

[Billing Code 7709-01-P]

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4022

RIN 1212-AB18

Benefits Payable in Terminated Single-Employer Plans; Limitations on Guaranteed Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Proposed rule.

SUMMARY: This is a proposed rule to amend PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans. That regulation sets forth rules on PBGC's guarantee of pension plan benefits, including rules on the phase-in of the guarantee. The amendments implement section 403 of the Pension Protection Act of 2006, which provides that the phase-in period for the guarantee of benefits that are contingent upon the occurrence of an "unpredictable contingent event," such as a plant shutdown, starts no earlier than the date of the shutdown or other unpredictable contingent event.

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

ADDRESSES: Comments should be identified by Regulation Information Number (RIN 1212-AB18), and may be submitted by any of the following methods:

- Federal eRulemaking Portal: 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, NW., Washington, DC 20005-4026.

PBGC will make all comments available on its Web site, www.pbgc.gov. Copies of comments also may be obtained by writing PBGC's Communications and Public Affairs Department (CPAD) at Suite 240 at the above address or by visiting or calling CPAD during normal business hours (202-326-4040).

FOR FURTHER INFORMATION CONTACT: John H. Hanley, Director; Gail A. Sevin, Manager; or Bernard Klein, Attorney; Legislative & Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW, Washington, DC 20005, 202-326-4224. (TTY/TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4224.)

SUPPLEMENTARY INFORMATION:

Background

The Pension Benefit Guaranty Corporation (PBGC) administers the single-employer pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). The program covers certain private-sector, single-employer defined benefit plans, for which premiums are paid to PBGC each year.

Covered plans that are underfunded may terminate either in a distress termination under section 4041(c) of ERISA or in an involuntary termination (one initiated by PBGC) under section 4042 of ERISA. When such a plan terminates, PBGC typically is appointed statutory trustee of the plan, and becomes responsible for paying benefits in accordance with the provisions of Title IV.

Under sections 4022(b)(1) and 4022(b)(7) of ERISA and §§ 4022.24 through .26 of PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans, 29 CFR part 4022, PBGC's guarantee of new pension benefits and benefit increases is "phased in" over a

five-year period, which begins on the date the new benefit or benefit increase is adopted or effective (whichever is later).

On August 17, 2006, the Pension Protection Act of 2006, Pub. L. 109-280 (PPA 2006), was signed into law. Section 403 of PPA 2006 amended section 4022 of ERISA by adding a new section 4022(b)(8), which changes the start of the phase-in period for plant shutdown and other “unpredictable contingent event benefits” (UCEBs). Under new section 4022(b)(8), the phase-in rules are applied as if a plan amendment creating a UCEB was adopted on the date the unpredictable contingent event (“UCE”) occurred rather than as of the actual adoption date of the amendment, which is almost always earlier. As a result of the new provision, the guarantee of benefits arising from plant shutdowns and other UCEs that occur within 5 years of plan termination (or the date the plan sponsor entered bankruptcy, if applicable under PPA 2006, as explained below) generally will be lower than under prior law. This new provision, which does not otherwise change the existing phase-in rules, applies to benefits that become payable as a result of a UCE that occurs after July 26, 2005.

This proposed rule would amend part 4022 to implement the PPA 2006 changes to the guarantee of UCEBs. With one exception, explained below under the heading “Bankruptcy filing date treated as deemed termination date,” the other provisions of PPA 2006 affecting PBGC’s guarantee do not affect phase-in of the guarantee of UCEBs and thus are not addressed in this proposed rule.

Phase-in of PBGC Guarantee

Under section 4022(b)(7) of ERISA, the guarantee of benefits under a new plan or of a new benefit or benefit increase under an amendment to an existing plan (all of which are referred to in PBGC’s regulations as “benefit increases”) is “phased in” based on the number of full years the benefit increase is in the plan. The time period that a benefit increase has been provided

under a plan is measured from the later of the adoption date of the provision creating the benefit increase or the effective date of the benefit increase. Generally, 20 percent of a benefit increase is guaranteed after one year, 40 percent after two years, etc., with full phase-in of the guarantee after five years. If the amount of the monthly benefit increase is below \$100, the annual rate of phase-in is \$20 rather than 20 percent.

The phase-in limitation generally serves to protect the insurance program from losses caused by benefit increases that are adopted or made effective shortly before plan termination. This protection is needed because benefit increases can create large unfunded liabilities. An example is a plan amendment that significantly increases credit under the plan benefit formula for service performed prior to the amendment. Such increases generally are funded over time under the ERISA minimum funding rules. An immediate full guarantee would result in an inappropriate loss for PBGC if a plan terminated before an employer significantly funded a benefit increase. Phase-in of the guarantee allows time for some funding of new liabilities before they are fully guaranteed.

