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PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4007

RIN 1212–AB32

Payment of Premiums; Late Payment Penalty Relief

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) is lowering the rates of penalty charged for late payment of premiums by all plans, and providing a waiver of most of the penalty for plans with a demonstrated commitment to premium compliance.

DATES: *Effective date:* This rule is effective on [insert date 30 days after publication in the **Federal Register**].

Applicability date: The changes made by this rule apply to late premium payments for plan years beginning after 2015.

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SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of the Regulatory Action

This final rule is needed to reduce the financial burden of PBGC's late premium penalties. The rulemaking reduces penalty rates for all plans and waives most of the penalty for plans that meet a standard for good compliance with premium requirements.

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 4007 of ERISA, which gives PBGC authority to assess late payment penalties.

Major Provisions of the Regulatory Action

The penalty for late payment of a premium is a percentage of the amount paid late multiplied by the number of full or partial months the amount is late, subject to a floor of $25 (or the amount of premium paid late, if less). There are two levels of penalty, which heretofore have been 1 percent per month (with a 50 percent cap) and 5 percent per month (capped at 100 percent). The lower rate applies to "self-correction" — that is, where the premium underpayment is corrected before PBGC gives notice that there is or may be an underpayment. This final rule cuts the rates and caps in half (to ½ percent with a 25 percent cap and 2½ percent with a 50 percent cap, respectively) and eliminates the floor.

The rulemaking also creates a new penalty waiver that applies to underpayments by plans with good compliance histories if corrected promptly after notice from PBGC. PBGC will waive 80 percent of the penalty assessed for such a plan.

Background

PBGC administers the pension plan termination insurance program under title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Under ERISA sections 4006 and 4007, plans covered by title IV must pay premiums to PBGC. PBGC's premium regulations — on Premium Rates (29 CFR part 4006) and on Payment of Premiums (29 CFR part 4007) — implement ERISA sections 4006 and 4007.

ERISA section 4007(b)(1) provides that if a premium is not paid when due, PBGC is authorized to assess a penalty up to 100 percent of the overdue amount. The statute does not condition exercise of this authority on a finding of bad faith or lack of due care; it is solely based on the failure to pay.[1] However, the fact that assessment is authorized (rather than mandated) — and thus that PBGC could choose not to exercise the authority at all — indicates that PBGC has the flexibility to assess less than the full amount of penalty authorized and to reduce or eliminate a penalty.[2]

PBGC has provided for the exercise of its authority to impose penalties in the premium payment regulation. Under § 4007.8 of the regulation, late payment penalties accrue at the rate of 1 percent or 5 percent per month (or portion of a month) of the unpaid amount, except that the smallest penalty assessed is the lesser of $25 or the amount of unpaid premium. Whether the 1-percent or 5-percent rate applies depends on whether the underpayment is "self-corrected" or not. Self-correction refers to payment of the delinquent amount before PBGC gives written notice of a possible delinquency. One-percent penalties are capped by the regulation at 50

[1] The statute provides a waiver of penalty for 60 days if PBGC finds that timely payment would cause substantial hardship, but PBGC may not grant the waiver if it appears that the plan will be unable to pay the premium within 60 days. PBGC has found no record that such a waiver has ever been granted during the agency's 40+ years of existence.

[2] In contrast, the statute requires that interest on late premiums "shall be paid" at a specified rate for the overdue period.

percent and 5-percent penalties at 100 percent of the unpaid amount. Although penalties can be significant in some cases, they are generally assessed in amounts far less than the statutory maximum.

This two-tiered structure provides an incentive to self-correct and reflects PBGC's judgment that those that come forward voluntarily to correct underpayments deserve more forbearance than those that PBGC identifies through its premium enforcement programs.

