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PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4022, 4044, and 4062

RIN 1212-AB27

Benefit Payments and Allocation of Assets

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Proposed rule.

SUMMARY: This proposed rule would make changes to PBGC's regulations on Benefits Payable in Terminated Single-Employer Plans and Allocation of Assets in Single-Employer Plans. The changes would make clarifications and codify policies involving payment of lump sums, changes to benefit form, partial benefit distributions, and valuation of plan assets.

DATES: Comments must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] to be assured of consideration.

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.
>
> Mail or Hand Delivery: Regulatory Affairs Division, Office of General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW, Washington, DC 20005-4026.

All submissions must include the agency's name (Pension Benefit Guaranty Corporation, or PBGC) and the Regulation Identifier Number for this rulemaking (RIN 1212- AB27). Comments received will be posted without change to PBGC's website, http://www.pbgc.gov, including any personal information provided. 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 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: Joseph M. Krettek (krettek.joseph@pbgc.gov), Assistant General Counsel for Benefits, 202-326-4400 ext. 6772; or Deborah C. Murphy (murphy.deborah@pbgc.gov), Assistant General Counsel; Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW, Washington, DC 20005-4026. TTY users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4400 ext. 6772.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose and authority

This proposed rule would amend PBGC's regulations on benefit payments, allocation of assets, and termination liability to increase transparency of PBGC benefits administration, clarify and simplify language, increase flexibility, codify practices, and harmonize regulatory provisions with statutory provisions.

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, section 4022 of ERISA (Single-Employer Plan Benefits Guaranteed), section 4044 of ERISA (Allocation of Assets), and section 4062 of ERISA (Liability For Termination of Single-Employer Plans).

Major provisions

This proposed rule would:

Clarify that PBGC's rules on payment of a lump sum are unaffected by election of a lump-sum distribution before plan termination.

Change wording that refers to the dollar amount currently subject to cashout by statute ($5,000) so it refers instead to the statutory provision that specifies that dollar amount.

Clarify that a de minimis benefit of a participant who dies after plan termination will be paid as an amount due a decedent, not as a qualified preretirement survivor annuity.

Clarify that benefits will be paid to estates only as lump sums.

Clarify that accumulated mandatory employee contributions may not be withdrawn if benefits are in pay status when a plan becomes trusteed.

Clarify that the form of benefit in pay status when a plan becomes trusteed will not be changed.

Clarify that pre-trusteeship partial distributions are considered in determining benefits.

Require that fair market value or fair value, as appropriate, be used for purposes of valuing assets to be allocated to participants' benefits and in determining employer liability and net worth.

Background

The Pension Benefit Guaranty Corporation (PBGC) administers two insurance programs for private-sector defined benefit pension plans under title IV of the Employee Retirement Income Security Act of 1974 (ERISA): a single-employer plan termination insurance program and a multiemployer plan insolvency insurance program. This proposed rule deals only with single-employer plans. Covered plans that are underfunded may terminate either in a distress termination under section 4041(c) of ERISA or in an involuntary termination (one initiated by PBGC) under section 4042 of ERISA. When such a plan terminates, PBGC typically is appointed statutory trustee of the plan, and becomes responsible for paying benefits in accordance with the provisions of title IV.

The amount of benefits paid by PBGC under a terminated trusteed plan is determined by several factors. The starting point is the plan — PBGC pays only those benefits that the plan provides under the plan's terms. Thus, PBGC begins by determining each participant's accrued plan benefit.

After PBGC determines the amount of the participant's plan benefit, PBGC determines the amount it can guarantee. There are limitations on the benefits that PBGC can guarantee. One limitation, under sections 4001(a)(8) and 4022(a) of ERISA, is that PBGC guarantees only those benefits that are "nonforfeitable." For purposes of title IV, a benefit is nonforfeitable if the participant had satisfied the plan's (or ERISA's) requirements for the benefit by the plan's termination date (or, if applicable, by the bankruptcy filing date of the plan sponsor).[1]

Another limitation is the "maximum guaranteeable benefit" rule set forth in section 4022(b)(3) of ERISA, which caps the amount that PBGC can guarantee. The cap for a participant in a plan with a termination date in 2019 (or, if applicable, a bankruptcy filing date of the sponsor in 2019), who retires at age 65 under a straight-life annuity, is $5,607.95 per month. PBGC's guarantee is further limited by the "phase-in" rule, under which PBGC's guarantee of benefit increases during the 5-year period ending on the plan's termination date (or, if applicable, the bankruptcy filing date) is "phased in" at the number of years the benefit increase has been in effect, multiplied by the greater of: (1) 20 percent of the amount of the benefit increase; or (2) $20 per month.[2] The "phase-in" rule protects the title IV insurance program from losses when the sponsor of an underfunded pension plan increases benefits shortly before the plan terminates.

[1] *See* 29 CFR 4022.3(a)(1). For a plan that terminates while its sponsor is the subject of a bankruptcy or other insolvency proceeding, the petition or filing date of the proceeding is treated as the plan's termination date for purposes of the guarantee rules. *See* section 4022(g) of ERISA and 29 CFR 4022.3(b). *See also* section 404 of the Pension Protection Act of 2006, P.L. 109-280 (Aug. 17, 2006).
[2] *See* section 4022(b)(1), (b)(7), and (g) of ERISA.

Another limitation, the accrued-at-normal limitation, is equal to the dollar amount of a participant's benefit in the straight life annuity form at normal retirement age. The portion that exceeds this limitation is not a PBGC guaranteeable benefit.

