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PBGC Proposes Changes to Reportable Events Rules

The PBGC has proposed changes to its reportable events rules to conform to the provisions of the Pension Protection Act of 2006. They would also streamline some of the current requirements and eliminate most of the automatic waivers and extensions.

Background

ERISA Section 4043 requires that the PBGC be notified by the administrator or sponsor of a defined benefit plan when certain reportable events occur. These notifications are designed to make the PBGC aware of events that might lead to additional underfunding of a plan or a possible plan termination.

Certain provisions of the Pension Protection Act of 2006 (PPA) have an impact on the PBGC's reportable events regulations. Therefore, the PBGC has now issued proposed regulations which would amend the current regulations to comply with the PPA provisions, and otherwise update and streamline existing rules.

Proposed Regulations

Advance Reporting Test

The PBGC must be notified of reportable events within 30 days after they occur. For certain events relating to plans of non-public sponsors, advance reporting is also required no later than 30 days before the occurrence of the event, if specified conditions relating to the funding level of all plans in the controlled group are met as of the last day of the prior plan year. However, the amounts needed to determine the funding level are already prepared for purposes of calculating PBGC premiums for the prior plan year as of the plan's valuation date, which in most cases, is the first day of the plan year.

The proposed regulations would change the determination date for the funding level from the last day of the prior plan year to the valuation date of the prior plan year. This would reduce the number of required calculations and would also enable sponsors to determine whether they are subject to the advance reporting requirements before an event occurs.

Automatic Waivers and Extensions

The current regulations provide for automatic waivers and extensions for most reportable events (e.g., for small plans, for well funded plans). The proposed regulations would eliminate most of the automatic waivers and extensions, and include tables showing a list of the current and proposed waivers and extensions for each reportable event.

> ***BUCK COMMENT.*** *The PBGC feels that the current waivers and extensions sometimes prevent early warnings of potential problems. If notified of events sooner, it would have the opportunity to consult with plan sponsors to look for ways to avoid further underfunding or distress terminations, or to reduce the impact of terminations on the PBGC.*

Active Participant Reductions

Facility Closings. A reduction in active participants that results from a substantial cessation of operations (e.g., a facility closing) may be required to be reported to the PBGC under ERISA Section 4063(a). To avoid duplicative reporting, the proposed regulations would not require PBGC notification of an active participant reduction reportable event if (i) it falls under the provisions of Section 4062(e) or Section 4063(a), and (ii) it is reported timely to the PBGC as required under Section 4063(a).

Frequency of Reporting. The proposed regulations would waive reporting of an active participant reduction if another active participant reduction was reported within the past year.

Failure to Contribute

A reportable event occurs when required contributions are not made. The proposed regulations would clarify that missed contributions required as a condition of a funding waiver (in addition to contributions required to amortize a funding waiver) would trigger the requirement to report due to failure to make required contributions.

Inability to Pay Benefits When Due

Under the proposed regulations, reporting for the failure to pay benefits when due would only apply to small plans that are exempt from the liquidity shortfall provisions (which impose more stringent contribution requirements where liquid assets are insufficient to cover anticipated benefit payments).

Transfer of Benefit Liabilities

Cashouts and Annuitizations. The proposed regulations would provide that cashouts (i.e., lump sum payments) and purchases of irrevocable commitments to provide an annuity do not constitute transfers of benefit liabilities that must be reported.

Plans of Other Members of Controlled Group. Currently, a transfer of benefit liabilities requires reporting for the plan that transfers benefit liabilities and for all other plans in the controlled group. However, a waiver exists that limits the post-event reporting to only the transferor plan. No such waiver exists for advance reporting.

The proposed regulations would eliminate the waiver for post-event reporting and narrow the reporting requirement (both post-event and advance) to only the transferor plan.

New Reportable Events

Low Adjusted Funding Target Attainment Percentage. The proposed regulations would add a new reportable event (both post-event and advance) that would occur when a plan's Adjusted Funding Target Attainment Percentage (AFTAP) is certified by an enrolled actuary to be less than 60 percent, or when a plan's AFTAP is presumed to be less than 60 percent (in accordance with IRC Section 436(h) or ERISA Section 206(g)(7)).

Transfer to Retiree Health Account. The proposed regulations would add a new reportable event (post-event only) that would occur when a transfer of $10 million or more is made in accordance with IRC Section 420(f) (i.e., a transfer of excess pension assets to a health benefits account). This new reportable event would also be triggered if the funded ratio of the plan falls below 120 percent during the transfer period (determined in accordance with IRC Section 420).

PBGC Forms

Currently, the use of PBGC forms for reporting events is optional in certain cases. In addition, the lists of required items to be included in the filing are sometimes different on the forms and in the current regulations. Therefore, the proposed regulations would eliminate the lists of information that must be reported from the regulations and would include the lists on the forms required to be filed. Also, the use of forms would be required in all cases.

Partial Electronic Filings

Currently, filings are considered timely if certain basic information is submitted on time electronically and followed up with the remaining information within one or two business days. The proposed regulations would eliminate this provision and would require complete filings to be made on time.

Other Changes

Several other clarifying changes have been proposed as part of these regulations – some changes are editorial (e.g., removing definitions that would no longer be needed) and some are merely cross-reference and language changes to conform with PPA.

Applicability

The new rules would be applicable to reportable events occurring, or advance filings due, on or after the effective date of final regulations.

Comments

Comments on the proposed regulations are due by January 22, 2010.

Conclusion

These proposed regulations would provide relief for sponsors in certain cases (e.g., eliminating duplicative filings), but would also create the need for additional filings (e.g., AFTAP less than 60 percent, elimination of automatic waivers). Buck's consultants are available to discuss the impact of these regulations with you.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.