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## **PENSION BENEFIT GUARANTY CORPORATION**

### **29 CFR Part 4010**

### **RIN 1212-AB30**

### **Annual Financial and Actuarial Information Reporting; Changes to Waivers**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Proposed rule.

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**SUMMARY:** The Pension Benefit Guaranty Corporation (PBGC) is proposing to amend its regulation on Annual Financial and Actuarial Information Reporting to codify provisions of the Moving Ahead for Progress in the 21<sup>st</sup> Century Act and the Highway Transportation and Funding Act of 2014 and related guidance that affect reporting under ERISA section 4010. In addition, PBGC is proposing to limit the reporting waiver under the current regulation tied to aggregate plan underfunding of \$15 million or less to smaller plans and to add reporting waivers for plans that must file solely on the basis of either a statutory lien resulting from missed contributions over \$1 million or outstanding minimum funding waivers exceeding the same amount (provided the missed contributions or funding waivers were previously reported to PBGC). The proposed rule also makes some technical changes.

**DATES:** Comments must be submitted on or before [insert date 60 days after publication in the Federal Register].

**ADDRESSES:** Comments may be submitted by any of the following methods:

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

- E-mail: [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov).
- Fax: 202-326-4224.
- Mail or Hand Delivery: Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005-4026.

Corporation, 1200 K Street, NW., Washington, DC 20005-4026.

All submissions must include the Regulatory Identification Number for this rulemaking (RIN 1212-AB30). Comments received, including personal information provided, will be posted to [www.pbgc.gov](http://www.pbgc.gov). Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington DC 20005-4026, or calling 202-326-4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4040.)

**FOR FURTHER INFORMATION CONTACT:** Catherine B. Klion

([Klion.Catherine@pbgc.gov](mailto:Klion.Catherine@pbgc.gov)), Assistant General Counsel for Regulatory Affairs, Office of the General Counsel; or Daniel S. Liebman ([Liebman.Daniel@pbgc.gov](mailto:Liebman.Daniel@pbgc.gov)), Attorney, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington DC 20005-4026; 202-326-4024. (TTY/TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4024.)

**SUPPLEMENTARY INFORMATION:**

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

This rulemaking is necessary to implement statutory changes under the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21) and Highway Transportation and Funding Act of 2014 (HATFA) affecting reporting under PBGC's regulation on Annual Financial and Actuarial Information Reporting (29 CFR part 4010), to modify the regulation's waivers to better balance

the burden of reporting with PBGC's need for information, and to make certain technical changes.

PBGC's legal authority for this action comes from 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 4010 of ERISA.

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

### ***MAP-21 and HATFA stabilized interest rate rules***

MAP-21 provided rules that limited the volatility of interest rates (which are used for certain funding and benefit restriction purposes) by constraining them within a range, or “corridor,” around the 25-year average segment rates. The rates inside the corridor are referred to as “stabilized rates.” HATFA extended the period during which the narrowest range applies. MAP-21 and HATFA included statutory provisions regarding the application of the stabilized rates to ERISA section 4010 reporting requirements. The proposed rule codifies the statutory changes and PBGC guidance on when stabilized rates are and are not taken into account for purposes of PBGC's regulation on Annual Financial and Actuarial Information Reporting.

### ***Changes to \$15 million aggregate underfunding waiver***

Section 4010.11(a) of the current regulation provides a waiver from reporting if the aggregate underfunding of pension plans in a controlled group does not exceed \$15 million. PBGC's experience with this waiver, especially after MAP-21 and HATFA, is that it results in critical information not being reported. As a result, PBGC's ability to timely intervene to protect potentially troubled plans, participant benefits, and the pension insurance system is significantly undermined. To address this issue, the proposed rule provides that the waiver would be limited to controlled groups with fewer than 500 participants.