In some cases a participant may receive more than his or her guaranteed benefit, depending on the allocation of the plan's assets under section 4044(a) of ERISA or the allocation of PBGC's recoveries under section 4022(c) of ERISA, or both. Title IV directs PBGC to allocate the assets of a terminated pension plan among the participants and beneficiaries of the plan in the order of six priority categories. Section 4044(a) gives highest priority to benefits derived from participants' own contributions (priority categories 1 and 2), next highest to benefits of certain retirees or persons who were or could have been in pay status three years before the plan terminated based on the lowest annuity benefit payable under the plan provisions at any time during the 5-year period ending on the termination date (priority category 3),[3] then to benefits guaranteed by PBGC (priority category 4), and last to nonguaranteed benefits (priority categories 5 and 6). PBGC allocates assets to benefits in priority category 3 — some of which may not be guaranteed — before guaranteed benefits in priority category 4. So, if a terminated plan's assets are sufficient to cover all benefits in priority category 3, PBGC will pay those benefits using the plan's assets, regardless of whether they are guaranteed.

PBGC values the benefits in each of a terminated plan's six priority categories and values the terminated plan's assets. PBGC values both benefits and plan assets as of the termination date. After PBGC values the plan benefits and assets, the assets are allocated to the priority

[3] For a plan that terminates while its sponsor is the subject of a bankruptcy or other insolvency proceeding, the 3-year and 5-year lookbacks under priority category 3 are based on the bankruptcy filing date rather than the plan's termination date. *See* section 4044(e) of ERISA.

categories, beginning with priority category 1, either until all benefits in all categories have been covered or until the assets are insufficient to pay all benefits within a category.

In determining a participant's PBGC-payable benefit under title IV of ERISA, PBGC takes into account any partial plan distribution (whether a lump sum or an annuity purchase) that the plan made to the participant before plan trusteeship. PBGC offsets the benefit payable under title IV by the amount of the earlier distribution. This includes accounting for the distribution in determining the participant's maximum guaranteeable benefit (i.e., the maximum benefit that PBGC can guarantee by law, based on, among other things, the plan's termination date (or, if applicable, bankruptcy filing date), the participant's age, and his or her form of benefit). PBGC reduces the amount otherwise guaranteed because a participant in receipt of a partial plan distribution is effectively receiving each month a portion of his or her plan benefits (even if the distribution was paid as a lump sum). Likewise, PBGC accounts for the earlier distribution in assigning a participant's benefit to the priority categories under section 4044(a) of ERISA. PBGC treats the amount paid as in the highest priority category in which the participant has benefits, because the participant has already received the distribution (or is receiving it as a separate annuity from an insurer).

PBGC prescribes the forms of benefit under which payment may be made. For a participant or beneficiary receiving an annuity benefit from the plan at the time PBGC becomes trustee of the plan, PBGC generally continues payment in the form being paid. For participants not yet in pay status, PBGC provides the plan's automatic forms for married and unmarried participants and a menu of optional PBGC annuity forms. Except in very limited circumstances, PBGC pays benefits as annuities, not single lump sums. One exception is where the total value of the participant's benefit is de minimis — i.e., $5,000 or less under current law. Another exception is where a portion of the participant's benefit is attributable to mandatory employee contributions. In this case, PBGC allows a participant to elect a return of his or her accumulated mandatory employee contributions in a lump sum.

A participant or beneficiary in pay status in almost all circumstances cannot change his or her elected form of benefit after PBGC becomes plan trustee. This rule is consistent with the practices of most ongoing plans and prevents adverse selection (for example, by allowing a participant to choose a single-life form after his or her spouse dies) and possible increased actuarial costs. PBGC has applied this rule both to participants and beneficiaries who went into pay status after PBGC became trustee and to participants and beneficiaries who were in pay status at the time PBGC became trustee and who later requested a change in benefit form from PBGC.

When an underfunded title IV-covered plan terminates, a claim arises in favor of PBGC and against the former sponsor and its controlled group for the difference between the plan's benefit liabilities and its assets. PBGC determines this claim for the amount of unfunded benefit liabilities as of the termination date and accrues interest from that date.[4] ERISA directs PBGC to collect any portion of this claim that exceeds 30 percent of the collective net worth of the former sponsor and its controlled group under commercially reasonable terms.[5] PBGC calculates its claim for unfunded benefit liabilities consistently with its determination of assets and benefit liabilities for purposes of the asset allocation under section 4044(a).

PBGC's regulations on Benefits Payable in Terminated Single-Employer Plans, 29 CFR part 4022, Allocation of Assets in Single-Employer Plans, 29 CFR part 4044, and Liability for Termination of Single-Employer Plans, 29 CFR part 4062 govern these areas. In the course of

[4] *See* sections 4001(a)(18) and 4062(b)(1) of ERISA.
[5] *See* section 4062(b)(2) of ERISA.

PBGC's regulatory review, PBGC has identified opportunities to improve benefits administration by making it more transparent — filling in gaps where guidance is needed, simplifying or removing language, codifying policies, and applying consistency in asset valuation. Accordingly, PBGC is proposing to amend these three regulations to make the changes described below. PBGC invites comment on the proposed changes.

A detailed discussion of the proposed regulatory changes follows.

Proposed Regulatory Changes

General prohibition of lump sums

Payments of lump sums at or soon before plan termination raise concerns about abuse of the insurance program. For example, a lump-sum payment reduces the amount of assets in an underfunded plan that could be allocated to the benefits of other participants, who may have benefits in higher priority categories, or that could fund guaranteed benefits. Thus, payment of such a lump sum could adversely affect other participants or PBGC.[6] As noted above, PBGC does not pay benefits in a lump sum except in certain limited circumstances (e.g., de minimis benefits). Section 4022.7(a) of the benefit payments regulation currently provides that "[i]f a benefit that is guaranteed under this part is payable in a single installment or substantially so under the terms of the plan, or an option elected under the plan by the participant, the benefit will not be guaranteed or paid as such," but PBGC will guarantee the annuity equivalent.

[6] As an indication that Congress was concerned about lump sums affecting other participants, section 4045 of ERISA authorizes PBGC to recover a portion of a lump sum made before plan termination. The statute allows PBGC to recover, for payments made within the three-year period immediately before termination, the amount which exceeds the present value of the guaranteed benefit that the participant would have received if he or she had elected to receive the benefit as an annuity.

