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## **PENSION BENEFIT GUARANTY CORPORATION**

### **29 CFR Part 4010**

### **RIN 1212-AB30**

### **Annual Financial and Actuarial Information Reporting**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule.

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**SUMMARY:** The Pension Benefit Guaranty Corporation (“PBGC”) is amending its regulation on Annual Financial and Actuarial Information Reporting to codify provisions of recent legislation and related guidance that affect reporting under ERISA section 4010. The final rule modifies the reporting waiver under the current regulation tied to aggregate plan underfunding of \$15 million or less to be based on non-stabilized interest rates. In addition, the final rule adds new reporting waivers for smaller plans and 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 applications for minimum funding waivers were previously reported to PBGC). The final rule also provides alternative methods of compliance for reporting certain actuarial information and makes a few technical changes to the regulation.

**DATES:** Effective [insert date 30 days after publication in the Federal Register]. See Applicability in **SUPPLEMENTARY INFORMATION**.

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## **SUPPLEMENTARY INFORMATION:**

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

This rulemaking is necessary to implement recent statutory changes—under the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (“MAP-21”)<sup>1</sup>, the Highway Transportation and Funding Act of 2014 (“HATFA”)<sup>2</sup> and the Bipartisan Budget Act of 2015 (“BBA”)<sup>3</sup>—that affect reporting under PBGC’s regulation on Annual Financial and Actuarial Information Reporting (29 CFR part 4010), to modify the regulation’s waivers and information requirements 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**

#### ***Interest rate stabilization 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.

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<sup>1</sup> Pub. L. 112-141, enacted July 6, 2012.

<sup>2</sup> Pub. L. 113-159, enacted August 8, 2014.

<sup>3</sup> Pub. L. 114-74, enacted November 3, 2015.

BBA further extended that period, generally effective for plan years beginning after December 31, 2015. MAP-21 included statutory provisions regarding the application of the stabilized rates to ERISA section 4010 reporting requirements. The final rule codifies the statutory changes and PBGC guidance on when stabilized rates are and are not taken into account for purposes of 4010 reporting.

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

Section 4010.11(a) of the regulation provides a waiver from reporting if the aggregate underfunding (the “4010 funding shortfall”) of pension plans in a controlled group does not exceed \$15 million. PBGC’s experience with this waiver under the old regulation, especially since MAP-21, was that it resulted 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 was significantly undermined. To address this issue, PBGC proposed to limit the waiver to smaller plans. In response to public comments, the final rule permits plans of any size to use this waiver (as was the case under the old rule), but modifies how the 4010 funding shortfall is determined and, as explained below, provides a separate waiver based solely on plan size to ensure that smaller plans qualify for a waiver.

### ***New waivers***

The final rule adds a waiver from reporting for plans with controlled groups with fewer than 500 participants, regardless of plan underfunding. Further, 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 other new waivers. As in the proposed rule, the final rule waives 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 applications for 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***

In response to comments, the final rule provides alternative methods of compliance for reporting certain actuarial information and 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>4</sup>

### ***4010 regulation***

PBGC's regulation on Annual Financial and Actuarial Information Reporting (29 CFR part 4010)<sup>5</sup> implements ERISA section 4010. Under § 4010.4(a), reporting is required if any of the following conditions exist:

1. The funding target attainment percentage ("FTAP")<sup>6</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).

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<sup>4</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.

<sup>5</sup> For ease of reference, this preamble refers to the regulation as it exists before the final rule becomes applicable as the "old regulation" and the regulation as amended by this final rule as the "new regulation". If a statement is true for both the old and new regulations, this preamble will simply refer to the "regulation."

<sup>6</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).

2. The conditions 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. 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 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 and older data, is 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 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>7</sup>

***MAP-21 and statutory extensions of interest rate stabilization rules***

MAP-21 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, under MAP-21, the stabilized rates are otherwise extended to all other 4010 requirements involving minimum funding-related determinations, including those requirements created solely by regulation, such as the 4010 funding shortfall waiver.