Funding of liabilities created by a benefit increase generally starts at the same time as the PBGC guarantee first applies under the phase-in rule. Under ERISA and the Internal Revenue Code (“Code”), liability created by a benefit increase must be reflected in a plan’s required contribution no later than the plan year following adoption of the benefit increase. For example, a benefit increase that is adopted and effective in the 2009 plan year must be reflected in the minimum funding contribution calculations for a plan year not later than the 2010 plan year. Similarly, such a benefit increase would become partially guaranteed during the 2010 plan year.

Over the years, legislative reforms, including those in PPA 2006, have generally shortened the permitted funding period from thirty years to seven years (or less in certain cases). This closer coordination between the permitted funding period and five-year guarantee phase-in

period generally enhanced the effectiveness of phase-in in protecting the PBGC insurance program against losses due to unfunded benefit increases. However, as explained below, before the PPA 2006 changes to the phase-in of UCEBs, this coordination generally failed in the case of UCEBs.

Unpredictable Contingent Event Benefits

UCEBs, described more specifically below, are benefits or benefit increases that become payable solely by reason of the occurrence of a UCE such as a plant shutdown.

UCEBs typically provide a full pension, without any reduction for age, starting well before an unreduced pension would otherwise be payable. The events most commonly giving rise to UCEBs are events relating to full or partial plant shutdowns or other reductions in force. UCEBs, which are frequently provided in pension plans in various industries such as the steel and automobile industries, are payable with respect to full or partial plant shutdowns as well as shutdowns of different kinds of facilities, such as administrative offices, warehouses, retail operations, etc. UCEBs are also payable, in some cases, with respect to layoffs and other workforce reductions.¹

A typical shutdown benefit provision in the steel industry — the so-called “70/80 Rule” — generally allows participants who lose their jobs due to the complete or partial closing of a facility or a reduction-in-force and whose age plus service equals 70 (if at least age 55) or 80 (at any age) to begin receiving their full accrued pension immediately, even though they have not reached normal retirement age. Similar UCEBs are common in the automobile industry with respect to shutdowns and layoffs. The purpose of these benefits is to assist participants financially in adjusting to a permanent job loss.

¹ The Technical Explanation of PPA 2006 prepared by the Joint Committee on Taxation Staff specifies that UCEBs include benefits payable with respect to “facility shutdowns or reductions in workforce.” Joint Committee on Taxation, *Technical Explanation of H.R. 4, the “Pension Protection Act of 2006,” as passed by the House on July 26, 2006, and as considered by the Senate on August 3, 2006* (JCX-38-06), August 3, 2006, at 90 (hereinafter *Technical Explanation of PPA 2006*).

Time lag between start of guarantee phase-in and funding of UCEBs

A UCEB provision typically has been in a plan many years before the occurrence of the event that eventually triggers the benefit, such as a plant shutdown. As a result, before PPA 2006, shutdown benefits, for example, were often fully guaranteed under the phase-in rules when a shutdown occurred. Because the benefit is contingent on the occurrence of an unpredictable event, plan sponsors typically did not make contributions to provide for advance funding of such benefits; funding of such benefits often did not begin until after the UCE had occurred. If, as often happened, plan termination occurred within a few years after a shutdown, the time lag between the start of the phase-in period and the start of funding resulted in an increased loss to the insurance program.

Treatment of UCEBs in OBRA 1987

Congress first explicitly addressed UCEBs in funding reforms contained in the Pension Protection Act of 1987, enacted as part of P.L. 100-203, the Omnibus Budget Reconciliation Act of 1987 (OBRA 1987). The OBRA 1987 rules for deficit reduction contributions required employers to recognize UCEBs on an accelerated basis (generally, within five to seven years), beginning after the triggering event occurred.² However, the rules did not address the mismatch of the funding and guarantee phase-in periods discussed above. They also did not address the fact that UCEBs are likely to be triggered when the employer is experiencing financial difficulty, which threatens both funding and continuation of the plan. For these reasons, in the years since OBRA 1987, PBGC has assumed more than \$1 billion of unfunded benefit liabilities from shutdown and similar benefits.

² Pub. L. No. 100-203, 10 Stat. 1330, 339-41 (codified as amended at 26 U.S.C. § 412(l) (1987)); *see* S. Rep. No. 100-63 at 171-72, 175-76 (1987).