Some have suggested that the prohibition on lump-sum payments does not apply to a participant who elected a lump sum before plan termination.[7] To remove any ambiguity in the regulation, PBGC proposes to amend § 4022.7(a) of the benefit payments regulation to make explicit (and consistent with PBGC's practice) that the prohibition on lump sums includes an optional lump sum elected under the plan by the participant but not paid before plan trusteeship. This rule would apply regardless of the reason for not paying the lump sum.

This change would not affect the payment of benefits in a lump sum in the circumstances permitted under § 4022.7(b) and (c) of the benefit payments regulation.

De minimis threshold

Section 203(e)(1) of ERISA and section 411(a)(11)(A) of the Internal Revenue Code (Code) set the maximum present value of a benefit that a pension plan may pay in a mandatory lump-sum distribution as $5,000. Before 1997, the maximum was $3,500. PBGC's benefit payments regulation contains three provisions that refer to this threshold, and the regulation had to be amended when the amount increased.[8] To avoid amending the regulation again if Congress changes the current threshold, PBGC proposes to amend the three provisions so that they refer not to a set amount, but to the dollar amount specified under section 203(e)(1) of ERISA.

The three provisions are §§ 4022.7(b)(1)(i) and (iii) and 4022.7(d)(1) of the current benefit payments regulation.

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[7] *See, e.g., Fisher v. PBGC*, 151 F.Supp.3d 159 (D.D.C. 2016) (remanded to PBGC for further explanation of its denial of a lump-sum distribution elected by a participant before the plan filed its distress termination notice). In July 2016, PBGC's Appeals Board issued a revised decision, which is the subject of continuing litigation in the same court, case no. 14-1275 (RDM). The Board's decision is available at https://www.pbgc.gov/sites/default/files/legacy/docs/apbletter/Guarantee-of-a-QSERP-On-Remand-2016-07-22.pdf.

[8] *See* 63 FR 38305 (July 16, 1998).

Deceased participants with de minimis benefits

Currently, § 4022.7(b)(1)(iii) of the benefit payments regulation provides that if (1) the lump sum value of a qualified preretirement survivor annuity (QPSA) is $5,000 or less, (2) the benefit is not yet in pay status, and (3) the participant dies after the termination date, then the surviving spouse may elect to receive the QPSA benefit as a lump sum or an annuity. Section 4022.7(b)(1)(iii) of the benefit payments regulation is silent about the lump-sum value of the participant's benefit, and the provision would appear to apply regardless, so long as the three conditions above are met. However, if the lump-sum value of the participant's benefit is de minimis as of the termination date under § 4022.7(b)(1)(i) of the benefit payments regulation and the participant dies after the termination date, PBGC's policy is to pay the benefit under the rules in subpart F of the benefit payments regulation ("Certain Payments Owed Upon Death"). Subpart F provides rules for the payment of benefits that may be owed to a deceased participant or beneficiary, such as the reimbursement of an earlier underpayment to the participant or beneficiary. PBGC treats de minimis benefits as due and owing as of the plan's termination date, because they are payable by PBGC at any time, regardless of the participant's age, and presumably most participants with de minimis benefits would apply for an immediate lump sum if PBGC were able to notify them of its availability upon plan termination.

PBGC proposes to amend § 4022.7(b)(1)(iii) of the benefit payments regulation to make clear that in the case of a participant with a de minimis benefit who dies after the plan's termination date and whose benefit is not yet in pay status, PBGC will treat the benefit as payable under subpart F. Furthermore, if a participant is married, PBGC will pay the full value of the participant's de minimis benefit to the surviving spouse (not limited to the value of a QPSA), with any interest owed. PBGC proposes to clarify § 4022.93 of subpart F ("Who will get the benefits PBGC may owe me at the time of my death?") by adding an exception to the current order of priority. Proposed new § 4022.93(d) would provide that the surviving spouse of a participant with a benefit that does not exceed the dollar amount specified in section 203(e)(1) of ERISA, who dies after the termination date when the benefit is not yet in pay status, will receive the full value of the de minimis benefit of a deceased participant. This benefit will normally exceed the value of the QPSA.

Additionally, PBGC proposes to clarify the form of PBGC's payment to a surviving spouse where the participant has a non de minimis benefit. In proposed new § 4022.7(b)(1)(iv), if the deceased participant's benefit exceeds the dollar amount specified in section 203(e)(1) of ERISA but the lump sum value of annuity payments under the QPSA does not exceed that amount, and the benefit is not in pay status, PBGC may pay the QPSA as a lump sum, or as an annuity, if available and elected by the surviving spouse. For example, if the value of the participant's benefit is $6,000 and the value of the QPSA is $3,000, PBGC will pay the QPSA of $3,000 to the surviving spouse in a lump sum, or as an annuity, if available, and if elected by the surviving spouse. (By contrast, if the value of the participant's benefit is $4,000, PBGC would treat that amount as owed to the participant and pay the full $4,000 to the spouse under subpart F of the benefit payments regulation.)

Payments to estates

PBGC may owe benefits to a deceased participant or beneficiary as of the date of his or her death. For example, benefits may be owed if the estimated benefit that PBGC paid before the date of death was less than the final benefit that PBGC determines should have been paid. Or, as described above, the participant may have been owed a de minimis benefit. Subpart F of the benefit payments regulation identifies the recipient of benefits owed at death. One possible payee is the participant's or beneficiary's estate.[9]

Currently, § 4022.7(b)(1)(iv) of PBGC's benefit payments regulation provides for a lump-sum payment "if so elected by the estate." The typical alternative to a lump sum is a life annuity — and a life annuity is inappropriate for an estate.

Accordingly, PBGC proposes to redesignate current § 4022.7(b)(1)(iv) as new § 4022.7(b)(1)(v) and eliminate the annuity election, so that lump-sum payment becomes automatic for an estate. The proposed change clarifies that PBGC will always pay benefits owed to an estate, regardless of the de minimis threshold, in a lump sum, with no annuity option.

