

[Billing Code 7709-01-P]

Pension Benefit Guaranty Corporation

29 CFR Parts 4001, 4022, 4041, and 4044

RIN 1212-AB17

Cash Balance Plans; Benefit Determinations and Plan Valuations for Statutory Hybrid Plans; Pension Protection Act of 2006

AGENCY: Pension Benefit Guaranty Corporation

Action: Proposed rule

SUMMARY: This proposed rule would implement provisions of the Pension Protection Act of 2006 (PPA 2006) that change the rules for determining benefits upon the termination of a statutory hybrid plan, such as a cash balance plan. PPA 2006 provides that, when such a plan terminates, a variable rate used under the plan to determine accrued benefits will be equal to the average of the rates of interest used under the plan during the five-year period ending on the termination date. Further, the amount of the benefit payable in the form of an annuity payable at normal retirement age will be determined using the interest rate and mortality table specified under the plan for that purpose as of the termination date (or an average interest rate if the plan rate is a variable rate). For a plan terminated and trustee by PBGC, the proposed rule would amend PBGC's regulations to conform the rules for determining the allocation of assets and the amount of benefits payable under Title IV of ERISA to the PPA 2006 changes in the benefit determination rules for statutory hybrid plans. The proposed rule would also implement a PPA 2006 change for determining the present value of the accrued benefit under a statutory hybrid plan. Finally, the proposed rule would provide guidance on benefits payable under a statutory hybrid plan that terminates in a standard termination.

DATES: Comments must be submitted on or before [insert date 60 days after publication in the Federal Register].

ADDRESSES: Comments, identified by Regulatory Information Number (RIN 1212-AB17) may be submitted by any of the following methods

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the web site instructions for submitting comments.
- E-mail: reg.comments@pbgc.gov.
- Fax: 202-326-4224.
- Mail or Hand Delivery: Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street N.W., Washington, DC 20005-4026.

Comments received, including personal information provided, will be posted to www.pbgc.gov.

Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, N.W., Washington, DC 20005-4026, or calling 202-326-4040 during normal business hours. (TTY and TDD 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: John H. Hanley, Director, or Constance Markakis, Attorney; Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street N.W., Washington, DC 20005-4026; 202-326-4024. (TTY and TDD users may call the Federal relay service toll free at 1-800-877-8339 and ask to be connected to 202-326-4024.)

SUPPLEMENTARY INFORMATION:

Background

When Pension Benefit Guaranty Corporation (PBGC) becomes trustee of a plan that terminates in a distress termination under section 4041 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), or an involuntary termination (one initiated by PBGC) under section 4042 of ERISA, PBGC determines the amount of the annuity benefit that will be paid to a participant or beneficiary and whether the participant or beneficiary is eligible for a de minimis lump-sum payment. Guaranteed benefit determinations are made under section 4022 of ERISA. PBGC also values the benefits payable under the plan for purposes of allocating the plan's assets to priority categories in accordance with section 4044 of ERISA, determines employer liability under sections 4062 through 4064 of ERISA, and determines the amount of any unfunded nonguaranteed benefits payable under section 4022(c) of ERISA. These benefit determinations and plan valuations are generally made as of the plan's termination date.¹

The termination of a cash balance plan presents unique issues for PBGC.² In contrast to a traditional defined benefit plan, which defines a participant's benefit under the plan as an annuity commencing at normal retirement age, a cash balance plan defines a participant's benefit as the balance of a hypothetical account maintained for the participant. The balance of a participant's hypothetical account consists generally of annual pay credits (*e.g.*, a percentage of the participant's pay for the year) and annual interest credits (*i.e.*, the hypothetical earnings on the

¹ As described below, section 404 of PPA 2006 added sections 4022(g) and 4044(a)(3) of ERISA, which treat the date the sponsor's bankruptcy petition was filed as the termination date of the plan for specified purposes. These changes apply for plan terminations that occur during the bankruptcy of the plan sponsor, if the bankruptcy filing date is on or after September 16, 2006. For convenience, this preamble generally refers to the plan's termination date, although in some cases this reference will instead apply to the bankruptcy filing date.

² Statutory hybrid plans other than cash balance plans, such as pension equity plans, also raise unique issues. For convenience, and because cash balance plans are the most common type of underfunded statutory hybrid plan trusted by PBGC, this preamble generally refers to cash balance plans, although the regulatory changes would apply to all statutory hybrid plans.

account balance) at rates specified under the plan. The plan also provides an interest rate and mortality table (or factor) used for converting the participant's hypothetical account balance into a benefit payable as an annuity. Upon the termination of a cash balance plan (or an earlier freeze), the pay credits to a participant's hypothetical account cease, but interest credits generally continue to be added to the participant's hypothetical account until the participant begins to receive benefits.

If a cash balance plan uses a fixed interest rate as of the plan's termination date to determine accrued benefits or the amount of a benefit payable in the form of an annuity payable at normal retirement age, PBGC uses the plan's fixed rate when calculating benefits for valuation and payment purposes. PBGC has encountered difficult payment and valuation issues, however, when a cash balance plan uses a variable interest rate – *e.g.*, a rate that changes annually under the plan based on changes in an underlying index plus a margin. Many plans using variable rates adopted the standard indices and associated margins set forth in IRS Notice 96-8 (1996-1 C.B. 359) – which are based on the yields on Department of the Treasury (Treasury) constant maturities of various durations – to determine the plan's interest crediting rate or annuity conversion rate.

Under PBGC's operating policy on cash balance plans (established pre-PPA 2006), when PBGC performs its plan valuation under ERISA section 4044 of ERISA (for plans that terminated before the effective date of the relevant PPA 2006 changes), it fixes the plan's variable index at the plan's termination date. To calculate the value, as of the plan's termination date, of a participant's annuity commencing at the expected retirement age, PBGC derives a fixed rate equal to the average of the annual yields for 30-year Treasury constant maturities for

the month specified in the plan, decreased by the associated margin in IRS Notice 96-8 for the variable index used by the plan, and adjusted by any plan margin.³

Under this operating policy, however, PBGC does not derive a fixed interest rate from a variable rate to determine benefits for payment purposes. Instead, PBGC pays a participant's pension benefit using the actual interest crediting rates in effect under the plan's variable index for periods after the plan's termination date. Until a participant commences benefits, PBGC estimates annuity payments using the most recent interest rate under the variable index used by the plan to determine the participant's projected benefit. The fact that a participant's exact benefit can be determined only when the participant begins receiving benefits has frequently resulted in benefit calculations for payment purposes that vary both from previously provided estimates and from benefit calculations for valuation purposes.

PBGC pays benefits in a single installment if the lump sum value of a benefit payable by PBGC is de minimis (currently \$5,000 or less). See § 4022.7(b). In the case of cash balance plans, the payment of de minimis lump sums has posed difficult issues for PBGC due to PBGC's policy of determining lump sums using a present value calculation of the participant's benefit. Cash balance plans typically pay benefits in the form of a lump sum and often pay an amount equal to the hypothetical account balance.⁴ In contrast, in accordance with its operating policy on cash balance plans, PBGC uses the present value methodology in § 4022.7(d) to determine the lump sum value of a benefit, and, if either the present value or the participant's hypothetical

³ This policy applied only for plans that used a variable interest rate based on an index specified in IRS Notice 96-8, and that used either no plan margin or a plan margin that is constant.

⁴ Under IRS Notice 96-8, plans that use the standard indices to determine their interest crediting rates were permitted to pay the hypothetical account balance, even if this amount was less than the present value of the participant's life annuity payable at normal retirement age determined using the applicable interest rate and the applicable mortality table under section 417(e) of the Code.

account balance (or accumulated percentage of final average compensation) as of the termination date is de minimis, PBGC generally pays the greater of the two amounts.

Pension Protection Act of 2006

In the Pension Protection Act of 2006, Pub. L. 109-280 (PPA 2006), which became law on August 17, 2006, Congress sought to address, among other things, the problems encountered by terminating plans that use a variable interest rate. Under sections 701(a)(1) and 701(b)(1) of PPA 2006, which added section 411(b)(5)(B)(vi) of the Internal Revenue Code (Code) and section 204(b)(5)(B)(vi) of ERISA, an applicable defined benefit plan must include the following provisions that would apply upon termination of the plan:

- If the interest crediting rate (or equivalent amount) is a variable rate, the rate of interest used to determine accrued benefits under the plan will equal the average of the rates of interest used under the plan during the five-year period ending on the termination date.
- The interest rate and mortality table used to determine the amount of any benefit under the plan payable in the form of an annuity payable at normal retirement age is the rate and table specified under the plan for such purpose as of the termination date. If the interest rate is a variable rate, the rate used must be the average of the rates used under the plan during the five-year period ending on the termination date.

This change was intended to facilitate the calculation of benefits and provide participants with greater certainty about their benefit amounts when a plan terminates. This change is part of a more general interest rate requirement imposed by sections 701(a)(1) and 701(b)(1) of PPA 2006, which treats an applicable defined benefit plan as failing to meet accrual requirements related to age if the terms of the plan provide for an interest credit (or an equivalent amount) for any plan year that is greater than a market rate of return.

