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DOL Proposes Regulations on Annual Funding Notice

The Department of Labor (DOL) has issued proposed regulations addressing the annual defined benefit plan funding notice required by Section 101(f) of ERISA. The proposed regulations are very similar to the informal guidance the DOL provided in a 2009 field assistance bulletin (FAB). The FAB remains in effect until the proposed regulations are made final. Plan administrators may rely on the model notices in the FAB or in the proposed regulations.

Background

Prior to the Pension Protection Act of 2006 (PPA), administrators of single-employer pension plans only had to provide annual funding notices to participants and beneficiaries of plans that had to pay the Pension Benefit Guaranty Corporation (PBGC) a variable rate premium (VRP). All administrators of multiemployer plans were required to provide a funding notice to participants and beneficiaries annually. Plan administrators of both types of plans also had to distribute a summary annual report (SAR) to participants and beneficiaries. The SAR provided financial data taken from the plan's Form 5500 annual report for the prior plan year.

The SAR was due 60 days after the filing date for the Form 5500 for a plan year, which could be as late as December 15 of the following plan year. The single-employer plan annual funding notice had the same deadline. Multiemployer plans had to provide the pre-PPA funding notice within 120 days after the end of the plan year.

PPA amended Section 101(f) of ERISA to require all multiemployer defined benefit pension plans and all single-employer defined benefit pension plans that the PBGC insures to provide an annual funding notice to participants, beneficiaries, and others. PPA moved the funding notice due date for all plans (except plans with 100 or fewer participants) to 120 days after the end of the plan year, eliminated the SAR requirement for plans that are required to provide the new funding notice, and substantially expanded the information that the notice must contain.

In 2009, the DOL issued [FAB 2009-01](#), which explained how the DOL would enforce the Section 101(f) funding notice requirement in the absence of final regulations. (See our February 11, 2009 [NewsFlash](#).) In the FAB, the DOL advised its staff to treat plan administrators as satisfying the requirements of the law if the administrator complied with the guidance contained in the FAB and acted in accordance with a good faith, reasonable interpretation of the requirements for matters not covered by the FAB.

BUCK COMMENT. *The FAB remains the DOL's stated enforcement policy. While the proposed regulations do not provide specifically that plan administrators may rely on the proposed regulations, the DOL will no doubt consider following the proposed regulations as a reasonable interpretation of the statute.*

The Proposed Regulations

No Notice Required

Single-Employer Plan. The proposed regulations allow plan administrators of certain terminating single-employer plans not to provide a funding notice. This exception applies only if the due date for the funding notice is on or after the date that the PBGC is appointed trustee in an involuntary termination or the plan has distributed to participants and beneficiaries assets satisfying all benefit liabilities (or, in certain cases, all guaranteed benefits) in a standard or distress termination.

BUCK COMMENT. *The filing of a standard or distress termination notice or the passing of the proposed termination date does not by itself exempt a plan administrator from providing funding notices.*

The proposed regulations also make an exception from the notice requirement for a disappearing plan in a merger or consolidation of plans where a disappearing plan has legally transferred all assets and liabilities to a surviving plan. This rule applies to the notice for the final plan year of a disappearing plan that ends coincident with, or immediately prior to, the merger. The surviving plan must include in its funding notice for the year a general explanation of the merger or consolidation.

Multiemployer Plan. For multiemployer plans, the DOL, at the request of the PBGC, modified the existing exception for multiemployer plans receiving financial assistance from the PBGC to instead refer to multiemployer plans that are insolvent. The exception applies only as long as the plan remains insolvent.

Content

Identifying Information. The notice must include the usual types of information identifying the plan, the plan sponsor, and the plan administrator. The name of the sponsor, the EIN, and the plan number should match those used for the annual Form 5500 report.

Funding Percentage. The funding notice must include a statement that the funding percentage for the plan year to which the notice relates (the "notice year") is at least 100% or, if it is not, the notice must include the actual funding percentage. The notice must also include a similar statement or percentage for each of the two preceding plan years. The relevant funding percentage for a single-employer plan is the funding target attainment percentage (FTAP) for the notice year as calculated under the funding rules. Thus, assets are reduced by the funding standard carryover balance and the prefunding balance (referred to here collectively as the credit balance) and liabilities are determined without counting any "at-risk" liabilities. The relevant funding percentage

for a multiemployer plan is the actuarial value of the plan assets divided by the accrued liability determined under the unit credit funding method (whether or not the plan uses the unit crediting method for its actuarial valuation).