Accumulated mandatory employee contributions

PBGC proposes to clarify that if a participant is not in pay status at the time the plan becomes trusteed, the participant may withdraw any accumulated mandatory employee contributions (AMECs) in a single lump sum at any time before going into pay status, if the plan would have permitted such a withdrawal. But if a participant is in pay status at the time the plan becomes trusteed, PBGC will not allow the participant to change his or her benefit and elect a withdrawal of his or her AMECs.

Mandatory employee contributions (MECs) are contributions that are required as a condition of employment with the plan sponsor or of obtaining benefits under the plan attributable to employer contributions. AMECs are MECs credited with interest at a specified rate, as described under section 411(c)(2) of the Code. In general, AMECs provide for an employee-derived benefit and a preretirement death benefit. Some plans provide that participants may withdraw their AMECs before retirement.

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[9] *See* 29 CFR 4022.93(a).

For a terminated plan, section 4044(a)(2) of ERISA makes the portion of a participant's benefit derived from his or her AMECs a priority category 2 (PC2) benefit. Section 4022.7(b)(2) of PBGC's benefit payments regulation permits PBGC to pay a participant his or her AMECs in a lump sum if two conditions are met:[10] the participant elects payment of the AMECs as a lump sum within 61 days after he or she receives notification that an election is available; and payment of the AMECs as a lump sum is consistent with the plan's provisions.

PBGC proposes to simplify administration of the AMEC provisions by amending § 4022.7(b)(2)(i) to remove the 61-day limit.

Although plans typically offer only a lump-sum return of AMECs, § 4022.7(b)(2)(i) of the benefit payments regulation allows a participant to withdraw his or her AMECs not just in a single lump sum, but in "a series of installments." Providing this treatment has administrative costs for PBGC, and the option has low value to participants. If a participant wishes to receive his or her AMECs over time, he or she can elect to have the AMECs increase his or her monthly annuity benefit. PBGC sees no compelling reason for the regulation to continue including this separate option, and proposes to eliminate it.

Section 4022.7(b)(2)(ii) of the benefit payments regulation currently permits a participant who has already begun receiving from the plan an annuity that is partially derived from AMECs to elect a return of his or her AMECs after plan termination. This provision is inconsistent with the general rule (discussed below under *Change in benefit form*) that once a benefit is in pay status, no change is permitted. In practice, PBGC does not give a participant who was in pay status at the time the plan becomes trusteed the option of withdrawing AMECs after payments

[10] PBGC's regulation makes an exception for benefits attributable to a rollover from a defined contribution plan. Such rollovers are described in IRS's guidance on the purchase of additional benefits from a defined benefit plan. *See* IRS Rev. Rul. 2012-4. These benefits are generally treated as AMECs, but PBGC does not allow payment of them in a lump sum. *See* 29 CFR 4022.7(b)(2)(iii).

have begun. PBGC proposes to clarify that it does not permit participants in pay status to elect to withdraw AMECs. The proposed rule would amend § 4022.7(b)(2)(ii) to provide that if a participant is in pay status at the time the plan becomes trusteed,[11] PBGC will not allow the participant to withdraw any AMECs.

Change in benefit form and benefit corrections

In almost all plans, changes in the form of payment after benefit commencement — for example, by allowing a participant to add or eliminate a survivor benefit or substitute one beneficiary for another — are not permitted. Such changes — made with information not available when benefit payments began — could result in increased actuarial costs to a plan. For example, a participant might, after starting a straight-life annuity, learn that his or her health is failing and therefore wish to add a survivor benefit to continue payments after his or her death.

Similarly, PBGC generally does not allow a participant to change his or her elected form of benefit after payments begin. Section 4022.8(d) of PBGC's current benefit payments regulation provides that "[o]nce payment of a benefit starts, the benefit form cannot be changed." However, § 4022.8(a) provides, "[t]his section applies where benefits are not already in pay status."

The regulation was intended to prevent changes in the form of a benefit commenced both before and after PBGC trusteeship.[12] To remove any doubt that the benefit form may not be changed once payment of a benefit begins (at any point in time), PBGC proposes to amend

[11] Although ERISA provides only that PBGC "may" become the trustee (*see* section 4042(b)(1) of ERISA), in practice PBGC has been appointed trustee of almost every underfunded plan that has terminated since 1974, and for this reason PBGC's regulations assume PBGC trusteeship of an underfunded terminated plan.

[12] The preamble to the final rule adopting § 4022.8 (67 FR 16950) explains that "[i]f a participant's benefit is already in pay status, PBGC continues to pay the benefit (subject to the limitations in title IV of ERISA) in the form being paid."

§ 4022.8(a) to remove the words "[t]his section applies where benefits are not already in pay status."

Although PBGC does not generally allow a change in the benefit form after benefits begin, PBGC's existing policies recognize that PBGC sometimes makes errors in the benefit estimates it sends to participants and beneficiaries, which may result in benefit elections that would not have been made if PBGC had provided more accurate estimates. Accordingly, PBGC proposes under new § 4022.9(d) to allow PBGC to make limited exceptions to the rule prohibiting changes in benefit form for such errors. Proposed § 4022.8(d) would provide that, subject to benefit corrections in § 4022.9(d), once payment of a benefit begins the form cannot be changed, regardless of whether PBGC or the plan put the participant into pay status.

Under PBGC's current policy, a change in the form of benefit is permitted under only two circumstances: (1) when PBGC erred by 10 percent or more in the relative value of optional forms when providing a benefit estimate (i.e., PBGC used incorrect form conversion factors), and (2) when PBGC erred by 10 percent or more in the early retirement factor used to provide a benefit estimate. PBGC proposes to clarify the circumstances in which PBGC would permit a change in form of benefit. Proposed § 4022.9(d) would provide that PBGC may prescribe the time and manner for correcting errors, in benefit estimates and in initial determinations, that affect benefit form and benefit starting dates. Current paragraph (d) of § 4022.9 would become paragraph (e) of § 4022.9. In addition, PBGC proposes to revise the heading of § 4022.9 to reflect the promulgation of paragraph (d) concerning benefit corrections. The proposed heading for § 4022.9 would be: "§ 4022.9 Time of Payment, benefit applications and corrections."