### *New waivers*

As part of PBGC's review of its regulations under Executive Order 13563, PBGC determined that it could reduce the burden of 4010 reporting and avoid duplicative reporting by adding two new waivers. The proposed rule would waive reporting required solely on the basis of either a statutory lien resulting from missed contributions over \$1 million or outstanding minimum funding waivers exceeding the same amount, provided that the missed contributions resulting in the lien or minimum funding waivers were reported to PBGC under its regulation on Reportable Events and Certain Other Notification Requirements (part 4043) by the due date for the 4010 filing.

### *Other Changes*

The proposed rule also makes a few technical changes to the regulation.

## **Background**

PBGC administers the pension insurance programs under Title IV of ERISA. ERISA section 4010 requires the reporting of actuarial and financial information by controlled groups with single-employer pension plans that have significant funding problems. ERISA section 4010 also requires PBGC to provide an annual summary report to Congress containing aggregate information filed with PBGC under that section.<sup>1</sup>

### *Current 4010 regulation*

PBGC's regulation on Annual Financial and Actuarial Information Reporting (29 CFR part 4010) implements ERISA section 4010. Under § 4010.4(a), reporting is required if any of the following conditions exist:

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<sup>1</sup> See ERISA section 4010(e). The report is submitted to the Committee on Health, Education, Labor, and Pensions and the Committee on Finance of the Senate and the Committee on Education and the Workforce and the Committee on Ways and Means of the House of Representatives.

1. The funding target attainment percentage (FTAP)<sup>2</sup> at the end of the preceding plan year of a plan maintained by the contributing sponsor or any member of its controlled group is less than 80 percent (80-percent Gateway Test).
2. The conditions specified in ERISA section 303(k) and section 430(k) of the Internal Revenue Code (Code) for imposing a lien for missed contributions exceeding \$1 million have been met with respect to any plan maintained by any member of the controlled group.
3. The Internal Revenue Service (IRS) has granted one or more minimum funding waivers totaling in excess of \$1 million to any plan maintained by any member of the controlled group, and any portion of the waiver(s) is still outstanding.

Part 4010 of PBGC's regulations specifies the identifying, financial, and actuarial information that filers must submit under ERISA section 4010. PBGC reviews the information that is filed and enters it into an electronic database for more detailed analysis. This analysis helps PBGC to anticipate possible threats to the pension insurance system and focus its resources on situations that pose the greatest risks to that system.

Filings under part 4010 play a major role in PBGC's ability to protect participant and plan interests because 4010 information is typically more current than other sources of information available to PBGC. Protection for participants may be lost if a company completes a transaction that creates possible significant risk to the plan and participants before PBGC can act. PBGC can use 4010 information to quickly evaluate a fast-moving transaction to protect participants.

When PBGC evaluates the risk of a plan terminating underfunded, it needs the plan's termination liability. If PBGC has a recent 4010 filing for the plan, it has the plan's termination liability calculated directly using seriatim data and certified by an enrolled actuary. With reliable information readily available, PBGC can conduct a timely and accurate analysis. But if PBGC

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<sup>2</sup> The FTAP is a measure of how well the plan is funded. In general, a plan's FTAP is the ratio (expressed as a percentage) of the value of plan assets to the plan's funding target. See ERISA section 303(d)(2).

does not have a 4010 filing for the plan, PBGC must estimate the plan's termination liability based on outdated Form 5500 Schedule SB data. This analysis takes time and, because it is based on estimates, may be less accurate, which may negatively impact asset recoveries and participant benefits if the plan terminates underfunded.

PBGC also uses information from 4010 filings to value its contingent liabilities, as reported in its annual financial statements. Under ERISA section 4010(e), PBGC submits an annual report to Congress summarizing the data received in 4010 filings.