Sections 701(a)(2) and 701(b)(2) of PPA 2006 also create special rules for computing benefits under an applicable defined benefit plan by reference to the hypothetical account balance. Under new sections 411(a)(13)(A) of the Code and 203(f)(1) of ERISA, a plan is not treated as failing to meet the present value requirements of sections 417(e) of the Code or 205(g) of ERISA (and certain other vesting and accrued benefit rules) if the present value of the accrued benefit of any participant is equal to the amount expressed as the balance in the hypothetical account or as an accumulated percentage of the participant's final average compensation.

New sections 411(a)(13)(C) of the Code and 203(f)(3) of ERISA define an "applicable defined benefit plan" as a defined benefit plan under which the accrued benefit (or any portion thereof) for a participant is calculated as the balance of a hypothetical account maintained for the participant or as an accumulated percentage of the participant's final average compensation. The term also describes any plan that has an effect similar to an applicable defined benefit plan under regulations issued by Treasury.

The changes to the plan termination requirements made by sections 701(a)(1) and 701(b)(1) of PPA 2006 are effective for years beginning after December 31, 2007, unless the plan sponsor elects the earlier application of such requirements for any period after June 29, 2005.⁵ A special rule for collectively bargained plans provides a delayed effective date.⁶ The changes to the present value rules made by sections 701(a)(2) and 701(b)(2) of PPA 2006 are effective for distributions made after August 17, 2006.

⁵ In the case of a new plan not in existence on June 29, 2005, these requirements are effective for periods beginning on or after June 29, 2005.

⁶ Section 701(e)(4) of PPA 2006 provides that, for a plan maintained under one or more collective bargaining agreements between employee representatives and one or more employers that is ratified on or before August 17, 2006, the interest and three-year vesting requirements will not apply to plan years before –

- The earlier of the date on which the last of the collective bargaining agreements terminates (determined without regard to any extension made on or after August 17, 2006), or January 1, 2008, or
- January 1, 2010.

Treasury issued final regulations on Hybrid Retirement Plans (2010 final Treasury regulations), 75 FR 64123 (Oct. 19, 2010), and simultaneously issued proposed Additional Rules Regarding Hybrid Retirement Plans (2010 proposed Treasury regulations), 75 FR 64197 (Oct. 19, 2010). These regulations provide guidance on changes made by PPA 2006 under sections 411(a)(13) and 411(b)(5) of the Code.

The other PPA 2006 provisions relevant to this proposed rule are in section 404, which added sections 4022(g) and 4044(e) of ERISA. These provisions provide that, when an underfunded pension plan terminates during the bankruptcy of the plan sponsor, the date that the sponsor's bankruptcy petition was filed is treated as the plan's termination date for purposes of determining (1) the amount of benefits PBGC guarantees, and (2) the amount of benefits in priority category 3 in the section 4044 asset allocation. These changes apply for plan terminations that occur during the bankruptcy of the plan sponsor, if the bankruptcy filing date was on or after September 16, 2006. On June 14, 2011 (at 76 FR 34590), PBGC published a final rule on Bankruptcy Filing Date Treated as Plan Termination Date for Certain Purposes that implements section 404 of PPA 2006.

Overview of Proposed Rule

This proposed rule would amend PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022) to implement the above-described changes made by PPA 2006 upon the termination of a statutory hybrid plan. This proposed rule is intended to be consistent with the proposed Treasury rules under section 411(b)(5) of the Code that apply upon termination of a statutory hybrid plan (included in the 2010 proposed Treasury regulations at Treas. Reg. § 1.411(b)(5)-1(e)(2)). No inference should be drawn from the language in this proposed rule as to any changes that may be made to the Treasury rules when the 2010 proposed

Treasury regulations are issued as final regulations. After the 2010 proposed Treasury regulations are finalized, PBGC intends to take those final Treasury regulations into account, so that the rules that finalize these proposed regulations are consistent with the final rules in the Treasury regulations.

Under the proposed rule, PBGC would generally determine plan benefits based on plan terms as of the plan's termination date; if, however, the plan used a variable rate during the five-year period ending on the termination date, PBGC would take into account the plan's provisions for determining and applying an average rate of interest in accordance with section 411(b)(5)(B)(vi) of the Code and proposed Treas. Reg. § 1.411(b)(5)-1(e)(2). In addition, the proposed rule sets forth certain default rules that PBGC would apply to the extent that the terms of the plan do not satisfy the plan termination requirements under PPA 2006 or Treasury regulations thereunder, or fail to specify provisions necessary to implement those requirements. Except in the case of certain involuntary plan terminations, PBGC would generally apply its rules to determine the benefits of any participant with an annuity starting date after the plan's termination date or, in the case of a distress termination under ERISA section 4041(c), the plan's proposed termination date. The proposed rule also addresses the interest crediting rules that apply to a plan that terminates during the bankruptcy of the plan sponsor.

In addition, the proposed rule would amend PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044) to conform the rules for valuing benefits and allocating plan assets to the changes in the benefit determination rules. Under the proposed rule, certain benefits would be calculated differently for valuation purposes than for payment purposes. For example, de minimis benefits would continue to be calculated as annuities for valuation purposes, as under the current regulation, but the method of calculating such benefits

for payment purposes would change under the proposed rule. The proposed rule would also amend part 4044 to provide that the priority category 3 benefits of a participant who is eligible but does not retire three years before a plan's termination date (or bankruptcy filing date, if applicable) would be determined based on the participant's account balance and the interest rates under the plan as if the participant had retired three years before the termination date (or bankruptcy filing date, if applicable).

The proposed rule would amend PBGC's regulation on Termination of Single-Employer Plans (29 CFR part 4041) to provide that, for purposes of part 4041, a plan that terminates in a standard termination (or a distress termination where the plan is sufficient for guaranteed benefits) will be deemed to satisfy the plan termination requirements under section 204(b)(5)(B)(vi) of ERISA and section 411(b)(5)(B)(vi) of the Code and Treasury regulations if the plan calculates and pays benefits consistent with the provisions for statutory hybrid plans under part 4022.

A detailed discussion of the proposed rule follows.

Proposed Regulatory Changes

Definition of Statutory Hybrid Plan

Under section 411(a)(13)(C) of the Code,⁷ an "applicable defined benefit plan" is a defined benefit plan under which the accrued benefit (or any portion thereof) is calculated as the balance of a hypothetical account maintained for the participant or as an accumulated percentage of the participant's final average compensation; the definition includes any plan that has an effect similar to an applicable defined benefit plan. Treasury's final regulations on Hybrid Retirement Plans use the term "statutory hybrid plan" to describe plans that are subject to the provisions of sections 411(a)(13) and 411(b)(5)(B) of the Code. To maintain a uniform and consistent

⁷ References to Code provisions used hereinafter should be read to include parallel provisions of ERISA.

application of PPA 2006 changes to the rules in this area, PBGC is proposing to amend § 4001.2 to add a definition of a “statutory hybrid plan” that cross-references the definition of a statutory hybrid plan under Treasury regulations.⁸

PBGC Benefit Determinations – In General

PBGC proposes to amend part 4022 to add a new subpart H that would specifically address the determination of benefits payable under a terminating statutory hybrid plan. Subpart H would supplement the general rules in part 4022 for purposes of determining a participant’s benefit under the provisions of a statutory hybrid plan and the amount and form of benefits guaranteed or otherwise payable under Title IV of ERISA.

When PBGC trustees a terminated plan (including a statutory hybrid plan), as a first step in determining the benefits payable under Title IV, it determines a participant’s benefit in accordance with the terms of the plan on the termination date. As described in proposed new § 4022.121, for statutory hybrid plans, this includes provisions relating to the interest rate(s) and mortality table used by the plan, such as the rate used to determine interest credits and the timing for determining such rate, the frequency at which interest credits are applied, and the interest rate and mortality table (or annuity conversion factor) used to determine the participant’s benefit payable in the form of an annuity payable at normal retirement age – provided the plan’s provisions satisfy the requirements of section 204(b)(5)(B) of ERISA and section 411(b)(5)(B) of the Code and implementing regulations.

⁸ Under § 1.411(a)(13)-1(d), a statutory hybrid plan means a defined benefit plan that contains a statutory hybrid benefit formula, which is defined as a benefit formula used to determine all or any part of a participant's accumulated benefit that is either a lump sum-based benefit formula (under which the benefit is expressed as the current balance of a hypothetical account maintained for the participant or as the current value of an accumulated percentage of the participant’s final average compensation) or a benefit formula that has an effect similar to a lump sum-based benefit formula.

Because statutory hybrid plans use various methods for determining a participant's annuity benefit, PBGC would follow the plan's terms for this purpose. For example, a cash balance plan that defines the accrued benefit as an annuity commencing at normal retirement age, and that – for purposes of sections 411(a)(13) and 411(b)(5) – expresses the accrued benefit as the balance of the participant's hypothetical account, may under its terms determine the participant's annuity by projecting interest credits to the participant's normal retirement date. In that case, PBGC would add interest credits to the participant's hypothetical account balance each interest crediting period beginning after the plan's termination date through the participant's normal retirement date (or the current date, if later) and then use the conversion factors (or the interest rate and the mortality table) specified under the plan as of the termination date to determine the benefit payable as an annuity. Alternatively, if such plan provides for the use of immediate annuity conversion factors, PBGC would add interest credits to the participant's hypothetical account balance through the participant's annuity starting date, then use the conversion factors (or the interest rate and mortality table) specified under the plan as of the termination date to determine the benefit payable as an annuity at the participant's age on the annuity starting date. In the case of a pension equity plan that provides for the use of deferred annuity conversion factors (or an interest rate and mortality table), PBGC would determine the current value of the accumulated percentage of an active participant's final average compensation as of the plan's termination date and apply the conversion factors specified under the plan as of the termination date to determine the benefit payable as an annuity at different future ages to the participant.