MAP-21 provided that the stabilized interest rate corridor would begin phasing-out in 2013. HATFA delayed the start of that phase-out until 2018. BBA further delayed the start of the phase-out until 2020, thereby further extending the period for which the interest rate stabilization rules are likely to impact 4010 filings (by making it more likely that the \$15 million aggregate underfunding waiver will apply).

IRS issued Notice 2012-61 providing guidance on pension funding stabilization under MAP-21.<sup>8</sup>

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<sup>7</sup> 74 FR 11022 (Mar. 16, 2009), <http://www.gpo.gov/fdsys/pkg/FR-2009-03-16/pdf/E9-5741.pdf>.

<sup>8</sup> <http://www.pbgc.gov/Documents/n-12-61.pdf>.

PBGC issued two Technical Updates providing guidance on applying the statutory rate stabilization provisions that began with MAP-21 to 4010 reporting.<sup>9</sup>

### ***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>10</sup> noting several regulatory areas—including 29 CFR part 4010—for review to see how PBGC can reduce burden while preserving its ability to receive critical information. The plan identified expansion of waivers from 4010 reporting as an area to explore.

### ***Proposed rule***

On July 27, 2015 (at 80 FR 44312), PBGC published in the **Federal Register** a proposed rule (the “proposed rule”) for notice and comment that codified the statutory stabilized interest rate provisions related to 4010 reporting, made changes to the waiver structure, and other technical changes. The proposed rule limited the \$15 million aggregate underfunding waiver to smaller plans and added 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 applications for minimum funding waivers were previously reported to PBGC).

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<sup>9</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>10</sup> See <http://www.pbgc.gov/documents/plan-for-regulatory-review.pdf>.

PBGC received ten comment letters (from a total of twelve entities) on the proposed rule.<sup>11</sup> The commenters represented several professional and business trade organizations, pension plan consultants, plan sponsors, and a law firm. Generally, commenters opposed the proposal to limit the \$15 million aggregate underfunding waiver to small plans while supporting PBGC's effort to add other waivers. Commenters provided suggestions on the proposal and on other matters under the regulation. The comments on the proposed rule and PBGC's responses are discussed below with the topics to which they relate.

## **Regulatory Changes**

### ***MAP-21 interest rate stabilization 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 interest rate stabilization rules, the FTAP used for the 80-percent Gateway Test is also determined without regard to such rules.<sup>12</sup>

To codify the statutory change and the guidance in Technical Updates 12-2 and 14-2, the final rule revises the definition of "funding target attainment percentage" in § 4010.2 to provide that it is determined without regard to the interest rate stabilization rules and rename it the "4010 funding target attainment percentage." The final rule includes conforming changes in §§ 4010.4(a)(1), 4010.4(b), and 4010.8(a)(6). In addition, the final rule revises § 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 interest rate stabilization rules.

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<sup>11</sup> See comments at <http://www.pbgc.gov/prac/pg/other/guidance/pending-proposed-rules.html>.

<sup>12</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.



To reduce the administrative burden of determining whether a 4010 filing is required, Technical Update 12-2 waived reporting if the FTAP of each plan maintained by the filer's controlled group, determined without regard to the statutory stabilized interest rate provisions, 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.<sup>13</sup> (See Technical Update 12-2 for more explanation.) The final rule effectively codifies this waiver from reporting and extends the relief to the related information requirement.

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

As mentioned above, PBGC added the \$15 million aggregate underfunding waiver to the 4010 regulation in 2009. The preamble to the 2009 final rule 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>14</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 rule (see footnote 7) stated that "the waiver will generally exempt controlled groups maintaining only small plans from section 4010 reporting."

Because of the impact of stabilized interest rates that began with MAP-21, PBGC believes that further refinement of the \$15 million aggregate underfunding waiver is necessary.

