" and refers to the regulation as amended by this final rule as the "new regulation." See *Applicability* below.

<sup>5</sup> Category 1 events include Extraordinary Dividend or Stock Redemption, Active Participant Reduction, Change in Contributing Sponsor or Controlled Group, Distributions to a Substantial Owner, and Transfer of Benefit Liabilities events. As discussed below, these are events for which the low-default risk and well-funded plan safe harbors will apply under the final regulation.

<sup>6</sup> See footnote 3 above.

*Executive Order 13563*

On January 18, 2011, the President issued Executive Order 13563 on Improving Regulation and Regulatory Review (76 FR 3821, January 21, 2011). Executive Order 13563 encourages identification and use of innovative tools to achieve regulatory ends, calls for streamlining existing regulations, and reemphasizes the goal of balancing regulatory benefits with burdens on the public. Executive Order 13563 also requires agencies to develop a plan to review existing regulations to identify any that can be made more effective or less burdensome in achieving regulatory objectives.<sup>7</sup>

*2013 Proposal*

PBGC reconsidered the reportable events regulation in the spirit of Executive Order 13563 and in light of the comments to the 2009 proposal. On April 3, 2013 (at 78 FR 20039), PBGC published a new proposed rule (the 2013 proposal). The 2013 proposal took a very different approach to waivers from the 2009 proposal. Whereas the 2009 proposal simply eliminated most automatic waivers, the 2013 proposal substituted a new system of waivers (safe harbors) to reduce burden where possible without depriving PBGC of the information it needs to protect the pension insurance system.

One of the waivers in the 2013 proposal was for employers that met a safe harbor based on what the proposal described as sponsor financial soundness (*i.e.*, an employer's capacity

to meet its financial commitments in full and on time) as determined through credit report scores and the satisfaction of related criteria. A second safe harbor that was more stringent than the existing funding-based waivers was available for plans that were either fully funded on a termination basis or 120 percent funded on a premium basis. The 2013 proposal also preserved or extended some waivers under the old regulation (including small-plan waivers) that the 2009 proposal would have eliminated.

PBGC received 13 comment letters on the 2013 proposal, mainly from the same sources as the comments on the 2009 proposal.<sup>8</sup> PBGC also held its first-ever regulatory public hearing, at which eight of the commenters discussed their comments.

Most of the commenters on the 2013 proposal expressed appreciation for PBGC's re-proposing the rule and for the opportunity for further public input. Several commenters complimented PBGC on its general overall effort or said the 2013 proposal was an improvement on the 2009 proposal. One commenter approved PBGC's efforts to balance its need for information with the public's burden of providing it and to streamline the reporting process. Another commenter applauded PBGC on its common sense, risk-based approach to reporting, and yet another commended PBGC for the proposed rule's significant relief for small plans, as well as the general focus on tying reporting to risk.

Nonetheless, all of the commenters took issue with aspects of the proposal,

particularly with the safe harbors, which four commenters suggested could cause more sponsors to leave the defined benefit system. Other concerns dealt with the difficulty of monitoring events in controlled groups and with proposed changes to the events dealing with active participant reductions and missed contributions. Some plan sponsor groups expressed general concern that by creating a plan sponsor financial soundness safe harbor, PBGC, on behalf of the Federal government, inevitably would become an entity that makes formal pronouncements on the financial prospects of American businesses. Two commenters urged that the proposal be withdrawn. The comments on the 2013 proposal and PBGC's responses are discussed below with the topics to which they relate.

**Final Rule Waivers**

In response to the comments, PBGC is issuing a final rule with safe harbors that are simpler, more flexible, and easier to comply with and that clearly target risk to the pension insurance system.<sup>9</sup> Under the final rule, all small plans (about two-thirds of all plans) will be waived from reporting Category 1 events (other than substantial owner distributions). Further, if a reportable event occurs, 82 percent of large plans qualify for at least one waiver for these events:<sup>10</sup>

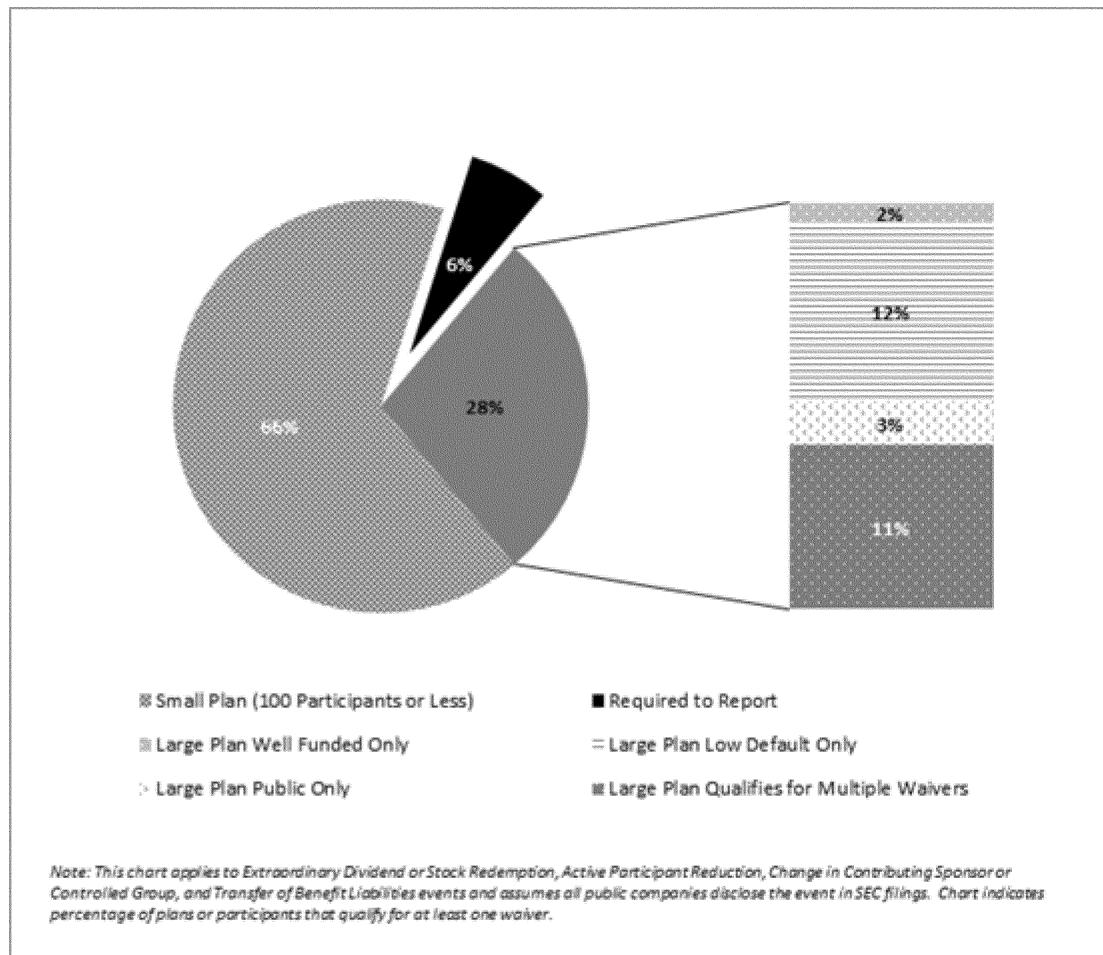
<sup>9</sup> See Summary Chart, below, for an overview of waivers and safe harbors under the old regulation and this final rule.

<sup>10</sup> For this purpose, large plans means those plans that have more than 100 participants. The charts included in this preamble do not reflect waivers for *de minimis* segments or foreign entities.

<sup>7</sup> PBGC's Plan for Regulatory Review can be found at <http://www.pbgc.gov/documents/plan-for-regulatory-review.pdf> (August 23, 2011).

<sup>8</sup> The 2013 proposal also received comments from one plan sponsor.

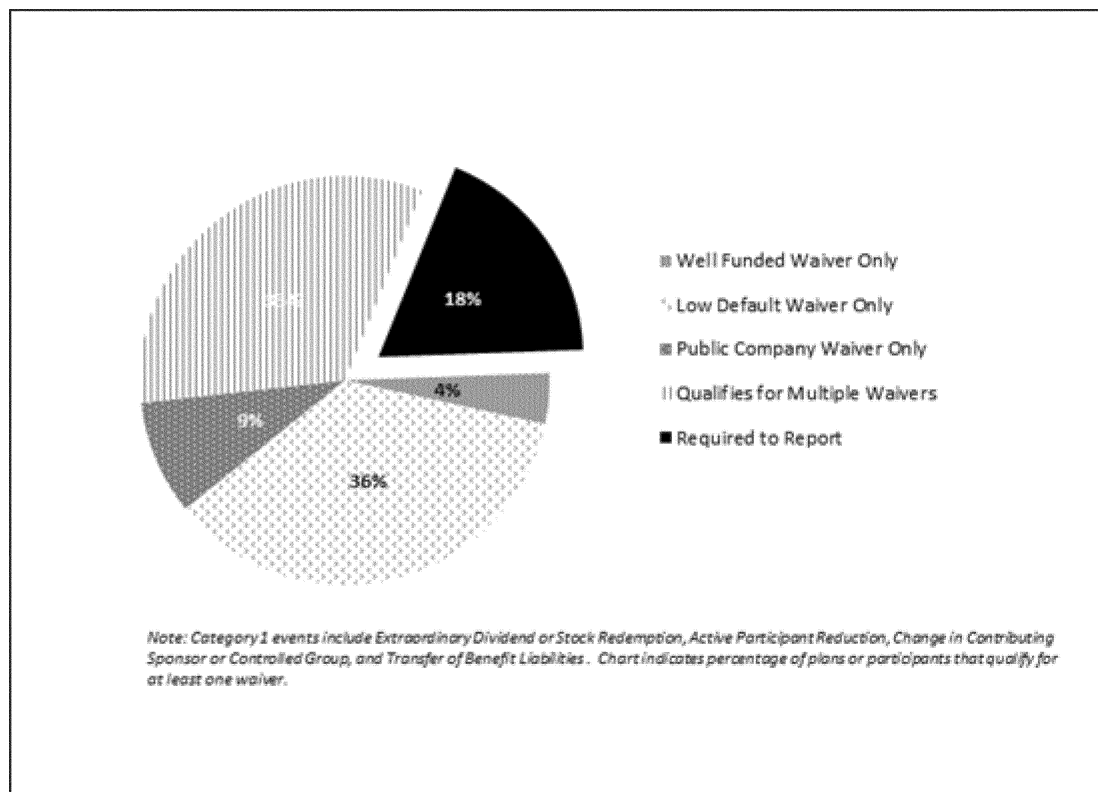
Figure 2: Data for Large Plans



As a result, if a reportable event occurs, 94 percent of all plans will qualify for at least one waiver under the

final regulation (an increase from 89 percent under the old regulation):

Figure 3 Selected Data for All Plans



### Low-Default-Risk Safe Harbor for Plan Sponsors

To address the issue of risk, the 2013 proposal provided a risk-based safe harbor tied to the risk of default on financial obligations of a plan sponsor. PBGC developed the proposed safe harbor based on its experience that the default risk of a plan sponsor generally correlates with the risk of an underfunded termination of the sponsor's pension plan. One major component of the risk of underfunded termination is the likelihood that the plan sponsor will, within the near future, fall into one of the "distress" categories in section 4041(c)(2)(B) of ERISA (liquidation, reorganization, or inability to pay debts when due and to continue in business). Another is that the sponsor will go out of business, abandoning the plan and forcing PBGC to terminate it under section 4042 of ERISA. Thus, the 2013 proposal recognized that the risk of underfunded termination of a plan within the near future depends most significantly on the plan sponsor's financial strength.<sup>11</sup>

<sup>11</sup> In 2013, 66 percent of reportable events reports from filers that were below investment grade resulted in the opening of investigations. For this purpose, "investment grade" means a credit rating of Baa3 or higher by Moody's or BBB- or higher by Standard and Poor's.

The 2013 proposal provided a waiver from reporting for each of five events (active participant reductions, substantial owner distributions, controlled group changes, extraordinary dividends, and benefit liabilities transfers) if, as of the date an event occurred, each contributing sponsor (or highest US member of its controlled group) was what the proposal termed "financially sound," that is, had adequate capacity to meet its obligations in full and on time as evidenced by its satisfaction of five criteria:

1. The entity had a qualifying commercial credit report score.
2. The entity had no secured debt (with certain exceptions).
3. The entity had positive net income for the most recent two fiscal years.
4. The entity did not experience any loan default event in the previous two years (regardless of whether reporting was waived).
5. The entity did not experience a missed contribution event in the previous two years (unless reporting was waived).

To focus public input on this issue, the 2013 proposal asked specific questions about the financial soundness standard and sought suggestions for alternative approaches to determining financial soundness based on widely

available and accepted financial standards.

One commenter found the sponsor financial soundness safe harbor to be a reasonable attempt to accomplish the goal of providing broad waivers in situations where there is no significant risk to PBGC. But most commenters opposed the safe harbor as a concept, arguing that it would not be business-friendly or helpful in protecting the pension insurance system. Some commenters characterized the financial soundness test as a pronouncement by PBGC on the financial status of American businesses, which they believed to be inappropriate for a government agency.

However, many federal agencies have rules that include standards for measuring aspects of financial health or ability to meet certain financial obligations for a wide variety of purposes, including eligibility to use certain forms, qualification for funding, or participation in certain activities. These regulations govern not only the financial services industry, but such wide-ranging activities as agriculture, education, energy, and the environment.<sup>12</sup> The provisions of the

<sup>12</sup> See e.g., Department of Agriculture biorefinery assistance program (7 CFR 4279.202(d)); Department of Education requirements for institutions to participate in Federal student

Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203) (the Dodd-Frank Act) clearly contemplate the use of some types of creditworthiness standards in federal regulations.<sup>13</sup> And there is precedent in federal regulations for using the “adequate capacity” standard in determining financial soundness.<sup>14</sup>

PBGC understands that the proposed “financial soundness” terminology caused concern for some commenters, who perceived that the provisions of the safe harbor tests could be seen as measuring the overall financial prospects of a company. However, the safe harbor tests were never meant for that purpose. Rather, they were intended to measure the likelihood that a company would be able to continue to sponsor a plan and thus not present a risk to the pension insurance system. To clarify this point, the final regulation more precisely characterizes this safe harbor as the company low-default-risk safe harbor rather than the sponsor financial soundness safe harbor, and refers to a safe harbor for plans (described below) as the well-funded plan safe harbor rather than the plan financial soundness safe harbor.

assistance programs (34 CFR 668.15); Department of Energy loan guarantees for projects that employ innovative technologies (10 CFR part 609); and Environmental Protection Agency rules on owners and operators of underground carbon dioxide storage wells (40 CFR 146.85).

<sup>13</sup> Section 939A of the Dodd-Frank Act proscribes federal regulations that require the use of credit ratings, but Section 939 also requires agencies to replace references to credit ratings in regulations with alternative standards of creditworthiness. Section 939A is premised on the fact that federal agencies can and do use standards of financial capacity for various purposes.

<sup>14</sup> For example, recent rules promulgated by Federal banking agencies use similar language that PBGC reviewed in developing its own standard for its regulation on reportable events. The 2013 proposal states: For purposes of this part, an entity that is a plan sponsor or member of a plan sponsor's controlled group is “financially sound” . . . if . . . it has adequate capacity to meet its obligations in full and on time as evidenced by its satisfaction of all of the five criteria described in paragraphs (b)(1) through (b)(5) of this section”). This language is similar to an FDIC rule (“an insured savings association . . . shall not acquire or retain a corporate debt security unless the savings association . . . determines that the issuer of the security has adequate capacity to meet all financial commitments under the security for the projected life of the security”) and an Office of the Comptroller of the Currency (OCC) rule (“*Investment grade* means the issuer of a security has an adequate capacity to meet financial commitments under the security for the projected life of the asset or exposure. An issuer has an adequate capacity to meet financial commitments if the risk of default by the obligor is low and the full and timely repayment of principal and interest is expected”). See FDIC rule (77 FR 43151, Jul. 24, 2102) at <http://www.gpo.gov/fdsys/pkg/FR-2012-07-24/pdf/2012-17860.pdf> and OCC rule (77 FR 35253, June 13, 2012) at <http://www.gpo.gov/fdsys/pkg/FR-2012-06-13/pdf/2012-14169.pdf>.

PBGC's company low-default-risk safe harbor is entirely voluntary and relies mainly on private-sector financial metrics derived from a company's own financial information; one component of the safe harbor, which is not required to be used to satisfy the low-default-risk standard, is based on widely available financial information that most plan sponsors (and their U.S. parents) already have, and that represents well-known, objective, non-governmental assessments of default risk used in a wide variety of business contexts. Use of the safe harbor is not conditioned on an evaluation by PBGC of plan sponsor financial soundness. Nor does it involve sponsors' reporting to PBGC (or anyone) any financial metrics, such as company financial information, credit scores or other evidence of creditworthiness.

PBGC remains convinced that adding a company low-default-risk safe harbor to the reportable events regulation furthers PBGC's goals of tying reporting to risk and avoiding unnecessary reports. Thus, the final rule contains a risk-based safe harbor with modifications to mitigate commenters' concerns, particularly by providing more flexibility in applying the safe harbor and clarifying when and how the satisfaction of the low-default-risk standard is determined.

#### *Adequate Capacity Standard*

The final rule provides that an entity (a “company”) that is a contributing sponsor of a plan or the highest level U.S. parent of a contributing sponsor satisfies the low-default-risk standard if the company has adequate capacity to meet its obligations in full and on time as evidenced by satisfying either (A) the first two, or (B) any four, of the following seven criteria:

1. The probability that the company will default on its financial obligations is not more than 4 percent over the next five years or not more than 0.4 percent over the next year, in either case determined on the basis of widely available financial information on the company's credit quality.
2. The company's secured debt (with some exceptions) does not exceed 10 percent of its total asset value.
3. The company's ratio of total-debt-to-EBITDA<sup>15</sup> is 3.0 or less.
4. The company's ratio of retained-earnings-to-total-assets is 0.25 or more.
5. The company has positive net income for the two most recent completed fiscal years.
6. The company has not experienced any loan default event in the past two

<sup>15</sup> Earnings before interest, taxes, depreciation, and amortization.

years regardless of whether reporting was waived.