If the mortality table specified under the plan as of the termination date used to determine the amount of any benefit payable in the form of an annuity (*i.e.*, the table used to

convert a hypothetical account balance to an annuity) is a table that is updated automatically in future years to reflect expected improvements in mortality experience (*e.g.*, the applicable mortality table provided under Code section 417(e)(3)), PBGC would determine benefits payable under the plan based on the mortality table as of the termination date taking into account future adjustments for expected mortality improvements through the annuity starting date.

The provisions of proposed new subpart H would be used to determine the benefits of any participant or beneficiary in a plan covered by the subpart with an annuity starting date after the plan's termination date or, in the case of a distress termination under ERISA section 4041(c), after the proposed termination date. A plan administrator's failure to apply an average interest rate as of the proposed termination date would require benefits to be re-determined using an average rate of interest. The proposed termination date would also be the relevant date if a plan provides a notice of intent to terminate in a distress termination and subsequently terminates under section 4042, and the termination date is the same as the proposed termination date under section 4041(c). If the proposed termination date is moved to a later date in a distress termination case (or in a distress termination that becomes an involuntary termination), benefits determined using an average interest rate between the proposed termination date and the final termination date would be recalculated using the interest rate that would have applied under the plan prior to the plan's final termination date.

Proposed new § 4022.121(a)(3)(ii) provides a special rule for a plan that terminates in an involuntary termination where the termination date is earlier than the date on which PBGC institutes termination proceedings pursuant to section 4042. In that situation, in determining benefits under part 4022, PBGC generally would not change the interest rate(s) (or the mortality table or conversion factor) used by the plan under its provisions to calculate a benefit payable for

a participant or beneficiary whose annuity starting date is after the termination date but on or before the date on which PBGC institutes termination proceedings or who submits a completed election for an annuity benefit during that time period. This would protect benefit determinations and participant elections when a plan operates in good faith in accordance with its terms prior to any notice of termination proceedings. PBGC would have discretion not to follow this special rule if warranted under the facts and circumstances, e.g., to avoid abuse.

Variable Rates

Paragraph (c) of proposed new § 4022.121 describes the averaging methodology PBGC would apply upon termination of a plan in the case of a variable rate. In accordance with proposed Treas. Reg. § 1.411(b)(5)-1(e)(2), if the interest crediting rate used to determine a participant's accumulated benefit (or a portion thereof) has been a variable rate during the interest crediting periods in the five-year period ending on the plan's termination date (including a rate that was not the same fixed rate during all such periods), PBGC would determine an average of the interest crediting rates used under the plan during the five-year period. For this purpose, the interest crediting rates used under the plan would include each rate that applied under the terms of the plan during an interest crediting period for which the interest crediting date is within the five-year period ending on the plan's termination date.⁹ The average rate would be determined as the arithmetic average of the rates used, expressed as an annual rate.

PBGC would apply the plan's average interest crediting rate to determine the participant's accumulated benefit¹⁰ under the plan beginning after the plan's termination date

⁹ An interest crediting rate that applied under the terms of the plan only with respect to a date that is distinct from the plan's regular interest crediting date, such as the date of separation from employment or plan termination, would not be included in determining an average of the interest crediting rates that applied under the terms of the plan during the five-year period.

¹⁰ Under Treas. Reg. § 1.411(a)(13)-1(d)(2), a participant's accumulated benefit at any date means the participant's benefit, as expressed under the terms of the plan, accrued to that date. Thus, for example, for a cash balance plan the accumulated benefit is expressed as the current balance of a hypothetical account, and for a pension equity plan the

through the participant's normal retirement date (or annuity starting date, as applicable under the plan). If the plan's termination date occurs in the middle of an interest crediting period, PBGC would credit interest based on the plan's interest crediting rate (on a pro rata basis) for the portion of the interest crediting period ending on the plan's termination date; such rate would not be included in the determination of the average rate. For any subsequent partial interest crediting period (*e.g.*, the portion of the interest crediting period following the plan's termination date), PBGC would credit a pro rata amount of the plan's average interest crediting rate. This approach is consistent with the statute and would simplify administration for PBGC.

In the event that the plan used a variable rate during the five-year period ending on the plan's termination date to determine the amount of a participant's benefit payable in the form of an annuity payable at normal retirement age, PBGC would determine the arithmetic average of the interest rates (or tabular adjustment factors) that applied during periods for which the date of each rate (or factor) change was within the five-year period ending on the plan's termination date.

Under Code section 411(b)(5)(B)(vi)(II), the average rate is used to determine the amount of any benefit under the plan payable in the form of an annuity payable at normal retirement age. PBGC would apply an average rate to determine a benefit under the plan that is payable in the form of a life annuity (*i.e.*, an annuity that continues at least as long as the life of the annuitant, such as a straight-life annuity, joint-and-50%-survivor annuity, or 10-year certain and continuous annuity) payable at normal retirement age. In the case of an immediate annuity conversion plan that uses a variable interest rate to determine the amount of a benefit, PBGC would apply an average rate to determine a benefit under the plan payable in the form of a life annuity payable at

accumulated benefit is expressed as the current value of an accumulated percentage of the participant's final average compensation.

the annuity starting date. In either case, the averaging requirement would apply only to determine the amount of the benefit in the automatic PBGC form under § 4022.8(b) of PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans, *e.g.*, the form a married participant or an unmarried participant (as applicable) would be entitled to receive from the plan in the absence of an election. If the participant or beneficiary elects an optional PBGC form under § 4022.8(c), PBGC would convert the benefit amount from the automatic PBGC form in accordance with that section.

Paragraph (c) of proposed new § 4022.121 also provides that, consistent with Treasury regulations, if the interest crediting rate in any interest crediting period during the five-year period ending on the termination date is based on a variable rate that is not described in proposed Treas. Reg. § 1.411(b)(5)-1(e)(2)(ii)(B) (*e.g.*, the rate of return on plan assets), PBGC would replace such rate with the third segment rate under Code section 430(h)(2)(C)(iii) for the last calendar month ending before the beginning of the interest crediting period for purposes of determining the average interest crediting rate. In accordance with proposed Treas. Reg. § 1.411(b)(5)-1(e)(2)(ii)(C), PBGC generally would adjust the third segment rate by any maximums or minimums applicable to the interest crediting rate in the period under the plan's terms, but would not adjust the third segment rate to account for any other adjustments under the plan to the interest crediting rate.

Default Rules and Other Rules

Paragraph (d) of proposed new § 4022.121 describes the default rules that PBGC would apply to the extent that plan provisions do not satisfy section 204(b)(5)(B) of ERISA and section 411(b)(5)(B) of the Code and implementing regulations, or that the plan fails to specify provisions necessary to implement applicable statutory and regulatory requirements. In the case

of a plan that uses a variable rate but does not provide for the determination of an average rate or an arithmetic averaging methodology to be used upon termination of the plan, PBGC would determine an arithmetic average in the manner described above. If a plan does not specify a mortality table (or otherwise indicate the table or annuity conversion factor to be used), PBGC would use the mortality table provided under section 417(e) of the Code that would apply if the annuity starting date were the plan's termination date (*i.e.*, future adjustments for expected mortality improvements under the mortality table would not be taken into account). If a plan fails to specify an interest crediting rate or annuity conversion interest rate (or otherwise indicate the rate or factor to be used), PBGC would compute an average rate as the arithmetic mean of the 30-year Treasury Constant Maturity rates in effect for the calendar month in which the plan terminates and for the same calendar month in each of the preceding four years.

Under the proposed regulation, PBGC would apply a single average interest crediting rate to determine the benefits of all similarly situated participants under the plan (*i.e.*, the same average interest crediting rate would apply to the extent the same rates applied under the plan to determine all participants' benefits). In the case of a plan that terminates within five years after the effective date of the PPA 2006 termination requirements with respect to the plan, PBGC would determine the average rate by including interest crediting rates used by the plan before the effective date but within the five-year period ending on the termination date. In the case of a plan (or the statutory hybrid benefit formula under a plan) that is in effect for less than five years, PBGC would determine the average rate based on the interest crediting periods during the time the plan (or the statutory hybrid benefit formula) was in effect.

PPA 2006 Bankruptcy Terminations

Paragraph (e) of proposed new § 4022.121 provides a special rule for determining interest credits in the case of a plan that terminates while the sponsor is in bankruptcy (a PPA 2006 bankruptcy termination, as defined in § 4001.2). PBGC would project the amount of the participant's hypothetical account balance as of the bankruptcy filing date using the following interest rates:

- To credit interest beginning after the bankruptcy filing date and ending on the plan's termination date, the actual interest crediting rate(s) used under the plan during each interest crediting period.
- To credit interest beginning after the plan's termination date and ending on the participant's normal retirement date or, in some cases, annuity starting date, the rate in effect under the plan as of the plan's termination date, including the average interest crediting rate as determined under subpart H if the plan used a variable rate during the five-year period ending on the plan's termination date.