Under § 4010.11(a) of the current regulation, reporting is waived if the aggregate underfunding of all plans (4010 funding shortfall) maintained by the filer's controlled group does not exceed \$15 million (referred to in this preamble as the "\$15 million aggregate underfunding waiver"). PBGC added this waiver to the regulation in March 2009 when PBGC amended the regulation to implement changes under the Pension Protection Act of 2006.<sup>3</sup>

### ***MAP-21 and HATFA***

MAP-21 (enacted July 6, 2012) provided relief from the minimum funding requirements that apply to plan sponsors of single-employer defined benefit plans. This was accomplished by establishing rules that limit the volatility of certain interest rates used for funding purposes by constraining them within a corridor. MAP-21 also contained provisions on the application of those rules to ERISA section 4010 reporting requirements. Section 40211(b)(3)(D) of MAP-21 amended ERISA section 4010 by adding paragraph (d)(3), which provides that the stabilized interest rates do not apply for purposes of determining the funding target or the FTAP required to be reported under ERISA section 4010(d). However, they apply for all other 4010 requirements

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<sup>3</sup> 74 FR 11022 (Mar. 16, 2009), <http://www.gpo.gov/fdsys/pkg/FR-2009-03-16/pdf/E9-5741.pdf>, (2009 rule).

involving minimum funding-related determinations, including those requirements created solely by regulation.

MAP-21 provided that the stabilized interest rate corridor would begin phasing-out in 2013. HATFA (enacted August 8, 2014) delayed the start of that phase-out until 2018, thereby extending the period for which the stabilized interest rate rules are most likely to impact 4010 filings.

IRS issued Notice 2012-61 providing guidance on pension funding stabilization under MAP-21.<sup>4</sup>

PBGC issued two Technical Updates providing guidance on applying the statutory provisions of MAP-21 and HATFA to 4010 reporting.<sup>5</sup> PBGC wanted to provide guidance to the pension community more quickly than could be done through rulemaking. PBGC is now codifying the statutory changes and guidance in the 4010 regulation, after giving the public an opportunity to comment.

### ***Regulatory review***

On January 18, 2011, the President issued Executive Order 13563, “Improving Regulation and Regulatory Review,” to ensure that Federal regulations seek more affordable, less intrusive means to achieve policy goals, and that agencies give careful consideration to the benefits and costs of those regulations. In response to the Executive Order, PBGC on August 23, 2011, promulgated its Plan for Regulatory Review,<sup>6</sup> noting several regulatory areas—including 29 CFR part 4010—for review to see how PBGC can reduce burden while preserving its ability

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<sup>4</sup> <http://www.pbgc.gov/Documents/n-12-61.pdf> .

<sup>5</sup> Technical Update 12-2: Effect of MAP-21 on 4010 Reporting (Sept. 11, 2012), <http://www.pbgc.gov/prac/other-guidance/tu/tu12-2.html>; Technical Update 14-2: Effect of HATFA on 4010 Reporting (Oct. 17, 2014), <http://www.pbgc.gov/prac/other-guidance/tu/tu14-2.html>.

<sup>6</sup> See <http://www.pbgc.gov/documents/plan-for-regulatory-review.pdf>.

to receive critical information. The plan identified expansion of waivers from 4010 reporting as an area to explore.

### **Proposed Regulatory Changes**

#### ***MAP-21 and HATFA stabilized interest rate rules***

ERISA section 4010(b)(1) provides that 4010 reporting is required if any plan sponsored by a member of the controlled group has an FTAP, “as determined as defined in subsection (d),” below 80 percent. Because section 4010(d), as amended by MAP-21, requires that the FTAP be determined without regard to the MAP-21 stabilized interest rate rules, the FTAP used for the 80-percent Gateway Test is also determined without regard to such rules.<sup>7</sup>

To codify the statutory change and the guidance in Technical Updates 12-2 and 14-2, PBGC is proposing to revise the definition of “funding target attainment percentage” in § 4010.2 to provide that it is determined without regard to the stabilized interest rate rules and rename it the “4010 funding target attainment percentage.” The proposed rule includes conforming changes in §§ 4010.4(a)(1), 4010.4(b), and 4010.8(a)(6). In addition, the proposed rule would revise § 4010.8(a)(5) to clarify that the plan’s funding target as of the valuation date (required to be reported in a 4010 filing) is determined without regard to the stabilized interest rate rules.