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<sup>13</sup> [https://www.irs.gov/irb/2012-42\\_IRB/ar10.html](https://www.irs.gov/irb/2012-42_IRB/ar10.html) .

<sup>14</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>.

Under the old regulation, many sponsors that would not have qualified for the waiver prior to MAP-21 were waived from reporting because underfunding was under \$15 million based on stabilized rates.

As a result, PBGC was 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>15</sup> To put that number in context, it is comparable to the 207 filings PBGC received for 2014. 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 the statutory stabilized interest rate provisions cover more than 1,000 participants and have very large unfunded benefit liabilities measured on a termination basis. Thus, the old regulation did 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 has not been receiving information it would otherwise receive solely because plans that were never intended to qualify for the regulatory waiver were, in fact, qualifying as a result of the statutory stabilized interest rate provisions that began with MAP-21.

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

In the preamble to the proposed rule, PBGC stated that because Congress provided that stabilized rates are disregarded for purposes of determining whether a 4010 filing is required, it was 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 at the time that doing so would be overly complicated and administratively burdensome. PBGC was also concerned that this approach might make it more difficult to verify compliance because the liability underlying the shortfall calculation would not be reported on Schedule SB to Form 5500. 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 proposed 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 defined benefit plans maintained by the controlled group was fewer than 500.

All commenters opposed limiting the availability of the \$15 million aggregate underfunding waiver to controlled groups with fewer than 500 participants and reported that such limitation would unnecessarily burden many large plans by requiring 4010 reporting. Some commenters pointed out instances in which the proposed waiver would be unavailable due to circumstances that were incidental to the aims of the regulation (*e.g.*, recent acquisitions of small plans where additional funding may not have yet occurred or multiple employer plans that have over 500 participants but where individual employers may not have control over plan funding). Some commenters suggested that the proposed change would result in lower funding contributions for large plans by eliminating the incentive under the old rule to fund up to qualify

for the waiver. In addition, several commenters believed that the proposed participant count limit would be a permanent change to the regulation to address a temporary condition that would impact reporting long after stabilized rates no longer had an impact on plan liabilities.<sup>16</sup>

As an alternative to the proposal to limit the \$15 million aggregate underfunding waiver to controlled groups with fewer than 500 participants, six commenters (including three who commented in one letter) suggested that PBGC's concerns could be addressed if potential filers were required to use non-stabilized rates (instead of stabilized rates) to determine the 4010 funding shortfall instead of stabilized rates. Two of these commenters pointed out that sponsors still use non-stabilized rates for other purposes and therefore, basing the 4010 funding shortfall determination on non-stabilized rates would not be overly burdensome.<sup>17</sup> These same commenters suggested that if PBGC were to have a participant count limit, the threshold should be increased (with suggested limits ranging from 1,000 or 3,000 participants). Two other commenters recommended that PBGC consider incorporating the low-default risk waiver from PBGC's 2015 final rule on Reportable Events<sup>18</sup> into the 4010 regulation as an effective way to tie risk to reporting. Other suggestions for alternatives included incorporating funding ratios of at least 90 percent on a stabilized interest rate basis, allowing for simplified reporting if the waiver under the proposed rule were to be retained, and increasing the participant count threshold.

PBGC was interested to learn that commenters were not concerned that basing the determination of the waiver on non-stabilized rates would result in overly burdensome reporting requirements. Given that a substantial segment of the commenters supported this suggestion and

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<sup>16</sup> PBGC received comments on the proposed rule before BBA was enacted. Although BBA does not make stabilized interest rates permanent, it still lengthens the amount of time such rates impact 4010 reporting.

<sup>17</sup> These uses include: 4010 Funding Target Attainment Percentage, Variable Rate Premium under the alternative method, annual funding notice supplement, and Code section 404 deduction limits.