De Minimis Lump Sums

The proposed rule would add a new § 4022.122 to describe how PBGC would make determinations regarding de minimis lump sum payments (currently \$5,000 or less under § 4022.7) under a statutory hybrid plan. Consistent with section 411(a)(13)(A) of the Code, if a plan provides for a single sum form of payment equal to the amount expressed as the balance in a hypothetical account, PBGC generally would determine whether the lump sum value of a benefit payable by PBGC is de minimis based on the participant's hypothetical account balance as of the plan's termination date, and, if so, would pay that amount to the participant.

However, regardless of plan provisions, if after August 17, 2006, a plan made lump sum payments based on participants' hypothetical account balances without regard to the present

value rules under section 417(e) of the Code, or stated in writing its intent to make lump sum payments on that basis (*e.g.*, through communications to affected participants), PBGC would make de minimis lump sum determinations on that same basis. *I.e.*, PBGC would treat the plan as if it had been amended to reflect plan operation in accordance with section 411(a)(13)(A) of the Code, pursuant to the amendatory period provided under section 1107 of PPA 2006. PBGC would also make de minimis lump sum determinations based on the participants' hypothetical account balances without regard to the section 417(e) rules if there is no single sum form of payment under the plan or no description of the calculation for such a payment.

In the case of a plan that provides for use of section 417(e) of the Code in determining lump sums and that, after August 17, 2006, has *not* made lump sum payments based solely on participants' hypothetical account balances or stated in writing its intent to make lump sum payments on that basis (*e.g.*, through communications to affected participants), PBGC would make de minimis lump sum determinations in accordance with § 4022.7(d) and its operating policy on cash balance plans.

Phase-In of Guarantee of Benefit Increases

The proposed rule would add a new § 4022.123 to PBGC's regulations to describe changes in the terms of a statutory hybrid plan resulting in a benefit increase that would be subject to the phase-in limitations on the PBGC guarantee (*i.e.*, a benefit increase that has been in effect for less than five years on the plan's termination date). Such changes include, but are not limited to, a change in the plan's mortality table, timing or method for crediting interest, or basis for crediting interest or determining the annuity conversion factor (*e.g.*, a change from a fixed rate to a variable rate, or from one variable index to another variable index).

The proposed regulation would clarify that certain adjustments in the interest rate would not be subject to the phase-in limitations. These include: (i) a change in the interest rate under a single variable rate index (*e.g.*, a change in the yield on 5-year Treasury Constant Maturities from one date to another); (ii) a change that is required to comply with the termination requirements of ERISA section 204(b)(5)(B)(vi) and Code section 411(b)(5)(B)(vi) (*e.g.*, a change in the plan's interest rate to an average rate of interest at termination); (iii) a change in the plan's interest crediting rate that is permitted, notwithstanding section 411(d)(6) of the Code, pursuant to Treas. Reg. §1.411(b)(5)-1(e)(3) (*e.g.*, an amendment to change under certain circumstances to the long-term investment grade corporate bond rate); (iv) a change permitted during the amendatory period under section 1107 of PPA 2006 or any extension of the amendatory period issued by the Treasury Department; and (v) an automatic future update in a mortality table specified under the plan as of the termination date that reflects expected improvements in mortality experience. PBGC believes that excluding such changes from the phase-in rule is warranted. Changes in rate due to the fluctuations of a variable index or to the averaging under the termination requirements would just as likely result in a benefit decrease as a benefit increase. Furthermore, any increase in benefits that might result from the above changes would be moderated by the requirement to average the plan's rates for the five-year period ending on the termination date, and by the substitution of the third segment rate for any variable rate that is not described in proposed Treasury regulation § 1.411(b)(5)-1(e)(2)(ii)(B) (*e.g.*, the rate of return on plan assets) for purposes of determining the average interest crediting rate. Lastly, updates under a mortality table that automatically reflects age improvements are an inherent aspect of the annuity conversion factor used; by contrast, a change to the conversion

factor (e.g., from a fixed mortality table to one that updates automatically) by a plan would be subject to phase-in.

Allocation of Assets – Distress and Involuntary Terminations

PBGC proposes to amend part 4044 by adding a new § 4044.52(e) to address the valuation of benefits under a terminating statutory hybrid plan. The proposed regulation provides that benefits should be valued consistent with the general valuation rules of part 4044 and the provisions for the calculation and payment of benefits in subpart H of part 4022.

In two situations, notwithstanding PBGC's calculation of benefits for payment purposes, PBGC would value the benefits under a cash balance plan in the same manner as all other benefits are valued. First, although proposed new § 4022.122 provides for the determination of de minimis lump sums in some cases on the basis of the participant's hypothetical account balance, a benefit payable as a de minimis lump sum would nevertheless be required to be valued, for purposes of part 4044, in the form of a benefit payable as an annuity in the absence of a valid election under the terms of the plan (as is the case under current regulations). Second, despite the special rule in proposed new § 4022.121(a)(3)(ii) that would generally require PBGC to use the plan's interest crediting rate and annuity conversion interest rate to determine benefits commencing or elected during the time period between the plan's termination date and the date on which PBGC institutes termination proceedings, these benefits would be valued, for purposes of part 4044, using the interest rates in effect under the plan (including the five-year average rate, if applicable) as of the plan's termination date.

Proposed new § 4044.52(e)(4) describes the calculation of a priority category 3 benefit under a statutory hybrid plan. Priority category 3 benefits generally are benefits in pay status, or that could have been in pay status, three years before the termination date; priority category 3

benefits come ahead of guaranteed benefits in priority category 4 in the section 4044 asset allocation. In a plan termination that is not a PPA 2006 bankruptcy termination, the priority category 3 benefit for a participant eligible to receive an annuity (taking into account PBGC's rules on the Earliest PBGC Retirement Date under § 4022.10) before the beginning of the three-year period ending on the termination date but not in pay status as of that date would be determined based on the balance of the participant's hypothetical account and the interest crediting rate and annuity conversion factor under the plan had the participant retired three years before the termination date.¹¹ In the case of PPA 2006 bankruptcy termination, the bankruptcy filing date would substitute for the termination date in determining whether a participant or beneficiary is eligible for a priority category 3 benefit, and the amount of benefits in priority category 3. A priority category 3 benefit would in no event exceed the benefit amount payable under the terms of the plan as of the plan's termination date (determined by applying the averaging rules under § 4022.121 if the plan uses a variable rate).

Standard and Distress Terminations

The termination requirements under section 411(b)(5)(B)(vi) of the Code, added by PPA 2006, apply to any applicable defined benefit plan upon the termination of the plan. Sections 4041.28(c) and 4041.50 provide that, in general, the plan administrator of a plan that terminates in a standard termination or a distress termination where the plan is sufficient for guaranteed benefits must close out the plan "in accordance with all applicable requirements under the Code and ERISA." These requirements include the new rules for cash balance plans under section 411(b)(5)(B)(vi) of the Code and implementing Treasury regulations.

¹¹ Benefits in priority category 3 are limited to the lowest annuity benefit payable under the plan provisions at any time during the five-year period ending on the termination date (or bankruptcy filing date, if applicable). This limitation also affects the benefits of participants who retired between three and five years before the termination date (or bankruptcy filing date, if applicable).

The proposed rule would amend § 4041.28(c) to provide that for purposes of part 4041 the plan administrator of a statutory hybrid plan would be deemed to satisfy the applicable Code and ERISA requirements if it calculates and pays benefits consistent with the interest and mortality provisions described in proposed new § 4022.121.

Issues Not Addressed

This proposed rule does not address issues relating to plans in which the interest crediting rate is determined by participant direction, *e.g.*, where the interest crediting rate depends upon choices made by the participant. PBGC will provide further guidance as appropriate.

Applicability

The proposed regulatory changes to implement the plan termination requirements under section 411(b)(5)(B)(vi) of the Code would generally apply to any plan with a termination date in a plan year beginning on or after January 1, 2008. In addition, the proposed changes would apply to any plan that was not in existence on June 29, 2005. Pursuant to sections 701(e)(3) through (e)(5) of PPA 2006, if a plan elected to have these statutory provisions apply for any period after June 29, 2005, and before the plan year beginning on or after January 1, 2008, or if the statutory provisions are first effective for a plan after the first plan year beginning on or after January 1, 2008 (*e.g.*, a collectively bargained plan), these regulatory changes would apply to any plan with a termination date on or after such earlier effective date elected by the plan, or such later effective date provided under PPA 2006. For plans that terminate under part 4041 on or after the effective date of these statutory provisions and pending the issuance of final Treasury regulations, compliance with PPA 2006 would constitute compliance with the new rules for Title IV purposes.¹²

¹² The 2010 final Treasury regulations provide that, for periods after the statutory effective date and before the regulatory effective date, a plan is permitted to rely on the provisions of the 2010 final Treasury regulations, the

The proposed regulatory changes to implement the lump sum provisions under section 411(a)(13) of the Code would apply to distributions made from a terminated plan with a termination date in a plan year beginning on or after January 1, 2008.