The premium payment regulation and its appendix also authorize waivers of late premium payment penalties. For example, § 4007.8(f) provides an automatic waiver for cases where premiums are not more than seven days late. The regulation and appendix also provide for waivers based on facts and circumstances and give detailed guidance about some specific grounds for waivers, such as where there is reasonable cause for the late payment.[3] PBGC may also waive penalties where it finds that there are other appropriate circumstances.[4]

On April 28, 2016 (at 81 FR 25363), PBGC published a proposed rule to reduce penalty rates for late payment of annual (flat- and variable-rate) premiums and create a new automatic waiver of 80 percent of penalties at the higher rate for plans that demonstrate good compliance.[5] PBGC sought public comment on its proposal. Four comments were received. Three commenters supported the proposal. The other commenter expressed opposition, citing the importance of plan funding and payment of premiums. PBGC believes, as discussed below, that the reduction of premium late-payment penalties it is implementing will not adversely affect

[3] Section 22(a) of the appendix to the premium payment regulation says that there is reasonable cause for failure to pay a premium timely if the failure arises from circumstances beyond the payer's control and the payer could not avoid the failure by the exercise of ordinary business care and prudence. Examples are provided in sections 24 and 25 of the appendix: sudden and unexpected absence of a responsible individual, loss of records in a casualty or disaster, erroneous PBGC advice, and inability to get necessary information.

[4] See section 21(b)(5) of the appendix to the premium payment regulation.

[5] The proposal would not affect penalties for late payment of the termination premium under § 4007.13 of the premium payment regulation.

premium payments; and by reducing the cost of maintaining a plan, the penalty reduction appears more likely to improve than impair plan funding.

One commenter that supported the proposal urged PBGC to go further and apply the new penalty rules to all unresolved premium penalty cases. PBGC is adhering to its proposal to apply the new rules to premiums for plan years beginning after 2015. Future applicability is a reasonable approach for all kinds of new rules, whether more lenient (as here) or stricter. And to apply the new rules to some but not all late premium payments for pre-2016 years could be seen as an inequitable approach. A plan that corrected promptly — and whose case was therefore closed — would not get the benefit of the new, lower penalties; whereas one that delayed would be subject to lower penalties if its case was still open.

However, PBGC has concluded that — in pending requests for reconsideration for pre-2016 years — it is appropriate to use its pre-existing discretionary authority to take account of good compliance and prompt correction, among other facts and circumstances. While such exercises of discretion cannot be expected to turn on the same factual analysis or provide the same result as this final rule, they represent a similar quality of consideration as that provision.

The same commenter also urged PBGC to consider similar relief on a case-by-case basis for cases that have already been resolved under pre-amendment rules. The comment focused particularly on penalties that were large and “disproportionate” (under the circumstances) and arose from “inadvertence.” PBGC is not persuaded to take this course.

Because larger penalties correlate with larger premiums, larger plans, and larger employers, relief focused on larger penalties would be focused away from smaller plans and employers — at odds with PBGC’s goal of reducing burden for small entities. And since virtually every failure to pay premiums timely is inadvertent, inadvertence is neither a useful nor an appropriate criterion for granting penalty relief. Further, "disproportionality" is a subtle and subjective standard that could take time to apply consistently to a large number of cases. And significantly, the principle of finality is important in avoiding perpetual uncertainty about the outcomes of disputes. PBGC considers it inappropriate to reopen cases properly closed.

PBGC's action

PBGC is adopting the penalty relief it proposed but is clarifying the operation of the 80-percent waiver for compliant plans, as discussed below.

Reduced penalty rates

Over the years — especially in recent years — Congress has significantly increased PBGC premium rates. Since late payment penalties are a percentage of unpaid premium, the penalties have gone up in proportion to the increase in premiums. While it is not unfair to impose larger penalties for late payment of larger amounts, PBGC is sensitive to the fact that a penalty assessed today may be several times what would have been assessed years ago for the same acts or omissions involving a plan with the same number of participants and the same unfunded vested benefits.