7. The sponsor has not experienced a missed contribution event in the past two years unless reporting was waived.

For reporting to be waived for an event to which the safe harbor applies, both the contributing sponsor and the highest level U.S. parent of the contributing sponsor must satisfy the company low-default-risk safe harbor. (The 2013 proposal required only that, for each contributing sponsor of the plan, either the sponsor or the highest level U.S. parent of the contributing sponsor satisfy the safe harbor requirements.) Requiring that both entities satisfy the safe harbor requirements addresses the issue of intercompany transactions between or among members of a controlled group that may disperse assets and liabilities within the controlled group.

Although the low-default-risk safe harbor has some similarities with standards PBGC described in its 2013 guidelines concerning enforcement of ERISA section 4062(e),<sup>16</sup> differences exist because of the different purposes of the statute. The 4062(e) guidelines were intended to inform PBGC's exercise of its discretion in enforcing monetary liability for certain business cessations, whereas the reportable events regulation provides rules for the public on compliance with ERISA section 4043's reporting requirements.

The final rule revises two criteria (probability of default in the first criterion and secured debt level in the second criterion) from the 2013 proposal and adds two new criteria (based on a ratio of total-debt-to-EBITDA described in the third criterion listed above and a ratio of retained-earnings-to-total-assets described in the fourth criterion listed above). PBGC selected these four criteria based on historical data on rates of company defaults on financial obligations from widely published financial information.<sup>17</sup> These criteria represent

<sup>16</sup> [http://www.pbgc.gov/Documents/4062\(e\)-enforcement-of-guidelines.pdf](http://www.pbgc.gov/Documents/4062(e)-enforcement-of-guidelines.pdf). See PBGC's Web site for 4062(e) Developments, [http://www.pbgc.gov/prac/reporting-and-disclosure/section-4062\(e\)-developments.html](http://www.pbgc.gov/prac/reporting-and-disclosure/section-4062(e)-developments.html).

<sup>17</sup> See e.g., Moody's Investors Service Corporate and Recovery Default Rates, 1920–2010 (Feb. 28, 2011) <http://efinance.org.cn/cn/FEben/Corporate%20Default%20and%20Recovery%20Rates,1920-2010.pdf>; Standard & Poor's 2010 Annual U.S. Corporate Default Study And Rating Transitions (March 30, 2011) <http://www.standardandpoors.com/ratings/articles/en/us/?articleType=HTML&assetID=1245302234800>; and Standard & Poor's 2011 Annual U.S. Corporate Default Study And Rating Transitions (March 23, 2012) [http://www.standardandpoors.com/spf/upload/Ratings\\_EMEA/2012-03-23\\_2011AnnualUSCorpDefaultStudy.pdf](http://www.standardandpoors.com/spf/upload/Ratings_EMEA/2012-03-23_2011AnnualUSCorpDefaultStudy.pdf).

financial metrics that are easily identified from existing sources of information and are used regularly by creditors as indicators of a company's ability to meet its financial obligations in full and on time. Lenders take into account such rates of default when extending credit to borrowers on terms showing the borrowers have adequate capacity to meet financial obligations. The revised criteria take into account one commenter's suggestion that PBGC consider incorporating into the safe harbor alternative risk measures such as debt-to-EBITDA and debt-to-total-capital ratios that are used in common debt covenants and routinely tracked by companies that issue debt or borrow from banks. The changes to the low-default-risk standard are described in more detail below.

#### Determination Date

To make the safe harbor user-friendly, the final rule provides that a company determine whether it qualifies for the low-default-risk safe harbor once during an annual financial reporting cycle (on a "financial information date"). If it qualifies on that financial information date, its qualification remains in place throughout a "safe harbor period" that ends 13 months later or on the next financial information date (if earlier).<sup>18</sup> If it does not qualify, its non-qualified status remains in place until the next financial information date.

The description of financial information used to determine whether the safe harbor is available is similar to that used in PBGC's regulation on Annual Financial and Actuarial Information Reporting.<sup>19</sup> PBGC used this description so that the pension plan community would be familiar with the provisions and to maintain consistency across PBGC regulations, to the extent possible. The financial information date for a company is the date annual financial statements (including balance sheets, income statements, cash flow statements, and notes to the financial statements) are filed with the Securities and Exchange Commission (SEC) on Form 10-K (if the company is a public company) or the closing date of the company's annual accounting period (if the company is not a public company).

For a company that does not have annual financial statements, the financial information date is the date the company files with the Internal Revenue Service (IRS) its annual federal income tax return or IRS Form 990.

The final regulation refers to the annual financial statements or applicable IRS return or Form 990 associated with a financial information date as "supporting financial information." The supporting financial information associated with a financial information date will also be used to evaluate whether the secured debt, EBITDA-to-total-debt, and/or retained-earnings-to-total-assets criteria are met. To evaluate whether the positive net income criterion is met, supporting financial information associated with the two most recent consecutive fiscal years must be used.

If an accountant's audit or review report expresses a material adverse view or qualification, the company will not satisfy the low-default-risk standard for the safe harbor. Common adverse qualifiers used in the accounting profession that will render supporting financial information unsatisfactory for purposes of the safe harbor include such language as "awareness of one or more material modifications that should have been made in order for the financial statements to be in conformity with [applicable accounting standards]"; "the financial statements do not present fairly, in all material respects, the company's financial condition and results of operations in conformity with [applicable accounting standards]"; or "substantial doubt about the company's ability to continue as a going concern for a reasonable period of time."<sup>20</sup>

#### Commercial Measures Criterion

To satisfy the criterion for the company financial soundness safe harbor under the 2013 proposal, a company needed to have a credit score, reported by a commercial credit reporting company (CCRC) commonly used in the business community, that indicated a low likelihood that the company would default on its obligations over the next twelve months. Examples of such scores were to be listed in PBGC's reportable events forms and instructions.

Seven commenters were critical of the commercial credit score criterion. Most of these commenters opposed the use of the score as a criterion altogether, while

some indicated that the use of credit scores or similar information would be acceptable in limited circumstances if it were voluntary. Some concerns raised by commenters centered on the extent to which companies pay attention or have access to CCRC scores. Large public companies typically are more familiar with their credit ratings from nationally recognized statistical rating organizations (NRSROs) registered with the SEC, and some small companies may not have CCRC scores. Other concerns included costs associated with obtaining or monitoring scores, inaccurate score data, and a lack of specificity as to how and when PBGC would update its forms and instructions with valid CCRC score examples.

The final regulation addresses these concerns. Under the final rule's company low-default-risk safe harbor provision, the criterion that corresponds to the proposed CCRC score criterion is optional. In addition, CCRC scores are not the exclusive benchmark for satisfying that new criterion. Instead, companies are not limited to using particular reports or tools and are afforded broad flexibility to use widely available business metrics that measure default probability. This approach avoids the need to list and update examples of scores in PBGC's forms and instructions.

Under the final rule, the first criterion (referred to as the "commercial measures" criterion) will be met for a company if the probability that the company will default on its financial obligations is not more than 4 percent over the next five years or not more than 0.4 percent over the next year, in either case determined on the basis of widely available financial information on the company's credit quality—not limited to CCRC scores. PBGC's intent is to provide flexibility to companies in meeting the standard and allow a company to determine whether it satisfies the new criterion by referring to third party information that the company considers reliable and already uses with confidence for other business purposes. Thus, the final rule does not require the use of a CCRC score to satisfy the commercial measures criterion (although a company may still choose to obtain a CCRC score if it does not have one, as contemplated in the 2013 proposal).

The commercial measures standard replicates the underlying probability of default risk reflected in the CCRC score standard under the 2013 proposal<sup>21</sup> and

<sup>18</sup> Thirteen months allows for some variation from year to year on the date that annual financials are reported.

<sup>19</sup> See § 4010.9.

<sup>20</sup> See e.g., Public Company Accounting Oversight Board, AU Section 508 Reports on Audited Financial Statements [http://pcaobus.org/standards/auditing/pages/au508.aspx#ps-pcaob\\_e65bc2e0-ad78-42d7-a99b-8c59d98b3fd3](http://pcaobus.org/standards/auditing/pages/au508.aspx#ps-pcaob_e65bc2e0-ad78-42d7-a99b-8c59d98b3fd3); American Institute of CPAs (AICPA), AU-C Section 705 Modifications to the Opinion in the Independent Auditor's Report <http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-C-00705.pdf>; and AICPA, AR Section 90 Review of Financial Statements <http://www.aicpa.org/Research/Standards/CompilationReview/DownloadableDocuments/AR-00090.pdf>.

<sup>21</sup> PBGC compared company one-year default rates from information PBGC reviewed that is referred to in footnote 17 above with CCRC score

represents a threshold below which PBGC believes there is legitimate concern as to a company's long-term ability to continue a pension plan.<sup>22</sup> The one- and five-year time periods for measuring default rate are typical periods over which third parties analyze the risk of default.

PBGC believes that almost every sponsor and its highest level U.S. parent will be able to obtain widely available financial information that indicates their probability of default over either a one- or five-year period. Typical metrics (from 2013) that would meet the probability-of-default standard include a D&B score of 1477, risk class of 3, or percentile of 46–55; a CreditRiskMonitor<sup>23</sup> score of 9, and may include other financial metrics reflecting a level of investment grade rating. PBGC believes that 70 percent of plan sponsors will be able to meet the probability-of-default criterion based on widely available financial information on their credit quality. Sponsors of small plans, which are more likely to have difficulty obtaining credit quality information, will generally qualify for the small-plan waiver for four of the five events<sup>24</sup> covered by the company low-default-risk safe harbor.

In crafting the revised commercial measures criterion, PBGC reviewed language used in a recent final rule designed to bring a Department of Treasury regulation into compliance with the Dodd-Frank Act.<sup>25</sup> PBGC also

took into account other agency rulemakings where credit ratings were used in compliance with Section 939A of the Dodd-Frank Act. Explaining the usefulness of outside sources of credit quality information, including credit ratings, these agencies suggested in preambles to their rules that the voluntary use of credit ratings from NRSROs is permissible where they are one but not the sole source of information used to determine credit quality.<sup>26</sup>

One of the commenters requested that PBGC provide relief from information penalties if a company relies on a CCRC score that turns out to be inaccurate or stale. PBGC believes such relief is unnecessary under the final rule because a company may choose a measure that the company knows is accurate, or the company may choose to satisfy the low-default-risk safe harbor in other ways.

#### *Secured Debt Criterion*

Under the 2013 proposal, one of the criteria required to satisfy the sponsor financial soundness standard was that the entity had no secured debt, disregarding leases or debt incurred to acquire or improve property and secured only by that property (e.g., mortgages and equipment financing, including capital leases). In the preamble to the 2013 proposal, PBGC said it was aware that there may be other circumstances in which a company capable of borrowing without security might nonetheless choose to offer security to a lender—for example,

*published financial information or on the basis of other relevant facts and circumstances which reflect the relative credit quality of the corporation or the comparable obligation.* (Emphasis added.)

<sup>26</sup> See e.g., SEC Final Rule: Removal of Certain References to Credit Ratings Under the Investment Company Act (79 FR 1321, January 8, 2014) (<http://www.gpo.gov/fdsys/pkg/FR-2014-01-08/pdf/2013-31425.pdf>): “We believe, however, that credit ratings can serve as a useful data point for evaluating credit quality, and as noted above, a fund’s board (or its delegate) may not rely solely on the credit ratings of an NRSRO without performing additional due diligence”; and Department of Labor, Employee Benefits Security Administration Proposed Amendments to Class Prohibited Transaction Exemptions To Remove Credit Ratings Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (78 FR 37578–9, June 21, 2013) (<http://www.gpo.gov/fdsys/pkg/FR-2013-06-21/pdf/2013-14790.pdf>): “In making these determinations, a fiduciary would not be precluded from considering credit quality reports prepared by outside sources, including credit ratings prepared by credit rating agencies, that they conclude are credible and reliable for this purpose” and “For purposes of this amendment, the Department believes that a fiduciary’s determination of the credit quality of commercial paper according the proposed standard, should, as a matter of prudence, include the reports or advice of independent third parties, including, where appropriate, such commercial paper’s credit rating.”

if doing so would significantly reduce the cost of a loan. PBGC sought public comment on the extent to which the proposed no-secured-debt test might be failed by plan sponsors that had a low risk of default and on how to make the test correspond better with commercial reality (e.g., by disregarding more types of secured debt).

Two commenters stated that a plan sponsor’s use of secured debt is not appropriate as a measure of the plan sponsor’s financial health because, as PBGC acknowledged in the 2013 proposal, a financially healthy company may obtain secured debt for a variety of business reasons that do not relate to the credit risk of the company, such as to obtain favorable interest rates or because the company has assumed the debt from an entity it acquires.

These comments gave PBGC a better appreciation for how widespread a practice it is for creditworthy companies to obtain secured debt. Under the final rule, the criterion will be satisfied if a company’s secured debt (disregarding leases or debt incurred to acquire or improve property and secured only by that property) does not exceed 10 percent of the company’s total assets.

PBGC was reluctant to try to predict the types of secured debt that low-risk borrowers would be more likely to have than higher-risk borrowers. The 10 percent threshold included in the criterion serves to make a simple allowance for secured debt that good credit quality businesses may have. In addition, PBGC’s experience is that approximately 90 percent of companies that would meet the commercial measures criterion of the safe harbor do not have a ratio of secured-debt-to-total-assets above 10 percent.<sup>27</sup> PBGC believes this correlation between the ability to meet financial obligations and the level of secured debt supports the use of 10 percent as an appropriate threshold for this safe harbor criterion.

#### *Net-Income Criterion*

Another criterion for the sponsor financial soundness safe harbor in the 2013 proposal was that the company had positive net income for the past two years. (For non-profit entities, “net income” was to be measured as the excess of total revenue over total expenses as required to be reported on Internal Revenue Service Form 990.)

Four commenters raised issues regarding the positive net income criterion. Two commenters stated that the requirement did not necessarily

<sup>27</sup> This figure is based on review of financial statement data for companies in PBGC databases that could meet the commercial measures criterion.

data; see e.g., <https://www.dnb.com/product/FSS/FAQsv7.1.pdf>.

<sup>22</sup> See e.g., tying adequate capacity to meet financial obligations to the lowest tier of investment grade rating in Table 3 in [http://www.standardandpoors.com/spf/general/RatingsDirect\\_Commentary\\_979212\\_06\\_22\\_2012\\_12\\_42\\_54.pdf](http://www.standardandpoors.com/spf/general/RatingsDirect_Commentary_979212_06_22_2012_12_42_54.pdf).

<sup>23</sup> This company was suggested by one of the commenters on the 2013 proposal. According to CreditRiskMonitor’s Web site, the company provides comprehensive commercial credit reports for more than 40,000 public companies world-wide.

<sup>24</sup> The distributions to substantial owner event does not have a small plan waiver.

<sup>25</sup> See Department of Treasury Final Rule: Modification of Treasury Regulations Pursuant to Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act. (78 FR 54758, September 6, 2013) (<http://www.gpo.gov/fdsys/pkg/FR-2013-09-06/pdf/2013-21752.pdf>). The relevant regulatory text states:

“Sec. 1.249–1 Limitation on deduction of bond premium on repurchase: (e)(2)(ii) In determining the amount under paragraph (e)(2)(i) of this section, appropriate consideration shall be given to all factors affecting the selling price or yields of comparable nonconvertible obligations. Such factors include general changes in prevailing yields of comparable obligations between the dates the convertible obligation was issued and repurchased and the amount (if any) by which the selling price of the convertible obligation was affected by reason of any change in the issuing corporation’s credit quality or the credit quality of the obligation during such period (determined on the basis of widely



reflect the financial risk profile of a company because, for example, accounting losses, such as non-cash adjustments, could create negative net income for purposes of financial statements but not reflect the health of business operations. One of these commenters suggested that if the positive net income criterion were retained, PBGC should consider adjustments to reflect these unusual charges.

PBGC did not revise this criterion in the final rule in response to the commenters' concerns about non-cash accounting losses. Net income measures the economic value a company creates over the measurement period, and a lack of net income is one indication of risk that a company may lack the resources to fulfill its obligations. Because non-cash losses (as well as non-cash gains) are components of such economic value, PBGC considers it appropriate not to exclude non-cash charges from the net-income criterion.

The description of the net-income criterion in the 2013 proposal indicated that net income was to be measured under generally accepted accounting principles (GAAP) or International Financial Reporting Standards (IFRS) standards. PBGC included GAAP and IFRS in the 2013 proposal to provide rigorous and widely-used accounting standards for determining net income and because some companies may need to comply with IFRS as a result of the international scope of their operations. One commenter stated that because GAAP and IFRS are not compatible standards, two similarly situated companies might have different reporting requirements. PBGC has addressed this concern by eliminating the references to GAAP and IFRS in the final rule.

Another commenter said that a company might not know net income for the prior fiscal year when an event occurs, making it impossible to determine whether the safe harbor was available. The final rule addresses this concern by providing that the low-default-risk safe harbor is satisfied on a financial information date (discussed above) rather than on a date an event occurs.

One commenter said that the net-income criterion was unfair because it could not be satisfied by financially healthy companies in cyclical industries or companies that experience rare and significantly adverse events, such as a natural disaster. As also explained in *Active Participant Reduction* below, PBGC is not making special exceptions from the reporting obligations due to a natural disaster or other unusual event

because such an occurrence can cause significant financial challenges to a company and raise concerns about its ability to meet future pension and other financial obligations. Similarly, PBGC believes that it would be inappropriate to provide an exclusion for companies in cyclical industries because a company at a low point in its income cycle may for just that reason be vulnerable to an event that would cause concern about meeting its pension obligations. Alerting PBGC to the possibility that a company may not be able to meet such obligations is exactly what the reportable events regulation is intended to do, regardless of what caused the default risk to rise. In any event, such a company might still be able to avail itself of the safe harbor by choosing another way of meeting the low-default-risk standard.