Regulatory Impact Analysis

Regulatory Procedures

Executive Order 12866 “Regulatory Planning and Review” and Executive Order 13563 “Improving Regulation and Regulatory Review”

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Orders 12866 and 13563 require a comprehensive regulatory impact analysis be performed for any economically significant regulatory action, defined as an action that would result in an annual effect of \$100 million or more on the national economy or which would have other substantial impacts. In accordance with OMB Circular A-4, the Department has examined the economic and policy implications of this proposed rule and has concluded that the action’s benefits justify its costs.

Under Section 3(f)(1) of Executive Order 12866, a proposed rule is economically significant if “it is likely to result in a rule that may . . . [h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State,

2010 proposed Treasury regulations, the 2007 proposed regulations on Hybrid Retirement Plans, 72 FR 73680, 48 (Dec. 28, 2007), and IRS Notice 2007-6 for purposes of satisfying the requirements of sections 411(a)(13) and 411(b)(5) of the Code.

local, or tribal governments or communities.” PBGC has determined that this proposed rule does not cross the \$100 million threshold for economic significance and is not otherwise economically significant.

The economic effect of the proposed rule is attributable almost entirely to the economic effect of the PPA 2006 changes to terminating cash balance plans. Accordingly, PBGC is basing its determination on its experience with plans subject to these provisions.

PBGC estimates that, to date, the total economic effects of the PPA 2006 changes – in terms of lower benefits paid to participants and associated savings – is less than \$4 million. These effects are primarily due to lower lump sum payments to some participants as a result of the PPA 2006 provisions that allow payment of the hypothetical account balance to participants. Because PBGC generally pays lump sums only when the benefit is de minimis (currently \$5,000 or less), and because only a small percentage of participants in cash balance plans trustee by PBGC receive benefits in lump sum form, the economic effects are relatively small.

PBGC estimates that there will be little if any economic effect from PPA 2006’s averaging provisions. As explained in the **Background** section, before the PPA 2006 changes went into effect, if a cash balance plan used a variable interest rate at plan termination to determine accrued benefits, for payment purposes PBGC credited interest to a participant’s account using the plan’s variable index from the termination date until a participant’s normal retirement date or annuity starting date. PPA 2006 requires that a cash balance plan that uses a variable rate for calculating benefits use the average of the rates used under the plan during the five-year period ending on the plan termination date. This change could result in larger benefits payable to some participants and smaller benefits payable to other participants as compared to

the pre-PPA 2006 methodology, depending on fluctuations in rates. PBGC believes that these losses and gains in benefits for participants will be largely offsetting.

Although, PBGC cannot predict with certainty which cash balance plans will terminate, the funding level of such plans, or the number of participants that will be paid de minimis lump sum payments, given the relatively low estimate of the effect of the statutory provisions to date, PBGC has determined that the annual effect of the proposed rule will be less than \$100 million.

Regulatory Flexibility Act

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. The amendments implement and in some cases clarify statutory changes made in PPA 2006; they do not impose new burdens on entities of any size. Accordingly, as provided in section 605 of the Regulatory Flexibility Act (5 U.S.C 601 et seq.), sections 603 and 604 do not apply.

Paperwork Reduction Act

The amendments in the proposed rule would change the information requirements approved by the Office of Management and Budget under the Paperwork Reduction Act under OMB control number 1212-0036 (expires December 31, 2013). PBGC is submitting the information requirements relating to these amendments to part 4041 to the Office of Management and Budget for review and approval under the Paperwork Reduction Act. Copies of PBGC's request may be obtained free of charge by contacting the Disclosure Division of the Office of the General Counsel of PBGC, 1200 K Street, NW., Washington, DC 20005, 202-326-4040; the request is also available on www.reginfo.gov.

PBGC estimates that 1,379 plan administrators will be subject to the collection of information requirements under 1212-0036 each year, and that the total annual burden of complying with these requirements is 2,161 hours and \$3,098,441. Much of the work associated with terminating a plan is performed for purposes other than meeting these requirements. (Detailed information on these burden estimates is included in PBGC's request.)

Comments on the paperwork provisions under this proposed rule should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Pension Benefit Guaranty Corporation, via electronic mail at OIRA_DOCKET@omb.eop.gov or by fax to (202) 395-6974. Although comments may be submitted through [insert date 60 days after date of publication in the Federal Register], the Office of Management and Budget requests that comments be received on or before [insert date 30 days after date of publication in the Federal Register] to ensure their consideration.

Comments may address (among other things) –

- Whether the proposed collection of information is needed for the proper performance of PBGC's functions and will have practical utility;
- The accuracy of PBGC's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancement of the quality, utility, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

List of Subjects

29 CFR Part 4001

Pensions.

29 CFR Part 4022

Pension insurance, Pensions.

29 CFR 4041

Pension insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR 4044

Pension insurance, Pensions.

For the reasons given above, PBGC proposes to amend 29 CFR parts 4001, 4022, 4041, and 4044 as follows.

PART 4001 – Terminology

1. The authority citation for part 4001 continues to read as follows:

Authority: 29 U.S.C. 1301, 1302(b)(3).

2. In § 4001.2, add a new definition in alphabetical order to read as follows:

§ 4001.2 Definitions

Statutory hybrid plan means a cash balance plan or other statutory hybrid plan under regulations issued by the Department of the Treasury.

PART 4022 – Benefits Payable in Terminated Single-Employer Plans

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

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

4. In § 4022.2, amend the first paragraph by removing the words “proposed termination date, substantial owner” and adding in their place “proposed termination date, statutory hybrid plan, substantial owner.”

5. Add a new subpart H to read as follows:

Subpart H – Calculation of benefits payable under statutory hybrid plans

§ 4022.120 Purpose and scope.

(a) *General.* This subpart H supplements the general rules in part 4022. These rules apply for determining the benefit payable under the provisions of a statutory hybrid plan and the amount of the benefit that PBGC will guarantee or that is payable under title IV of ERISA. To the extent the rules and procedures of this subpart H conflict with the rules and procedures in subparts A through G of part 4022, the provisions of subpart H govern.

(b) *Statutory hybrid plan.* In general, a statutory hybrid plan (defined in § 4001.2 of this chapter) includes a hybrid defined benefit pension plan under the terms of which the accumulated benefit of a participant (or any portion thereof) is expressed as the current balance of a hypothetical account maintained for the participant (a cash balance formula), as the current value of an accumulated percentage of the participant's final average compensation (a pension equity formula), or as a formula with an effect similar to a cash balance or pension equity formula. This subpart H applies with respect to all or any portion of a participant's benefit under a defined benefit plan to the extent such benefit is determined under a statutory hybrid benefit formula.

§ 4022.121 Interest and mortality assumptions and other plan terms.

(a) *In general.* PBGC will determine a participant's benefit based on the terms of the plan, including the interest rate and mortality table otherwise applicable for determining that benefit under the plan, as of the plan's termination date. Special rules apply under paragraph (e) of this section for a PPA 2006 bankruptcy termination.

(1) *Plan terms.* PBGC will determine plan benefits using relevant plan provisions in effect as of the plan's termination date (or, for determining the average rate in the case of a variable rate, within the 5-year period ending on the plan's termination date). All relevant plan provisions (including provisions that become applicable upon plan termination) must be consistent with the requirements under section 204(b)(5)(B) of ERISA and section 411(b)(5)(B) of the Code and regulations thereunder. Relevant plan provisions include, but are not limited to, the following:

(i) The basis and the timing for determining the interest crediting rate used by the plan for each plan year (or portion thereof).

(ii) The periodic frequency at which interest credits are applied (monthly, quarterly, etc.).

(iii) The interest rate and mortality table (or conversion factor) used to determine the amount of any benefit payable in the form of an annuity payable at normal retirement age. If a plan uses a mortality table as of the termination date that is updated automatically to reflect expected improvements in mortality experience (*e.g.*, the applicable mortality table provided under Code section 417(e)(3)), PBGC will take into account future adjustments under that table for expected improvements in mortality experience through each participant's annuity starting date.

(iv) The averaging methodology to be used, if the interest crediting rate or the annuity conversion interest rate under the plan is a variable rate, upon the termination of the plan.

(v) The method for determining a participant's annuity benefit. Examples—

Example 1. Immediate annuity conversion plan. A cash balance plan determines immediate annuity benefits by applying immediate annuity conversion factors to the participant's hypothetical account balance as of the annuity starting date. PBGC will add interest credits to

the participant's hypothetical account balance each interest crediting period beginning after the plan's termination date through the participant's annuity starting date and convert the balance to an annuity using the immediate annuity conversion factors (specified under the plan as of the termination date) at the participant's age on the annuity starting date.

Example 2. Deferred annuity conversion plan. A pension equity plan determines annuity benefits by applying deferred annuity conversion factors to the accumulated percentage of the participant's final average compensation at cessation of accruals. PBGC will determine the current value of the accumulated percentage of an active participant's final average compensation as of the plan's termination date and convert this value to an annuity using the deferred annuity conversion factors specified under the plan as of the termination date (followed by an adjustment, if necessary, in the annuity using the plan's early retirement provisions to reflect the participant's age on the annuity starting date) to determine the benefit payable as an annuity at different future ages to the participant.