Treatment of UCEBs in PPA 2006

Congress further addressed UCEBs in PPA 2006. PPA 2006 affected UCEBs in two important ways.

First, PPA 2006 added new ERISA section 206(g) and parallel Code section 436(b) that restrict payment of UCEBs with respect to a UCE if the plan is less than 60 percent funded for the plan year in which the UCE occurs (or would be less than 60 percent funded taking the UCEB into account). Unless the restriction is removed during that plan year as a result of additional contributions to the plan or an actuarial certification meeting certain requirements, the restriction becomes permanent and, under Treas. Reg. § 1.436-1(a)(4)(iii),³ the plan is treated as if it does not provide for those UCEBs.⁴ Because PBGC guarantees only benefits that are provided under a plan, a UCEB that is treated as not provided under the plan because of this restriction is not guaranteeable by PBGC at all, and the phase-in rules that are the subject of this proposed regulation do not come into play for such a UCEB. Moreover, under Treas. Reg. § 1.436-1(a)(3)(ii), benefit limitations under ERISA section 206(g) that were in effect immediately before plan termination continue to apply after termination.

Second, PPA 2006 better aligns the starting dates of the funding and guarantee phase-in of UCEBs. Under PPA 2006, phase-in of the PBGC guarantee does not start until the UCE actually occurs. Specifically, ERISA section 4022(b)(8), added by section 403 of PPA 2006, provides: “If an unpredictable contingent event benefit (as defined in section 206(g)(1)) is

³ Treasury Regulations under Code sections 430 and 436 also apply for purposes of the parallel rules in ERISA sections 303 and 206(g).

⁴ 74 Fed. Reg. 53004, 53062 (Oct. 15, 2009). Treas. Reg. § 1.436-1(a)(4)(iii) permits all or any portion of prohibited UCEBs to be restored by a plan amendment that meets the requirements of section 436(c) of the Code and Treas. Reg. § 1.436-1(c) and other applicable requirements. Such an amendment would create a “benefit increase” under § 4022.2 and therefore PBGC’s guarantee of UCEBs restored by such an amendment would be phased in from the later of the adoption date of the amendment or the effective date as of which the UCEB is restored, as provided under § 4022.27(c) of the proposed regulation.

payable by reason of the occurrence of any event, this section shall be applied as if a plan amendment had been adopted on the date such event occurred.” The provision applies to UCEs that occur after July 26, 2005. Thus, for purposes of the phase-in limitation, the date a UCE occurs is treated as the adoption date of the plan provision that provides for the related UCEB. This statutory change provides the PBGC insurance program a greater measure of protection than prior law from losses due to unfunded UCEBs – most notably, benefits that become payable by reason of a plant shutdown or similar event such as a permanent layoff.⁵

ERISA section 206(g)(1), as added by section 103(a) of PPA 2006, defines “unpredictable contingent event benefit” as:

“any benefit payable solely by reason of —

- (i) a plant shutdown (or similar event, as determined by the Secretary of the Treasury), or
- (ii) an event other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or occurrence of death or disability.”

PPA 2006 did not alter the rule that UCEBs are not guaranteed at all unless the triggering event occurred prior to the plan termination date (see *PBGC v. Republic Tech. Int’l, LLC*, 386 F.3d 659 (6th Cir. 2004)).

Treasury final regulation UCEB definition

On October 15, 2009 (at 74 FR 53004), the Department of the Treasury (Treasury) published a final rule on Benefit Restrictions for Underfunded Pension Plans that defines UCEB for purposes of ERISA section 206(g)(1), and thus also for purposes of section 4022(b)(8).

Treasury’s final regulation clarifies the following points regarding UCEBs:

⁵ In addition, Treas. Reg. § 1.430(d)-(1)(f)(6) requires that calculation of the funding target for a single-employer plan take into account, based on information as of the valuation date, the probability that UCEBs will become payable. Under that Treasury Regulation, the probability may be assumed to be zero if there is not more than a de minimis likelihood that the UCE will occur.

- UCEBs include only benefits or benefit increases to the extent such benefits or benefit increases would not be payable but for the occurrence of a UCE.
- The reference to “plant shutdown” in the statutory definition of UCEB includes a full or partial shutdown.