One commenter objected to the application of the criterion to non-profits as inconsistent with the nature of non-profit organizations. PBGC disagrees. A non-profit may have positive net income that does not jeopardize its non-profit status, so long as the income is related to the non-profit's purpose and is not distributed to the non-profit's officers, directors, or others connected to the non-profit. In fact, many large non-profits with defined benefit plans, such as certain hospital systems, have substantial net income. Thus, PBGC does not view this criterion to be inconsistent with non-profit operating realities.

#### *Criteria Related to Loan Defaults and Missed Contributions*

The 2013 proposal contained two other financial soundness safe harbor criteria, which were intended to supplement and confirm the general picture of financial soundness painted by the satisfaction of the credit report test. These criteria were:

- For the past two years, the company had no missed contribution events, unless reporting was waived.
- For the past two years, the company had no loan default events, whether or not reporting was waived.

Two commenters urged PBGC to disregard for purposes of the missed contribution criterion a missed contribution that occurred because of a missed or untimely funding balance election or because of a mandatory reduction of a funding standard carryover balance or prefunding balance. The latter can retroactively create a late quarterly contribution that may not be known of by the reporting deadline.

As discussed in the *Missed Contributions* section below, the final

rule includes a modification of the missed contribution event (which is the basis for the operation of this criterion) to excuse a missed timely funding balance election. PBGC did not make a similar change with respect to a mandatory reduction of a funding standard carryover balance or prefunding balance. The commenter who raised this issue acknowledged that such a situation should be a reportable event but expressed concern that a company should not be deprived of qualifying for the safe harbor for this reason alone. With the changes in the final rule that allow for more flexibility in meeting the low-default-risk safe harbor, a company that experiences a mandatory reduction in its funding balance can still qualify for the safe harbor by meeting another criterion.

One of these commenters also requested that PBGC clarify that late contribution reporting under section 303(k) (for amounts over \$1 million) would not be considered when making the determination of whether the criterion was met. PBGC declined to make this change. Having unpaid contributions exceeding \$1 million is too serious a deficit to ignore and in PBGC's view, not consistent with adequate capacity to meet one's obligations.

One commenter asked that PBGC make an exception to the no-loan-default criterion to excuse "meaningless technical defaults" that are not indicative of any financial challenges. As explained in detail in the *Loan Default* section, the final rule distinguishes between events of default (which can lead to substantial contractual remedies for a lender to protect its investment) and other circumstances (which may be violations of an agreement but do not trigger such remedies).

#### *New Criteria—Ratios of Total-Debt-to-EBITDA and Retained-Earnings-to-Total-Assets*

In addition to giving companies the ability to satisfy the low-default-risk safe harbor by various combinations of criteria, the final rule includes two additional criteria available for companies to use. Both of these new criteria are financial metrics that are easily derived from standard financial information.

One of these criteria is based on the ratio of total-debt-to-EBITDA. This ratio is commonly referred to as a leverage ratio and is used to assess a company's ability to meet its debt obligations. Companies with a ratio of total-debt-to-EBITDA of 3.0 or less correspond fairly closely with those that would satisfy the

commercial measures criterion.<sup>28</sup> Thus, for the debt-to-EBITDA criterion to be satisfied, a company must have a ratio of total-debt-to-EBITDA of 3.0 or less.

The other new criterion is based on the ratio of retained-earnings-to-total-assets. To satisfy this criterion, a company must have a ratio of retained-earnings-to-total-assets of 0.25 (one-to-four) or more. PBGC included this safe harbor criterion because it shows how much of a company's assets have been financed with the company's profits. In PBGC's experience, companies with high retained earnings tend to have higher profitability and/or a longer operating history that enables the accumulation of retained earnings—qualities that indicate the ability to meet financial obligations. Analysis of information available to PBGC suggests that companies that would meet the commercial measures criterion have an average ratio of retained-earnings-to-total-assets of at least 0.25.

#### *Well-Funded Plan Safe Harbor*

The old regulation had waivers based on several different measures of funded status, sometimes combined with other factors such as public company status. The 2013 proposal also used plan funding as a basis for relief from filing requirements, but with two different measures, both of which were to apply to the same five events as the company risk-based safe harbor (active participant reductions, substantial owner distributions, controlled group changes, extraordinary dividends, and benefit liabilities transfers). Reporting was to be waived if the plan was either fully funded on a termination basis or 120 percent funded on a premium basis (determined, in either case, using prior-year data).

In the preamble to the 2013 proposal, PBGC explained that from its perspective, it is more appropriate to measure plan funding levels using termination-basis assumptions than ongoing-plan assumptions because termination liability is a better measure of the financial impact of plan termination on PBGC and participants.<sup>29</sup> However, PBGC was aware that for plans, measuring funding on an ongoing-plan basis is more common because variable-rate premiums, required contributions, benefit restrictions, and annual funding notices are all based on ongoing-plan

calculations. Thus, PBGC proposed both ways of meeting the safe harbor. To compensate for the different assumptions and timing that generally make termination liability higher than on-going plan liability, the 2013 proposal included a 20-percent cushion to make those two measures more nearly equivalent.

Nine commenters on the 2013 proposal criticized the plan financial soundness safe harbor because the required funding ratios were unrealistically high. The commenters also generally opposed basing a safe harbor on termination-basis liability since few plans ordinarily make that determination. Three commenters also said that funding at 100 percent of termination liability could create a risk of excise tax liability.

After consideration of the comments, PBGC is persuaded that a well-funded plan safe harbor based on termination-basis liability would be unnecessarily burdensome for most plans—especially if the threshold remained at 100 percent—and would give reporting relief to few plans. Thus, the final rule eliminates the test for the well-funded plan safe harbor based on termination-basis liability.

PBGC is also persuaded that a well-funded plan safe harbor based on 120 percent funding on a premium basis is not helpful to most plans since plans are not likely to fund that high, despite PBGC's belief that such a level of funding would better reflect the risk to the pension insurance system. After considering various levels of funding as suggested by commenters, PBGC concluded that 100 percent funding—meaning a plan would pay no variable-rate-premium (VRP)—is a realistic and reasonable goal and strikes an appropriate balance between the burden of reporting and PBGC's need for information to protect the pension insurance system. Thus, the well-funded plan safe harbor in the final rule applies if the plan owed no VRP for the plan year preceding the event year.<sup>30</sup> Plans exempt from the VRP (e.g., certain new plans) will qualify for the safe harbor regardless of their funding percentage.

This safe harbor is less protective of the pension insurance system because, among other reasons, liabilities measured on an on-going basis are generally lower than liabilities measured on a termination basis, and for premium purposes, only vested

liabilities are counted. Thus, PBGC anticipates that it will not receive some potentially useful reports. However, PBGC accepts this trade-off in the interest of addressing sponsor and plan concerns.

The 2013 proposal looked to the VRP data for the year before the event year to determine whether a plan qualified for the safe harbor. One commenter suggested that PBGC allow plans that did not meet the test with prior year premium information to meet the test based on current year premium information, if available by the date an event occurs. Under this approach, a calendar-year plan with a reportable event in November 2014 could determine its eligibility for the waiver based on its 2014 VRP filing, instead of its 2013 VRP filing.

After consideration of the comment, PBGC is not accepting this suggestion. PBGC does not want to lose reports from plans when funding improves without gaining reports from plans whose funding deteriorates. Yet PBGC does not want to require all plans to reassess qualification for the safe harbor when VRP data become available. Basing the safe harbor on prior year premium information keeps the safe harbor simple and predictable; plans will know for certain prior to year-end whether they will qualify for the safe harbor for the entire next plan year.

The 2013 proposal gave small plans a filing extension—for events to which this plan financial soundness safe harbor applied—until one month after the prior year's premium filing due date (i.e., five months after the end of the prior year). PBGC's recent final rule on premiums (see 79 FR 13547, March 11, 2014), which advances the small-plan premium due date 6½ months, makes this extension unnecessary, and thus it is not included in the final reportable events regulation.

#### *Small-Plan Waivers*

The 2013 proposal included small-plan waivers for five events, as compared to two events under the old regulation. One commenter specifically commended PBGC for expanding the availability of small plan waivers. The final rule changes the small-plan category from fewer than 100 participants to 100 participants or fewer for consistency with PBGC's recent premium final rule. Otherwise, the small-plan waiver is unchanged from the 2013 proposal.

#### *Public Company Waiver*

The old regulation contained a limited public company waiver for reporting controlled group change and

<sup>28</sup> See e.g., Table 3 in <http://www.standardandpoors.com/ratings/articles/en/us/?articleType=HTML&assetID=1245329097686>.

<sup>29</sup> To underscore this point, PBGC is required under accounting rules to identify contingent liabilities on PBGC's financial statements in this manner.

<sup>30</sup> This safe harbor essentially restores a similar waiver under the old regulation, which waived notice for six events if no VRP was required to be paid for the plan for the event year.

liquidation events. Reporting of these events was waived if the plan's contributing sponsor before the effective date of the transaction was a public company and the fair market value of the plan's assets was at least 80 percent of the plan's vested benefits amount. In the case of a liquidation event, the waiver applied only if each plan maintained by the liquidating member was maintained by another member of the plan's controlled group after the liquidation. The old regulation also contained an extension for public companies to report controlled group change, liquidation, and extraordinary dividend events until 30 days after the earlier of the first Form 10-Q filing deadline that occurred after the transaction or the date when a press release with respect to the transaction was issued.

The 2013 proposal did not include a reporting waiver for public companies. One commenter urged PBGC to exempt public company sponsors from reportable events requirements entirely. This commenter asserted that because publicly-traded companies already report significant events on their SEC filings, there is no reason for them to provide duplicative filings to PBGC.

In evaluating the commenter's suggestion, PBGC reviewed SEC reporting requirements and reportable event notices to determine the extent to which PBGC could get timely and relevant information from SEC filings that could substitute for reportable events filings.<sup>31</sup> Based on this review, the final rule waives reporting where any contributing sponsor of the affected plan is a public company and the contributing sponsor timely files a SEC Form 8-K disclosing the event, except where such disclosure is under a SEC Form 8-K item relating primarily to results of operations or financial statements.<sup>32</sup> This waiver applies to the same five events as the low-default-risk and well-funded plan safe harbors. PBGC found that SEC filings provide adequate and timely information to

PBGC with respect to these events because they are either required to be reported under a specific Form 8-K item or because they are material information for investors.<sup>33</sup>

The public company waiver does not apply to other events because PBGC found that for those events SEC filings would not necessarily provide adequate and timely information. For instance, SEC rules do not require specific reporting of ERISA events, such as an inability to pay benefits when due or a missed contribution, on SEC Form 8-K unless the events would be considered material to investor decisions,<sup>34</sup> which often may not be the case for small plans sponsored by large companies. Yet these events may still pose a risk to the plan and the pension insurance system.<sup>35</sup>

Similarly, corporate events such as loan default and liquidation events may not be disclosed in SEC filings because the information is not considered material to investors (and thus not required to be reported under SEC rules).<sup>36</sup> Further, even if an event is disclosed in an SEC filing, the filing will likely not contain actuarial or other important information that would be included in a reportable events notice. These kinds of events present a high risk to the pension insurance system by

<sup>31</sup> Information about these events is often filed on SEC Form 8-K under either Item 7.01 Regulation FD Disclosure or Item 8.01 (Other Events) rather than under one of the specified disclosure items on SEC Form 8-K. Publicly-traded companies may also be subject to additional requirements to disclose events such as dividend transactions that are fulfilled through filing an 8-K report. For example, the New York Stock Exchange states that "a listed company is expected to release quickly to the public any news or information which might reasonably be expected to materially affect the market for its securities" and includes dividend announcements as an example of a news item that should be handled on an immediate release basis through SEC regulation FD disclosure. See Sections 202.05 and 06 of the NYSE Listed Company Manual. <http://nysemanual.nyse.com/lcm/>. PBGC anticipates that not all controlled group changes will be reported on SEC Form 8-K. See e.g., Item 2.01 (Completion of Acquisition or Disposition of Assets). The requirement is only to disclose the completion of an acquisition or disposition of a significant amount of assets.

<sup>34</sup> Although such events may be disclosed in quarterly or annual SEC reports in financial statements, the disclosure would not be timely or provide adequate information for PBGC purposes.

<sup>35</sup> For instance, in one case, a company did not report the shutdown of one of its facilities in a March 2008 SEC filing. PBGC discovered the shutdown through a Form 10 filing and negotiated a settlement under ERISA section 4062(e) that resulted in a \$400,000 contribution into the plan before the company filed bankruptcy and terminated the pension plan.

<sup>36</sup> SEC Form 8-K's Item 2.04 (Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement) requirement is only triggered if the consequences of the event are material to the registrant.

their very nature and thus, timely and complete information on them is particularly important.

There is no need for a public company waiver for the insolvency event in the final regulation (Bankruptcy or Similar Settlements under the old regulation), since the new event description excludes Bankruptcy Code filings, and public company insolvencies are handled through proceedings under the Bankruptcy Code.

The public company waiver's requirement of actual disclosure (and not mere public company status) is consistent with the requirement of actual disclosure for public company extensions under the old regulation. Such extensions are no longer necessary because all public companies will be waived from reporting these events so long as the event is actually disclosed.

#### *Foreign Entity and De Minimis Waivers*

The old regulation provided reporting waivers for several events where the entity or entities involved in the event were foreign entities or represented a *de minimis* percentage of a controlled group.<sup>37</sup> The 2013 proposal expanded the availability of those waivers to five events (extraordinary dividends, controlled group changes, insolvencies, liquidations, and loan defaults).<sup>38</sup> The final rule's treatment of *de minimis* and foreign-entity waivers is unchanged from the 2013 proposal.

With respect to *de minimis* waivers, one commenter requested that PBGC clarify whether an investment in a subsidiary is included in tangible or intangible assets, particularly in the case of shell companies whose only asset is the stock of a subsidiary, for purposes of determining whether the entity is *de minimis*. PBGC believes that treatment of stock in a subsidiary should be consistent with the regulatory and accounting requirements sponsors follow to prepare financial statements.

#### *Controlled Group Situations*

One commenter raised concerns about the difficulty in monitoring members of complex controlled groups for reportable events, particularly for the

<sup>37</sup> Both types of waiver apply to controlled group change, liquidation, and extraordinary dividend; the foreign entity waiver also applies to loan default and bankruptcy. The foreign entity waiver is limited to entities that are not direct or indirect parents of contributing sponsors; discussion of the foreign-entity waiver in this preamble should be understood to incorporate this limitation.

<sup>38</sup> The waiver would use the ten percent standard for *de minimis* segments. For liquidation, loan default, and insolvency, the *de minimis* waiver is available only if the entity involved in the event was not a contributing sponsor.

<sup>31</sup> See <http://www.sec.gov/about/forms/form8-k.pdf>.

<sup>32</sup> The exceptions for results of operations and financial statements fall under SEC Form 8-K Item 2.02 (Results of Operations and Financial Condition) and Item 9.01 (Financial Statements and Exhibits). The final rule's public company waiver includes these exceptions because disclosure of a reportable event under these items may be incidental to the event that requires SEC disclosure. For example, the release of results of operations may include a reference to a reportable event in the context of the overall business activities during a fiscal quarter. In such a case, PBGC believes the SEC disclosure often may be a passing reference with little information about the reportable event and likely made long after the event may have occurred.

five reportable events that involve reporting at the controlled group level rather than the plan level: Controlled group changes, liquidation, loan defaults, extraordinary dividends, and insolvency events. The commenter stated that complicated controlled group situations require significant coordination across plan sponsors and controlled group members to gather information and test the various reporting waivers. Some commenters suggested that the proposal was unclear about whether the sponsor safe harbor tests had to be met by all controlled group members.

Similar issues existed under the old regulation. Nonetheless, the final rule makes changes from the proposal to address these concerns and minimizes burden for plans that experience events involving controlled groups in a number of ways. The final rule:

- Includes public company waivers for five events.
- Clarifies that the company low-default-risk safe harbor (which also applies to controlled group changes and extraordinary dividends) requires satisfaction by a contributing sponsor and the highest level U.S. parent of the contributing sponsor, not by the whole controlled group or by the contributing sponsor or highest level U.S. parent alone.
- Provides that satisfaction of the low-default-risk safe harbor is based on a single point in time during an annual financial cycle rather than determination after each of one or more events during a year.

Besides those changes in the final rule, the exclusion of proceedings under the Bankruptcy Code from the insolvency event description in the final rule (as in the 2013 proposal) will obviate most reporting of insolvency cases that involve controlled groups, since most such companies will go through federal bankruptcy proceedings in the event of insolvency.

The final regulation (like the proposal) provides relief from monitoring smaller controlled group members (through the *de minimis* 10-percent segment waivers) and all foreign controlled group members that are not parent entities. The inclusion of a small-plan waiver for the controlled group change event also provides relief in this regard. PBGC believes these exceptions will alleviate the need to monitor the controlled group members that are potentially the most difficult to track. In addition, PBGC expects that many smaller controlled group members typically will not undergo loan default events because their debt levels will not meet the \$10 million reporting

threshold. Thus, PBGC determined that no further changes in the final regulation were necessary to address concerns about controlled group monitoring.

#### *Effect of Proposal on Loan Agreements*

As discussed in the 2013 proposal, PBGC reviewed loan agreements to better understand the concerns of commenters on the 2009 proposal about the effect of the proposal on loan agreements.<sup>39</sup> Based on this review, PBGC concluded that the elimination of reporting waivers would not adversely affect most plan sponsors with loan agreements. Further, PBGC was not aware of any instance where filing notice of a reportable event caused a lender to declare a default. PBGC believes that if a lender were to declare a default it would be because the underlying event indicated a deterioration in the debtor's financial situation.

PBGC sought further feedback from the public on this issue in the 2013 proposal and asked that commenters provide copies of relevant loan agreements and information about the number and circumstances of plan sponsors that have experienced default or suffered other adverse consequences related to loan agreements as a result of a reportable event. No such documentation was received.