Example 3. Projected annuity conversion plan. A cash balance plan determines annuity benefits by reference to the accrued benefit, which is determined by projecting the participant's hypothetical account balance with interest credits to the plan's normal retirement age. PBGC will add interest credits to the participant's hypothetical account balance each interest crediting period beginning after the plan's termination date through the participant's normal retirement date (or the current date, if later) and convert the balance to an annuity payable at that age using the immediate conversion factors for that age (or the interest rate and mortality table) specified under the plan as of the termination date (followed by an adjustment, if necessary, in the annuity using the plan's early retirement provisions to reflect the participant's age on the annuity starting date).

(2) *Fixed or variable interest rate and related terms.* If, during the 5-year period ending on the plan's termination date, the plan uses the same fixed interest rate to determine a participant's accumulated benefit or the amount of any benefit under the plan payable in the form of an annuity payable at normal retirement age, PBGC will apply the rules in paragraph (b) of this section. If, during the 5-year period ending on the plan's termination date, the plan uses a variable rate (as defined in paragraph (c)(4)) to determine a participant's accumulated benefit or the amount of any benefit under the plan payable in the form of an annuity payable at normal retirement age, PBGC will apply the rules in paragraph (c) of this section. To the extent that the terms of the plan do not satisfy section 204(b)(5)(B) of ERISA and section 411(b)(5)(B) of the Code and implementing regulations, or that the plan fails to specify provisions necessary to implement applicable statutory and regulatory requirements, PBGC will determine plan benefits using the rules under paragraph (d) of this section. In the case of a PPA 2006 bankruptcy termination, PBGC will apply the interest crediting rules in paragraph (e) of this section.

(3) *Benefits affected.* (i) *General rule.* The provisions of this § 4022.121 apply to determine the benefits of any participant or beneficiary with an annuity starting date after the plan's termination date. If the plan administrator issues a notice of intent to terminate in a distress termination under ERISA section 4041(c), in compliance with § 4041.42 of this chapter, the plan administrator must apply the provisions of this § 4022.121 as of the proposed termination date specified in the notice of intent to terminate under § 4041.43. (If the plan fails to qualify for distress termination, in accordance with § 4041.42(d), benefits determined using an average interest rate must be recalculated using the interest rate otherwise applicable under the plan, disregarding the proposed termination date.)

(ii) *Special rule for involuntary terminations.* Notwithstanding paragraph (a)(3)(i) of this section, if PBGC initiates termination proceedings under ERISA section 4042 and the termination date is earlier than the date on which PBGC institutes such proceedings, PBGC generally will not change the interest rate(s), the mortality table, or other conversion factor used by the plan (in accordance with ongoing plan provisions) to calculate a benefit payable to a participant or beneficiary whose annuity starting date is after the termination date but on or before the date on which PBGC institutes termination proceedings. PBGC also generally will not change the interest rate(s), the mortality table, or other conversion factor used by the plan to calculate the benefit of a participant or beneficiary who submits a completed election for an annuity benefit during the period between the termination date and the date on which PBGC initiates termination proceedings. (This special rule does not apply in the case of a plan that issues a notice of intent to terminate in a distress termination under section 4041(c) and subsequently terminates under section 4042, where the termination date is the same as the proposed termination date under section 4041(c).) PBGC may in its discretion apply the general rule in paragraph (a)(3)(i) instead of the special rule in this paragraph (a)(3)(ii) if warranted under the facts and circumstances (*e.g.*, to avoid abuse).

(b) *Fixed interest rate.* If the interest crediting rate used to determine the participant's accumulated benefit (or a portion thereof) under the plan is the same fixed rate during each interest crediting period for which the interest crediting date is within the 5-year period ending on the plan's termination date, PBGC will use the fixed rate to apply interest credits to a participant's hypothetical account beginning after the termination date and ending on the participant's normal retirement date or annuity starting date, as applicable. If the interest rate (or tabular adjustment factor) used to determine the amount of any benefit under the plan payable in

the form of an annuity payable at normal retirement age is the same fixed rate (or factor) for the entire 5-year period ending on the termination date, PBGC will use such fixed rate (or factor) to convert the participant's hypothetical account to an annuity.

(c) *Variable rate.*

(1) *Use of average rate for determining interest credits after termination date.*

(i) If the interest rate used by the plan to determine a participant's accumulated benefit (or a portion thereof) under the plan was a variable rate during the interest crediting periods in the 5-year period ending on the plan's termination date, PBGC will use the average of the interest crediting rates used under the plan during the 5-year period ending on the termination date to apply interest credits to a participant's hypothetical account balance beginning after the termination date and ending on the participant's normal retirement date or annuity starting date, as applicable.

(ii) For purposes of paragraph (c)(1)(i), the average is the arithmetic average, expressed as an annual rate, of the interest crediting rates that applied under the terms of the plan during any interest crediting period for which the interest crediting date is within the 5-year period ending on the termination date (excluding any interest crediting date under the terms of the plan that is distinct from the plan's regular interest crediting date, such as the date of separation from employment or plan termination).

(2) *Use of average rate for determining annuity amount.* If the interest rate (or tabular adjustment factor) used by the plan to determine the amount of any benefit under the plan payable in the form of an annuity payable at normal retirement age is a variable rate during the 5-year period ending on the plan's termination date, PBGC will determine the arithmetic average of the interest rates (or factors) that applied under the terms of the plan during periods for which

the date of any rate (or factor) change was within the 5-year period ending on the termination date. The average rate will apply to determine the amount of any benefit under the plan payable in the form of a life annuity (*i.e.*, an annuity that continues at least as long as the life of the annuitant) payable at normal retirement age, or, in the case of an immediate annuity conversion plan that uses a variable rate to determine the amount of a benefit, to determine the amount of any benefit under the plan payable in the form of a life annuity payable at the annuity starting date. In either case, the averaging requirement will apply only to determine the amount of the benefit in the automatic PBGC form under § 4022.8(b) of PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans, *e.g.*, the form a married participant or an unmarried participant (as applicable) would be entitled to receive from the plan in the absence of an election. If the participant or beneficiary elects an optional PBGC form under § 4022.8(c), PBGC will convert the benefit amount from the automatic PBGC form in accordance with that section.

(3) *Replacement with 3rd Segment Rate.* If the interest crediting rate in any interest crediting period during the 5-year period ending on the termination date is a variable rate described in § 1.411(b)(5)-1(d)(5) of the Treasury regulations or a variable rate that is impermissible under Treasury regulations, PBGC will replace such rate with the third segment rate under Code section 430(h)(2)(C)(iii) for the last calendar month ending before the beginning of the interest crediting period. Consistent with Treasury regulations, PBGC generally will adjust the third segment rate to account for any maximums or minimums to the interest crediting rate that applied in the period under the plan's terms, but will not adjust the third segment rate with regard to other reductions that applied in the period under the plan.

(4) *Application of average interest rate.* The average interest crediting rate determined under paragraphs (c)(1), (c)(2), and (c)(3) of this section will apply to determine the participant's accumulated benefit beginning after the plan's termination date, and ending on the participant's normal retirement date (or later annuity starting date), or – depending on the terms of the plan – the participant's annuity starting date. If the plan's termination date occurs in the middle of an interest crediting period, the participant's hypothetical account balance will be credited with a pro rata amount of the interest credit the participant would have otherwise received under the terms of the plan for the portion of the interest crediting period ending on the plan's termination date (but this rate will not be included in the average interest crediting rate determined under paragraphs (c)(1), (c)(2), and (c)(3) of this section). For any subsequent partial interest crediting period (*e.g.*, a portion of the interest crediting period following the plan's termination date), the participant's hypothetical account balance will be credited with a pro rata amount of the average interest crediting rate determined under paragraphs (c)(1), (c)(2), and (c)(3).

(5) *Definition of variable rate.* A variable interest rate is a rate of interest that is adjusted at least annually under the plan based on a floating interest rate, yield, or rate of return, and that otherwise satisfies the requirements of section 204(b)(5) of ERISA and section 411(b)(5) of the Code and regulations thereunder. It includes interest credits determined under a plan based on the greater of 2 or more different interest crediting rates (*e.g.*, a fixed rate and a variable rate); a floor applied to certain rates; and a rate that can never be in excess of certain bond-based rates (see Treasury regulations § 1.411(b)(5)-1(d)). Also, for purposes of the averaging rules described in § 4022.121(c), a variable rate includes any rate that was not the same fixed rate on any interest crediting date during the interest crediting periods in the 5-year period ending on the

plan's termination date or, in the case of a variable annuity conversion rate (or factor), on the date of any rate (or factor) change within the 5-year period ending on the termination date.

(d) *Default rules for determining benefits.* To the extent that plan provisions do not satisfy section 204(b)(5)(B) of ERISA and section 411(b)(5)(B) of the Code and implementing regulations, or that the plan fails to specify provisions necessary to implement applicable statutory or regulatory requirements (including requirements in paragraph (d)(5) and (d)(6) of this section), PBGC will apply the rules in paragraphs (d)(1) through (d)(6) of this section.

