

PBGC Updated Reportable Event Regulations Released

PBGC's final regulations updating rules for filing reportable event reports with the agency add new waivers for select events based on the financial health of the plan sponsor and on SEC reports made by public companies. Plan financial health is generally determined based on funding sufficient to avert paying variable rate premiums. PBGC predicts that the adjustments to the filing requirements will more appropriately target situations presenting a risk to the agency and yet reduce the number of reports that must be filed.

In this article: [PBGC Wraps up Final Rule](#) | [Four Key Waivers](#) | [Summary of Post-Event Reporting Waivers](#) | [Additional Items of Note](#) | [Advance Notice](#) | [Effective Date](#) | [In Closing](#)

Background

"Reportable event" requirements established in ERISA obligate plan sponsors to inform the PBGC when certain specific events occur. This assists PBGC, as insurer for ERISA defined benefit plans, in its efforts to monitor covered plans in a variety of ways. Existing PBGC regulations explain the requirements and what information to provide to the PBGC when the events occur. Those regulations include an array of waivers and extensions that allow plan sponsors to delay some reports and avoid reporting many of the events, if the plan's funding is maintained at a healthy level.

PBGC proposed changing the reportable event regulations in 2009 (see our [December 2, 2009](#) *For Your Information*), and again in 2013 (see our [April 5, 2013](#) *For Your Information*). The 2009 proposal would have increased reporting requirements by eliminating most waivers.

The 2013 proposal drew criticism over proposed waivers that were described as plan sponsor financial soundness waivers. The concern was that the agency would be making pronouncements on the financial prospects of American businesses.

PBGC Wraps up Final Rule

On September 11, the PBGC published [final regulations](#) that include a financial "safe harbor," revise the availability of waivers based on the



plan's funding status ("no variable rate premium" filers) and small plan status, and add a public company waiver (where relevant information is disclosed in SEC filings). These waivers are described more fully below. This publication also provides a summary chart modified from the helpful chart provided in the PBGC release and discusses key points and revisions of definitions and requirements in the final regulations.

Four Key Waivers

PBGC's final regulations include an array of waivers, many of which are continued from the prior regulations. Many waivers from the old regulations are gone — primarily the alternative funding-based waivers. Four key waivers are expected to reduce the overall number of events that are required to be reported. The four waivers apply to five of the six events that accounted for over 90 percent of filings between 2012 and 2014.

Company Low-Default-Risk Safe Harbor

This first waiver replaces the "financial soundness" waiver in the 2013 proposal. Despite the name change, the waiver still judges the plan sponsor's ability to pay for plan liabilities so that the risk that PBGC would need to take action is low. If the "low-default-risk standard" is met, the waiver applies for events occurring during the "safe harbor period" beginning on the "financial information date" and ending up to 13 months later (or on the next financial information date if sooner). For controlled groups, each contributing sponsor and the highest level U.S. parent would need to meet the safe harbor. This safe harbor is not available if a company receives an audit or review report that expresses a material adverse view or qualification in the supporting financial information associated with the financial information date.

The financial information date ("qualifying date") is one of three dates:

1. The SEC Form 10-K filing date for the most recent completed fiscal year before the filing date.
2. The closing date for the most recent completed fiscal year before that date, if financial statements are not required to be filed with the SEC.
3. The federal income tax return filing date for the most recent completed fiscal year, if there are no financial statements for that year.

To meet the low-default-risk standard, a company must either satisfy the first two criteria listed below, or any four criteria from this list of seven options:

1. The probability that the company will default on its financial obligations is not more than 4 percent over the next five years or not more than 0.4 percent over the next year, in either case determined on the basis of widely available financial information on the company's credit quality.
2. The company's secured debt (disregarding leases and debt incurred to acquire or improve property and secured only by that property) does not exceed 10 percent of the company's total assets.
3. The company has a ratio of retained-earnings-to-total-assets of 0.25 or more.

Reminder

The final reportable event regulations do not update PBGC reporting and liability regulations under ERISA 4062(e) substantial cessation of operations rules. Plan sponsors and administrators should have this additional requirement on their radar and be aware of the recent modifications made to it by Congress. Details on the revision are covered in our [January 14, 2015](#) *For Your Information*.

4. The company has a ratio of total-debt-to-EBITDA (earnings before interest, taxes, depreciation and amortization) of 3.0 or less.
5. The company has positive net income for the two most recently completed fiscal years preceding the qualifying date.
6. During the two-year period ending on the qualifying date, the company has not experienced a loan default reportable event for any loan with an outstanding balance of \$10 million or more to the company regardless of whether reporting was waived under loan default reportable event regulation.
7. During the two-year period ending on the qualifying date, there has not been any failure to make timely minimum funding contributions (including contributions required as a condition of a waiver), unless reporting was waived under the reportable event regulation.