PBGC has good reason to believe that smaller penalties will provide an adequate incentive for compliance by premium payers. PBGC's experience has been that compliance with the premium payment requirements is influenced primarily by the consistency of PBGC's penalty assessment activities, and only secondarily by the size of penalties assessed. PBGC observes that in most cases, a late payment is inadvertent and that assessment of a penalty sparks improvement of a plan's compliance systems whether the penalty is large or small. This experience supports the conclusion that if PBGC continues its current consistent enforcement efforts, assessing significantly lower penalties will yield a satisfactory level of compliance.

Accordingly, PBGC is cutting penalty rates and caps in half, so that the lower (self-correction) rate will be ½ percent with a 25 percent cap, and the higher rate will be 2½ percent with a 50 percent cap. PBGC is also eliminating the floor on penalty assessments, so that if the penalty assessment formula generates a penalty less than $25, it will not be automatically inflated to the floor amount.

Recognition of good premium compliance

Applying a lower penalty rate to self-correction recognizes that it is desirable for a plan to catch and fix its own mistakes, whatever its compliance history may be. PBGC has given this matter further thought and concluded that a demonstrated commitment to premium compliance is also worthy of recognition, even if a plan corrects an underpayment (of which it is likely unaware) only after notice from PBGC. PBGC believes such a commitment is evidenced where a plan has a history of consistent compliance and acts promptly to correct an underpayment when notified by PBGC. PBGC will therefore automatically waive 80 percent of penalties assessed at the higher (2½-percent) rate where the following two conditions are satisfied.

The first condition is that the plan have a five-year record of premium compliance. Generally, this means timely payment of all premiums for the five plan years preceding the year of the delinquency, as shown by the plan's premium filings. However, a late payment will not count against a plan if PBGC did not require payment of a penalty, such as where there was a waiver of the entire penalty. A plan that was not in existence as a covered plan for the full five years will be judged on its coverage years.

The second condition is prompt correction. Prompt correction, for this purpose, means that the premium shortfall for which a penalty is being assessed is made good no later than 30 days after PBGC notifies the plan in writing that there is or might be a problem. In other words, a plan that meets the first condition, and is assessed penalty at the 2½-percent rate, will qualify for an automatic 80-percent reduction if the premium shortfall is paid within 30 days.

PBGC has made two clarifying changes to the proposed regulatory text describing the 80-percent waiver. The amount waived is now described as 80 percent of the amount "assessed," rather than the amount "otherwise applicable." And the amount that must have been paid by the end of the 30-day period is now described as the "total amount of premium" for the year, rather than the "amount of unpaid premium." PBGC feels that the new formulations are clearer and more definite.

Effect of changes

PBGC typically discovers the most common premium payment errors fairly quickly — errors like failing to pay, sending payment that doesn't match the information filed, and so forth — and generally notifies plans of their delinquencies within a month or two after the due date. Thus, a plan that corrects an underpayment before or promptly after notice from PBGC typically owes no more than a few months' penalty.

For example, if a plan paid a $1 million premium two months late (after notice from PBGC), the penalty under the regulation as it existed before this amendment would be $100,000 (two months times 5 percent times $1 million). Under the revised regulation, the penalty would be $50,000 (two months times 2½ percent times $1 million). If the plan qualified for the compliant plan partial waiver, the penalty would be reduced by 80 percent, from $50,000 to $10,000.

In a typical case, the changes in this final rule will in effect make the penalty rate for compliant plans the same as the "self-correction" penalty rate. In clarification of the preamble to the proposed rule, however, this will not be true in the unusual case where a penalty cap comes into play. For while the penalty rates for self-correctors and others are in the ratio of one to five, the caps are in the ratio of one to two.

The effect of the changes is summarized in the following table on the assumption that the penalty caps do not come into play.

Good compliance history?	Monthly penalty rate if shortfall is corrected —		
	At or before date of PBGC notice	Within 30 days after PBGC notice	More than 30 days after PBGC notice
No	½ percent	2½ percent	2½ percent
Yes	½ percent	½ percent (after waiver)	2½ percent

Compliance with regulatory requirements

Executive Orders 12866 and 13563

PBGC has determined, in consultation with the Office of Management and Budget, that this final rule 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.