Assets and Liabilities as of the Valuation Date. The single-employer plan notice must also include information, as of the valuation date, on the plan's total assets, funding standard carryover balance, and prefunding balance. Further, the notice must disclose the plan's net assets (i.e., assets reduced by the credit balance), the liabilities used in determining the FTAP, and, if applicable, any at-risk liability. Similar rules apply for reporting the underlying elements of the multiemployer funding ratio.

End of Year Assets and Liabilities. The notice must include information on the end-of-year market value of assets for the notice year (but not for the two preceding years). While the valuation date asset value may be the actuarial value of the assets, the notice's end-of-the-year value must be the market value of the assets. The end-of-the-year asset value may, but is not required to, include any amounts contributed after the end of the notice year for the notice year if contributed before the funding notice is distributed. Contributions to single-employer plans after the last day of the notice year must be discounted back to the last day of the notice year using the plan's effective interest rate for the notice year. Multiemployer plans do not discount these contributions.

The actuary of a single-employer plan may project end-of-year liability values from valuation date liabilities using reasonable actuarial assumptions and the interest rate for the last month of the year. Multiemployer plans do not have to report end-of-the-year liabilities.

Demographic Information. The notice must report the number of plan participants as of the valuation date for the notice year broken down by active employees, retired and separated employees receiving benefits, and retired and separated employees not yet receiving benefits. These are the same categories as on the Form 5500 annual report but the Form 5500 uses end-of-year data. The DOL asks for comments on how beneficiaries of deceased participants should be reflected in the participant count and whether demographic information for prior years would be helpful and should be required.

Funding and Investment Policies. PPA requires the notice to include a statement of the plan's funding policy and a breakdown of the plan's investments by the percentage it holds of each asset category. The DOL provides a list of relevant asset categories in the model notice, which are the same categories specified in Schedule H of the Form 5500. The asset category percentages are determined as of the last day of the notice year using the same rules as specified for Schedule H. The proposed regulations add a requirement for the notice to include a statement of the plan's investment policy (if any).

Multiemployer Plans in Endangered or Critical Status. As a result of PPA, a multiemployer plan must determine, based on its projected financial health, whether it is in critical status, endangered status, or neither (frequently referred to as being in the red, yellow, or green zone). The notice must identify the zone and if red or yellow, summarize the plan's most recent, applicable rehabilitation plan or funding improvement plan (and any updates). The notice must also tell the participant and others how they can get obtain copies of the applicable

rehabilitation or funding improvement plan and copies of the actuarial information demonstrating the actions taken in response to the plan.

Material Events. The notice must include information on any material event taking effect during the year in which the notice is distributed (i.e., the year after the notice year). The proposed regulations define an event as “material” if (a) it is expected to increase or decrease either assets or liabilities five percent or more over the asset or liability figure on the valuation date of the notice year or (b) the plan’s enrolled actuary otherwise determines it will have a material effect on the plan’s funding percentage. Relevant events are plan amendments, scheduled benefit increases or reductions, other known events such as an extension of coverage to a new group of employees, a plan merger, spinoff, or consolidation, an event that increases immediate eligibility for shutdown benefits, the introduction of an early retirement window, and a cost-of-living increase for retirees. The FAB provides that the DOL would not enforce this requirement with respect to any event not known at least 120 days before the notice is issued. The DOL does not include that limit, or any other limit, in the proposed regulations but asks for comments on whether it should be included in a final regulation.

BUCK COMMENT. *Because the FAB continues to apply until the DOL issues final regulations, plan administrators may still apply the 120-day rule.*

Miscellaneous. Single-employer plan notices must include a discussion of the PBGC termination and guaranteed benefit rules. Multiemployer plan notices must include a discussion of the reorganization and insolvency rules, including the limits on benefit payments. All notices must include information on how a participant or beneficiary may obtain a copy of the plan’s filed Form 5500.

The notice of a single-employer plan whose sponsor, or a member of the sponsor’s controlled group, had to provide annual financial and actuarial information to the PBGC under ERISA Section 4010 for an information year must state that the sponsor made a Section 4010 filing. Because the information year (generally, the calendar year) and the plan year may not match, the DOL asks for comments on any possible problems.