(1) *Averaging requirement or averaging methodology.* If the plan uses a variable rate to determine the participant's accumulated benefit or the amount of any benefit payable as an annuity at normal retirement age, PBGC will determine a participant's benefits using the arithmetic average of the rates of interest used under the plan, as described in paragraph (c).

(2) *Mortality table.* With respect to the mortality table to be used, PBGC will use the mortality table provided under Code section 417(e) that would apply if the annuity starting date were the plan's termination date (*i.e.*, no future projections to the mortality table).

(3) *Interest crediting rate.* Solely with respect to a plan's failure to specify the interest crediting rate to be used, PBGC will compute an average interest crediting rate as the arithmetic mean of the 30-year Treasury Constant Maturity rates in effect for five calendar months: the calendar month in which the plan terminates, and, for each of the preceding four years, the calendar month that is the same as the calendar month in which the plan terminates. For example, if a plan terminates in July 2009, the relevant months would be July 2009, July 2008, July 2007, July 2006, and July 2005.

(4) *Annuity conversion interest rate.* With respect to an annuity conversion interest rate or conversion factor to be used, PBGC will compute an average annuity conversion interest rate

as the arithmetic mean of the 30-year Treasury Constant Maturity rates in effect for five calendar months: the calendar month in which the plan terminates, and, for each of the preceding four years, the calendar month that is the same as the calendar month in which the plan terminates. For example, if a plan terminates in July 2009, the relevant months would be July 2009, July 2008, July 2007, July 2006, and July 2005.

(5) *Five-year period includes plan years before 2008.* PBGC will take into account the interest rates used under the plan prior to the first plan year beginning on or after January 1, 2008 (or the earlier or later effective date described in sections 701(e)(3)-(5) of PPA 2006), if these plan years are part of the 5-year averaging period, for purposes of calculating an average rate of interest. For plans in existence on June 29, 2005, the rates used before the 2008 plan year (or other PPA 2006 effective date for a plan) during the 5-year averaging period are not subject to the requirements of section 204(b)(5)(B) of ERISA and section 411(b)(5)(B) of the Code (except as otherwise provided under Treasury regulations) although PBGC will apply the rules in paragraph (c)(2) of this section to such rates.

(6) *Statutory hybrid benefit formula in effect less than five years.* If the statutory hybrid benefit formula under the plan was in effect for less than five years, PBGC will use the interest rates used under the plan, modified in accordance with this section, during the period the statutory hybrid benefit formula was in effect to calculate the average rate of interest.

(7) *Examples of application of averaging rules.*

Example 1. Projected annuity conversion plan with replacement of 3rd segment rate.

Upon the termination of a cash balance plan, the plan provides a variable index for purposes of determining the interest crediting rate. The plan credits interest annually at the end of each calendar year through the participant's normal retirement date (or the current date, if later). The

plan's termination date is June 30, 2015. For the two immediately preceding interest crediting dates within the 5-year period ending on the termination date, December 31, 2014, and December 31, 2013, the plan used the annual rate of return on plan assets as of the end of the preceding plan year as its interest crediting rate. For the three preceding interest crediting dates within the 5-year period, the plan used the rates under a Treasury bond index described in Treas. Reg. § 1.411(b)(5)-1(d)(4) as of the end of the preceding plan year as its interest crediting rate. Based on these rates, the plan used interest crediting rates of 8.00%, -3.00%, 4.50%, 5.50%, and 6.00%, respectively, for the interest crediting periods ending December 31, 2014, December 31, 2013, December 31, 2012, December 31, 2011, and December 31, 2010. When calculating the average rate of interest, PBGC would replace the rate of return on plan assets with the third segment rate for the last calendar month ended before the beginning of each interest crediting period. Assume these third segment rates are 6.40% and 6.70%, respectively. PBGC would replace the 8.00% interest rate with 6.40% and the -3.00% interest rate with 6.70%. PBGC would then calculate the average rate of interest as the arithmetic average of 6.40%, 6.70%, 4.50%, 5.50%, and 6.00%, which equals 5.82% $((6.40 + 6.70 + 4.50 + 5.50 + 6.00)/5)$. PBGC thus would use a pro rata amount of the annual rate of return on plan assets for the period ending December 31, 2014, to credit a participant's hypothetical account balance for the period from January 1, 2015 through June 30, 2015, and a rate of 5.82% to apply interest credits to a participant's hypothetical account balance each year for the period from July 1, 2015, through the participant's normal retirement date (pro rated for any partial interest crediting period).

Example 2. Immediate annuity conversion plan with fixed tabular conversion factor.

The interest crediting rate is the same as in *Example 1*, except that the plan credits interest through the participant's retirement date and provides for immediate annuity conversion factors

at any age. Assume a participant has a hypothetical account balance equal to \$100,000 as of the plan's termination date on June 30, 2015; this balance includes annual pay credits through December 31, 2014, and a pro rata interest credit through June 30, 2015, based on the plan's interest crediting rate. The participant retires on November 1, 2020, at age 55. PBGC would determine the participant's hypothetical account balance on November 1, 2020, by applying interest credits to the participant's \$100,000 hypothetical account balance at an annual rate of 5.82%, credited on December 31 of each year and pro rated for any partial crediting period. The resulting hypothetical account balance at the participant's retirement is \$135,216 ($\$100,000 \times 1.0582^{5.33333}$) (this includes pro rata credit for the periods July 1, 2015 through December 31, 2015, and January 1, 2020 through October 31, 2020). PBGC would then determine the amount of the participant's benefit payable as an annuity by converting the hypothetical account balance to an immediate annuity using the plan's immediate annuity conversion factor at age 55. The plan provides for an immediate annuity conversion factor of 14.2 at age 55. Therefore, the resulting monthly annuity benefit for the participant at age 55 is \$794 ($\$135,216 / (14.2 \times 12)$).

Example 3. Immediate annuity conversion plan with variable conversion interest rate.

The facts are the same as in Examples 1 and 2, except that the plan used a variable annuity conversion rate based on the rates under a Treasury bond index described in Treas. Reg. § 1.411(b)(5)-1(d)(4) at the beginning of each plan year. The plan's average annuity conversion rate would include rates on the date of each rate change that occurred within the 5-year period from July 1, 2010 through June 30, 2015. Assume these rates are 5.25%, 4.75%, 5.50%, 4.50%, and 5.50%, respectively, for the date of each rate change on January 1, 2015, January 1, 2014, January 1, 2013, January 1, 2012, and January 1, 2011. PBGC would calculate the arithmetic average of 5.25%, 4.75%, 5.50%, 4.50%, and 5.50%, which equals 5.10% ($(5.25 + 4.75 + 5.50$

+ 4.50 + 5.50)/5). The plan defines the mortality table used to convert account balances to monthly annuity benefits to be GAR94. PBGC would then use 5.10% and mortality table GAR94 to calculate an annuity conversion factor of 14.4198 at age 55. Therefore, the resulting monthly annuity benefit for the participant at age 55 is \$781 ($\$135,216 / (14.4198 \times 12)$).

(e) *PPA 2006 bankruptcy termination.* In the case of a PPA 2006 bankruptcy termination, PBGC will apply interest credits to a participant's hypothetical account balance determined as of the bankruptcy filing date by using the following interest rates:

(i) The interest rate(s) in effect under the plan for the period beginning after the bankruptcy filing date and ending on the plan's termination date.

(ii) The interest rate as of the plan's termination date – or if the interest rate under the plan is a variable rate as of the termination date, the average rate of interest as determined under paragraphs (c) or (d) of this section – for the period beginning after the termination date and ending on the participant's normal retirement date (or later annuity starting date), or – depending on the terms of the plan – on the participant's annuity starting date.

§ 4022.122 Lump sum payment.

(a) *Lump sum as hypothetical account balance under the plan.* Notwithstanding § 4022.7 of this part, if the plan provides for a single sum payment equal to the balance of the hypothetical account of the participant (or the value of the accumulated percentage of the participant's final average compensation), PBGC will determine whether the benefit is payable as a de minimis lump sum payment and the amount of the lump sum payment based on the participant's hypothetical account balance (or the accumulated percentage of final average compensation) as of the plan's termination date, to the extent payable under title IV of ERISA.

(b) *Lump sum based on section 417(e) under the plan.*

(1) *In general.* If paragraph (a) of this section does not apply (*e.g.*, the plan provides that the present value rules of section 417(e) of the Code apply in calculating the amount of a single sum payment), PBGC will use the methodology in § 4022.7 of this part to determine the lump sum value of the benefit. If either this amount or the participant's hypothetical account balance (or accumulated percentage of final average compensation), as of the termination date, is \$5,000 or less, PBGC will pay the greater of the two amounts as a de minimis lump sum payment, except as provided in paragraph (b)(2) of this section.

(2) *Exception.* If, on or after August 18, 2006, the plan has made any lump sum payments based on the hypothetical account balance (or the current value of the accumulated percentage of the participant's final average compensation) without regard to the present value rules of section 417(e) of the Code, or stated in writing its intent to make lump sum payments on that basis, PBGC will calculate the lump sum value of a benefit, to determine whether the benefit is payable as a lump sum and, if so, the amount of the payment, in accordance with paragraph (a) of this section.