Partial benefit distributions

The proposed rule would clarify that PBGC takes into account pre-trusteeship partial plan distributions (in lump sum or annuity form) when determining a participant's maximum guaranteeable benefit (MGB) and the benefits assignable to the section 4044(a) priority categories.[13]

A participant in receipt of a partial plan distribution (including a rehired participant) is effectively already receiving each month a portion of his or her plan benefits (even if it was paid as a lump sum). PBGC takes the partial plan distribution into account in determining the participant's MGB under section 4022 of ERISA and in allocating assets to the participant's benefits under section 4044 of ERISA to avoid treating other participants unfairly and applying PBGC insurance funds improperly. PBGC has a longstanding policy that a pre-trusteeship partial plan distribution (whether a lump sum or an annuity purchase) is taken into account when PBGC determines a participant's benefit.

For purposes of section 4022, PBGC offsets the benefit payable under title IV of ERISA by the partial plan distribution in determining a participant's MGB.[14] If PBGC were to disregard the partial distribution, it could guarantee the participant a larger total benefit than allowed under sections 4022(a) and (b)(3) of ERISA, because the limitations apply to a participant's benefit under a plan, not just the portion that remains to be distributed as of the termination date. And the participant might receive a larger guaranteed benefit than another participant who was identically situated except that he or she did not receive a partial distribution. For similar

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[13] This rulemaking treats a lump sum or annuity purchase for a portion of a participant's plan benefit as a "partial plan distribution," but it does not attempt to provide a complete or exhaustive definition of the term.

[14] *See, e.g.,* PBGC Op. Ltr. 86-28 (concluding that PBGC must deduct an annuity purchase when calculating the participant's MGB). PBGC's position has been upheld in court. *See Lami v. PBGC,* 1989 U.S. Dist. LEXIS 19153 (W.D. Pa. 1989).

reasons, PBGC takes account of a partial plan distribution when assigning benefits to the priority categories under section 4044(a) of ERISA.

To codify PBGC's treatment of a partial plan distribution when calculating the MGB, PBGC proposes to add a new provision to § 4022.23 of the benefit payments regulation (dealing with computation of maximum guaranteeable benefits). The new provision would explain how PBGC adjusts the MGB to account for a partial distribution. If the remainder annuity starts on the *same* date as the partial lump sum or purchased annuity, PBGC subtracts the monthly annuity equivalent of the partial plan distribution (generally determined as of the starting date of the distribution and using plan factors and assumptions) from the participant's MGB and adjusts the participant's MGB based on his or her age as of the plan's termination date (or, if applicable, bankruptcy filing date). If the distribution occurred after the plan's termination date (or, if applicable, bankruptcy filing date), PBGC subtracts the monthly annuity equivalent from the MGB and adjusts the MGB based on age at the distribution date.[15] Section 4022.23(c) of the benefit payments regulation therefore provides that the MGB should be adjusted for the participant's age and benefit form as of the later of the plan's termination date or the starting date of the purchased annuity or the monthly annuity equivalent.

If the partial plan distribution occurred *before* the starting date of the remainder annuity, and the remainder annuity starts *after* the plan's termination date (or, if applicable, bankruptcy filing date), then PBGC follows a two-step approach. PBGC first calculates the percentage of the MGB as of (i) the plan's termination date (or bankruptcy filing date) or (ii) the date of the partial distribution (if later), that the partial distribution represents. PBGC then multiplies the

[15] If the starting dates of the partial plan distribution and the remainder annuity are different, but both dates occur before the plan's termination date (or, if applicable, bankruptcy filing date), PBGC adjusts the MGB based on age as of the plan's termination date (or, bankruptcy filing date).

MGB applicable to the starting date of the remainder annuity by the percentage calculated in the first step. (The MGB determined in the second step will reflect any increases in age as of the later starting date of the remainder annuity.)[16]

For purposes of assigning benefits to the priority categories under section 4044(a) of ERISA, PBGC treats a partial plan distribution as reducing the participant's benefit in the highest priority (lowest-number) category in which he or she has benefits. (In most cases, this would be PC3 or PC4.) PBGC proposes to codify this treatment in § 4044.10 of its regulation on Allocation of Assets in Single-Employer Plans (dealing with manner of allocation).

PBGC's reasons for this treatment are similar to its reasons for adjusting the MGB to reflect a partial distribution. In substance, the participant has already received the highest possible priority for the portion of the benefit covered by the partial plan distribution because he or she already has the benefit in hand. Also, if PBGC were to do otherwise, partial plan distributions could further distort the section 4044 allocation, because the participants who received partial plan distributions would effectively be getting a double priority: once for the partial plan distribution, and again for some or all of the remainder annuity. In many cases, this would disadvantage others in the same plan with benefits in the same priority category or higher priority categories, who had not received a partial distribution, because fewer assets would be allocated to their priority benefits.

To account for partial plan distribution, PBGC first values benefits in each of the priority categories, disregarding the distribution. PBGC then subtracts the monthly annuity equivalent of the partial plan distribution (generally determined as of the starting date of the remainder annuity, but no later than the plan's termination date, and using plan factors and assumptions)

[16] This approach measures the percentage of the MGB that PBGC treats as "used up" upon receipt of the partial plan distribution and applies the remaining balance of the MGB to the remainder annuity.

from the highest priority category in which the participant has benefits, continuing to the next highest priority category until the partial plan distribution has been fully accounted for.

The proposed amendments to § 4022.23 of the benefit payments regulation and § 4044.10(b) of the asset allocation regulation would codify the above treatment of partial plan distributions. PBGC also proposes to include an example in § 4022.23 of the benefit payments regulation to show how PBGC reduces the MGB for a partial plan distribution.