To reduce the administrative burden of determining whether a 4010 filing is required, Technical Update 12-2 waives reporting if the FTAP of each plan maintained by the filer’s controlled group, determined without regard to the MAP-21 stabilized interest rate rules, would be at least 80 percent if the value of plan assets used for minimum funding purposes were substituted for the value described in IRS Notice 2012-61, Q&A NA-3. The proposed rule would codify this waiver. (See Technical Update 12-2 for more explanation.)

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<sup>7</sup> Thus, the FTAP used for purposes of the 80-percent Gateway Test might not be the same as the FTAP reported on line 14 of the 2014 Schedule SB of Form 5500.



### ***Changes to \$15 million aggregate underfunding waiver***

As mentioned above, PBGC added the \$15 million aggregate underfunding waiver to the 4010 regulation in 2009. In the preamble to the 2009 final rule, PBGC cited the Technical Explanation of the Pension Protection Act of 2006 prepared by the Staff of the Joint Committee on Taxation as support for the waiver. The Technical Explanation stated: “It is intended that the PBGC may waive the requirement [for reporting under ERISA section 4010 based upon the 80-percent Gateway Test] in appropriate circumstances, such as in the case of small plans.”<sup>8</sup>

PBGC set the waiver threshold at \$15 million in aggregate underfunding based on its experience that underfunding below that amount presented a level of risk and exposure to PBGC that was sufficiently low to warrant the waiver of reporting based solely on the 80-percent Gateway Test. The preamble to the 2009 final regulation stated that “the waiver will generally exempt controlled groups maintaining only small plans from section 4010 reporting.”

Because of the impact of MAP-21 and HATFA, PBGC believes that further refinement of the \$15 million aggregate underfunding waiver is necessary. Many sponsors that would not have qualified for the waiver if not for MAP-21 and HATFA are waived from reporting because, using stabilized rates, underfunding falls below \$15 million.

As a result, PBGC is not receiving valuable information from approximately 200 controlled groups for which 4010 reporting was required before MAP-21 and HATFA (*i.e.*, after MAP-21 and HATFA, reporting was not required solely because the use of stabilized rates resulted in aggregate underfunding being less than \$15 million).<sup>9</sup> To put that number in context,

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<sup>8</sup> See Joint Committee on Taxation, Technical Explanation of H.R. 4, the “Pension Protection Act of 2006,” as passed by the House on July 26, 2006, and as considered by the Senate on August 3, 2006 (JCX-38-06), August 3, 2006 on page 115. <http://www.jct.gov/x-38-06.pdf>.

<sup>9</sup> PBGC is aware of these 200 controlled groups because PBGC’s regulation requires an explanation be provided where a filing is required one year, but not the next. These 200 controlled groups indicated on their 4010 filings that they had a plan below 80-percent funded, but the aggregate underfunding was below \$15 million. PBGC believes

PBGC received only 313 filings for 2013. PBGC's ability to protect plans can be reduced significantly if it does not have 4010 information to use to analyze transactions, evaluate termination risks, and measure its contingent liabilities for its financial statements.

The vast majority of plans for which 4010 reporting would be required if not for MAP-21 and HATFA cover more than 1,000 participants and have very large unfunded benefit liabilities measured on a termination basis. Thus, the current regulation does not allow PBGC to access important available information on plans that present substantial risk and exposure to the pension insurance system. Further, because PBGC is required to submit an annual report to Congress summarizing the data received in 4010 filings, Congress is not receiving information it would otherwise receive solely because plans that were never intended to qualify for the regulatory waiver are, in fact, qualifying as a result of MAP-21 and HATFA.