Treasury’s final regulation also states that a UCEB includes benefits triggered by events similar to plant shutdowns. Treas. Reg. § 1.436-1(j)(9) defines a UCEB as follows:

An unpredictable contingent event benefit means any benefit or increase in benefits to the extent the benefit or increase would not be payable but for the occurrence of an unpredictable contingent event. For this purpose, an unpredictable contingent event means a plant shutdown (whether full or partial) or similar event, or an event (including the absence of an event) other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability. For example, if a plan provides for an unreduced early retirement benefit upon the occurrence of an event other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability, then that unreduced early retirement benefit is an unpredictable contingent event benefit to the extent of any portion of the benefit that would not be payable but for the occurrence of the event, even if the remainder of the benefit is payable without regard to the occurrence of the event. Similarly, if a plan includes a benefit payable upon the presence (including the absence) of circumstances specified in the plan (other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or the occurrence of death or disability), but not upon a severance from employment that does not include those circumstances, that benefit is an unpredictable contingent event benefit.

Overview of Proposed Regulatory Changes

This proposed regulation incorporates the definition of UCEB under section 206(g)(1)(C) of ERISA and Treas. Reg. § 1.436-1(j)(9). It also provides that the guarantee of a UCEB would be phased in from the latest of the date the benefit provision is adopted, the date the benefit is effective, or the date the UCE that makes the benefit payable occurs.

Under the proposed regulation, PBGC would determine the date the UCE occurs based on the plan provisions and the relevant facts and circumstances, such as the nature and level of

activity at a facility that is closing and the permanence of the event. The date of the event as conceived, planned, announced, or agreed to by the employer might be relevant but would not be controlling. Where a plan provides that a UCEB is payable only upon the occurrence of more than one UCE, the proposed regulation provides that the guarantee would be phased in from the latest date when all such UCEs have occurred. For example, if a UCEB is payable only if a participant is laid off and the layoff continues for a specified period of time, the phase-in period would begin at the end of the specified period of time. Similarly, if a UCEB is payable only if both the plant where an employee worked is permanently shut down and it is determined that the employer has no other suitable employment for the employee, the phase-in period would begin when it is determined that the employer had no other suitable employment for the employee (assuming that date was later than the shutdown date).

The proposed regulation includes eight examples that show how the UCEB phase-in rules would apply in the following situations:

- Shutdown that occurs later than the announced shutdown date.
- Sequential permanent layoffs.
- Skeleton shutdown crews.
- Permanent layoff benefit for which the participant qualifies shortly before the sponsor enters bankruptcy.
- Employer declaration during a layoff that return to work is unlikely.
- Shutdown benefit with age requirement that can be met after the shutdown.
- Retroactive UCEB.
- Removal of IRC Section 436 restriction.⁶

⁶ The examples in proposed § 4022.7 are not an exclusive list of UCEs or UCEBs and are not intended to narrow the statutory definition, as further delineated in Treasury Regulations.

Whether a UCEB phase-in determination applies on a participant-by-participant basis, as opposed to facility-wide or some other basis, would depend largely upon plan provisions. For example, a benefit triggered by a reduction-in-force would be determined with respect to each participant, and thus layoffs that occur on different dates would generally be distinct UCEs. But a benefit payable only upon the complete shutdown of the employer's entire operations would apply plan-wide, and thus the shutdown date generally would be the date of the UCE for all participants.

Discussion

UCEBs covered

As noted above, new ERISA section 4022(b)(8), added by section 403 of PPA 2006, changes the rules for phasing in the guarantee of UCEBs in the case of UCEs that occur after July 26, 2005. Section 4022(b)(8) covers shutdown-type benefits, including benefits payable by reason of complete shutdowns of plants, and benefits payable when participants lose their jobs or retire as a result of partial closings or reductions-in-force at all kinds of facilities, in addition to other UCEBs. Accordingly, proposed § 4022.27(a) expressly refers to benefits payable as a result of “plant shutdowns or other unpredictable contingent events . . . , such as partial facility closings and permanent layoffs.”⁷

As stated above, a UCEB is defined by section 206(g)(1)(C) of ERISA to include benefits payable solely by reason of (1) a plant shutdown or similar event, or (2) an event other than an event such as attainment of a certain age or performance of service, that would trigger eligibility for a retirement benefit. The proposed regulation provides that PBGC would determine whether

⁷ As explained in Technical Explanation of PPA 2006, *supra* note 1, “layoff benefits,” as that term is used in Treasury Regulation § 1.401-1(b)(1)(i), are *severance* benefits that may not be included in tax-qualified pension plans. In contrast, the benefits covered in this proposed regulation are *retirement benefits* payable in the event of certain workforce reductions. These retirement benefits — generally subsidized early retirement benefits — may be provided in tax-qualified plans insured by PBGC.

a benefit is a UCEB based on the facts and circumstances; the substance of the benefit, not what it is called, determines whether the benefit would be a UCEB covered by the new phase-in rule. Accordingly, under proposed § 4022.27(b), the guarantee of any benefit that PBGC determines, based on plan provisions and facts and circumstances, is a shutdown benefit or is otherwise a UCEB would be phased in as a UCEB.