One commenter on the 2013 proposal said that since the 2009 proposal, many companies already have renegotiated agreements to provide that the occurrence of a reportable event that is not automatically waived is an event of default only if the event could result in a certain amount of financial liability or could have a material adverse effect on the borrower. But the commenter went on to say that a material adverse effect clause does not provide clarity as to when the clause actually has been or could be triggered. A second commenter, while agreeing with PBGC that in most cases, a non-waived reportable event will not result in an automatic default, said it is the creditor who determines whether the event results in material adverse effect.<sup>40</sup> Both commenters suggested that lenders may try to renegotiate agreements under the pretext that a reportable event had resulted in (or could have) a material adverse effect on the borrower, which would be time consuming and costly

and could force the borrower to accept unfavorable terms.

Two commenters urged PBGC to retain the old reportable events regulation because companies have taken the regulation's provisions into account in contracting with not only lenders but also with employee benefit plan investors (who invest in swaps and futures agreements).<sup>41</sup> However, the old regulation has been unchanged since 1997, when the economy, defined benefit pension plans and the pension insurance program looked very different than they do today. Based on more than 15 years of experience with the old regulation, PBGC has found that the regulation is not effective in providing timely reports for plans that pose the most risk to the pension insurance system.

Moreover, reportable events notices are designed to give PBGC notices of events that could impair the payment of a debt (*i.e.*, a pension obligation). If a lender invokes a material adverse effect clause as a result of a reportable event, it is because the lender has concerns that the event will impair the company's ability to pay on the loan, not because the event is reported to PBGC. In other words, a company's lender's concerns in this regard and PBGC's concerns are likely to be congruent.

Although PBGC's understanding of the impact of the regulation on loan agreements has not changed, PBGC believes that the changes made in this final rule should assuage commenters' concerns in this area. The final rule provides more waivers than under the 2013 proposal. PBGC anticipates that about 94 percent of plans covered by PBGC will qualify for at least one waiver under the active participant reduction, controlled group change, extraordinary dividend, benefit liability transfer, and substantial owner distribution event provisions. Along with missed contribution events (which PBGC does not expect to be reported in greater numbers under the final rule), these five events accounted for over 90% of filings between 2012 and 2014. Thus, with more waivers covering the most common events, sponsors will be better off under the new regulation than under the old regulation, and PBGC expects an overall net reduction in reporting under the final rule (see discussion in *Executive Orders 12866 and 13563 and Paperwork Reduction Act*), and an

<sup>39</sup> See 78 FR 20047–8.

<sup>40</sup> This commenter suggested that the preamble to the 2013 proposal downplayed the significance of reportable events on loan covenants and loan defaults. The commenter estimates that five to ten percent of its time is spent monitoring and revising corporate events to avoid reporting.

<sup>41</sup> This commenter also stated at the hearing that one of its members would have faced bankruptcy proceedings unless it was able to renegotiate its credit agreement to include a material adverse effect clause to a provision that required the absence of a reportable events filing. The commenter indicated that the sponsor was successful in this effort.

increase in the reporting of events that are a true concern to the pension insurance system. In addition, the deferral of the applicability date for the final regulation should give plan sponsors time to consult with loan providers about appropriate amendments to loan agreements, which, as mentioned by the commenter referred to above, companies appear already to be doing.<sup>42</sup>

### Descriptions of Events Under the Final Rule

The next sections of the preamble address specific event descriptions, which can impact reporting requirements in much the same way as waivers. The final rule follows the 2013 proposal that reporting of an insolvency event is required only when a member of a plan's controlled group is involved in insolvency proceedings that are not under the federal Bankruptcy Code) and makes no changes in event descriptions that were not addressed in the 2013 proposal.

#### Active Participant Reduction

Under ERISA section 4043(c)(3), in general, a reportable active participant reduction occurs when the number of active participants is reduced below 80 percent of the number at the beginning of the year or below 75 percent of the number at the beginning of the prior year.

Creeping losses of active participants may cross the two percentage thresholds at different times in one year. The 2009 proposal added a reporting waiver to limit reporting to once a year on the premise that PBGC would monitor for at least a year any plan that reported an active participant reduction.

The 2013 proposal introduced a new approach to reporting active participant reductions. It distinguished between rapid reductions—which would have to be reported immediately—and slower reductions attributable to attrition—which would have to be tested for and reported only once a year. This approach addressed a comment on the 2009 proposal requesting relief from the need to monitor constantly for creeping active participant reductions that might exceed one of the percentage thresholds. Because the attrition event can occur only once a year, PBGC eliminated the 2009 proposal's waiver from reporting subsequent active participant reduction event notices after the first such event in the same year was reported. PBGC

reasoned that quick drops in the number of active participants should be easy to spot without exercising unusual vigilance.

Under the 2013 proposal, a “quick” active participant reduction event would occur when the reporting threshold was crossed either within a single 30-day period (a short-period event) or as a result of a single cause (a single-cause event), such as the discontinuance of an operation, a natural disaster, a reorganization, a mass layoff, or an early retirement incentive program. An attrition event would occur if the active participant count at the end of a plan year fell below one of the percentage thresholds. A 120-day reporting extension beyond the end of the year would provide time to count active participants.

The final rule generally tracks the 2013 proposal but eliminates the short-period event (as one commenter requested), lengthens the reporting extension for attrition events, and makes some minor editorial changes for clarification. PBGC concluded that the burden of monitoring for short-period events would outweigh the value of short-period event reports, since most short-period events would likely also be either single-cause events or eventually captured in an attrition-event filing. In addition, PBGC decided to extend the reporting deadline for attrition events until the premium due date for the plan year following the event year.

Two commenters requested reinstatement of the waiver of reporting more than once a year from the 2009 proposal, or clarification of when more frequent reporting would be required. As explained above, the “once-a-year” waiver is no longer necessary for creeping active participant losses because the attrition event can arise only once a year. And after consideration, PBGC has concluded that it cannot adequately monitor plans for multiple rapid active participant reduction events in the same year. Further, two or more distinct events in the same year could signal extreme financial distress that merit timely reporting to PBGC. Thus the “once-a-year” waiver is not in the final rule.

Two commenters suggested exempting frozen plans from the active participant reduction event or waiving reporting unless plan liabilities increased (as from a triggering of shut-down benefits). PBGC has not adopted these suggestions. Although the active participant reduction event may be more easily triggered for a frozen plan, such plans can pose just as much risk to the pension insurance system as plans that are not frozen.

One commenter asked for a waiver or extension of the requirement to report active participant reductions caused by natural disasters. The issue here would appear to apply equally to all reportable events, but even limiting the proposal to the active participant reduction event, PBGC is concerned that the occurrence of a disaster may increase, rather than obviate, the importance of timely reporting because a natural disaster may have a lasting negative impact on the ability of a business to continue operating. Thus, PBGC is providing no special rules for disasters in the final rule. Note, however, that in appropriate cases, PBGC issues disaster relief notices that provide temporary relief from reporting requirements.<sup>43</sup> Case-by-case waivers and extensions are also available.

One commenter wanted PBGC to waive reporting of active participant reductions due to spinoffs within a controlled group. PBGC sees no more reason to waive reporting where there is an intra-group spinoff than where there is no spinoff. The loss of active participants is of concern itself, regardless of cause. Further, such a spin-off may be a precursor to the transfer of benefit liabilities outside the controlled group. Accordingly, no such waiver is provided in the final rule, though case-by-case waivers are available.

Finally, this commenter also questioned the utility of reports of active participant reduction events, suggesting that PBGC is unaffected by active participant reductions and takes no action on a report of such an event unless accompanied by some other event. PBGC disagrees with this assessment. Notices of active participant reductions (which often result from business restructurings) give PBGC a chance to intervene to protect plan assets when a restructuring fails and plan termination becomes a significant possibility.

#### Missed Contributions

Under the old regulation (§ 4043.25), a missed contribution event occurs when a plan sponsor fails to make any required plan contribution by its due date.

The final rule (like the 2009 and 2013 proposals) clarifies the language in § 4043.25. This reportable event does not apply only to contributions required by statute,<sup>44</sup> but also to contributions

<sup>42</sup> When credit and investment agreements are renegotiated, borrowers might be able to address uncertainty raised by having material adverse effect clauses by negotiating a dollar figure threshold that would trigger an event of default.

<sup>43</sup> See PBGC guidance on disaster relief at <http://www.pbgc.gov/res/other-guidance/dr.html>.

<sup>44</sup> Such required contributions include quarterly contributions under ERISA section 303(j)(3) and Code section 430(j)(3), liquidity shortfall contributions under ERISA section 303(j)(4) and

required as a condition of a funding waiver that do not fall within the statutory provisions on waiver amortization charges.<sup>45</sup> The final rule (like the 2013 proposal) includes waivers for this event for a missed contribution made up within 30 days after its due date and for small plans that miss quarterly contributions.

One commenter suggested that PBGC add a waiver for contributions missed solely because of a failure to timely make a funding balance election. The final rule adds a waiver for a missed contribution where the failure to timely make the contribution is due solely to the plan sponsor's failure to timely make a funding balance election.

The final rule also clarifies a technical point from the 2013 proposal. The requirement to submit a reportable event notice for a missed contribution is satisfied by submission of Form 200 for the same event. However, reliance on Form 200 to satisfy the reportable event filing requirement does not transform Form 200 into a reportable event notice. Thus, the final rule makes clear that a Form 200 filing is not protected by the non-disclosure provisions of ERISA section 4043(f).

#### *Inability To Pay Benefits When Due*

In general, a reportable event occurs when a plan fails to make a benefit payment timely or when a plan's liquid assets fall below the level needed for paying benefits for six months. The old regulation excuses failure to pay due to inability to locate the payee or any other administrative delay of less than two months (or two benefit payment periods). In reviewing the proposed rule, PBGC concluded that it would be unfair to require a plan to report an inability to pay benefits when due simply because (despite the diligence called for by the fiduciary standards) a payee could not be located within the prescribed time limit. Accordingly, the final rule clarifies that the time limit does not apply to delay in paying a missing payee. Other administrative delays are excused only to the extent they do not exceed the prescribed time limit.

Code section 430(j)(4), and contributions to amortize funding waivers under ERISA section 303(e) and Code section 430(e).

<sup>45</sup> Such "non-statutory" contributions are not taken into account under ERISA section 303(k) and Code section 430(k), dealing with liens that arise because of large missed contributions, and are therefore disregarded under § 4043.81, which implements those provisions. However, violating the conditions of a funding waiver typically means that contributions that were waived become retroactively due and unpaid and are counted for purposes of § 4043.81.

#### *Distribution to Substantial Owner*

Under the old regulation, distributions to substantial owners generally were required to be reported if the total distributions to an owner exceeded \$10,000 in a year, unless the plan was fully funded for nonforfeitable benefits. The 2013 proposal limited the event to circumstances where the distributions to one substantial owner exceeded one percent of plan assets or the distributions to all substantial owners exceeded five percent of plan assets. In addition, PBGC proposed to limit reporting for a distribution in the form of an annuity to one notice, which would satisfy all future reporting requirements for the annuity so long as the annuity did not increase. Once notified that an annuity was being paid to a substantial owner, PBGC would need no further notices that the annuity was continuing to be paid.

One commenter asked PBGC to exclude from reporting payments made to comply with the minimum required distribution rules of Code section 401(a)(9), which might involve an increasing annuity if the substantial owner were still working and accruing benefits but required to take minimum distributions. In response, the final rule provides that reporting for distributions in the form of annuities is required only once, without the limitation that the annuity be non-increasing.

#### *Controlled Group Change*

Under § 4043.29 (both in the old regulation and the new regulation), a reportable event occurs for a plan when there is a transaction that results, or will result, in one or more persons' ceasing to be members of a plan's controlled group. For this purpose, the term "transaction" includes a written or unwritten legally binding agreement to transfer ownership or an actual transfer or change of ownership. (A transaction is not reportable if it will result solely in a reorganization involving a mere change in identity, form, or place of organization, however effected.)

One commenter to the 2013 proposal raised concerns that elimination of the waivers for this event under the old regulation (which the 2013 proposal replaced with other waivers) would require significant monitoring of every transaction in which any controlled group member engages throughout the year and analysis of each such transaction to determine whether reporting is required. This commenter further asserted that the 2013 proposal would add significant administrative burdens without a corresponding increase in the security of the pension

insurance system and urged PBGC to restore the funding and public company waivers that applied under the old regulation. PBGC has addressed this concern with the final rule's inclusion of the small plan and public company waivers, without regard to plan funding status. See the discussion above in the sections *Public Company Waiver* and *Controlled Group Situations*.

The 2013 proposal deleted the example in § 4043.29(e)(3) of the old regulation that indicated that a reportable event occurred when a member of a controlled group ceased to exist upon being merged into another member in the course of a reorganization. However, this point was not made clearly by the language in § 4043.29(a) describing the event. The final rule adds language further clarifying that a controlled group member's ceasing to exist because of a merger into another member of the group is not a reportable event.

Like the 2013 proposal, the final rule provides that whether an agreement is legally binding is to be determined without reference to any conditions in the agreement. For this purpose, a legally binding agreement means an agreement that provides for obligations that are material to and enforceable by and against the parties to the agreement, regardless of whether any conditions of the agreement have been met or satisfied (in other words, an agreement does not fail to be legally binding solely because it is subject to conditions that have not been performed).<sup>46</sup> Example 2 in the regulatory text has been modified to make clear when the filing is triggered. The provisions on controlled group change events are otherwise unchanged from the 2013 proposal.

#### *Extraordinary Dividends*

Under the old regulation, an extraordinary dividend or stock redemption occurred when a member of a plan's controlled group declared a distribution (a dividend or stock redemption) that alone or in combination with previous distributions exceeded a level specified in the regulation. The 2013 proposal eliminated much of the computational detail that the old regulation prescribed for determining whether a reportable event had occurred by providing that the computations be done in accordance with generally accepted accounting principles.

Although PBGC did not receive comments on the 2013 proposal for this event, PBGC decided to include in the

<sup>46</sup> See similar language in SEC Form 8-K Item 1.01 used to define a material definitive agreement.

final rule a waiver for public companies from reporting extraordinary dividends and stock redemptions, as discussed above under *Public Company Waiver*.

#### *Transfer of Benefit Liabilities*

The reportable events regulation requires reporting to PBGC when, in any 12-month period, three percent or more of a plan's benefit liabilities are transferred to a person outside the transferor plan's controlled group or to a plan or plans maintained by a person or persons outside the transferor plan's controlled group. Transfers of benefit liabilities are of concern to PBGC because they may reduce the transferor plan's funded percentage<sup>47</sup> and because the transferee may be a higher default risk than the transferor.

Both the 2009 and 2013 proposals clarified that satisfaction of a plan's benefit liabilities through the payment of a lump sum or the purchase of an irrevocable commitment to provide an annuity would not constitute a transfer of benefit liabilities that must be reported under the regulation. In the preamble to the 2013 proposal (78 FR at 20050), PBGC stated it had concluded that such transfers need not be reported because the provisions in section 436 of the Code and section 206(g) of ERISA (as added by the Pension Protection Act of 2006 (PPA)) prohibit or limit cashouts and annuitizations by significantly underfunded plans. In addition, since cashouts and annuitizations do not involve benefit liabilities transferring to another plan, PBGC reasoned there would be no concern about a transferee plan's financial health.

One commenter on the 2013 proposal opposed the exclusion of lump sums and annuity purchases from the reporting requirement. This commenter suggested that cash-outs or annuitizations on a large scale, sometimes referred to as de-risking or risk transfers, presage the decline of the defined benefit pension plan system. This commenter stated PBGC could gather information that might lead to regulatory or statutory protection for participants impacted by these types of transactions. During the hearing on the 2013 proposal, however, all of the panelists of this commenter expressed opposite views.

PBGC shares concerns about the potential impact of cashouts and annuitizations on a large scale on

retirement security, including concerns that some of these transactions may leave a plan underfunded or effectively be part of a standard termination without meeting the applicable statutory and regulatory requirements (including reporting to PBGC and disclosure to participants). PBGC also recognizes that such transactions may create burdens on individuals whose options to obtain lifetime income in retirement are limited or who may not have the resources or experience to manage lump sum distributions in a way that replicates the professional investment management (with the associated fiduciary responsibilities) of defined benefit plan assets. PBGC notes, however, that few companies would be subject to advance reporting of such transactions, thus severely limiting the utility of such reporting, as compared to its burden. Therefore, PBGC is not adopting the commenter's suggestion in this final rule. Accordingly, the final rule retains the treatment of lump sum distributions and annuity purchases from the proposals.

Nevertheless, PBGC believes there are ways to address the commenter's concerns. PBGC believes it has useful tools to monitor and analyze trends (e.g., Form 5500 and premium filings) as well as tools to provide education and outreach to participants, and is carefully considering how best to do so.<sup>48</sup>

#### *Loan Default*

Under the old regulation, a loan default reportable event occurred, with respect to a loan with an outstanding balance of \$10 million or more to any member of a plan's controlled group, when a loan payment was more than 30 days late (10 days in the case of advance reporting), when the lender accelerated the loan, or when there was a written notice of default based on a drop in cash reserves, an unusual or catastrophic event, or the debtor's persistent failure to meet agreed-on performance levels.

PBGC believes that the significance of both potential and actual loan defaults on such large loans is so great that reporting should not be restricted to the current list of reporting triggers. Rather, PBGC believes that not only any default on a loan of \$10 million or more—even a default on a loan within a controlled group—but waivers and amendments of loan covenants that are made to avoid a default (to keep the loan arrangement functioning) may reflect financial difficulty and pose serious challenges

for the pension insurance system. Accordingly, in the 2013 proposal PBGC expanded the definition of the loan default event. Under the 2013 proposal, a reportable event would occur if a member of a plan's controlled group had an outstanding loan balance of \$10 million or more and—

- There was an acceleration of payment or a default under the loan agreement, or
- The lender waived or agreed to an amendment of any covenant in the loan agreement for the purpose of avoiding a default.

These changes were to apply for both post-event notices and advance notices.