(c) *Plan does not describe determination of lump sum amount.* If the plan does not provide for a single sum payment or de minimis lump sum payment, or does not describe the calculation of such a payment, PBGC will calculate the lump sum value of a benefit, to determine whether the benefit is payable as a lump sum and, if so, the amount of the payment, in accordance with paragraph (a) of this section.

§ 4022.123 Phase-in of guarantee of benefit increases.

(a) *Changes subject to phase-in limitation.* For purposes of applying § 4022.24 and the phase-in limitations on the guarantee under § 4022.25, except as otherwise provided in

subsection (b) of this section, a benefit increase as defined under § 4022.2 includes, but is not limited to, a benefit increase that results from a change in the plan's —

(i) Timing or method for crediting interest;

(ii) Fixed mortality table to another fixed mortality table;

(iii) Fixed mortality table to a mortality table that updates automatically in future years to reflect expected improvements in mortality experience (or such updated mortality table to a fixed mortality table), or other change in the basis on which a participant's hypothetical account balance is converted into a benefit payable as an annuity;

(iv) Fixed interest rate to another fixed interest rate; or

(v) Basis for crediting interest to a participant's hypothetical account or for determining the interest factor used to convert a hypothetical account to an annuity. Such a change includes, but is not limited to, a change from a fixed rate basis to a variable rate basis (or vice versa) or a change from one variable index to another variable index.

(b) *Changes not subject to phase-in limitation.* Changes resulting in a benefit increase under a plan that will not be treated as a benefit increase under § 4022.2 include —

(i) A change that is required to comply with the termination requirements of ERISA section 204(b)(5)(B)(vi) and Code section 411(b)(5)(B)(vi) (*e.g.*, a change in the plan's interest rate to an average rate of interest);

(ii) A change in the interest crediting rate that is permitted, notwithstanding section 411(d)(6) of the Code, pursuant to Treasury regulations (*e.g.*, a change that is permitted under Treas. Reg. § 1.411(b)(5)-1(e)(3), including a change under certain circumstances to the long-term investment grade corporate bond rate);

(iii) A change in the interest crediting rate that is permitted during the amendatory period under section 1107 of PPA 2006, or any extension of the amendatory period issued by the Department of the Treasury;

(iv) An adjustment in the interest rate under a specified variable rate index used by the plan; and

(v) An automatic future update in a mortality table specified under the plan as of the termination date that reflects expected improvements in mortality experience (*e.g.*, the applicable mortality table provided under Code section 417(e)(3)).

PART 4041 – TERMINATION OF SINGLE-EMPLOYER PLANS

6. The authority citation for part 4041 continues to read as follows:

Authority: 29 USC 1302(b)(3), 1341, 1344, 1350.

7. In § 4041.2, amend the first paragraph by removing the words “standard termination, termination date” and adding in their place “standard termination, statutory hybrid plan, termination date”.

8. In § 4041.28, amend paragraph (c) by redesignating paragraph (4) as paragraph (5), redesignating paragraph (3) as paragraph (4), and adding a new paragraph (3) to read as follows:

§ 4041.28. Closeout of plan.

* * * * *
(c) * * * * *
* * * * *

(3) *Statutory hybrid plans.* This paragraph (c)(3) applies only for purposes of this part. The plan administrator is deemed to comply with section 204(b)(5)(B)(vi) of ERISA and section 411(b)(5)(B)(vi) of the Code and implementing regulations issued by the Department of the

Treasury if the plan administrator distributes plan assets in satisfaction of plan benefits consistent with the provisions in § 4022.121 of this chapter.

9. In § 4041.42, amend paragraph (c) by adding a sentence at the end to read as follows: “The plan administrator of a statutory hybrid plan must do so consistent with the provisions under part 4022, subpart H, of this chapter.”

PART 4044 – ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS

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

Authority: 29 USC 1301(a), 1302(b)(3), 1341, 1344, 1362.

11. In § 4044.2, amend paragraph (a) by removing the words “single-employer plan, substantial owner” and adding in their place “single-employer plan, statutory hybrid plan, substantial owner”.

12. In § 4044.52, add a new paragraph (e) to read as follows:

§ 4044.52 Valuation of Benefits.

* * * * *

(e) *Statutory hybrid plans.*

(1) *In general.* Except as provided in paragraphs (e)(2) through (e)(4) of this section, benefits must be valued under a terminating statutory hybrid plan consistent with the general valuation rules of this subpart B of part 4044, and the provisions for the calculation and payment of benefits described in subpart H of part 4022 of this chapter.

(2) *De minimis lump sum exception.* If a benefit is payable as a de minimis lump sum under § 4022.122, the form to be valued is the benefit payable as an annuity in the absence of a valid election under the terms of the plan, at the expected retirement age, in accordance with §§ 4044.51 through 4044.57 of this part.

(3) *Involuntary termination exception.* If a benefit payment is calculated pursuant to § 4022.121(a)(3)(ii), the benefit will be valued based on the interest crediting rate and the annuity conversion rate in effect under the plan as of the plan's termination date (subject to the rules of §§ 4022.121 through 4022.123, disregarding § 4022.121(a)(3)(ii)), at the expected retirement age, in accordance with §§ 4044.51 through 4044.57 of this part.

(4) *Priority category 3 benefits.* The amount of the priority category 3 benefit under § 4044.13 of this part with respect to a participant who was eligible to receive a priority category 3 benefit will be determined in accordance with paragraphs (e)(4)(i) through (iii) of this section.

(i) In the case of a termination that is not a PPA 2006 bankruptcy termination, the priority category 3 benefit of a participant who is eligible to receive an annuity before the beginning of the 3-year period ending on the termination date, but whose benefit was not in pay status as of that date, will be determined based on the balance of the participant's hypothetical account, the interest crediting rate, and the annuity conversion factor that the plan would have used had the participant retired three years before the termination date (on the same day and month as the termination date). The interest rates as so determined will be used to apply interest credits from such date through the plan's normal retirement age, and to convert the participant's hypothetical account balance to an annuity. (If the plan provides for immediate annuity conversion factors, the amount of the account balance is determined and converted to an annuity as of the date three years before the termination date, based on the rates in effect as of that date.) The benefits in priority category 3 are generally based on the lowest annuity benefit payable under the plan provisions during the 5-year period ending on the termination date.

(ii) In the case of a PPA 2006 bankruptcy termination, the priority category 3 benefit of a participant who is eligible to receive an annuity before the beginning of the 3-year period ending

on the bankruptcy filing date, but whose benefit was not in pay status as of that date, will be determined based on the balance of the participant's hypothetical account, the interest crediting rate, and the annuity conversion rate that the plan would have used had the participant retired three years before the bankruptcy filing date (on the same day and month as the bankruptcy filing date). The interest rates as so determined will be used to apply interest credits from such date through the plan's normal retirement age, and to convert the participant's hypothetical account balance to an annuity. (If the plan provides for immediate annuity conversion factors, the amount of the account balance is determined and converted to an annuity as of the date three years before the bankruptcy filing date, based on the rates in effect as of that date.) The benefits in priority category 3 are generally based on the lowest annuity benefit payable under the plan provisions during the 5-year period ending on the bankruptcy filing date.

(iii) In accordance with § 4044.10, the benefit assigned to priority category 3, as determined under paragraphs (e)(4)(i) or (e)(4)(ii), may not exceed the amount of the benefit determined as of the plan's termination date under the plan provisions as of the termination date (including the use of an average rate of interest in the case of a variable rate under § 4022.121).

(5) *Example:* The plan termination is a PPA 2006 bankruptcy termination with a bankruptcy filing date on August 31, 2008. Because Participant A had reached his Earliest PBGC Retirement Date, as defined in § 4022.10, based on plan provisions in effect on August 31, 2005, on the same day and month as the bankruptcy filing date but three years earlier, Participant A has benefits in priority category 3. The plan used the 1-year Treasury Constant Maturity rate of 3.64% for the calendar month prior to the bankruptcy filing date (July 2005) to determine both the interest crediting rate and the annuity conversion rate on August 31, 2005. PBGC would determine Participant A's priority category 3 benefit based on the balance of

Participant A's hypothetical account as of August 31, 2005, by using the interest rate used under the plan on August 31, 2005, to apply interest credits from August 31, 2005, through the normal retirement age (as provided under the plan's terms) and convert the participant's hypothetical account balance to an annuity. The participant's priority category 3 benefit would be limited to the amount of the participant's plan benefit as of the termination date, in accordance with § 4044.10, determined by applying interest credits based on the interest rate(s) in effect under the plan for the period from the bankruptcy filing date through the plan's termination date, and the interest rate as of the plan's termination date (including the average of the rates of interest under a variable index used by the plan during the 5-year period ending on the termination date) for the period from the termination date to the normal retirement age.

13. Add new § 4044.76 to subpart B to read as follows:

§ 4044.76 Statutory hybrid plans.

(a) *Valuation.* This section supplements the general rules in part 4044 for the valuation of benefits payable in a terminated statutory hybrid plan.

(b) *Interest and mortality assumptions.* In determining benefits under the plan, the plan administrator must value benefits consistent with the provisions in § 4022.121 of this chapter.

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Joshua Gotbaum
Director
Pension Benefit Guaranty Corporation

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