Valuation methodology

PBGC proposes to amend its asset allocation regulation and its regulation on Liability for Termination of Single-Employer Plans (29 CFR part 4062) to apply fair market value or fair value, as appropriate, for purposes of allocating assets to participants' benefits and determining and collecting employer liability for plan underfunding.

When an underfunded pension plan terminates, PBGC must allocate the plan's assets among participants' benefits under section 4044 of ERISA, and it must determine the amount of the plan's unfunded benefit liabilities, i.e., the shortfall in assets to cover benefit liabilities, and collect it from the contributing sponsor and its controlled group under section 4062 of ERISA. PBGC's collection of the shortfall may depend on the amount of the shortfall and the net worth of the contributing sponsor and each member of its controlled group. Thus, it is necessary — in addition to valuing the plan's benefit liabilities — to value the plan's assets (to allocate to benefits and determine the shortfall) and the contributing sponsor's and controlled group members' net worth (to determine how PBGC is to collect the employer liability for the shortfall).

The statute does not explicitly require that these valuations be made in a consistent manner. It seems fair and reasonable, however, to use the same methodology to value plan assets for purposes of both allocating assets to benefits and determining the amount of unfunded benefit liabilities. It likewise seems fair and reasonable to use the same methodology for determining both employer liability and employer net worth.

The statute also does not specify the methodologies for valuing assets for purposes of allocating them to benefits among the priority categories or for determining employer net worth. For purposes of employer liability, section 4062(b)(1) of ERISA says that the liability is the plan's "unfunded benefit liabilities," which under section 4001(a)(18) of ERISA is to be determined using the "current value" of plan assets. "Current value" is not defined in title IV.

Section 4044.41(b) of the asset allocation regulation provides that plan assets are to be valued for allocation purposes at their fair market value.[17] Likewise, § 4062.4(c) of the employer liability regulation provides that a person's net worth is equal to its fair market value. Section 4062.3 of the employer liability regulation simply repeats the statutory direction that employer liability equals the total amount of unfunded benefit liabilities. PBGC has in practice used fair market value for this purpose. Thus, the valuation methodology for allocation, employer liability, and net worth is consistent.

PBGC believes that the value of pension plan assets determined under a "fair value" framework may be considered a reasonable estimate of value for the same assets for purposes of satisfying the above fair market value requirements for allocating assets, determining employer liability, and calculating net worth of liable persons. This view is reflected in PBGC's plan asset valuation procedures. PBGC, therefore, currently applies a fair value methodology in some cases. These cases include, but are not limited to, those where PBGC cannot reasonably obtain

[17] Section 4001.2 of PBGC's regulation on Terminology defines "fair market value" as "the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts."

the necessary data or inputs necessary to establish the fair market value, such as hedge funds, private equity funds and other hard to value assets.

The Financial Accounting Standards Board Accounting Standards Codification Section 820, *Fair Value Measurements and Disclosures* (ASC 820), establishes a framework for measuring fair value in accordance with accounting principles generally accepted in the United States of America (U.S. GAAP). Under PBGC's procedures, "hard to value" assets are generally Level 3 assets under the "fair value" hierarchy of ASC 820. Accordingly, to conform PBGC's regulations to current practice, PBGC has concluded that it would be appropriate to adopt the valuation methodologies of fair market value as defined in § 4001.2 of PBGC's regulation on Terminology or fair value in accordance with U.S. GAAP, as appropriate, for purposes of allocating assets, determining employer liability, and calculating net worth of liable persons. PBGC proposes to amend its asset allocation and employer liability regulations to achieve this result.

Applicability

The amendments under this proposed rule would apply to plan terminations initiated on or after the effective date of the final rule. However, most of the amendments codify policies and practices that PBGC has followed for many years, and PBGC will continue to follow those policies and practices in the interim.

Compliance with Rulemaking Guidelines

Executive Orders 12866, 13563, and 13771

PBGC has determined that this rule is not a "significant regulatory action" under Executive Order 12866 and Executive Order 13771. Accordingly, this proposed rule is exempt from Executive Order 13771, and the Office of Management and Budget has not reviewed the proposed rule under Executive Order 12866.

Executive Order 12866 directs 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).

Although this is not a significant regulatory action under E.O. 12866, PBGC has examined the economic and policy implications of this proposed rule and has concluded that there will be no significant economic impact as a result of the proposed amendments to PBGC's regulations. Most of the proposed amendments merely codify existing PBGC policies and practices. Making these policies and practices more transparent may decrease uncertainty among those affected by PBGC benefit determinations, reducing the need for inquiries, consultations or appeals. The proposed change to PBGC's regulation on valuation methodology should have no impact, because use of fair value instead of fair market value will not result in values that are regularly higher or lower; in other words, use of fair value may result in a slightly higher value in some cases and a slightly lower value in other cases.

Section 6 of Executive Order 13563 requires agencies to rethink existing regulations by periodically reviewing their regulatory program for rules that "may be outmoded, ineffective, insufficient, or excessively burdensome." These rules should be modified, streamlined, expanded, or repealed as appropriate. PBGC has identified the proposed amendments to the regulations on benefit payments and allocation of assets as consistent with the principles for review under E.O. 13563. PBGC believes the proposed codification of policies on how benefits are paid provides clearer guidance to the public, and that the changes to the asset valuation rule streamline the valuation process and incorporate current actuarial best practices.

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 proposed 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 this proposed 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[18] and is consistent with certain requirements in title I of ERISA[19] and the Code,[20] as well as the definition of a small entity that the Department of Labor has used for purposes of the Regulatory Flexibility Act.[21]

Further, while some large employers that terminate plans may have small plans that terminate along with larger ones, 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

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

[19] 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.

[20] 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.

[21] *See, e.g.,* DOL's final rule on Prohibited Transaction Exemption Procedures, 76 FR 66,637, 66,644 (Oct. 27, 2011).

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 amendments to the benefit payments regulation to implement this proposed rule.