The proposed definition of UCEB under § 4022.2 provides that a benefit does not cease to be a UCEB for phase-in purposes merely because the UCE has already occurred or its occurrence has become reasonably predictable. This interpretation is supported by the plain language of ERISA section 4022(b)(8), which incorporates ERISA section 206(g)(1)(C). Section 206(g)(1)(C) expressly defines a UCEB *not* in terms of degree of predictability, but rather whether a benefit is “payable solely by reason of a shutdown or similar event . . . or an event other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or occurrence of death or disability.” In other words, section 206(g)(1)(C) provides that a UCEB remains a UCEB after the UCE occurs. Because many events that are not reliably and reasonably predictable become predictable immediately before they occur, and the concept of predictability does not apply to events after they have occurred, PBGC interprets ERISA section 4022(b)(8) to apply to benefits such as shutdown benefits regardless of whether the events triggering those benefits have already occurred or have become predictable.

Date phase-in of PBGC guarantee begins

ERISA sections 4022(b)(1) and 4022(b)(7) provide that PBGC’s guarantee of a benefit increase is phased in from the date the benefit increase is “in effect,” i.e., from the later of the adoption date or effective date of the increase. ERISA section 4022(b)(8) (added by PPA 2006) provides that, for phase-in purposes, shutdown benefits and other UCEBs are deemed to be “adopted on the date . . . [the UCE] occurs.” Thus ERISA section 4022(b)(8) protects PBGC in

the typical situation where a shutdown or permanent layoff occurs long after a shutdown benefit provision was originally adopted.

Section 4022(b)(8) could be read to produce an incongruous result in an unusual situation — where the UCE occurs first and a UCEB is adopted later, effective retroactive to the UCE. Because the date of the UCE would be treated under section 4022(b)(8) as the adoption date of the UCEB, in this situation the phase-in arguably would begin on the date of the UCE (the later of the adoption date or effective date of the UCEB), rather than on the actual adoption date of the plan amendment, as under pre-PPA 2006 law. The result would be a more generous — and more costly — guarantee of UCEBs than under pre-PPA 2006 law. To avoid this incongruous result, proposed § 4022.27(c) provides that a benefit increase due solely to a UCEB would be “in effect” as of the latest of the adoption date of the plan provision that provides for the UCEB, the effective date of the UCEB, or the date the UCE occurs.

Finally, if a UCEB becomes payable because a restriction under IRC section 436 is removed after, for example, an adequate funding contribution is made, the effective date of the UCEB for phase-in purposes is determined without regard to the restriction.

Allocation of assets

When PBGC becomes trustee of a pension plan that terminates without sufficient assets to provide all benefits, it allocates plan assets to plan benefits in accordance with the statutory priority categories in section 4044 of ERISA. The category to which a particular benefit is assigned in the asset allocation can affect insurance program costs and the extent to which participants receive nonguaranteed benefits.

Priority category 3 in the asset allocation is particularly important, because it often includes benefits that, depending on the level of the plan assets, may be paid by PBGC even though not guaranteed. Priority category 3 contains only those benefits that were in pay status at

least three years before the termination date of the plan (or that would have been in pay status if the participant had retired before that three-year period). An individual's benefit amount in priority category 3 is based on the plan provisions in effect during the five-year period preceding plan termination under which the benefit amount would be the least. Thus priority category 3 does not include benefit increases that were adopted or became effective in the five years before plan termination or, in some cases as discussed below, the bankruptcy filing date.

PBGC considered whether the UCEBs that are not guaranteed under the PPA 2006 changes should be excluded from priority category 3. Under that approach, plan assets would go farther to pay for other benefits, especially guaranteed benefits, and participants would be less likely to receive UCEBs that are not guaranteed. Alternatively, if UCEBs that are not guaranteed under the PPA 2006 changes were included in priority category 3 – as they are under pre-PPA law and PBGC's current regulation on Allocation of Assets (part 4044) – plan assets would be less likely to reach other benefits, especially guaranteed benefits, and participants would be more likely to receive UCEBs that are not guaranteed.