<sup>18</sup> 80 FR 54979 (Sept. 11, 2015), <http://www.gpo.gov/fdsys/pkg/FR-2015-09-11/pdf/2015-22941.pdf>.

the fact that statutory stabilized interest rate provisions are scheduled to eventually phase-out, PBGC believes making this modification to the waiver is appropriate to reduce potential filer burden even though the data underlying the calculation does not get reported on Schedule SB. PBGC will be able to estimate the 4010 funding shortfall to evaluate compliance with the filing requirements using other information sponsors routinely file. As a result, the final rule eliminates the participant count limit for purposes of the \$15 million aggregate underfunding waiver and instead requires that the liability used to determine the 4010 funding shortfall be determined using non-stabilized rates. The final rule does not change how the asset portion of the 4010 funding shortfall is calculated (*i.e.*, the asset value used for this purpose is the asset value used for funding purposes, including averaging, if applicable, with no reduction for prefunding or carryover balances).

PBGC acknowledges that under this change, some smaller plans that would have qualified for the waiver under the proposed rule would not qualify for the waiver under the final rule. Accordingly, as described below, the final rule adds a new waiver for controlled groups with less than 500 participants, regardless of plan underfunding.

With the final rule modification to the \$15 million aggregate underfunding waiver and the new smaller plans waiver, PBGC believes that most of the commenters' concerns about modifying the waiver have been addressed. However, PBGC may reconsider suggestions from commenters that are not incorporated into the final rule, as well as other possibilities, as it gains experience with reporting under the new regulation.

#### ***New waivers—smaller plans***

PBGC concluded that it could provide burden relief for smaller plans without compromising the pension insurance system. Thus, the final rule provides that 4010 reporting is

waived for controlled groups where the aggregate number of participants in all plans (including any exempt plans) is fewer than 500 (the “smaller plans waiver”).

The final regulation provides that for purposes of the new smaller plans waiver, the aggregate number of participants in all plans maintained by a person’s controlled group includes any participants covered by a multiple employer plan in which the person participates (including participants covered by the multiple employer plan who are not or were not employed by the person). In other words, the person is treating as “maintaining” the whole multiple employer plan. For example, in the case of a multiple employer plan where each contributing sponsor has fewer than 500 participants in all of its plans, but the multiple employer plan as a whole covers 500 or more participants, the smaller plans waiver would not apply. This treatment is analogous to how the aggregate funding shortfall of a multiple employer plan is determined for purposes of the \$15 million aggregate underfunding waiver under the current regulation; for that purpose, the multiple employer plan’s entire shortfall is taken into account.

***New waivers— missed contributions resulting in a lien or outstanding minimum funding waivers***

As part of PBGC’s implementation of its Plan for Regulatory Review (which included public comment on how PBGC could reduce reporting burden), PBGC reviewed part 4010 to see how it could reduce burden while preserving its ability to receive critical information. As part of this process, PBGC proposed to waive 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 2014, there were 10 such filers. PBGC can look to reportable events

filings<sup>19</sup> to obtain information similar to that reported in 4010 filings required solely because of these reporting triggers.

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 \$16,000 in actuarial costs (depending in part on whether it was a first-time filing). Based on 2014 data, the aggregate actuarial cost savings for all filers could be over \$160,000.

Therefore, to reduce the burden of duplicative reporting, the proposed rule added 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 applications for minimum funding waivers were reported under part 4043 by the due date for the 4010 filing.

PBGC did not receive any comments on these proposed new waivers. The final rule retains these waivers as proposed.

#### ***Alternative methods of compliance for reporting certain actuarial information***

ERISA section 4010(d) requires that certain information be reported to PBGC when a filer makes a report under ERISA section 4010, including the funding target of the plan determined as if the plan has been in at-risk status for at least five plan years and determined without regard to the interest rate stabilization rules.<sup>20</sup> Section 4010.8 of the regulation implements the statutory information requirements. While not addressed in the proposed rule,

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<sup>19</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.