Because Congress provided that stabilized rates are disregarded for purposes of determining whether a 4010 filing is required, PBGC believes it is appropriate to modify the \$15 million aggregate underfunding waiver to fix this anomalous and unintended result. PBGC considered modifying the waiver to require that the 4010 funding shortfall be determined using non-stabilized rates, but concluded that doing so would be overly complicated and administratively burdensome. In order to preserve simplicity, better align the waiver with the plans it was originally intended to cover, and eliminate any need to do an additional calculation solely to determine if the waiver applies, PBGC is proposing to leave the determination of the 4010 funding shortfall unchanged and instead limit the availability of the \$15 million aggregate underfunding waiver to controlled groups where the aggregate number of participants in all

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the total number of reports it is not receiving solely due to the stabilized rates applicable to the \$15 million aggregate underfunding waiver test is much greater than 200. Besides the 200 prior filers, PBGC is aware of other controlled groups that did not have to file in the past, but would be required to file now if not for the fact that the waiver is based on stabilized rates.

defined benefit plans maintained by the controlled group is fewer than 500. For purposes of the waiver, the number of participants in any plan could be determined either as of the end of the plan year ending within the information year or as of the valuation date for that plan year.

Basing the participant count threshold on fewer than 500 participants would provide PBGC with 4010 information on nearly all of the approximately 200 controlled groups for which reporting would have been required if not for MAP-21 and HATFA. In addition, the threshold would be similar to an exemption under § 4010.8(c) for plans with fewer than 500 participants from providing § 4010.11 actuarial information in a 4010 report. PBGC specifically requests public comment on whether using a different participant count threshold or tying the \$15 million aggregate underfunding waiver directly to non-stabilized rates would be more appropriate.

#### *New waivers*

In response to several public comments and as part of its implementation of its Plan for Regulatory Review, PBGC has reviewed part 4010 to see how it could reduce burden while preserving its ability to receive critical information. As part of this process, PBGC considered waiving reporting for plans that must file 4010 information solely on the basis of either a statutory lien resulting from missed required contributions of over \$1 million or outstanding minimum funding waivers exceeding the same amount.

In 2012 and 2013, less than five percent of 4010 filers were required to report based on these two filing tests; in 2013, there were 15 such filers. PBGC can look to reportable events filings<sup>10</sup> to obtain information similar to that reported in 4010 filings required solely because of these reporting triggers.

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<sup>10</sup> PBGC receives reports for missed funding contributions under §§ 4043.25 and 4043.81 (Form 200) and applications for minimum funding waivers under § 4043.33.

Waiving reporting based on these two tests would reduce the compliance and cost burden on filers. A filer waived from 4010 reporting might save between six and 24 hours annually by not having to provide identifying and financial information and approximately \$17,000 in actuarial costs (depending in part on whether it was a first-time filing). Based on 2013 data, the aggregate actuarial cost savings for all filers could be over \$310,000.

Therefore, to reduce the burden of duplicative reporting, the proposed rule adds waivers from reporting for persons that must file a 4010 report solely on the basis of either a reporting trigger under § 4010.4(a)(2) for a statutory lien resulting from missed required contributions of over \$1 million or under § 4010.4(a)(3) for outstanding minimum funding waivers exceeding the same amount, provided that the missed contributions or minimum funding waivers were reported under part 4043 by the due date for the 4010 filing.

### ***Other changes***

The proposed rule revises § 4010.11 to conform to the new waivers discussed above, remove a paragraph on transition rules that are no longer necessary, and reorganize the paragraphs under the section.

The proposed rule deletes transition rules in current §§ 4010.4(b)(3) and (4) and 4010.8(h) that are no longer necessary and updates provisions regarding special funding rules.

Finally, the proposed rule makes two corrections to the regulation.

First, the proposed rule amends § 4010.8(b)(1) to correct a cross reference from § 4010.11(b) to § 4010.10(b).