On the basis of its proposed definition of small entity, PBGC certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the amendments in this proposed rule would not have a significant economic impact on a substantial number of small entities. All or virtually all of the effect of this proposed rule will be on PBGC or persons who receive benefits from PBGC. Accordingly, as provided in section 605 of the Regulatory Flexibility Act, sections 603 and 604 do not apply.

List of Subjects

29 CFR Part 4022

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

29 CFR Part 4044

Employee benefit plans, Pension insurance.

29 CFR Part 4062

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

For the reasons given above, PBGC proposes to amend 29 CFR parts 4022, 4044, and 4062 as follows.

PART 4022 — BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

1. The authority citation for part 4022 continues to read as follows:

Authority: 29 USC 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

2. Amend § 4022.7 by, revising paragraphs (a) and (b), and removing the phrase "is $5,000 or less" and adding in its place "does not exceed the dollar amount specified in section 203(e)(1) of ERISA" in paragraph (d)(1).

The revisions read as follows:

§ 4022.7 Benefits payable in a lump sum.

(a) *Alternative benefit.* Except as provided in this part, PBGC pays benefits only in annuity form. If a benefit that is guaranteed under this part is payable in a lump sum or substantially so under the terms of the plan, including an option elected under the plan by the participant before plan trusteeship, PBGC will not guarantee the benefit in such form but instead will guarantee an actuarially equivalent life annuity.

(b) *Payment by PBGC*--(1) *Payment in lump sum.* Notwithstanding paragraph (a) of this section:

(i) *In general.* If the lump sum value of a benefit (or of an estimated benefit) payable by PBGC and calculated as of the termination date does not exceed the dollar amount specified in section 203(e)(1) of ERISA and the benefit is not yet in pay status as of the date PBGC becomes trustee, the benefit (or estimated benefit) may be paid in a lump sum.

(ii) *Annuity option.* If PBGC would otherwise make a lump sum payment in accordance with paragraph (b)(1)(i) of this section and the monthly benefit (or the estimated monthly benefit) is equal to or greater than $25 (at normal retirement age and in the normal form for an unmarried participant), PBGC will provide the option to receive the benefit in the form of an annuity.

(iii) *Deceased participants after plan termination*. If the lump sum value of a participant's benefit calculated as of the termination date does not exceed the dollar amount specified in section 203(e)(1) of ERISA, and the participant dies after the plan's termination date and before the benefit is in pay status, PBGC will treat the benefit as owed to the participant at the time of his or her death and the rules in subpart F of this part apply.

(iv) *Payment of de minimis QPSA as lump sum or annuity*. If the lump sum value of a participant's benefit calculated as of the termination date exceeds the dollar amount specified in section 203(e)(1) of ERISA, the lump sum value of annuity payments under the qualified preretirement survivor annuity (or under an estimated qualified preretirement survivor annuity) does not exceed that amount, and the participant dies after the plan's termination date and before the benefit is in pay status, then the qualified preretirement survivor annuity (or the estimated qualified preretirement survivor annuity) may be paid in a lump sum, or as an annuity, if available, and if elected by the surviving spouse. For example, if the value of the participant's benefit is $6,000 and the value of the qualified preretirement survivor annuity is $3,000, PBGC will pay the qualified preretirement survivor annuity as a lump sum, or as an annuity, if available, and if elected by the surviving spouse.

(v) *Payments to estates.* PBGC will pay any annuity payments payable to an estate in a lump sum without regard to the threshold in paragraph (b)(1)(i) of this section. PBGC will discount the annuity payments using the Federal mid-term rate (as determined by the Secretary of the Treasury pursuant to section 1274(d)(1)(C)(ii) of the Code) applicable for the month the participant died based on monthly compounding.

(2) *Return of employee contributions*--(i) *In general.* Notwithstanding any other provision of this part, PBGC will pay as a lump sum instead of as an annuity, the value of the

portion of an individual's basic-type benefit derived from accumulated mandatory employee contributions, if payment in a lump sum is consistent with the plan's provisions and if the individual elects such payment either before or at the time he or she starts receiving annuity payments from PBGC for the remainder of his or her benefit. For purposes of this part, the portion of an individual's basic-type benefit derived from accumulated mandatory employee contributions is determined under § 4044.12 of this chapter (priority category 2 benefits), and the value of that portion is computed under the applicable rules contained in part 4044, subpart B of this chapter.

(ii) *Benefits in pay status.* If an individual is in pay status with an annuity as of the date the plan becomes trusteed, and if the individual did not elect to withdraw any accumulated mandatory employee contributions, PBGC will not allow the individual to withdraw any portion of the benefit derived from accumulated mandatory employee contributions as a lump sum.

* * * * *

3. Amend § 4022.8 by, removing the phrase "This section applies where benefits are not already in pay status." from paragraph (a) introductory text, and revising paragraph (d).

The revision reads as follows:

§ 4022.8 Form of payment.

* * * * *

(d) *Change in benefit form.* Subject to benefit corrections in § 4022.9(d), once payment of a benefit starts, the benefit form cannot be changed, regardless of whether the participant or beneficiary was put into pay status by the plan before the date PBGC becomes trustee of the plan.

* * * * *

4. Amend § 4022.9 by:

a. Revising the section heading;

b. Redesignating paragraph (d) as paragraph (e); and

c. Adding new paragraph (d).

The revision and addition read as follows:

§ 4022.9 Time of payment; benefit applications and corrections.

* * * * *

(d) *Benefit corrections*. PBGC may prescribe the time and manner for corrections of errors that affect benefit form and benefit starting dates.

* * * * *

5. Amend § 4022.23 by:

a. Adding a sentence to the end of paragraph (a);

b. Redesignating paragraph (g) as paragraph (h);

c. Removing the phrase "in paragraphs (c), (d), and (f) of this section" and adding in its place "in paragraphs (c), (d), (f), and (g) of this section" in the first sentence of newly redesignated paragraph (h); and

d. Adding new paragraph (g).