PBGC does not expect this final rule to cause a significant change in premium compliance patterns. As noted above, PBGC's experience is that prompt assessment, rather than amount, is the key to using penalties as a compliance tool. A reduction in the penalty cost of late payment is unlikely to reduce the incidence of late payment, but is also unlikely to encourage late payment: no penalty is better than a low penalty. Thus, the primary effect of the rule will be to save money for delinquent plans and reduce PBGC's penalty receipts. But PBGC assesses penalties not to generate income but to encourage compliance and sanction non-compliance. If PBGC can achieve the same level of timely payment while assessing lower penalties, higher penalties are inappropriate. And lower penalties may tend to encourage the continuation and adoption of defined benefit plans, a favorable outcome for plan participants.

PBGC estimates that this rule will reduce penalty assessments for late payment of premiums by $2 million per year.

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 this final rule, 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[6] and is consistent with certain

[6] See *e.g.*, special rules for small plans under part 4007 (Payment of Premiums).

requirements in title I of ERISA[7] and the Internal Revenue Code,[8] as well as the definition of a small entity that the Department of Labor (DOL) has used for purposes of the Regulatory Flexibility Act.[9] Using this proposed definition, about 64 percent (16,700 of 26,100) of plans covered by title IV of ERISA in 2010 were small plans.[10]

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

PBGC certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the amendments in this 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. This certification is based on the fact that small plans generally pay small premiums and thus small penalties for late payment of premiums. The average late premium penalty paid by a small plan for the 2014 plan year was about $160. This proposed rule would cut penalty payments in half, and thus create an

[7] 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.
[8] 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.
[9] See, *e.g.*, DOL's final rule on Prohibited Transaction Exemption Procedures, 76 FR 66637, 66644 (Oct. 27, 2011).
[10] See PBGC 2010 pension insurance data table S-31, http://www.pbgc.gov/Documents/pension-insurance-data-tables-2010.pdf.

average annual net economic benefit for each small plan of about $80. This is not a significant impact.

List of Subjects in 29 CFR Part 4007

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

In consideration of the foregoing, PBGC amends 29 CFR part 4007 as follows:

PART 4007 — PAYMENT OF PREMIUMS

■ 1. The authority citation for part 4007 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1303(A), 1306, 1307.

■ 2. In § 4007.8:

■ a. Paragraph (a) introductory text is amended by removing the words “paragraphs (b) through (g)” and adding in their place the words “paragraphs (b) through (h)”; and by removing the words “and is subject to a floor of $25 (or, if less, the amount of the unpaid premium)”;

■ b. Paragraph (a)(1) is amended by removing the words “a written notice” and adding in their place the words “the first written notice”; by removing the words “1 percent” and adding in their place the words “½ percent”; and by removing the words “50 percent” and adding in their place the words “25 percent”.

■ c. Paragraph (a)(2) is amended by removing the words “5 percent” and adding in their place the words “2½ percent”; and by removing the words “100 percent” and adding in their place the words “50 percent”.

■ d. Paragraph (h) is added.

The addition reads as follows:

§4007.8 Late payment penalty charges.

* * * * *

(h) *Demonstrated compliance.* PBGC will waive 80 percent of the premium payment penalty assessed under paragraph (a)(2) of this section if the criteria in paragraphs (h)(1) and (2) of this section are met.

(1) For each plan year within the last five plan years of coverage preceding the plan year for which the penalty rate is being determined, —

(i) Any required premium filing for the plan has been made; and

(ii) PBGC has not required payment of a penalty for the plan under this section.

(2) For the plan year for which the penalty rate is being determined, the total amount of premium is paid no later than 30 days after PBGC issues the first written notice as described in paragraph (a)(1) of this section.

Issued in Washington DC by

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