<sup>20</sup> See ERISA section 4010(d)(1)(B). Under § 4010.2, at-risk status means, with respect to a plan for a plan year, at-risk status as defined in ERISA section 303(i)(4) and Code section 430(i)(4).

three comment letters (representing five entities) suggested that PBGC either eliminate the requirement for plans that are not in at-risk status or provide a simpler alternative method of compliance for such plans. These commenters stated that PBGC does not need that information and that plans are not required to do the calculation for any purpose other than 4010 reporting. In addition, commenters noted that due to the complications of the at-risk rules, doing the calculation substantially increases the costs of preparing a 4010 filing.

PBGC finds these comments credible and agrees that PBGC generally does not need this information from plans that are not in at-risk status. And although PBGC does need information about the at-risk funding target from plans that are in at-risk status, the relevant information for PBGC is the at-risk funding target determined using stabilized rates, not the statutorily-required information determined without regard to the stabilization rules. However, because it is possible that PBGC might need the statutorily-required information from a particular plan or that Congress might request that information, PBGC concluded that providing an alternate method of compliance is preferable to waiving the requirement altogether. Therefore, the final rule provides that plans are not required to provide the at-risk funding target information (determined without regard to the stabilization rules) unless PBGC makes a written request for the information. In that event, the plan would have at least 30 days after PBGC's written request to provide the information. In addition, to ensure that PBGC receives relevant and timely information about the at-risk funding target from plans that are in at-risk status (*i.e.*, determined using stabilized rates), PBGC is adding that information to the list in § 4010.8(a)(11) of information required to be reported in an attachment to the 4010 filing (the valuation report).

Some of these same commenters also suggested that PBGC eliminate or provide for an alternate method of compliance for reporting the year-end plan termination liability calculation



information required under ERISA section 4010(d)(1)(A) and § 4010.8(a)(3) of the regulation. PBGC needs this information to run its analysis of whether a 4010 filer poses a risk to the pension insurance system. Thus, PBGC is not modifying or eliminating the year-end plan termination liability calculation in the final rule.

One commenter expressed its appreciation for the proposed rule's codification of relief provided in Technical Update 12-2, under which reporting would be waived if the 4010 FTAP of each plan maintained by a 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 interest rate stabilization rules (*i.e.*, the amount determined in accordance with IRS notice 2012-61, Q&A NA 3). However, under the proposed rule, if reporting were required, a filer would still need to calculate asset values without regard to the interest rate stabilization rules (in accordance with IRS notice 2012-61) for purposes of determining the 4010 FTAP to be reported in the filing. This commenter believed that this calculation should not be required at all since the difference in values (*i.e.*, the value of assets determined without regard to the interest rate stabilization rules compared to the value of plan assets used for minimum funding purposes) would generally be small. The commenter also noted that IRS and the Department of Labor ("DOL") do not require this calculation and that if PBGC were to require it, then two sets of asset values would need to be reported in the Annual Funding Notice (under ERISA section 101(f)) resulting in complexity and participant confusion.

PBGC agrees that requiring this calculation for a 4010 report is unnecessary. Thus, the final rule provides that for purposes of determining the 4010 FTAP, the value of plan assets used for minimum funding purposes may be substituted for the asset value determined without regard to interest rate stabilization rules. By doing so, there is no need to provide for the alternative

4010 FTAP waiver that was included in the proposed rule and thus, that waiver has been eliminated from the final rule.

***Other changes***

The final 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 final 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 final rule makes two corrections to the regulation.

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

Second, the final 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) and make a related conforming change. This change conforms the regulation to the statutory requirement. As a result of a drafting error in the 2009 final rule, the old regulation provided that, for purposes of determining a plan's benefit liabilities, the form-of-payment assumption must be the same as that used to determine the minimum required contribution. Although this assumption has had 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>21</sup>

Three commenters suggested that PBGC retain the option of using the § 4044.51 assumption. However it appeared to PBGC that none of these commenters held a particularly strong belief in this regard and that making any software program changes would not be too difficult. Further, PBGC has concluded that this information will help PBGC to conduct its analysis of the impact of a 4010 filing on the pension insurance system more effectively. For these reasons, and to conform to the statutory requirement, PBGC decided not to retain this provision from the proposed rule. Thus, the final rule requires the use of the § 4044.51 assumption for purposes of § 4010.8(d)(2).