In the preamble to the 2013 proposal, PBGC stated its belief that the reporting requirement for loan defaults under the proposed rule would be comparable to what a typical creditor would require of a borrower to monitor the ability of the borrower to meet its obligations under the loan agreement. PBGC sought the views of the public on specific issues dealing with loan defaults, including how PBGC might better replicate reporting of information to creditors and whether there is a category of "technical" defaults that should not be reportable events.

One commenter was concerned that the proposal would require PBGC to determine a plan sponsor's intent behind a waiver or amendment and was not sure how such intent could be determined. To address this comment, the final rule replaces words "for the purpose of avoiding a default" in the 2013 proposal with the words "the effect of which is to cure or avoid a breach that would trigger a default."

This commenter also said that the scope of the proposed expansion of the event definition was too broad, especially for public companies that might face SEC disclosure issues. The commenter urged PBGC to modify the proposal to require the reporting of an amendment or waiver only to "material financial covenants," and not all covenants (e.g., non-financial covenants such as compliance with ERISA and similar laws). Another commenter, in responding to the proposed loan default criterion of the sponsor financial soundness safe harbor, was also concerned that the proposed rule's description of the loan default event was too broad because so-called meaningless "technical defaults" that are waived by a lender and are not indicative of financial stress would be reported. Other than these comments, PBGC did not receive feedback on loan default concerns.

After reviewing the comments and further analysis of typical loan

<sup>47</sup> Under Code section 414(l), transfers of liabilities must be covered by assets. In most cases of liabilities transfers, assets from the transferor plan also will be transferred to the transferee plan, which would reduce the amount of assets in the transferor plan and may affect its funded percentage.

<sup>48</sup> PBGC is requiring reporting of risk transfers on premium forms, starting with filings for plan years beginning in 2015. See <http://www.pbgc.gov/Documents/2015-Premium-Payment-Instructions.pdf>.



agreement provisions, PBGC has decided to not make further changes to the event description in response to comments. Covenants that are tied to event-of-default triggers are put into loan agreements because lenders believe that failure to comply with such covenants is significant and serves as an early indicator that a company may be experiencing financial difficulties resulting in its inability to pay its debts on time and in full. Distinctions should be made between a breach of any covenant in a loan agreement and a breach of a particular covenant that gives rise to a possible event-of-default trigger. The former may cover the kinds of minor loan agreement violations of the kind the commenter who asked that “technical defaults” of loan agreements be excluded from reporting under the regulation. The latter are those types of breaches (e.g., non-payment, failure to meet a financial ratio, or failure to provide some important information) that the parties to the loan agreement have agreed are serious enough to undermine the loan agreement arrangement. Under the final regulation, PBGC will act as any another creditor would by requiring reporting of all incidents within the expanded scope of the loan default event. If a sponsor believes that an event triggering the loan default reporting requirement does not reflect financial difficulty or the ability of the sponsor to meet its pension obligations, PBGC will consider a request for a case-by-case waiver.

The final rule makes one other change to this event from the 2013 proposal. The final rule deletes a paragraph from the old regulation on the notice date for payment acceleration or loan default that referred to “other conditions” for such occurrences to be reportable. Because the provisions concerning “other conditions” are eliminated (following the 2013 proposal), this paragraph is no longer necessary.

#### Form 200 Reporting

One commenter suggested that PBGC allow for simplified reporting for Form 200 filings in limited situations, such as when the missed contribution has been made up by the filing due date and the plan has not missed any other contributions within a certain period of time. PBGC thought this was a good suggestion. Accordingly, under the final rule, if a plan sponsor makes up a missed contribution by the Form 200 notice due date, and the sponsor has not missed any other required contributions during the two-year period ending on the Form 200 notice due date, the plan may file the Form 200 notice without any of the attachments (e.g., controlled

group listing and company financial statements) otherwise required by the Form 200 and instructions.

#### Other Topics Under the Final Rule

##### Advance Reporting

In general, reportable events must be reported to PBGC within 30 days after they occur. But section 4043(b) of ERISA requires advance reporting by a contributing sponsor for certain reportable events if a “threshold test” is met, unless the contributing sponsor or controlled group member to which an event relates is a public company. The advance reporting threshold test is based on the aggregate funding level of plans maintained by the contributing sponsor and members of the contributing sponsor’s controlled group. The funding level criteria are expressed by reference to calculated values that are used to determine VRPs under section 4006 of ERISA.

PPA changed the plan funding rules in Title I of ERISA and in the Code and amended the VRP provisions of section 4006 of ERISA to conform to the changes in the funding rules. The final rule, like the prior proposals, conforms the regulation to the changes made under PPA.<sup>49</sup>

The regulatory language under the final rule is slightly modified to conform to changes made in a recent final rule on PBGC premiums under which small plans generally calculate the VRP using data from the plan year preceding the premium payment year, a requirement referred to as the “look-back rule.”<sup>50</sup> Thus, the reportable events final rule clarifies that the VRP data used for this advance reporting test are not the data for the prior year, but the data used to determine the VRP for the prior year.

There is no change in the final rule from the 2013 proposal that eliminated advance-notice extensions for loan default and voluntary insolvency events. (The notice date of an event where insolvency proceedings are filed against a debtor by someone outside the plan’s controlled group is extended to

<sup>49</sup> Several other PBGC regulations also refer to plan funding concepts using citations outmoded by PPA: The regulations on Filing, Issuance, Computation of Time, and Record Retention (29 CFR part 4000); Terminology (29 CFR part 4001); Variances for Sale of Assets (29 CFR part 4204); Adjustment of Liability for a Withdrawal Subsequent to a Partial Withdrawal (29 CFR part 4206); and Mergers and Transfers Between Multiemployer Plans (29 CFR part 4231). Thus, these regulations must also be revised to be consistent with ERISA and the Code as amended by PPA and with the revised premium regulations. The final rule makes the necessary conforming revisions, as proposed.

<sup>50</sup> See 79 FR 13547 (March 11, 2014).

10 days after proceedings begin). Thus, under the final rule, the due date for these events is the same as for other reportable events subject to the advance-notice requirements (i.e., 30 days prior to the event).

##### Forms and Instructions

PBGC issues three reporting forms for use under the reportable events regulation. Form 10 is for post-event reporting under subpart B of the regulation; Form 10-Advance is for advance reporting under subpart C of the regulation; and Form 200 is for reporting under subpart D of the regulation. Failure to report is subject to penalties under section 4071 of ERISA. The final rule eliminates some of the documentation that was required to be submitted with notices of two reportable events under the old regulation, but also requires that filers submit with notices of most events some information that is typically requested by PBGC after notices are reviewed. The final rule also requires the use of prescribed reportable events forms and moves from the regulation to the forms and instructions the lists of information items that must be reported.

Three commenters expressed concern about moving the information requirements from the regulation to the forms and instructions because public input on any changes might be limited; one of these commenters said that Paperwork Reduction Act (PRA) notices are easy to miss.

PBGC does not agree. PBGC posts all pending PRA submissions on its Web site at <http://www.pbgc.gov/res/laws-and-regulations/information-collections-under-omb-review.html>. Interested persons can sign up for notifications of new postings through PBGC’s Web site at <http://www.pbgc.gov/res/res/stay-informed.html>. PBGC observes that the public was provided an opportunity to comment on the forms and instructions in connection with the 2013 proposal and PBGC received only one substantive comment (noted below). Moving the information requirements to the forms and instructions will allow PBGC to be more flexible in responding to future developments, such as changes in information technology.<sup>51</sup>

One commenter felt that the 2013 proposal dramatically increased the information required to be initially reported. As explained in the 2013

<sup>51</sup> Although changes to the paperwork would not have to go through notice and comment rulemaking, they would still have to be reviewed by OMB under the Paperwork Reduction Act, which typically requires two public notices and a total of 90 days for submission of public comments.



proposal (78 FR 20051), PBGC acknowledges that initial information requirements generally will increase. However, the total amount of information submitted to PBGC (including both initial reports and follow-up information requested by PBGC) generally will not increase, and providing information all at one time is more efficient than doing so in multiple installments. Further, by requiring more information with the initial filing, the new requirements will allow PBGC to intervene to protect plans and participants more quickly in appropriate circumstances.

#### *Mandatory Electronic Filing*

The final rule, like the 2009 and 2013 proposals, requires electronic filing of reportable events notices. This requirement is part of PBGC's ongoing implementation of the Government Paperwork Elimination Act.

Filers are permitted to email filings with attachments using any one or more of a variety of electronic formats that PBGC is capable of reading as provided in the instructions on PBGC's Web site. (PBGC accepts imaged signatures for filings.)

PBGC may consider other E-filing enhancements, such as a Web-based filing application for reportable events similar to the applications for PBGC's section 4010 and premium filings, as internet capabilities and standards

change. Such developments would be reflected in PBGC's reportable events e-filing instructions.

PBGC sought public comment on its proposal to require electronic filing. One commenter favored electronic reporting while two others requested a paper filing option. In view of the fact that all plans subject to the reportable events regulation must file Form 5500 and PBGC premiums electronically, a paper option within the regulation for the occasional reportable event notice seems unnecessary. However, PBGC may grant case-by-case waivers of the electronic filing requirement.

#### *Other Changes*

The final rule makes a change to § 4043.20 that was not included in the 2013 proposal to clarify that the responsibility for a failure to file a reportable event notice if there is a change in plan sponsor or plan administrator lies with the person who is the plan administrator or contributing sponsor of the plan on the due date. Without this change, if there were a change in plan administrator or sponsor after a notice had been filed but before the due date, the new plan administrator or sponsor would be required to file another notice. A similar change is made to § 4043.61(a) with respect to a change in a contributing sponsor and the responsibility to file advance-notice reports.

The final rule also makes applicable to the regulation generally a provision—limited to one event in the old regulation—waiving reporting for statutory reportable events outside the scope of the reportable events described in the regulation. This provision has been reworded and moved from § 4043.31(c)(1) (dealing with extraordinary dividends) to § 4043.4(e) (dealing with waivers generally).

The 2013 proposal made other technical changes that are retained in the final rule.<sup>52</sup>

#### **Summary Chart**

The following tables summarize waiver and safe harbor provisions for reportable events for which post-event reporting is required. The first table shows waivers and safe harbors available under this final rule, and the second table shows a comparison of such provisions between the old regulation and this final rule. As explained in detail above, the final rule also provides reporting relief—like the relief provided by waivers—through changes to the definitions of certain reportable events, including substantial owner distributions and active participant reductions and through the requirement for filing only once a plan year for active participant reductions that occur by attrition.

<sup>52</sup> See 78 FR 20052–3.

Event	Reporting waived if:									
	Low risk of default	No VRP	Small plan	Public company (if event disclosed on SEC Form 8-K)	CG member causing event is:			Not more than 30 days late	Late credit balance election	Large plan subject to liquidity rules
					De minimis	Non-parent & foreign	De minimis & not a contributing sponsor			
Extraordinary Dividend or Stock Redemption	✓	✓	✓	✓	✓	✓				
Change in Contributing Sponsor or Controlled Group	✓	✓	✓	✓	✓	✓				
Active Participant Reduction	✓	✓	✓	✓						
Transfer of Benefit Liabilities	✓	✓	✓	✓						
Distribution to Substantial Owner	✓	✓		✓						
Insolvency <sup>a</sup>						✓	✓			
Liquidation						✓	✓			
Loan Default						✓	✓			
Failure to Make Required Contribution			✓ <sup>b</sup>					✓	✓	
Application for Funding Waiver										
Inability to Pay Benefits When Due										✓

a. Events under Bankruptcy Code waived in all cases.

b. Only waived if missed contribution is a quarterly installment



**Events with risk-based safe harbors (company low-default-risk or well-funded plan) <sup>53</sup> or other factors.**

Event	Waivers under old regulation	Final rule – if any of these safe harbors applies, no reporting is required		
		Company Low-default-risk Safe Harbor	Well-Funded Plan Safe Harbor	Other Safe Harbors
<b>Extraordinary Dividend or Stock Redemption</b>	<ul style="list-style-type: none"> <li>Member distributing is <i>de minimis</i> (5%);<sup>54</sup></li> <li>Member distributing is non-parent foreign entity (regardless of size);</li> <li>Member distributing is foreign parent, and distribution is made solely to other controlled group members;</li> <li>At least 80% funded;</li> <li>No VRP; or</li> <li>Less than \$1 M in premium underfunding</li> </ul>	↑	↑	<ul style="list-style-type: none"> <li>Member involved is <i>de minimis</i> (10%);</li> <li>Member involved is non-parent foreign entity (regardless of size); or</li> <li>Small plan (fewer than 100 participants)</li> <li>Public company disclosure</li> </ul>
<b>Change in Contributing Sponsor or Controlled Group</b>	<ul style="list-style-type: none"> <li>Member leaving is <i>de minimis</i> (10%);</li> <li>Member leaving is non-parent foreign entity (regardless of size);</li> <li>At least 80% funded &amp; public company;</li> <li>No VRP; or</li> <li>Less than \$1 M in premium underfunding</li> </ul>	↑	↑	
<b>Active Participant Reduction</b>	<ul style="list-style-type: none"> <li>Small plan (fewer than 100 participants)</li> <li>At least 80% funded if not a facility closing;</li> <li>No VRP; or</li> <li>Less than \$1 M premium underfunding</li> </ul>	↓	↓	<ul style="list-style-type: none"> <li>Small plan (fewer than 100 participants)</li> <li>Public company disclosure</li> </ul>
<b>Transfer of Benefit Liabilities</b>	<ul style="list-style-type: none"> <li>IRC 414(l) safe harbor is used for asset transfer;</li> <li>Plan whose liabilities are all transferred;</li> <li>Both plans fully funded after transfer using 414(l) assumptions; or</li> <li>Amount transferred is less than 3% of assets</li> </ul>			<p><i>Note: filing extension for reductions due to gradual attrition</i></p> <ul style="list-style-type: none"> <li>Small plan (fewer than 100 participants)</li> <li>Public company disclosure</li> </ul>
<b>Distribution to Substantial Owner</b>	<ul style="list-style-type: none"> <li>At least 80% funded;</li> <li>No VRP;</li> <li>Distributions less than IRC 415 limit; or</li> <li>Distributions less than 1% of assets<sup>55</sup></li> </ul>			<ul style="list-style-type: none"> <li>Public company disclosure</li> </ul>

<sup>53</sup> Company means the plan sponsor or the U.S. parent company. The risk-based tests are set forth in § 4043.9 of the final rule and described in the preamble under *Company Low-default-risk Safe Harbor* and *Well-Funded Plan Safe Harbor*.

<sup>54</sup> De minimis is defined in § 4043.2 of both the old regulation and the new regulation.

<sup>55</sup> The final rule, like the 2013 proposal, added to the description of this event a provision limiting the event to circumstances where the distributions to one substantial owner exceed one percent of plan assets or the distributions to all substantial owners exceed five percent of plan assets. The one-percent threshold echoes the waiver for this event under the old regulation but that was eliminate in the final rule.

Events with limited or no safe harbors		
Event	Waivers under old regulation	Safe Harbors under final rule
<b>Bankruptcy/Insolvency</b>	<ul style="list-style-type: none"> <li>Member in bankruptcy is non-parent foreign entity (regardless of size)</li> </ul>	<ul style="list-style-type: none"> <li>Event revised to exclude Bankruptcy Code cases.</li> <li>Member causing event is -               <ul style="list-style-type: none"> <li>Not a contributing sponsor and is <i>de minimis</i> (10%); or</li> <li>Non-parent foreign entity (regardless of size)</li> </ul> </li> </ul>
<b>Liquidation</b>	<ul style="list-style-type: none"> <li>Member liquidating is <i>de minimis</i> (10%) and plan survives;</li> <li>Member liquidating is non-parent foreign entity (regardless of size);</li> <li>At least 80% funded &amp; public company and plan survives; or</li> <li>No VRP or less than \$1 M in premium underfunding and plan survives</li> </ul>	<div style="text-align: center;">   <ul style="list-style-type: none"> <li>Member causing event is -               <ul style="list-style-type: none"> <li>Not a contributing sponsor and is <i>de minimis</i> (10%); or</li> <li>Non-parent foreign entity (regardless of size)</li> </ul> </li> </ul>  </div>
<b>Loan Default</b>	<ul style="list-style-type: none"> <li>Default cured or waived by lender within 30 days or by end of cure period;</li> <li>Member defaulting is non-parent foreign entity (regardless of size);</li> <li>At least 80% funded; or</li> <li>No VRP or less than \$1 M in premium underfunding</li> </ul>	
<b>Failure to Make Required Contribution</b>	<ul style="list-style-type: none"> <li>Missed quarterlies               <ul style="list-style-type: none"> <li>Plans with fewer than 25 participants if missed quarterly was not due to financial inability; simplified reporting for plans with 25-99 participants if missed quarterly was not due to financial inability (relief provided in Technical Update)</li> <li>Any sized plan, if made within 30 days of due date</li> </ul> </li> <li>Any other missed contribution, if made within 30 days of due date</li> </ul>	<ul style="list-style-type: none"> <li>Missed quarterlies of small plans (fewer than 100 participants)</li> <li>Any missed contribution, if made within 30 days of due date</li> <li>Late funding balance election</li> </ul>
<b>Application for Funding Waiver</b>	<ul style="list-style-type: none"> <li>None</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>
<b>Inability to Pay Benefits When Due</b>	<ul style="list-style-type: none"> <li>Plan with more than 100 participants (subject to liquidity shortfall rules)</li> </ul>	<ul style="list-style-type: none"> <li>Plan with more than 100 participants (subject to liquidity shortfall rules)</li> </ul>

## Applicability

The changes to Part 4043 made by this final rule are applicable to post-event reports for reportable events occurring on or after January 1, 2016, and to advance reports due on or after that date.

## Regulatory Procedures

### *Executive Orders 12866 and 13563*

PBGC has determined that this rule is a “significant regulatory action” under Executive Order 12866. The Office of Management and Budget has therefore reviewed this rule under Executive Order 12866.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Orders 12866 and 13563 require that a comprehensive regulatory impact analysis be performed for any economically significant regulatory action, defined as an action that would result in an annual effect of \$100 million or more on the national economy or that have other substantial impacts. In accordance with OMB Circular A-4, PBGC has examined the economic and policy implications of this rule and has concluded that the action’s benefits justify its costs.