Second, the proposed rule amends § 4010.8(d)(2) to provide that the form-of-payment assumption used when determining benefit liabilities for purposes of 4010 reporting is the assumption prescribed in § 4044.51 of PBGC's regulation on Allocation of Assets in Single-

Employer Plans (part 4044). This change would conform the regulation to the statutory requirement. As a result of a drafting error in the 2009 4010 final rule, the current regulation provides that, for purposes of determining a plan's benefit liabilities, the form-of-payment assumption must be the same as what is used to determine the minimum required contribution. Although this assumption has a relatively minor impact on the overall calculation, PBGC was concerned about the programming changes that would need to be made to valuation software to effectuate this unintended assumption change and therefore issued guidance that the actuary may use either the form-of-payment assumption prescribed in § 4044.51 or the form-of-payment assumption used to determine the minimum required contribution for the plan year ending within the filer's information year.<sup>11</sup> PBGC specifically requests comments on whether eliminating the option of using the latter form-of-payment assumption (*i.e.*, requiring that the § 4044.51 assumption be used) would necessitate significant programming changes or result in additional burden or cost.

### **Applicability**

The proposed rule would be applicable to information years beginning after December 31, 2015.

### **Compliance with Rulemaking Guidelines**

*Executive Orders 12866 "Regulatory Planning and Review" and 13563 "Improving Regulation and Regulatory Review"*

PBGC has determined, in consultation with the Office of Management and Budget (OMB), that this rulemaking is not a "significant regulatory action" under Executive Order 12866.

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<sup>11</sup> Technical Update 09-2: ERISA section 4010 reporting; Alternative form-of-payment assumption for determining benefit liabilities (Mar. 25, 2009), <http://www.pbgc.gov/prac/other-guidance/tu/tu09-2.html>.

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 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 which would have other substantial impacts.

Pursuant to section 1(b)(1) of E.O. 12866 (as amended by Executive Order 13422), PBGC has determined that regulatory action is required in this area. Principally, this regulatory action is necessary to codify changes made to 4010 reporting by MAP-21 and HATFA and related guidance. In addition, this proposed rule is necessary to modify waivers from 4010 reporting to better balance the burden of reporting with PBGC's need for the information and to target those plans with the highest risk and exposure to PBGC and the pension insurance system. Finally, the proposed rule is needed to correct errors in the current regulation. In accordance with OMB Circular A-4, PBGC also has examined the economic and policy implications of this proposed rule and has concluded that the action's benefits justify its costs.

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 proposed rule does

not cross the \$100 million threshold for economic significance and is not otherwise economically significant. The annual effect of the regulation with the proposed rule changes would far be less than \$100 million. See discussion under *Paperwork Reduction Act*.

This proposed rule is associated with retrospective review and analysis in PBGC's Plan for Regulatory Review issued in accordance with Executive Order 13563.

#### *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 Annual Financial and Actuarial Information Reporting regulation, PBGC considers a small entity to be a plan with fewer than 100 participants. This is substantially the same criterion PBGC uses in other regulations<sup>12</sup> and is consistent with certain requirements in Title I of ERISA<sup>13</sup> and the Code,<sup>14</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>15</sup>

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<sup>12</sup> See *e.g.*, special rules for small plans under part 4007 (Payment of Premiums).

<sup>13</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.

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 proposed 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 therefore requests comments on the appropriateness of the size standard used in evaluating the impact on small entities of the proposed amendments to part 4010.

PBGC certifies under section 605(b) of the Regulatory Flexibility Act that the amendments in this proposed rule would not have a significant economic impact on a substantial number of small entities. The proposed amendments would limit application of a reporting waiver to larger plans and provide two new reporting waivers to plans of all sizes. Accordingly, as provided in section 605 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), sections 603 and 604 do not apply.

#### *Paperwork Reduction Act*

PBGC is submitting the information requirements under part 4010 to OMB for review and approval under the Paperwork Reduction Act. The information requirements under part 4010 have been approved by the OMB under the Paperwork Reduction Act (OMB control number 1212-0049, expires July 31, 2015). Copies of PBGC's request may be obtained free of charge by contacting the Disclosure Division of the Office of the General Counsel of PBGC, 1200 K Street, NW., Washington, DC 20005, 202-326-4040.

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<sup>14</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>15</sup> See, *e.g.*, DOL's final rule on Prohibited Transaction Exemption Procedures, 76 FR 66637, 66644 (Oct. 27, 2011).