The additions read as follows:

§ 4022.23 Computation of maximum guaranteeable benefits.

(a) *** * *** In the case of a partial plan distribution, the maximum guaranteeable monthly amount computed under this section will be reduced in accordance with paragraph (g) of this section.

*** * * * ***

(g) *Partial plan distribution*--(1) *General.* A partial plan distribution means a distribution (for example, a lump-sum payment or an annuity purchase) of a portion of the participant's accrued benefit under the plan. In the case of a lump-sum payment, the starting date of the partial plan distribution for purposes of this subsection is the date on which the lump-sum payment is made. In the event the participant has received a partial plan distribution, PBGC reduces the monthly maximum guaranteeable benefit amount computed under paragraphs (a) through (f) and (h) of this section as follows:

(i) In a case in which the partial plan distribution and the remainder annuity started on the same date, PBGC subtracts the monthly annuity equivalent of the partial plan distribution (generally determined as of the starting date of the distribution and using plan factors and assumptions) from the participant's monthly maximum guaranteeable benefit as of the termination date (or, if payments began after the termination date, as of the starting date of the partial plan distribution and the remainder annuity). If the starting dates were different but both occurred on or before the termination date, PBGC subtracts the monthly annuity equivalent of the partial plan distribution (generally determined as of the starting date of the partial plan distribution) from the participant's monthly maximum guaranteeable benefit as of the termination date.

(ii) In a case in which the partial plan distribution and the remainder annuity do not start on the same date, and in which the starting date of the remainder annuity occurs after the termination date, PBGC:

(A) Determines a percentage, by dividing the monthly annuity equivalent of the partial plan distribution (generally determined as of the starting date of the partial plan distribution and using plan factors and assumptions) by the participant's monthly maximum guaranteeable benefit as of the termination date (or, if the partial plan distribution occurred after the termination date, as of the starting date of the distribution); and then

(B) Reduces the participant's monthly maximum guaranteeable benefit applicable to the starting date of the remainder annuity by the percentage determined in paragraph (g)(1)(ii)(A) of this section.

(2) *Example.* Participant A received a lump-sum partial plan distribution that was equivalent to a straight-life annuity of $1,834.16 per month commencing on the date the distribution occurred. When the plan later terminates in 2016, Participant A is age 59 and has a monthly maximum guaranteeable benefit of $3,056.93 per month. PBGC determines a percentage with respect to the partial plan distribution as follows: $1,834.16/$3,056.93 = 60%. Five years after the termination date, Participant A starts his remainder annuity. By this date, Participant A's monthly maximum guaranteeable benefit (adjusted for age and benefit form as of the annuity starting date of the remainder annuity) is $4,660.56 per month, which PBGC reduces by 60 percent. Thus, PBGC will guarantee no more than $1,864.22 per month of Participant A's remainder annuity.

* * * * *

6. Amend § 4022.93 by, revising the section heading and paragraph (a) introductory text and adding paragraph (d) to read as follows:

§ 4022.93. Who will get benefits PBGC may owe me at the time of my death?

(a) *In general.* Except as provided in paragraphs (b), (c), and (d) of this section, we will pay any benefits we owe you at the time of your death to the person(s) surviving you in the following order—

* * * * *

(d) *Lump sum payments to surviving spouses.* For a deceased participant whose benefit has a lump sum value not exceeding the dollar amount specified in section 203(e)(1) of ERISA, payment will be made to the surviving spouse (if any) if such spouse would otherwise be entitled to receive a qualified preretirement survivor annuity under section 205(a)(2) of ERISA, and the surviving spouse will receive highest priority under paragraph (a) of this section.

PART 4044 — ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS

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

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

8. Amend § 4044.10 by:

a. Redesignating the text of paragraph (b) as paragraph (b)(1);

b. Adding a subject heading for paragraph (b)(1); and

c. Adding paragraph (b)(2).

The additions read as follows:

§ 4044.10 Manner of allocation.

***   *   *   *   ***

(b) *Assigning benefits*--(1) *In general.* *   *   *

(2) *Partial plan distribution.* A partial plan distribution means a distribution (for example, a lump-sum payment or an annuity purchase) of a portion of the participant's accrued benefit under the plan. In the event the participant has received a partial plan distribution, PBGC adjusts the participant's benefits assigned to the priority categories under section 4044(a) of ERISA by:

(i) Determining the amount of the participant's benefit in each of the priority categories, treating the participant's total benefit as the sum of the partial plan distribution and remainder benefit; and

(ii) Reducing the otherwise applicable amount in the highest priority category in which the participant has benefits by the annuity equivalent of the partial plan distribution (generally determined as of the starting date of the remainder annuity, but no later than the plan's termination date, using plan factors and assumptions). If the amount of the partial plan distribution exceeds the benefit in the highest category, PBGC reduces the otherwise applicable amount in the next highest priority category by the excess.

*** * * * ***

9. Amend § 4044.41 by revising paragraph (b) to read as follows:

§ 4044.41 General valuation rules.

*** * * * ***

(b) *Valuation of assets.* Plan assets generally will be valued at their fair market value as defined in § 4001.2 of this chapter. As appropriate, plan assets will be valued at their fair value in accordance with accounting principles generally accepted in the United States of America (U.S. GAAP).

PART 4062 — LIABILITY FOR TERMINATION OF SINGLE-EMPLOYER PLANS

10. The authority citation for part 4062 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1362-1364, 1367, 1368.

11. Amend § 4062.4 by revising paragraph (c) introductory text to read as follows:

§ 4062.4 Determinations of net worth and collective net worth.

* * * * *

(c) *Factors for determining net worth.* A person’s net worth is to be determined on the basis of the factors set forth below in this section, to the extent relevant; different factors may be considered with respect to different portions of the person’s operations. Generally, fair market value, as defined in § 4001.2 of this chapter, is to be used. As appropriate, fair value in accordance with accounting principles generally accepted in the United States of America (U.S. GAAP) is to be used.

Issued in Washington, DC.

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