As discussed above, some reportable events present little or no risk to the pension insurance system—where, for example, the plan sponsor presents a low risk of default and the risk of plan termination is correspondingly low. Reports of such events are unnecessary in the sense that PBGC typically reviews but takes no action on them. PBGC analyzed 2013 records to determine how many such reports it received for events to which the proposed sponsor safe harbor would apply, then reanalyzed the data to see how many unnecessary reports would have been received if the plan sponsor safe harbor in the proposed rule had been in effect (that is, excluding reports that would have been waived under the plan sponsor safe harbor test).<sup>56</sup> It found that the proportion of unnecessary filings would

be much lower under the final regulation than under the old regulation—9 percent (19 filings) compared to 50 percent (215 filings). Such improved efficiency will be reflected in dramatically reduced regulatory burden on sponsors and plans that satisfy the risk-based safe harbors. Further, PBGC estimates that the number of total filings will be reduced under the final regulation.

Fewer unnecessary reports means a more efficient reporting system and a greater proportion of filings that present the opportunity for increased plan protection through monitoring and possible intervention in transactions based on risk, leading to better protection for the pension insurance system and retirement security generally.

Using data from 2013, PBGC has estimated the benefit of better-targeted reporting under the new regulation in terms of the value of early intervention as a creditor where a reportable event may foreshadow sponsor default. Early intervention as a creditor leads to higher recoveries of plan underfunding. PBGC estimates that the value of early intervention would exceed the dollar equivalent of the increased burden associated with the higher rate of targeted reporting by approximately \$4.3 million.

Under Section 3(f)(1) of Executive Order 12866, a regulatory action is economically significant if “it is likely to result in a rule that may . . . [h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” PBGC has determined that this final rule does not cross the \$100 million threshold for economic significance and is not otherwise economically significant.

This action is associated with retrospective review and analysis in PBGC’s Plan for Regulatory Review issued in accordance with Executive Order 13563 on “Improving Regulation and Regulatory Review.”

### *Regulatory Flexibility Act*

The Regulatory Flexibility Act imposes certain requirements with respect to rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a rule is not likely to have a significant economic impact on a substantial

number of small entities, section 603 of the Regulatory Flexibility Act requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the proposed rule describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations and governmental jurisdictions.

For purposes of the Regulatory Flexibility Act requirements with respect to the proposed amendments to the reportable events regulation, PBGC considers a small entity to be a plan with fewer than 100 participants. This is the same criterion used to determine the availability of the “small plan” waiver, and is consistent with certain requirements in Title I of ERISA<sup>57</sup> and the Code,<sup>58</sup> as well as the definition of a small entity that the Department of Labor (DOL) has used for purposes of the Regulatory Flexibility Act.<sup>59</sup> Using this definition, about 64 percent (14,349 of 22,344) of plans covered by Title IV of ERISA in 2014 were small plans.<sup>60</sup>

Further, while some large employers may have small plans, in general most small plans are maintained by small employers. Thus, PBGC believes that assessing the impact of the final rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration (13 CFR 121.201) pursuant to the Small Business Act. PBGC requested comments on the appropriateness of the size standard used in evaluating the impact on small entities of the proposed amendments to the reportable events regulation. PBGC received no comments in response to this request.

On the basis of its definition of small entity, PBGC certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the amendments in this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, as provided in section 605

<sup>57</sup> See, e.g., ERISA section 104(a)(2), which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants.

<sup>58</sup> See, e.g., Code section 430(g)(2)(B), which permits plans with 100 or fewer participants to use valuation dates other than the first day of the plan year.

<sup>59</sup> See, e.g., DOL’s final rule on Prohibited Transaction Exemption Procedures, 76 FR 66,637, 66,644 (Oct. 27, 2011).

<sup>60</sup> See PBGC 2014 pension insurance data table S-31 <http://www.pbgc.gov/documents/2013-DATA-BOOK-FINAL.pdf>.

<sup>56</sup> Filings that involved section 4062(e) events always resulted in the opening of cases and were excluded from the analysis.

of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), sections 603 and 604 do not apply. This certification is based on the fact that the reportable events regulation requires only the filing of one-time notices on the occurrence of unusual events that affect only certain plans and that the economic impact of filing is not significant. The average burden of submitting a notice—based on the estimates discussed under *Paperwork Reduction Act*, below—is less than 5½ hours and \$745 (virtually the same as under the old regulation).

#### *Paperwork Reduction Act*

PBGC is submitting the information collection requirements under this rule to the Office of Management and Budget (OMB) under the Paperwork Reduction Act. There are two information collections under part 4043, approved under OMB control number 1212–0013 (covering subparts B and C), which expires May 31, 2018, and OMB control number 1212–0041 (covering subpart D), which expires June 30, 2018.

PBGC is making the following changes to these information requirements that were approved by OMB:

- PBGC's experience is that in order to assess the significance of virtually every post-event filing for a missed contribution, inability to pay benefits, loan default, liquidation, or insolvency, it must obtain from the filer certain actuarial, financial and controlled group information. Filers were previously required to submit some of this information for some events, but PBGC has made its information collection for all these events more uniform. Accordingly, in connection with the final rule, PBGC now requires that every post-event filing for one of these events include the following financial and controlled group information (actuarial information was already required):

1. The financial information required will be copies of audited financial statements for the most recent fiscal year. (If audited statements were not immediately available, copies of unaudited financial statements (if

available) or tax returns would be required, to be followed up with required financial statements when available.)

2. The controlled group information required will be tailored to the event being reported and will generally include identifying information for each plan maintained by any member of the controlled group and a description of the controlled group with members' names.

- Similarly, PBGC has found that it needs the same financial and controlled group information for advance-notice filings (in addition to actuarial information already required). For notices of applications for funding waiver requests, the information can typically be gleaned from the copy of the application that accompanies the reportable event notice. With this exception, PBGC is requiring that every advance notice filing include these items (unless the information is publicly available).

- Controlled group changes and benefit liability transfers involve both an "old" controlled group and a "new" controlled group. PBGC had already required submission of controlled group information with notices of controlled group changes under the old regulation and is now also requiring the same for benefit liability transfers.

- Because extraordinary distributions raise questions about controlled group finances, PBGC now requires submission of financial information with notices of events of this type.

- PBGC now requires that notices of substantial owner distributions give the reason for the distribution to help PBGC analyze its significance.

- Inability to pay benefits raises the specter of imminent sponsor shutdown and plan termination. Accordingly, for notice of this event, PBGC now requires submission of copies of the most recent plan documents and IRS qualification letter.

- PBGC is adding to the Form 200 information submission requirements a requirement to provide information about all controlled group real property,

and identity of controlled group principal executive offices.

- Simplified reporting for Form 200 filings is now available where the filer has not missed any required contribution (other than the missed contribution that triggered the Form 200 filing requirement during the two-year period ending on the notice due date for the Form 200) and has made up the missed contribution by the notice due date; under the simplified reporting provision, none of the attachments that are otherwise required to be included in the filing (e.g., controlled group listing and company financial statements) need to be provided.

- In missed contribution cases, there is sometimes a credit balance that is available for application to a contribution that is due. PBGC needs to be able to determine whether all or a portion of the credit balance has been properly applied toward payment of the contribution. Accordingly, PBGC is requiring Form 200 filers to indicate how much (if any) of the carryover balance or prefunding balance was used for partial payment of the missed contribution and submit copies of election letters relating to the application of the carryover balance and prefunding balance to the contribution.

- PBGC is requiring a description of each controlled group member's operational status (in Chapter 7 proceedings, liquidating outside of bankruptcy, on-going, etc.) in Form 200 filings.

PBGC needs the information in reportable events filings under subparts B and C of part 4043 (Forms 10 and 10-Advance) to determine whether it should terminate plans that experience events that indicate plan or sponsor financial problems. PBGC estimates that it will receive such filings from about 816 respondents each year and that the total annual burden of the collection of information will be about 4,496 hours and \$607,570. This represents a decreased burden compared to that under the old regulation, as the following table shows:

Annual burden:	Under old regulation:	Under new regulation:
Number of responses .....	867 .....	816.
Hour burden .....	4,487 hours .....	4,496 hours.
Dollar burden .....	\$660,853 .....	\$607,570.

As discussed above, the final rule is designed to reduce burden dramatically on well-funded plans and low-default-risk sponsors; thus, burden under the final rule is substantially associated

with higher-risk events, which are much more likely to deserve PBGC's attention. PBGC separately estimated the average burden changes for low-default-risk and non-low-default-risk entities. The

burden for low-default-risk sponsors is down from 443 hours and \$118,025 to zero. The burden for non-low-default-risk sponsors is up by 402 hours and \$64,742.

Low-default-risk	Volume	Hours	Cost
Current .....	128	443	\$118,025
Final .....	0	0	0
Change .....	(128)	(443)	(118,025)
Non low-default-risk	Volume	Hours	Cost
Current .....	739	4,094	\$542,828
Final .....	816	4,496	607,570
Change .....	77	402	64,742

PBGC needs the information in missed contribution filings under subpart D of part 4043 (Form 200) to determine the amounts of statutory liens arising under ERISA section 303(k) and Code section 430(k) and to evaluate the funding status of plans with respect to which such liens arise and the financial condition of the persons responsible for their funding. PBGC estimates that it will receive such filings from about 165 respondents each year and that the total annual burden of the collection of information will be about 990 hours and \$146,406.

#### List of Subjects

##### 29 CFR Part 4000

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

##### 29 CFR Part 4001

Employee benefit plans, Pension insurance.

##### 29 CFR Part 4043

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

##### 29 CFR Part 4204

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

##### 29 CFR Part 4206

Employee benefit plans, Pension insurance.

##### 29 CFR Part 4231

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

For the reasons given above, PBGC is amending 29 CFR parts 4000, 4001, 4043, 4204, 4206, and 4231 as follows.

#### PART 4000—FILING, ISSUANCE, COMPUTATION OF TIME, AND RECORD RETENTION

■ The authority citation for part 4000 is revised to read as follows:

**Authority:** 29 U.S.C. 1083(k), 1302(b)(3).

■ 2. In § 4000.3, paragraph (b)(3) is added to read as follows:

##### § 4000.3 What methods of filing may I use?

\* \* \* \* \*

(b) \* \* \*

(3) You must file notices under part 4043 of this chapter electronically in accordance with the instructions on PBGC's Web site, <http://www.pbgc.gov>, except as otherwise provided by PBGC.

\* \* \* \* \*

##### § 4000.53 [Amended]

■ 3. In § 4000.53, paragraphs (c) and (d) are amended by removing the words “section 302(f)(4), section 307(e), or” where they occur in each paragraph and adding in their place the words “section 101(f), section 303(k)(4), or”.

#### PART 4001—TERMINOLOGY

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

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

##### § 4001.2 [Amended]

■ 5. In § 4001.2:

■ a. The definition of “controlled group” is amended by removing the words “section 412(c)(11)(B) of the Code or section 302(c)(11)(B) of ERISA” and adding in their place the words “section 412(b)(2) of the Code or section 302(b)(2) of ERISA”.

■ b. The definition of “funding standard account” is amended by removing the words “section 302(b) of ERISA or section 412(b) of the Code” and adding in their place the words “section 304(b) of ERISA or section 431(b) of the Code”.

■ c. The definition of “substantial owner” is amended by removing the words “section 4022(b)(5)(A)” and adding in their place the words “section 4021(d)”.

■ 6. Part 4043 is revised to read as follows:

#### PART 4043—REPORTABLE EVENTS AND CERTAIN OTHER NOTIFICATION REQUIREMENTS

##### Subpart A—General Provisions

Sec.

4043.1 Purpose and scope.

4043.2 Definitions.

4043.3 Requirement of notice.

4043.4 Waivers and extensions.

4043.5 How and where to file.

4043.6 Date of filing.

4043.7 Computation of time.

4043.8 Confidentiality.

4043.9 Company low-default-risk safe harbor.

4043.10 Well-funded plan safe harbor.

##### Subpart B—Post-Event Notice of Reportable Events

4043.20 Post-event filing obligation.

4043.21 Tax disqualification and Title I noncompliance.

4043.22 Amendment decreasing benefits payable.

4043.23 Active participant reduction.

4043.24 Termination or partial termination.

4043.25 Failure to make required minimum funding payment.

4043.26 Inability to pay benefits when due.

4043.27 Distribution to a substantial owner.

4043.28 Plan merger, consolidation, or transfer.

4043.29 Change in contributing sponsor or controlled group.

4043.30 Liquidation.

4043.31 Extraordinary dividend or stock redemption.

4043.32 Transfer of benefit liabilities.

4043.33 Application for minimum funding waiver.

4043.34 Loan default.

4043.35 Insolvency or similar settlement.

##### Subpart C—Advance Notice of Reportable Events

4043.61 Advance reporting filing obligation.

4043.62 Change in contributing sponsor or controlled group.

4043.63 Liquidation.

4043.64 Extraordinary dividend or stock redemption.

4043.65 Transfer of benefit liabilities.

4043.66 Application for minimum funding waiver.

4043.67 Loan default.

4043.68 Insolvency or similar settlement.

##### Subpart D—Notice of Failure to Make Required Contributions

4043.81 PBGC Form 200, notice of failure to make required contributions; supplementary information.

**Authority:** 29 U.S.C. 1083(k), 1302(b)(3), 1343.

**Subpart A—General Provisions****§ 4043.1 Purpose and scope.**

This part prescribes the requirements for notifying PBGC of a reportable event under section 4043 of ERISA or of a failure to make certain required contributions under section 303(k)(4) of ERISA or section 430(k)(4) of the Code. Subpart A contains definitions and general rules. Subpart B contains rules for post-event notice of a reportable event. Subpart C contains rules for advance notice of a reportable event. Subpart D contains rules for notifying PBGC of a failure to make certain required contributions.

**§ 4043.2 Definitions.**

The following terms are defined in § 4001.2 of this chapter: benefit liabilities, Code, contributing sponsor, controlled group, ERISA, fair market value, irrevocable commitment, multiemployer plan, PBGC, person, plan, plan administrator, plan year, single-employer plan, and substantial owner.

In addition, for purposes of this part:

*De minimis 10-percent segment* means, in connection with a plan's controlled group, one or more entities that in the aggregate have for a fiscal year—

(1) Revenue not exceeding 10 percent of the controlled group's revenue;

(2) Annual operating income not exceeding the greater of—

(i) 10 percent of the controlled group's annual operating income; or

(ii) \$5 million; and

(3) Net tangible assets at the end of the fiscal year(s) not exceeding the greater of—

(i) 10 percent of the controlled group's net tangible assets at the end of the fiscal year(s); or

(ii) \$5 million.

*De minimis 5-percent segment* has the same meaning as *de minimis 10-percent segment*, except that “5 percent” is substituted for “10 percent” each time it appears.

*Event year* means the plan year in which a reportable event occurs.

*Foreign entity* means a member of a controlled group that—

(1) Is not a contributing sponsor of a plan;

(2) Is not organized under the laws of (or, if an individual, is not a domiciliary of) any state (as defined in section 3(10) of ERISA); and

(3) For the fiscal year that includes the date the reportable event occurs, meets one of the following tests—

(i) Is not required to file any United States federal income tax form;

(ii) Has no income reportable on any United States federal income tax form

other than passive income not exceeding \$1,000; or

(iii) Does not own substantial assets in the United States (disregarding stock of a member of the plan's controlled group) and is not required to file any quarterly United States tax returns for employee withholding.

*Foreign parent* means a foreign entity that is a direct or indirect parent of a person that is a contributing sponsor of a plan.

*Low-default-risk* has the meaning described in § 4043.9.

*Notice due date* means the deadline (including extensions) for filing notice of a reportable event with PBGC.

*Participant* means a participant as defined in § 4006.2 of this chapter.

*Public company* means a person subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934 or a subsidiary (as defined for purposes of the Securities Exchange Act of 1934) of a person subject to such reporting requirements.

*U.S. entity* means an entity subject to the personal jurisdiction of the U.S. district court.

*Well-funded plan safe harbor* has the meaning described in § 4043.10.

**§ 4043.3 Requirement of notice.**

(a) *Obligation to file*—(1) *In general.*

Each person that is required to file a notice under this part, or a duly authorized representative, must submit the information required under this part by the time specified in § 4043.20 (for post-event notices), § 4043.61 (for advance notices), or § 4043.81 (for Form 200 filings). Any information filed with PBGC in connection with another matter may be incorporated by reference. If an event is subject to both post-event and advance notice requirements, the notice filed first satisfies both filing requirements.

(2) *Multiple plans.* If a reportable event occurs for more than one plan, the filing obligation with respect to each plan is independent of the filing obligation with respect to any other plan.

(3) *Optional consolidated filing.* A filing of a notice with respect to a reportable event by any person required to file will be deemed to be a filing by all persons required to give PBGC notice of the event under this part. If notices are required for two or more events, the notices may be combined in one filing.

(b) *Contents of reportable event notice.* A person required to file a reportable event notice under subpart B or C of this part must file, by the notice date, the form specified by PBGC for that purpose, with the information

specified in PBGC's reportable events instructions.

(c) *Reportable event forms and instructions.* PBGC will issue reportable events forms and instructions and make them available on its Web site (<http://www.pbgc.gov>).

(d) *Requests for additional information.* PBGC may, in any case, require the submission of additional relevant information not specified in its forms and instructions. Any such information must be submitted for subpart B of this part within 30 days, and for subpart C or D of this part within 7 days, after the date of a written request by PBGC, or within a different time period specified therein. PBGC may in its discretion shorten the time period where it determines that the interests of PBGC or participants may be prejudiced by a delay in receipt of the information.

(e) *Effect of failure to file.* If a notice (or any other information required under this part) is not provided within the specified time limit, PBGC may pursue any equitable or legal remedies available to it under the law, including assessing against each person required to provide the notice a separate penalty under section 4071 of ERISA.