Well-Funded Plan Safe Harbor

A plan meets the well-funded plan safe harbor for an event year if no variable-rate premium was required to be paid for the plan year before the event year. This was one of the funding-based waivers under the old regulations. The other funding-based waivers applicable to various events under the old regulations — such as less than \$1M unfunded vested benefits (UVB), no UVB using ERISA 4010 assumptions, 80 percent funded on a UVB basis, fully funded on a termination basis — have been eliminated. The list of events for which the well-funded safe harbor now applies is the same as those eligible for some variation of the funding-based waivers under the old regulations, except that it is no longer available for the liquidation and loan default events.

Small Plan Waiver

A plan is eligible for the small plan waiver if the plan had 100 or fewer participants for whom flat-rate premiums were payable for the plan year before the event year.

Public Company Waiver

A plan is eligible for the public company waiver if any contributing sponsor of the plan before the transaction is a public company and timely files a SEC Form 8-K disclosing the event under an item of the Form 8-K other than under Item 2.02 (Results of Operations and Financial Condition) or in financial statements under Item 9.01 (Financial Statements and Exhibits).

Summary of Post-Event Reporting Waivers

A number of additional waivers, generally unchanged from those available in the old regulations are available for select events. All told, the following chart — modified somewhat from PBGC's version to include select key points and the Form 200 Notice of Failure to Make Required Contributions — summarizes the available waivers. Note that there are no reporting waivers for the Application for Funding Waiver reportable event or the Form 200 Notice of Failure to Make Required Contributions.

Event	Reporting Waived if:								
	Low default risk	No VRP	Small plan	Public Co. (if Form 8-K)	CG member causing event is:			Max 30 days late or late balance election	Large plan subject to liquidity rules
					De minimis	Non parent & foreign	De minimis & not contrib sponsor		
Extraordinary Dividend or Stock Redemption <i>File within 30 days from knowing/reason to know</i>	√	√	√	√	√	√			
Change in Contributing Sponsor or Controlled Group (other than merger of controlled group members) <i>File within 30 days from knowing/reason to know</i>	√	√	√	√	√	√			
Active Participant Reduction <i>Single-cause event (including spinoff) – file within 30 days</i> <i>Attrition event – file by following year premium due date</i>	√	√	√	√					
Transfer of Benefit Liabilities (excluding lump sums and annuity purchases) in excess of 3% <i>File within 30 days from knowing/reason to know</i>	√	√	√	√					
Distribution to Substantial Owner (One SO paid more than 1% in one year or all SOs paid more than 5%) <i>File within 30 days from knowing/reason to know</i>	√	√		√					
Insolvency (outside Bankruptcy Code/Bankruptcy no longer reported) <i>File within 30 days from knowing/reason to know</i>						√	√		

Event	Reporting Waived if:								
	Low default risk	No VRP	Small plan	Public Co. (if Form 8-K)	CG member causing event is:			Max 30 days late or late balance election	Large plan subject to liquidity rules
					De minimis	Non parent & foreign	De minimis & not contrib sponsor		
Liquidation <i>File within 30 days from knowing/reason to know</i>						√	√		
Loan Default (\$10M or more/Cure period exception eliminated) <i>File within 30 days from knowing/reason to know (cure period extensions eliminated)</i>						√	√		
Failure to Make Required Contribution in excess of \$1M <i>File Form 200 within 10 days</i> <i>Attachments not required if missed contribution paid before filing and no other misses for past 2 years</i>									
Failure to Make Required Contribution not in excess of \$1M <i>File within 30 days from knowing/reason to know</i>			√ if quarterly					√	
Application for Funding Waiver <i>File within 30 days from knowing/reason to know</i>									
Inability to Pay Benefits When Due (such as 2 months administrative delay) <i>File within 30 days from knowing/reason to know</i>									√

Additional Items of Note

Responsibility

The plan administrator and each contributing sponsor of a plan that experiences a reportable event are required to notify PBGC within 30 days after they know or have reason to know that the reportable event has occurred, unless a waiver or extension applies. A reportable event filing by any person required to file is deemed to be a filing by all persons required to give notice of the event. If there is a change in plan administrator or contributing sponsor, the responsibility for any filing failure, including a defective filing, lies with the person who is the plan administrator or contributing sponsor of the plan on the 30th day after the reportable event occurs.

If notices are required for two or more events, the notices may be combined in one filing. If an event is subject to both post-event and advance notice requirements, the notice filed first satisfies both filing requirements.

If a reportable event occurs for more than one plan, the filing obligation of each plan is independent of the filing obligation of any other plan. For example, for a controlled group breakup involving multiple plans, each plan would have an obligation to report the change in its controlled group.

Watch for Changes in Forms

Many instructions have been stripped out of the regulations, particularly the list of items that must be filed with the report. The regulations now say that the responsible party must file, by the notice date, “the form specified by PBGC for that purpose, with the information specified in PBGC's reportable events instructions.” PBGC asserts that this will allow them to be more flexible in responding to future developments, such as changes in information technology.