PBGC estimates that once the final rule takes effect it will receive 4010 filings from about 450 contributing sponsors or controlled group members annually and that the total annual burden of the collection of information will be about 3,900 hours and \$7,632,000.

Comments on the paperwork provisions under this proposed rule should be mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Pension Benefit Guaranty Corporation, via electronic mail at [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov) or by fax to (202) 395-6974. Although comments may be submitted through [insert date 60 days after publication in the Federal Register], the Office of Management and Budget requests that comments be received on or before [insert date 30 days after publication in the Federal Register] to ensure their consideration. Comments may address (among other things) —

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

#### **List of Subjects in 29 CFR Part 4010**

Pension insurance, Pensions, Reporting and recordkeeping requirements.

For the reasons given above, PBGC proposes to amend 29 CFR part 4010 as follows:

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

##### **REPORTING**

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

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

2. Section 4010.2 is amended by removing the definition for “Funding target attainment percentage” and adding a definition for “4010 funding target attainment percentage” in alphanumeric order to read as follows:

**§ 4010.2 Definitions.**

\* \* \* \* \*

*4010 funding target attainment percentage* means, with respect to a plan for a plan year, the percentage as determined under § 4010.4(b) for the plan year.

\* \* \* \* \*

3. In § 4010.4:

a. Paragraph (a) introductory text is amended by removing the words “A contributing sponsor” and adding in their place the words “Subject to the waivers in § 4010.11, a contributing sponsor”.

b. Paragraph (a)(1) is amended by adding “4010” before the phrase “funding target attainment percentage”.

c. Paragraph (d) is removed, and paragraphs (e) and (f) are redesignated as paragraphs (d) and (e), respectively.

d. Paragraph (b) and newly redesignated paragraph (e) are revised to read as follows:

**§ 4010.4 Filers.**

\* \* \* \* \*

(b) *4010 funding target attainment percentage--(1) General.* The 4010 funding target attainment percentage for a plan for a plan year equals the funding target attainment percentage as provided under ERISA section 303(d)(2) and Code section 430(d)(2) determined as of the

valuation date for the plan year without regard to the segment rate stabilized interest provisions of ERISA section 303(h)(2)(iv) and Code section 430(h)(2)(iv).

(2) *Prefunding balance and funding standard carryover balance elections.* For purposes of determining the 4010 funding target attainment percentage for a plan for the plan year, prefunding balances and funding standard carryover balances must reflect any elections (or deemed elections) under ERISA section 303(f) and Code section 430(f) that affect the value of such balances as of the beginning of the plan year, regardless of when the elections (or deemed elections) are made.

\* \* \* \* \*

(e) *Certain plans to which special funding rules apply.* Except for purposes of determining the information to be submitted under § 4010.8(h) (in connection with the actuarial valuation report), the following statutory provisions are disregarded for purposes of this part:

(1) Section of 402(b) of the Pension Protection Act of 2006, Public Law 109-280, dealing with certain frozen plans of commercial passenger airlines and airline caterers.

(2) Section 104 of the Pension Protection Act of 2006 as amended by the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, Public Law 111-192, dealing with eligible charity plans and plans of certain rural cooperatives.

(3) The Cooperative and Small Employer Charity Pension Flexibility Act, Public Law 113-97, dealing with certain defined benefit pension plans maintained by more than one employer.