**§ 4043.4 Waivers and extensions.**

(a) *Waivers and extensions—in general.* PBGC may extend any deadline or waive any other requirement under this part where it finds convincing evidence that the waiver or extension is appropriate under the circumstances. Any waiver or extension may be subject to conditions. A request for a waiver or extension must be filed with PBGC in writing (which may be in electronic form) and must state the facts and circumstances on which the request is based.

(b) *Waivers and extensions—specific events.* For some reportable events, automatic waivers from reporting and extensions of time are provided in subparts B and C of this part. If an occurrence constitutes two or more reportable events, reporting requirements for each event are determined independently. For example, reporting is automatically waived for an occurrence that constitutes a reportable event under more than one section only if the requirements for an automatic waiver under each section are satisfied.

(c) *Multiemployer plans.* The requirements of section 4043 of ERISA are waived with respect to multiemployer plans.

(d) *Terminating plans.* No notice is required from the plan administrator or contributing sponsor of a plan if the



notice date is on or after the date on which—

(1) All of the plan's assets (other than any excess assets) are distributed pursuant to a termination under part 4041 of this chapter; or

(2) A trustee is appointed for the plan under section 4042 of ERISA.

(e) *Events not described in this part.* Notice of a reportable event described in section 4043(c) of ERISA is waived except to the extent that reporting is required under this part.

#### **§ 4043.5 How and where to file.**

Reportable event notices required under this part must be filed electronically in accordance with the instructions posted on PBGC's Web site, <http://www.pbgc.gov>. Filing guidance is provided by the instructions and by subpart A of part 4000 of this chapter.

#### **§ 4043.6 Date of filing.**

(a) *Post-event notice filings.* PBGC applies the rules in subpart C of part 4000 of this chapter to determine the date that a submission under subpart B of this part was filed with PBGC.

(b) *Advance notice and Form 200 filings.* Information filed under subpart C or D of this part is treated as filed on the date it is received by PBGC. Subpart C of part 4000 of this chapter provides rules for determining when PBGC receives a submission.

#### **§ 4043.7 Computation of time.**

PBGC applies the rules in subpart D of part 4000 of this chapter to compute any time period under this part.

#### **§ 4043.8 Confidentiality.**

In accordance with section 4043(f) of ERISA and § 4901.21(a)(3) of this chapter, any information or documentary material that is not publicly available and is submitted to PBGC pursuant to subpart B or C of this part will not be made public, except as may be relevant to any administrative or judicial action or proceeding or for disclosures to either body of Congress or to any duly authorized committee or subcommittee of the Congress. This provision does not apply to information or material submitted to PBGC pursuant to subpart D of this part, even where the submission serves as an alternative method of compliance with § 4043.25.

#### **§ 4043.9 Company low-default-risk safe harbor.**

(a) *Low-default-risk.* An entity (a "company") that is a contributing sponsor of a plan or the highest level U.S. parent of a contributing sponsor is "low-default-risk" on the date of an event if that date falls within a safe harbor period of the company as

described in paragraph (b) of this section.

(b) *Safe harbor period.* A safe harbor period for a company means a period that—

(1) Begins on a financial information date (as described in paragraph (c) of this section) on which the company satisfies the low-default-risk standard in paragraph (e) of this section, and

(2) Ends 13 months later or (if earlier) on the company's next financial information date.

(c) *Financial information date.* A financial information date for a company means—

(1) A date on which the company files on Form 10-K with the Securities and Exchange Commission ("SEC") audited annual financial statements (including balance sheets, income statements, cash flow statements, and notes to the financial statements) for the company's most recent completed fiscal year preceding the date of such filing;

(2) The date (the "closing date") on which the company closes the annual accounting period that results in the production of audited or unaudited annual financial statements for the company's most recent completed fiscal year preceding the closing date, if audited annual financial statements are not required to be filed with the SEC; or

(3) A date on which the company files with IRS an annual federal income tax return or IRS Form 990 (in either case, a "return") for the company's most recent completed fiscal year preceding the date of such filing, if at the time the return is filed there are no annual financial statements for the year of the return.

(d) *Supporting financial information.* For purposes of this section, the "supporting financial information" is the annual financial statements or return associated with the establishment of the financial information date.

(e) *Low-default-risk standard—(1) Adequate capacity.* For purposes of this part, except as provided in paragraph (e)(4) of this section, a company meets the low-default-risk standard as of a financial information date (the "qualifying date") if the company has adequate capacity to meet its obligations in full and on time on the qualifying date as evidenced by satisfying either:

(i) Both of the criteria described in paragraphs (e)(2)(i) and (ii) of this section, or

(ii) Any four of the seven criteria described in paragraphs (e)(2)(i) through (vii) of this section.

(2) *Criteria evidencing adequate capacity.* The criteria referred to in paragraph (e)(1) of this section are:

(i) The probability that the company will default on its financial obligations is not more than four percent over the next five years or not more than 0.4 percent over the next year, in either case determined on the basis of widely available financial information on the company's credit quality.

(ii) The company's secured debt (disregarding leases and debt incurred to acquire or improve property and secured only by that property) does not exceed 10 percent of the company's total assets.

(iii) The company has a ratio of retained-earnings-to-total-assets of 0.25 or more.

(iv) The company has a ratio of total-debt-to-EBITDA (earnings before interest, taxes, depreciation, and amortization) of 3.0 or less.

(v) The company has positive net income for the two most recently completed fiscal years preceding the qualifying date.

(vi) During the two-year period ending on the qualifying date, the company has not experienced an event described in § 4043.34(a)(1) or (2) (dealing with a default on a loan with an outstanding balance of \$10 million or more) with respect to any loan with an outstanding balance of \$10 million or more to the company regardless of whether reporting was waived under § 4043.34(b).

(vii) During the two-year period ending on the qualifying date, there has not been any failure to make when due any contribution described in § 4043.25(a)(1) or (2) (dealing with failure to make required minimum funding payments), unless reporting was waived under § 4043.25(c).

(3) *Using financial information to evaluate criteria—*(i) Subject to paragraph (e)(3)(ii) of this section with respect to evaluating the criterion described in paragraph (e)(2)(v) of this section, to evaluate whether criteria described in paragraphs (e)(2)(ii) through (v) of this section are met, a company must use the supporting financial information described in paragraph (d) of this section associated with the qualifying date.

(ii) In addition to the use of the supporting financial information to evaluate criteria as described in paragraph (e)(3)(i) of this section, to evaluate whether the criterion described in paragraph (e)(2)(v) of this section is met, the company must also use the supporting financial information as described in paragraph (d) of this section associated with the financial information date for the fiscal year preceding the fiscal year covered by the

supporting financial information associated with the qualifying date.

(iii) For purposes of paragraph (e)(2)(v) of this section, the excess of total revenue over total expenses as reported on the IRS Form 990 is considered to be net income.

(4) *Exception.* If a company receives an audit or review report for supporting financial information described in paragraph (d) of this section associated with the qualifying date that expresses a material adverse view or qualification, the company does not satisfy the low-default-risk standard.

#### **§ 4043.10 Well-funded plan safe harbor.**

For purposes of this part, a plan is in the well-funded plan safe harbor for an event year if no variable-rate premium was required to be paid for the plan under parts 4006 and 4007 of this chapter for the plan year preceding the event year.

### **Subpart B—Post-Event Notice of Reportable Events**

#### **§ 4043.20 Post-event filing obligation.**

The plan administrator and each contributing sponsor of a plan for which a reportable event under this subpart has occurred are required to notify PBGC within 30 days after that person knows or has reason to know that the reportable event has occurred, unless a waiver or extension applies. If there is a change in plan administrator or contributing sponsor, the responsibility for any failure to file or defective filing lies with the person who is the plan administrator or contributing sponsor of the plan on the 30th day after the reportable event occurs.

#### **§ 4043.21 Tax disqualification and Title I noncompliance.**

(a) *Reportable event.* A reportable event occurs when the Secretary of the Treasury issues notice that a plan has ceased to be a plan described in section 4021(a)(2) of ERISA, or when the Secretary of Labor determines that a plan is not in compliance with title I of ERISA.

(b) *Waiver.* Notice is waived for this event.

#### **§ 4043.22 Amendment decreasing benefits payable.**

(a) *Reportable event.* A reportable event occurs when an amendment to a plan is adopted under which the retirement benefit payable from employer contributions with respect to any participant may be decreased.

(b) *Waiver.* Notice is waived for this event.

#### **§ 4043.23 Active participant reduction.**

(a) *Reportable event.* A reportable event occurs for a plan:

(1) *Single-cause event.* On the date in a plan year when, as a result of a single cause—such as a reorganization, the discontinuance of an operation, a natural disaster, a mass layoff, or an early retirement incentive program—the number of active participants is reduced to less than 80 percent of the number of active participants at the beginning of such plan year or less than 75 percent of the number of active participants at the beginning of the plan year preceding such plan year.

(2) *Attrition event.* At the end of a plan year if the number of active participants covered by the plan at the end of such plan year is less than 80 percent of the number of active participants at the beginning of such plan year, or less than 75 percent of the number of active participants at the beginning of the plan year preceding such plan year.

(b) *Determination rules—(1) Determination dates.* The number of active participants at the beginning of a plan year may be determined by using the number of active participants at the end of the previous plan year, and the number of active participants at the end of a plan year may be determined by using the number of active participants at the beginning of the next plan year.

(2) *Active participant.* “Active participant” means a participant who—

(i) Is receiving compensation for work performed;

(ii) Is on paid or unpaid leave granted for a reason other than a layoff;

(iii) Is laid off from work for a period of time that has lasted less than 30 days; or

(iv) Is absent from work due to a recurring reduction in employment that occurs at least annually.

(3) *Employment relationship.* The employment relationship referred to in this paragraph (b) is between the participant and all members of the plan’s controlled group.

(c) *Reductions due to cessations and withdrawals.* For purposes of paragraph (a)(1) of this section, a reduction in the number of active participants is to be disregarded to the extent that it—

(1) Is attributable to an event described in ERISA section 4062(e) or 4063(a), and

(2) Is timely reported to PBGC under ERISA section 4063(a).

(d) *Waivers—(1) Small plan.* Notice under this section is waived if the plan had 100 or fewer participants for whom flat-rate premiums were payable for the plan year preceding the event year.

(2) *Low-default-risk.* Notice under this section is waived if each contributing sponsor of the plan and the highest level U.S. parent of each contributing sponsor are low-default-risk on the date of the event.

(3) *Well-funded plan.* Notice under this section is waived if the plan is in the well-funded plan safe harbor for the event year.

(4) *Public company.* Notice under this section is waived if any contributing sponsor of the plan before the transaction is a public company and the contributing sponsor timely files a SEC Form 8-K disclosing the event under an item of the Form 8-K other than under Item 2.02 (Results of Operations and Financial Condition) or in financial statements under Item 9.01 (Financial Statements and Exhibits).

(e) *Extension—attrition event.* For an event described in paragraph (a)(2) of this section, the notice date is extended until the premium due date for the plan year following the event year.

#### **§ 4043.24 Termination or partial termination.**

(a) *Reportable event.* A reportable event occurs when the Secretary of the Treasury determines that there has been a termination or partial termination of a plan within the meaning of section 411(d)(3) of the Code.

(b) *Waiver.* Notice is waived for this event.

#### **§ 4043.25 Failure to make required minimum funding payment.**

(a) *Reportable event.* A reportable event occurs when—

(1) A contribution required under sections 302 and 303 of ERISA or sections 412 and 430 of the Code is not made by the due date for the payment under ERISA section 303(j) or Code section 430(j), or

(2) Any other contribution required as a condition of a funding waiver is not made when due.

(b) *Alternative method of compliance—Form 200 filed.* If, with respect to the same failure, a filing is made in accordance with § 4043.81, that filing (while not considered to be submitted to PBGC pursuant to section 4043 of ERISA for purposes of section 4043(f) of ERISA) satisfies the requirements of this section.

(c) *Waivers—(1) Small plan.* Notice under this section is waived with respect to a failure to make a required quarterly contribution under section 303(j)(3) of ERISA or section 430(j)(3) of the Code if the plan had 100 or fewer participants for whom flat-rate premiums were payable for the plan year preceding the event year.

(2) *30-day grace period.* Notice under this section is waived if the missed contribution is made by the 30th day after its due date.

(3) *Late funding balance election.* Notice under this section is waived if the failure to make a timely required contribution is solely because of the plan sponsor's failure to timely make a funding balance election.

#### **§ 4043.26 Inability to pay benefits when due.**

(a) *Reportable event.* A reportable event occurs when a plan is currently unable or projected to be unable to pay benefits.

(1) *Current inability.* A plan is currently unable to pay benefits if it fails to provide any participant or beneficiary the full benefits to which the person is entitled under the terms of the plan, at the time the benefit is due and in the form in which it is due. A plan is not treated as being currently unable to pay benefits if its failure to pay is caused solely by—

(i) A limitation under section 436 of the Code and section 206(g) of ERISA (dealing with funding-based limits on benefits and benefit accruals under single-employer plans),

(ii) The inability to locate a person, or

(iii) Any other administrative delay, including the need to verify a person's eligibility for benefits, to the extent that the delay is for less than the shorter of two months or two full benefit payment periods.

(2) *Projected inability.* A plan is projected to be unable to pay benefits when, as of the last day of any quarter of a plan year, the plan's "liquid assets" are less than two times the amount of the "disbursements from the plan" for such quarter. "Liquid assets" and "disbursements from the plan" have the same meaning as under section 303(j)(4)(E) of ERISA and section 430(j)(4)(E) of the Code.

(b) *Waiver—plans subject to liquidity shortfall rules.* Notice under this section is waived unless the reportable event occurs during a plan year for which the plan is exempt from the liquidity shortfall rules in section 303(j)(4) of ERISA and section 430(j)(4) of the Code because it is described in section 303(g)(2)(B) of ERISA and section 430(g)(2)(B) of the Code.

#### **§ 4043.27 Distribution to a substantial owner.**

(a) *Reportable event.* A reportable event occurs for a plan when—

(1) There is a distribution to a substantial owner of a contributing sponsor of the plan;

(2) The total of all distributions made to the substantial owner within the one-

year period ending with the date of such distribution exceeds \$10,000;

(3) The distribution is not made by reason of the substantial owner's death;

(4) Immediately after the distribution, the plan has nonforfeitable benefits (as provided in § 4022.5 of this chapter) that are not funded; and

(5) Either—

(i) The sum of the values of all distributions to any one substantial owner within the one-year period ending with the date of the distribution is more than one percent of the end-of-year total amount of the plan's assets (as required to be reported on Schedule H or Schedule I to Form 5500) for each of the two plan years immediately preceding the event year, or

(ii) The sum of the values of all distributions to all substantial owners within the one-year period ending with the date of the distribution is more than five percent of the end-of-year total amount of the plan's assets (as required to be reported on Schedule H or Schedule I to Form 5500) for each of the two plan years immediately preceding the event year.

(b) *Determination rules—(1) Valuation of distribution.* The value of a distribution under this section is the sum of—

(i) The cash amounts actually received by the substantial owner;

(ii) The purchase price of any irrevocable commitment; and

(iii) The fair market value of any other assets distributed, determined as of the date of distribution to the substantial owner.

(2) *Date of substantial owner distribution.* The date of distribution to a substantial owner of a cash distribution is the date it is received by the substantial owner. The date of distribution to a substantial owner of an irrevocable commitment is the date on which the obligation to provide benefits passes from the plan to the insurer. The date of any other distribution to a substantial owner is the date when the plan relinquishes control over the assets transferred directly or indirectly to the substantial owner.

(3) *Determination date.* The determination of whether a participant is (or has been in the preceding 60 months) a substantial owner is made on the date when there has been a distribution that would be reportable under this section if made to a substantial owner.

(c) *Alternative method of compliance—annuity.* In the case of an annuity for a substantial owner, a filing that satisfies the requirements of this section with respect to any payment under the annuity and that discloses the

period, the amount of the payment, and the duration of the annuity satisfies the requirements of this section with respect to all subsequent payments under the annuity.

(d) *Waivers—(1) Low-default-risk.* Notice under this section is waived if each contributing sponsor of the plan and the highest level U.S. parent of each contributing sponsor are low-default-risk on the date of the event.

(2) *Well-funded plan.* Notice under this section is waived if the plan is in the well-funded plan safe harbor for the event year.

(3) *Public company.* Notice under this section is waived if any contributing sponsor of the plan before the transaction is a public company and the contributing sponsor timely files a SEC Form 8-K disclosing the event under an item of the Form 8-K other than under Item 2.02 (Results of Operations and Financial Condition) or in financial statements under Item 9.01 (Financial Statements and Exhibits).

#### **§ 4043.28 Plan merger, consolidation or transfer.**

(a) *Reportable event.* A reportable event occurs when a plan merges, consolidates, or transfers its assets or liabilities under section 208 of ERISA or section 414(l) of the Code.

(b) *Waiver.* Notice under this section is waived for this event. However, notice may be required under § 4043.29 (for a controlled group change) or § 4043.32 (for a transfer of benefit liabilities).

#### **§ 4043.29 Change in contributing sponsor or controlled group.**

(a) *Reportable event.* A reportable event occurs for a plan when there is a transaction that results, or will result, in one or more persons' ceasing to be members of the plan's controlled group (other than by merger involving members of the same controlled group). For purposes of this section, the term "transaction" includes, but is not limited to, a legally binding agreement, whether or not written, to transfer ownership, an actual transfer of ownership, and an actual change in ownership that occurs as a matter of law or through the exercise or lapse of pre-existing rights. Whether an agreement is legally binding is to be determined without regard to any conditions in the agreement. A transaction is not reportable if it will result solely in a reorganization involving a mere change in identity, form, or place of organization, however effected.

(b) *Waivers.* (1) *De minimis 10-percent segment.* Notice under this section is waived if the person or

persons that will cease to be members of the plan's controlled group represent a *de minimis* 10-percent segment of the plan's old controlled group for the most recent fiscal year(s) ending on or before the date the reportable event occurs.

(2) *Foreign entity*. Notice under this section is waived if each person that will cease to be a member of the plan's controlled group is a foreign entity other than a foreign parent.

(3) *Small plan*. Notice under this section is waived if the plan had 100 or fewer participants for whom flat-rate premiums were payable for the plan year preceding the event year.