### ***Timing***

PBGC proposed that the final rule would be applicable to information years beginning after December 31, 2015. Three commenters urged PBGC to allow a longer transition period/effective date so that controlled groups can plan for, or take action to avoid, 4010 filings (such as making funding contribution). One of these commenters specifically recommended that the effective date be no earlier than information years beginning 18 months after the final rule is published. Another commenter recommended that the “effective date be changed to information years beginning one year after the final rule is final or at [a] minimum allow plans to substitute their 2016 FTAP for applicable 4010 calculations if necessary to avoid filing.”

PBGC did not change the applicability date from the proposed rule. PBGC believes sponsors will have sufficient time to make additional contributions in order to qualify for the \$15 million aggregate underfunding waiver or make additional contributions or waive carryover or

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<sup>21</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>.

prefunding balances to increase the 4010 FTAP to above 80 percent.<sup>22</sup> Moreover, as always, PBGC will consider case-by-case waivers in the case of unusual situations. Finally, PBGC has been without 4010 information from certain plans since MAP-21 and needs that information from those plans as soon as practicable to better understand their current status and its impact on the pension insurance system. Accordingly, PBGC did not change the proposed applicability date in the final rule.

### **Applicability**

The regulatory changes in the final rule are applicable to information years beginning after December 31, 2015. The first filings under the new regulation are due April 17, 2017.<sup>23</sup>

### **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.

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

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<sup>22</sup> PBGC is aware that in the case of a controlled group with a calendar year information year that includes a plan with a non-calendar year plan year, that plan may have needed to make decisions about funding or contributions before this final rule was published. However, PBGC believes that in such a case the plan had sufficient notice in the proposed rule that it would likely need to fund up to avoid a 4010 filing for the 2016 information year.

<sup>23</sup> April 15, 2017, is a Saturday. In the rare case of a short information year beginning in 2016, the due date would be earlier; filers in that situation should contact PBGC.

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 final 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 final 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 final 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 final 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 final rule changes would far be less than \$100 million. See discussion under *Paperwork Reduction Act*.

This final 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 final rule is not likely to have a significant economic impact on a substantial number of small entities, section 604 of the Regulatory Flexibility Act requires that the agency present a final regulatory flexibility analysis at the time of the publication of the final rule describing the impact of the rule on small entities and steps taken to minimize the impact. Small entities include small businesses, organizations and governmental jurisdictions.

For purposes of the Regulatory Flexibility Act requirements with respect to the 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>24</sup> and is consistent with certain requirements in Title I of ERISA<sup>25</sup> and the Internal Revenue Code,<sup>26</sup> as well as the definition of a small entity that DOL has used for purposes of the Regulatory Flexibility Act.<sup>27</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

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<sup>24</sup> See *e.g.*, special rules for small plans under part 4007 (Payment of Premiums).

<sup>25</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>26</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>27</sup> See, *e.g.*, DOL's final rule on Prohibited Transaction Exemption Procedures, 76 FR 66637, 66644 (Oct. 27, 2011).

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 requested comments on the appropriateness of the size standard used in the proposed rule. PBGC received no comments on this point.

PBGC certifies under section 605(b) of the Regulatory Flexibility Act that the amendments in this final rule would not have a significant economic impact on a substantial number of small entities. 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, 2018). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

PBGC estimates that once the final rule takes effect it will receive 4010 filings from about 410 contributing sponsors or controlled group members annually and that the total annual burden of the collection of information will be about 3,600 hours and \$6,560,000.

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

Pension insurance, Pensions, Reporting and recordkeeping requirements.