4. In § 4010.8:

a. Paragraph (a)(6) is amended by adding “4010” before “funding target attainment percentage.”

b. Paragraph (b)(1) is amended by removing the reference “§ 4010.11(b)” and adding in its place the reference “§ 4010.10(b)”.

c. Paragraph (c)(1)(i) is amended by removing the reference “§ 4010.11(c)” and adding in its place the reference “§ 4010.11(b)”.

d. Paragraph (d)(2)(i) is amended by adding the words “form of payment,” after “Interest,”.

e. Paragraph (d)(2)(ii) is amended by removing the words “form of payment”.

f. Paragraph (h) is removed and paragraph (i) is redesignated as paragraph (h).

g. Paragraph (a)(5) and newly redesignated paragraph (h) are revised to read as follows:

**§ 4010.8 Plan actuarial information.**

(a) \* \* \*

(5) The funding target (as of the valuation date) for the plan year ending within the information year determined in accordance with ERISA section 303(i) and Code section 430(i)—

(i) Without regard to the segment rate stabilized interest provisions of ERISA section 303(h)(2)(iv) and Code section 430(h)(2)(iv); and

(ii) As if the plan has been in at-risk status for a consecutive period of at least five plan years;

\* \* \* \* \*

(h) *Plans subject to special funding rules.* Instead of the requirements of paragraph (a)(11) of this section:

(1) In the case of a plan year for which a plan is subject to section 402(b) of the Pension Protection Act of 2006, Public Law 109-280, dealing with certain frozen plans of commercial passenger airlines and airline caterers, the plan must meet the requirements in connection with

the actuarial valuation report in accordance with instructions on PBGC's website,

<http://www.pbgc.gov>.

(2) In the case of a plan year for which the application of new funding rules is deferred for a plan under section 104 of the Pension Protection Act of 2006, Public Law 109-280, as amended by the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, Public Law 111-192, dealing with eligible charity plans and plans of certain rural cooperatives, the plan must meet the requirements in paragraph (a)(5) of this section (in connection with the actuarial valuation report) in effect as of December 31, 2007.

(3) In the case of a plan year for which a plan is subject to the Cooperative and Small Employer Charity Pension Flexibility Act, Public Law 113-97, dealing with certain defined benefit pension plans maintained by more than one employer, the plan must meet the requirements in connection with the actuarial valuation report in accordance with instructions on PBGC's website, <http://www.pbgc.gov>.

5. Section 4010.11 is revised to read as follows:

**§ 4010.11 Waivers and extensions.**

(a) *Plan funding/participant count waiver.* Unless reporting is required by § 4010.4(a)(2) or (3), reporting is waived for a person (that would be a filer if not for the waiver) for an information year if, for the plan year ending within the information year—

(1) The aggregate 4010 funding shortfall for all plans (including any exempt plans) maintained by the person's controlled group (disregarding those plans with no 4010 funding shortfall) does not exceed \$15 million; and

(2) The aggregate number of participants in all plans (including any exempt plans) maintained by the person's controlled group is fewer than 500. For this purpose, the number of

participants in any plan may be determined either as of the end of the plan year ending within the information year or as of the valuation date for that plan year.

(b) *4010 funding shortfall for waivers and exemptions--(1) General.* A plan's 4010 funding shortfall for a plan year equals the funding shortfall as provided under ERISA section 303(c)(4) and Code section 430(c)(4) determined as of the valuation date for the plan year, except that the value of plan assets is determined without regard to the reduction under ERISA section 303(f)(4)(B) and Code section 430(f)(4)(B) (dealing with reduction of assets by the amount of prefunding and funding standard carryover balances).

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

(c) *Alternative 4010 FTAP.* Unless reporting is required by § 4010.4(a)(2) or (3), reporting is waived for a person for an information year if the 4010 funding target attainment percentage of each plan maintained by the person's controlled group would be at least 80 percent if the value of plan assets used for minimum funding purposes were substituted for the asset value determined without regard to the segment rate stabilized interest provisions of ERISA section 303(h)(2)(iv) for purposes of determining such percentage.

(d) *Missed contributions resulting in a lien or outstanding minimum funding waivers.* Reporting is waived for a person (that would be a filer if not for the waiver) for an information year if, for the plan year ending within the information year, reporting would have been required solely under § 4010.4(a)(2) or (3), provided that the missed contributions or minimum funding waivers (as applicable) were reported to PBGC under part 4043 of this chapter by the due date for the 4010 filing.

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

Issued in Washington, D.C., this 17th day of July, 2015.

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