Electronic Filing

Reportable event notices must be filed electronically using the instructions posted on PBGC's website. Filers are permitted to email filings with attachments using any one or more of a variety of electronic formats as provided in the instructions on PBGC's website. Indeed, PBGC accepts imaged signatures for filings.

PBGC will consider other e-filing enhancements and communicate any changes in their reportable events e-filing instructions.

Case-by-case waivers of the e-filing requirement may be granted.

Active Participants

Although not a change, we note that “active” for this purpose does not mean actively accruing benefits, rather, it means actively at work or on certain leaves or limited layoffs. Thus, freezing a plan does not reduce active participants. The new regulation defines two types of active participant reductions — single-cause events and attrition events. Single-cause events capture events such as reorganization, the discontinuance of an operation, a natural disaster, a mass layoff or an early retirement incentive program. Although not mentioned in the regulation itself, PBGC confirmed that a plan spinoff, even within the controlled group of the plan, is not exempted from the active participant reportable event. These would fall in the single-cause event category. Such events must be reported within 30 days of the “knowing or reason to know” date.

Attrition events are measured once per year at the end of the plan year and are reported at the plan premium filing date for the following year.

Comment. We anticipate that a new line item will be added to the premium form to capture this information.

Controlled Group Mergers

Under the old PBGC regulations, an example in the description of a change in contributing sponsor of a controlled group event required a report for mergers of controlled group companies. This example is now gone. Instead, the regulations specifically say that a merger involving members of the same controlled group is excluded from this type of event.

Transfers of Benefit Liabilities

The new description of the transfer of benefit liabilities event parts company with the old regulation in two ways. First, a number of waivers that had been available under the old regulation have been removed from the post-event reporting requirement. These include a waiver for complete plan transfers, a safe harbor based on using PBGC termination rates for a spinoff calculation, and a fully funded plan rule post transfer, also based on PBGC termination rates. These waivers now appear in the advance notice transfer of benefits liabilities event regulation.

The second change is the addition of a specific exclusion for the payment of lump sums and purchase of annuities. At one time, some parties were concerned that this transaction could trigger reporting under this event; others believed that the liability transfers contemplated by the reportable event regulation concerned movement to a different plan with possibly less secure sponsor backing rather than to an insurer or the ultimate beneficiary of the benefit. Comments on the proposed regulation urged that the PBGC count these transactions and use event reporting to monitor “de-risking” transactions. PBGC responded that they have other approaches for doing that. The new regulation thus specifies that annuity purchases and lump sum payments are not considered transfers of benefit liabilities for reportable event purposes.

Advance Notice

Certain events must be reported 30 days in advance if the contributing sponsor and controlled group members are not public companies and the aggregate unfunded vested benefits of plans maintained by the group (disregarding plans with no unfunded vested benefits) exceed \$50 million. The “Four Key Waivers” are off the table for these events. The due dates and waivers for these events are summarized below.

Advance Notice Reports Reporting Waived if:	Small plan (less than 500)	De minimis CG segment	Complete plan transfer or Meet certain IRC 414(l) rules
Extraordinary Dividend or Stock Redemption <i>File at least 30 days in advance of event</i>		√	
Change in Contributing Sponsor or Controlled Group (other than merger of controlled group members) <i>File at least 30 days in advance of event</i>	√	√	
Transfer of Benefit Liabilities (excluding lump sums and annuity purchases) in excess of 3% <i>File at least 30 days in advance of event</i>			√
Insolvency (outside Bankruptcy Code / Bankruptcy no longer reported) <i>File at least 30 days in advance of event; 10 days after the event if proceeding not commenced by CG member</i>			
Liquidation <i>File at least 30 days in advance of event</i>		√ <i>if plan stays in CG</i>	
Loan Default (\$10M or more)/Cure period exception eliminated <i>File at least 30 days in advance of event (cure period extensions eliminated)</i>			
Application for Funding Waiver <i>File within 10 days after event</i>			

Effective Date

The regulations are effective October 13, 2015 and apply to post-event reports for reportable events occurring on or after January 1, 2016, and to advance reports due on or after that date. Plan administrators and sponsors, as applicable, must file reports up until all plan assets (other than excess assets) are distributed or until a trustee is appointed after a PBGC-initiated termination.

In Closing

Plan sponsors will still need to be aware and monitor plan and corporate events on an ongoing basis to assure that reporting obligations are satisfied. But a determination early in the year that the new low-default-risk safe harbor, the well-funded plan safe harbor, or the small plan waiver is met can significantly reduce the events that will need to be monitored.

Authors

Marjorie Martin, FSPA, MAAA, EA

Robert W. Andersen, EA, ASA, MAAA, MSPA, MCA

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