(4) *Low-default-risk*. Notice under this section is waived if each post-event contributing sponsor of the plan and the highest level U.S. parent of each post-event contributing sponsor are low-default-risk on the date of the event.

(5) *Well-funded plan*. Notice under this section is waived if the plan is in the well-funded plan safe harbor for the event year.

(6) *Public company*. Notice under this section is waived if any contributing sponsor of the plan before the transaction is a public company and the contributing sponsor timely files a SEC Form 8-K disclosing the event under an item of the Form 8-K other than under Item 2.02 (Results of Operations and Financial Condition) or in financial statements under Item 9.01 (Financial Statements and Exhibits).

(c) *Examples*. The following examples assume that no waiver applies.

(1) *Controlled group breakup*. Plan A's controlled group consists of Company A (its contributing sponsor), Company B (which maintains Plan B), and Company C. As a result of a transaction, the controlled group will break into two separate controlled groups — one segment consisting of Company A and the other segment consisting of Companies B and C. Both Company A (Plan A's contributing sponsor) and the plan administrator of Plan A are required to report that Companies B and C will leave Plan A's controlled group. Company B (Plan B's contributing sponsor) and the plan administrator of Plan B are required to report that Company A will leave Plan B's controlled group. Company C is not required to report because it is not a contributing sponsor or a plan administrator.

(2) *Change in contributing sponsor*. Plan Q is maintained by Company Q. Company Q enters into a binding contract to sell a portion of its assets and to transfer employees participating in Plan Q, along with Plan Q, to Company R, which is not a member of Company Q's controlled group. There

will be no change in the structure of Company Q's controlled group. On the effective date of the sale, Company R will become the contributing sponsor of Plan Q. A reportable event occurs on the date of the transaction (*i.e.*, the date the binding contract was executed), because as a result of the transaction, Company Q (and any other member of its controlled group) will cease to be a member of Plan Q's controlled group. The event is not reported before the notice date. If on the notice date the change in the contributing sponsor has not yet become effective, Company Q has the reporting obligation. If the change in the contributing sponsor has become effective by the notice date, Company R has the reporting obligation.

#### § 4043.30 Liquidation.

(a) *Reportable event*. A reportable event occurs for a plan when a member of the plan's controlled group—

(1) Is involved in any transaction to implement its complete liquidation (including liquidation into another controlled group member);

(2) Institutes or has instituted against it a proceeding to be dissolved or is dissolved, whichever occurs first; or

(3) Liquidates in a case under the Bankruptcy Code, or under any similar law.

(b) *Waivers*—(1) *De minimis 10-percent segment*. Notice under this section is waived if the person or persons that liquidate do not include any contributing sponsor of the plan and represent a *de minimis* 10-percent segment of the plan's controlled group for the most recent fiscal year(s) ending on or before the date the reportable event occurs.

(2) *Foreign entity*. Notice under this section is waived if each person that liquidates is a foreign entity other than a foreign parent.

#### § 4043.31 Extraordinary dividend or stock redemption.

(a) *Reportable event*. A reportable event occurs for a plan when any member of the plan's controlled group declares a dividend or redeems its own stock and the amount or net value of the distribution, when combined with other such distributions during the same fiscal year of the person, exceeds the person's net income before after-tax gain or loss on any sale of assets, as determined in accordance with generally accepted accounting principles, for the prior fiscal year. A distribution by a person to a member of its controlled group is disregarded.

(b) *Determination rules*. For purposes of paragraph (a) of this section, the net value of a non-cash distribution is the

fair market value of assets transferred by the person making the distribution, reduced by the fair market value of any liabilities assumed or consideration given by the recipient in connection with the distribution. Net value determinations should be based on readily available fair market value(s) or independent appraisal(s) performed within one year before the distribution is made. To the extent that fair market values are not readily available and no such appraisals exist, the fair market value of an asset transferred in connection with a distribution or a liability assumed by a recipient of a distribution is deemed to be equal to 200 percent of the book value of the asset or liability on the books of the person making the distribution. Stock redeemed is deemed to have no value.

(c) *Waivers*—(1) *De minimis 10-percent segment*. Notice under this section is waived if the person making the distribution is a *de minimis* 10-percent segment of the plan's controlled group for the most recent fiscal year(s) ending on or before the date the reportable event occurs.

(2) *Foreign entity*. Notice under this section is waived if the person making the distribution is a foreign entity other than a foreign parent.

(3) *Small plan*. Notice under this section is waived if the plan had 100 or fewer participants for whom flat-rate premiums were payable for the plan year preceding the event year.

(4) *Low-default-risk*. Notice under this section is waived if each contributing sponsor of the plan and the highest level U.S. parent of each contributing sponsor are low-default-risk on the date of the event.

(5) *Well-funded plan*. Notice under this section is waived if the plan is in the well-funded plan safe harbor for the event year.

(6) *Public company*. Notice under this section is waived if any contributing sponsor of the plan before the transaction is a public company and the contributing sponsor timely files a SEC Form 8-K disclosing the event under an item of the Form 8-K other than under Item 2.02 (Results of Operations and Financial Condition) or in financial statements under Item 9.01 (Financial Statements and Exhibits).

#### § 4043.32 Transfer of benefit liabilities.

(a) *Reportable event*. A reportable event occurs for a plan when—

(1) The plan makes a transfer of benefit liabilities to a person, or to a plan or plans maintained by a person or persons, that are not members of the transferor plan's controlled group; and

(2) The amount of benefit liabilities transferred, in conjunction with other benefit liabilities transferred during the 12-month period ending on the date of the transfer, is 3 percent or more of the plan's total benefit liabilities. Both the benefit liabilities transferred and the plan's total benefit liabilities are to be valued as of any one date in the plan year in which the transfer occurs, using actuarial assumptions that comply with section 414(l) of the Code.

(b) *Determination rules*—(1) *Date of transfer*. The date of transfer is to be determined on the basis of the facts and circumstances of the particular situation. For transfers subject to the requirements of section 414(l) of the Code, the date determined in accordance with 26 CFR 1.414(l)–1(b)(11) will be considered the date of transfer.

(2) *Distributions of lump sums and annuities*. For purposes of paragraph (a) of this section, the payment of a lump sum, or purchase of an irrevocable commitment to provide an annuity, in satisfaction of benefit liabilities is not a transfer of benefit liabilities.

(c) *Waivers*—(1) *Small plan*. Notice under this section is waived if the plan had 100 or fewer participants for whom flat-rate premiums were payable for the plan year preceding the event year.

(2) *Low-default-risk*. Notice under this section is waived if each contributing sponsor of the plan and the highest level U.S. parent of each contributing sponsor are low-default-risk on the date of the event.

(3) *Well-funded plan*. Notice under this section is waived if the plan is in the well-funded plan safe harbor for the event year.

(4) *Public company*. Notice under this section is waived if any contributing sponsor of the plan before the transaction is a public company and the contributing sponsor timely files a SEC Form 8–K disclosing the event under an item of the Form 8–K other than under Item 2.02 (Results of Operations and Financial Condition) or in financial statements under Item 9.01 (Financial Statements and Exhibits).

#### **§ 4043.33 Application for minimum funding waiver.**

A reportable event for a plan occurs when an application for a minimum funding waiver for the plan is submitted under section 302(c) of ERISA or section 412(c) of the Code.

#### **§ 4043.34 Loan default.**

(a) *Reportable event*. A reportable event occurs for a plan when, with respect to a loan with an outstanding

balance of \$10 million or more to a member of the plan's controlled group—

(1) There is an acceleration of payment or a default under the loan agreement, or

(2) The lender waives or agrees to an amendment of any covenant in the loan agreement the effect of which is to cure or avoid a breach that would trigger a default.

(b) *Waivers*—(1) *De minimis 10-percent segment*. Notice under this section is waived if the debtor is not a contributing sponsor of the plan and represents a *de minimis* 10-percent segment of the plan's controlled group for the most recent fiscal year(s) ending on or before the date the reportable event occurs.

(2) *Foreign entity*. Notice under this section is waived if the debtor is a foreign entity other than a foreign parent.

#### **§ 4043.35 Insolvency or similar settlement.**

(a) *Reportable event*. A reportable event occurs for a plan when any member of the plan's controlled group—

(1) Commences or has commenced against it any insolvency proceeding (including, but not limited to, the appointment of a receiver) other than a bankruptcy case under the Bankruptcy Code;

(2) Commences, or has commenced against it, a proceeding to effect a composition, extension, or settlement with creditors;

(3) Executes a general assignment for the benefit of creditors; or

(4) Undertakes to effect any other nonjudicial composition, extension, or settlement with substantially all its creditors.

(b) *Waivers*—(1) *De minimis 10-percent segment*. Notice under this section is waived if the person described in paragraph (a) of this section is not a contributing sponsor of the plan and represents a *de minimis* 10-percent segment of the plan's controlled group for the most recent fiscal year(s) ending on or before the date the reportable event occurs.

(2) *Foreign entity*. Notice under this section is waived if the person described in paragraph (a) of this section is a foreign entity other than a foreign parent.

#### **Subpart C—Advance Notice of Reportable Events**

##### **§ 4043.61 Advance reporting filing obligation.**

(a) *In general*. Unless a waiver or extension applies with respect to the plan, each contributing sponsor of a plan is required to notify PBGC no later

than 30 days before the effective date of a reportable event described in this subpart C if the contributing sponsor is subject to advance reporting for the reportable event. If there is a change in contributing sponsor, the responsibility for any failure to file or defective filing lies with the person who is the contributing sponsor of the plan on the notice date.

(b) *Persons subject to advance reporting*. A contributing sponsor of a plan is subject to the advance reporting requirement under paragraph (a) of this section for a reportable event if —

(1) On the notice date, neither the contributing sponsor nor any member of the plan's controlled group to which the event relates is a public company; and

(2) The aggregate unfunded vested benefits, determined in accordance with paragraph (c) of this section, are more than \$50 million; and

(3) The aggregate value of plan assets, determined in accordance with paragraph (c) of this section, is less than 90 percent of the aggregate premium funding target, determined in accordance with paragraph (c) of this section.

(c) *Funding determinations*. For purposes of paragraph (b) of this section, the aggregate unfunded vested benefits, aggregate value of plan assets, and aggregate premium funding target are determined by aggregating the unfunded vested benefits, values of plan assets, and premium funding targets (respectively), as determined in accordance with part 4006 of this chapter for purposes of the variable-rate premium for the plan year preceding the effective date of the event, of plans maintained (on the notice date) by the contributing sponsor and any members of the contributing sponsor's controlled group, disregarding plans with no unfunded vested benefits (as so determined).

(d) *Shortening of 30-day period*. Pursuant to § 4043.3(d), PBGC may, upon review of an advance notice, shorten the notice period to allow for an earlier effective date.

##### **§ 4043.62 Change in contributing sponsor or controlled group.**

(a) *Reportable event*. Advance notice is required for a change in a plan's contributing sponsor or controlled group, as described in § 4043.29(a).

(b) *Waivers*—(1) *Small and mid-size plans*. Notice under this section is waived with respect to a change of contributing sponsor if the transferred plan has fewer than 500 participants.

(2) *De minimis 5-percent segment*. Notice under this section is waived if the person or persons that will cease to

be members of the plan's controlled group represent a *de minimis* 5-percent segment of the plan's old controlled group for the most recent fiscal year(s) ending on or before the effective date of the reportable event.

#### **§ 4043.63 Liquidation.**

(a) *Reportable event.* Advance notice is required for a liquidation of a member of a plan's controlled group, as described in § 4043.30.

(b) *Waiver—de minimis 5-percent segment and ongoing plans.* Notice under this section is waived if the person that liquidates is a *de minimis* 5-percent segment of the plan's controlled group for the most recent fiscal year(s) ending on or before the effective date of the reportable event, and each plan that was maintained by the liquidating member is maintained by another member of the plan's controlled group.

#### **§ 4043.64 Extraordinary dividend or stock redemption.**

(a) *Reportable event.* Advance notice is required for a distribution by a member of a plan's controlled group, as described in § 4043.31(a).

(b) *Waiver—de minimis 5-percent segment.* Notice under this section is waived if the person making the distribution is a *de minimis* 5-percent segment of the plan's controlled group for the most recent fiscal year(s) ending on or before the effective date of the reportable event.

#### **§ 4043.65 Transfer of benefit liabilities.**

(a) *Reportable event.* Advance notice is required for a transfer of benefit liabilities, as described in § 4043.32(a).

(b) *Waivers—(1) Complete plan transfer.* Notice under this section is waived if the transfer is a transfer of all of the transferor plan's benefit liabilities and assets to one other plan.

(2) *Transfer of less than 3 percent of assets.* Notice under this section is waived if the value of the assets being transferred—

(i) Equals the present value of the accrued benefits (whether or not vested) being transferred, using actuarial assumptions that comply with section 414(I) of the Code; and

(ii) In conjunction with other assets transferred during the same plan year, is less than 3 percent of the assets of the transferor plan as of at least one day in that year.

(3) *Section 414(l) safe harbor.* Notice under this section is waived if the benefit liabilities of 500 or fewer participants are transferred and the transfer complies with section 414(I) of the Code using the actuarial assumptions prescribed for valuing

benefits in trustee plans under §§ 4044.51 through 4044.57 of this chapter.

(4) *Fully funded plans.* Notice under this section is waived if the transfer complies with section 414(I) of the Code using reasonable actuarial assumptions and, after the transfer, the transferor and transferee plans are fully funded as determined in accordance with §§ 4044.51 through 4044.57 of this chapter and § 4010.8(d)(1)(ii) of this chapter.

#### **§ 4043.66 Application for minimum funding waiver.**

(a) *Reportable event.* Advance notice is required for an application for a minimum funding waiver, as described in § 4043.33.

(b) *Extension.* The notice date is extended until 10 days after the reportable event has occurred.

#### **§ 4043.67 Loan default.**

Advance notice is required for an acceleration of payment, a default, a waiver, or an agreement to an amendment with respect to a loan agreement described in § 4043.34(a).

#### **§ 4043.68 Insolvency or similar settlement.**

(a) *Reportable event.* Advance notice is required for an insolvency or similar settlement, as described in § 4043.35.

(b) *Extension.* For a case or proceeding under § 4043.35(a)(1) or (2) that is not commenced by a member of the plan's controlled group, the notice date is extended to 10 days after the commencement of the case or proceeding.

### **Subpart D—Notice of Failure To Make Required Contributions**

#### **§ 4043.81 PBGC Form 200, notice of failure to make required contributions; supplementary information.**

(a) *General rules.* To comply with the notification requirement in section 303(k)(4) of ERISA and section 430(k)(4) of the Code, a contributing sponsor of a single-employer plan that is covered under section 4021 of ERISA and (if that contributing sponsor is a member of a parent-subsidiary controlled group) the ultimate parent must complete and submit in accordance with this section a properly certified Form 200 that includes all required documentation and other information, as described in the related filing instructions. Notice is required whenever the unpaid balance of a contribution payment required under sections 302 and 303 of ERISA and sections 412 and 430 of the Code (including interest), when added to the aggregate unpaid balance of all preceding such payments for which

payment was not made when due (including interest), exceeds \$1 million.

(1) Form 200 must be filed with PBGC no later than 10 days after the due date for any required payment for which payment was not made when due.

(2) If a contributing sponsor or the ultimate parent completes and submits Form 200 in accordance with this section, PBGC will consider the notification requirement in section 303(k)(4) of ERISA and section 430(k)(4) of the Code to be satisfied by all members of a controlled group of which the person who has filed Form 200 is a member.

(b) *Supplementary information.* If, upon review of a Form 200, PBGC concludes that it needs additional information in order to make decisions regarding enforcement of a lien imposed by section 303(k) of ERISA and section 430(k) of the Code, PBGC may require any member of the contributing sponsor's controlled group to supplement the Form 200 in accordance with § 4043.3(d).

(c) *Ultimate parent.* For purposes of this section, the term "ultimate parent" means the parent at the highest level in the chain of corporations and/or other organizations constituting a parent-subsidiary controlled group.

### **PART 4204—VARIANCES FOR SALE OF ASSETS**

■ 7. The authority citation for part 4204 continues to read as follows:

*Authority:* 29 U.S.C. 1302(b)(3), 1384(c).

#### **§ 4204.12 [Amended]**

■ 8. Section 4204.12 is amended by removing the figures "412(b)(3)(A)" and adding in their place the figures "431(b)(3)(A)".

### **PART 4206—ADJUSTMENT OF LIABILITY FOR WITHDRAWAL SUBSEQUENT TO A PARTIAL WITHDRAWAL**

■ 9. The authority citation for part 4206 continues to read as follows:

*Authority:* 29 U.S.C. 1302(b)(3) and 1386(b).

#### **§ 4206.7 [Amended]**

■ 10. Section 4206.7 is amended by removing the figures "412(b)(4)" and adding in their place the figures "431(b)(5)".

### **PART 4231—MERGERS AND TRANSFERS BETWEEN MULTIPLE EMPLOYER PLANS**

■ 11. The authority citation for part 4231 continues to read as follows:

*Authority:* 29 U.S.C. 1302(b)(3), 1411.

**§ 4231.2 [Amended]**

■ 12. In § 4231.2, the definitions of “actuarial valuation” and “fair market value of assets” are amended by removing the words “section 302 of ERISA and section 412 of the Code” where they appear in each definition and adding in their place the words “section 304 of ERISA and section 431 of the Code”.

**§ 4231.6 [Amended]**

■ 13. In § 4231.6:

- a. Paragraph (b)(4)(ii) is amended by removing the figures “412(b)(4)” and adding in their place the figures “431(b)(5)”.
- b. Paragraph (c)(2) is amended by removing the words “section 412 of the Code (which requires that such assumptions be reasonable in the aggregate)” and adding in their place the words “section 431 of the Code (which

requires that each such assumption be reasonable)”.

■ c. Paragraph (c)(5) is amended by removing the figures “412” and adding in their place the figures “431”.

Issued in Washington, DC, this 8th day of September, 2015.

**Alice C. Maroni,**

*Acting Director, Pension Benefit Guaranty Corporation.*

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