For the reasons given above, PBGC is amending 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 “Unless a waiver in § 4010.11 of this part applies, a contributing sponsor”.

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

c. Paragraph (a)(2) is amended by adding the words “or 306(g)” after the word “303(k)” and adding the words “or 433(g)” after the word “430(k)”.

d. Paragraph (b) is revised.

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

f. Newly redesignated paragraph (e) is revised.

The revisions 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 without regard to the interest rate stabilization provisions of ERISA section 303(h)(2)(C)(iv) and Code section 430(h)(2)(C)(iv).

(2) *Assets used to determine 4010 funding target attainment percentage.* For purposes of determining the 4010 funding target attainment percentage for a plan for the plan year, the value of plan assets determined under ERISA section 303(g)(3) and Code section 430(g)(3) may (but need not) be substituted for the asset value determined without regard to the interest rate stabilization provisions of ERISA section 303(h)(2)(C)(iv) and Code section 430(h)(2)(C)(iv).

(3) *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 certain cooperatives and charities.

4. In § 4010.8:

a. Paragraph (a)(5) is revised.

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

c. Paragraph (a)(9) is amended by adding the words “or 306(g)” after the word “303(k)” and adding the words “or 433(g)” after the word “430(k)”.

d. Paragraph (a)(11)(vi) is amended by adding “and funding target” after “the target normal cost.”

e. Paragraph (b) is revised.

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

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

h. Paragraph (d)(2)(ii) is amended by removing the words “form of payment” from the parenthetical and adding the words “form of payment” after “interest,”.

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

The revisions read as follows:

**§ 4010.8 Plan actuarial information.**

(a) \* \* \*

(5) The at-risk funding target for the plan year ending within the information year determined under ERISA section 303(i) and Code section 430(i)—

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

(ii) Without regard to the interest rate stabilization provisions of ERISA section 303(h)(2)(C)(iv) and Code section 430(h)(2)(C)(iv);

\* \* \* \* \*

(b) *Alternative methods of compliance*—(1) *At-risk funding target*. Notwithstanding any other provision of this section, a filer is not required to provide the information specified in paragraph (a)(5) of this section for the plan year for which actuarial information is being reported unless PBGC requests in writing that the information be provided, in which case the filer must provide the information within 30 days of such request or such later date as PBGC specifies in the request.

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

(i) Including a statement, with the material that is submitted to PBGC, that the filer will file the unavailable information by the alternative due date specified in § 4010.10(b), and

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

\* \* \* \* \*

(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.**

(a) *Aggregate funding shortfall not in excess of \$15 million 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, 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, as determined under paragraphs (a)(1) and (2) of this section.

(1) *4010 funding shortfall; in general.* A plan's 4010 funding shortfall for a plan year equals the funding shortfall for the plan year as provided under ERISA section 303(c)(4) and Code section 430(c)(4), with the following exceptions:

(i) The funding target used to calculate the 4010 funding shortfall is determined without regard to the interest rate stabilization provisions of ERISA section 303(h)(2)(C)(iv) and Code section 430(h)(2)(C)(iv).

(ii) The value of plan assets used to calculate the 4010 funding shortfall 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.

(b) *Smaller plans waiver—(1) General.* Unless reporting is required by § 4010.4(a)(2) or (a)(3), reporting is waived for a person (that would be a filer if not for the waiver) for an

information year if, for the plan year ending within the information year, the aggregate 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.

(2) *Multiple employer plans.* For purposes of this paragraph (b), the aggregate number of participants in all plans maintained by a person's controlled group includes any participants covered by a multiple employer plan in which the person participates (including participants covered by the multiple employer plan who are not or were not employed by the person).

(c) *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 applications for minimum funding waivers (as applicable) were reported to PBGC under part 4043 of this chapter by the due date for the 4010 filing.

(d) *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 March, 2016.

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W. Thomas Reeder

Director

Pension Benefit Guaranty Corporation

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