Model Notices. The DOL provides model notices (one for single-employer plans and one for multiemployer plans) that plan administrators may, but are not required to, use to satisfy the content requirements. Plan administrators may include in the model notice any additional information that they believe would be necessary or helpful as long as it does not mislead and is permitted by law. The proposed regulations allow additional information to be included any place that it would be relevant.

BUCK COMMENT. *Although the proposed regulation is silent on the use of the proposed regulation’s model notice, an accompanying DOL fact sheet provides that plan administrators may use either the FAB’s model notices or the proposed regulations model notice to satisfy the notice requirement.*

Distribution Requirements

Time of Distribution. The plan administrator must distribute the notice within 120 days after the end of the notice year for plans with over 100 participants. Administrators of single-employer or multiemployer plans with 100 or fewer participants do not have to distribute the funding notice until the Form 5500 is filed. For purposes of the 100 participant test, participants in all plans in a controlled group are added together and tested on each day of the plan year that is immediately prior to the notice year.

Form and Style. The notice must be written in a manner that the plan administrator expects to be understood by the average plan participant and use a format that does not mislead.

Manner of Delivery. In the proposed regulations, the DOL does not address the manner of delivery. In the preamble to the regulations, the DOL explains that it will address this shortly in separate regulations on electronic distribution of notices. The FAB includes a safe-harbor for electronic delivery and a statement that a plan administrator could deliver the notice electronically in any way that was consistent with ERISA and E-SIGN.

***BUCK COMMENT.** The DOL also took the approach of reserving the electronic distribution rules in its recent regulations dealing with fee disclosure to participants. In those regulations, the DOL indicated that new electronic distribution regulations will be in place prior to those regulations' November 1, 2011 effective date.*

Distributees. The plan administrator must distribute the notice to all participants covered under the plan, all beneficiaries receiving benefits under the plan, and all labor organizations representing participants. All of these determinations are made as of the last day of the notice year.

The plan administrator must provide the PBGC with a copy of the notice unless the plan is exempt. The DOL, as requested by the PBGC, exempts any single-employer plan with underfunding of \$50 million or less from having to provide the PBGC with a copy of the notice. (The plan still must provide the notice to participants, beneficiaries, and labor organizations.) The plan administrator determines whether the plan meets this exception based on the asset and liability figures the actuary used to calculate the funding percentage on the valuation date. There is no PBGC reporting exception for multiemployer plans.

Administrators of multiemployer plans must also provide a notice to any employer who, as of the last day of the notice year, is a party to the collective bargaining agreement under which the plan is maintained or who otherwise may be subject to withdrawal liability.

Special Situations

Plans with Deferred PPA Funding Dates. PPA defers application of the new single-employer funding rules for plans of some cooperatives, plans affected by settlement agreements with the PBGC, plans of some government contractors, and plans of some charitable organizations. PPA did not defer the funding notice with respect to such plans. The proposed regulations require these plans to provide funding notices based on adjusted

information consistent with the pre-PPA funding rules. The DOL asks for comments on whether further special rules are needed.

Multiemployer Plan Mass Withdrawal. A multiemployer plan that suffers a mass withdrawal of contributing sponsors continues, in most cases, to pay benefits. Therefore, the proposed regulations require such plans to continue to provide notices. However, the DOL asks for comments on this requirement and whether different information should be required.

Insurance Contract Plans. Certain plans funded by insurance contracts require level premium payments over a participant's life with the premium and time of payment set by the insurance contract. The DOL does not exempt these plans from the funding notice but asks for comments on whether special rules are necessary.

Multiple Employer Pension Plans. Multiple employer plans are treated as single employer plans under the funding rules. The DOL requires that the same notice be given to all participants in the multiple employer plan. However, the rules automatically triggering benefit restrictions if the FTAP is below 60% or 80% will apply in some multiple employer plans (those where each employer's funding contribution is determined separately) on an employer-by-employer basis. The DOL asks for comments on whether special rules are needed for the funding notice to address this.

Conclusion

The guidance in these proposed regulations is very similar to that issued in the earlier DOL FAB, which stated the DOL's enforcement position. In the preamble to the proposed regulations, the DOL states that the FAB remains in effect until the Department adopts final regulations or issues other guidance. In a related fact sheet, the DOL allows plan administrators to satisfy the notice requirement using either the FAB's model notices or the proposed regulations' model notices. While there is no specific reliance on the proposed regulations in other contexts, the proposed regulations would likely be considered a reasonable interpretation of the statute if followed by the plan administrator.

Buck's consultants are available to help you prepare the notice or answer any questions.

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.