Because section 403 of PPA 2006 does not make any reference to section 4044,⁸ PBGC concluded that the latter interpretation is the better one, and thus the proposed regulation does not amend part 4044.

Bankruptcy filing date treated as deemed termination date

On July 1, 2008 (73 FR 37390), PBGC published a proposed rule, "Bankruptcy Filing Date Treated as Plan Termination Date for Certain Purposes; Guaranteed Benefits; Allocation of Plan Assets; Pension Protection Act of 2006," to implement section 404 of PPA 2006, which added a new section 4022(g) to ERISA. This section provides that when an underfunded plan

⁸ By contrast, three other provisions of PPA 2006 that changed PBGC's guarantee of benefits specifically provide changes to the asset allocation scheme under section 4044. *See* PPA 2006 sections 404 (treatment of bankruptcy filing date as deemed termination date), 402(g)(2)(A) (special termination rules for commercial airlines), and 407 (relating to majority owners), enacting respectively sections 4044(e), 4022(h), and 4044(b)(3) of ERISA.

terminates while its contributing sponsor is in bankruptcy, the amount of guaranteed benefits under section 4022 will be determined as of the date the sponsor entered bankruptcy (the “bankruptcy filing date”) rather than as of the termination date. The provision applies to plans terminating while the sponsor is in bankruptcy, if the bankruptcy filing date is on or after September 16, 2006.⁹

Section 4022(g) applies to all types of plan benefits, including UCEBs. Under this provision, if a permanent shutdown (or other UCE) occurs after the bankruptcy filing date, UCEBs arising from the UCE are not guaranteed because the benefits are not nonforfeitable as of the bankruptcy filing date. Similarly, if the shutdown (or other UCE) occurs before the bankruptcy filing date, the five-year phase-in period for any resulting UCEBs is measured from the date of the UCE to the bankruptcy filing date, rather than to the plan termination date. For example, if a permanent shutdown occurs three years before the bankruptcy filing date, the guarantee of any resulting UCEBs will be only 60 percent phased in, even if the shutdown was more than five years before the plan’s termination date. This rule is illustrated by Examples 4 and 5 in the proposed regulation.

PBGC considered whether UCEBs could be excepted from the section 4022(g) bankruptcy provision on the ground that the general phase-in rule in section 4022(g) is superseded by the specific section 4022(b)(8) phase-in rule for UCEBs. However, PBGC concluded that the language of the bankruptcy and UCEB statutory provisions does not allow for any such exception. The UCEB provision alters the starting date for phase-in of UCEBs, while the bankruptcy provision alters the date beyond which no further phase-in is allowed for any benefit increase, including a UCEB. PBGC sees no conflict in applying both provisions to UCEBs.

⁹ See definition of “PPA 2006 bankruptcy termination” in § 4001.2.

Estimated guaranteed benefits

ERISA section 4041(c)(3)(D)(ii)(IV) requires administrators of plans terminating in a distress termination to limit payment of benefits to estimated guaranteed benefits and estimated non-guaranteed benefits funded under section 4044, beginning on the proposed termination date. Section 4022.62 of PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans contains rules for computing estimated guaranteed benefits, including provisions for estimating guaranteed benefits when a new benefit or benefit increase was added to the plan within five years before plan termination. The proposed regulation would amend § 4022.62 to provide that the date the UCE occurs is treated as the date the UCEB was adopted, i.e., the date the plan was amended to include the UCEB.

Applicability

The regulatory changes made by this rule, like section 403 of PPA 2006, would apply to UCEBs that become payable as a result of a UCE that occurs after July 26, 2005.

Compliance with Regulatory Guidelines

Executive Order 12866

PBGC has determined that this proposed rule is a "significant regulatory action" under Executive Order 12866. The Office of Management and Budget has therefore reviewed the proposed rule under Executive Order 12866.

Under Section 3(f)(1) of Executive Order 12866, a regulatory action 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, local, or tribal governments or communities." The 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 entirely attributable to the economic effect of section 403 of PPA 2006. Three factors tend to reduce the economic impact of section 403.

First, before section 403 went into effect, PBGC often involuntarily terminated plans with shutdown liabilities before company-wide shutdowns, under the “long-run loss” provision in section 4042(a)(4) of ERISA. That provision allows PBGC to initiate termination proceedings if its long-run loss “may reasonably be expected to increase unreasonably if the plan is not terminated.” A sudden increase in PBGC’s liabilities resulting from a shutdown could create just such an unreasonable increase in long-run loss. Section 403 avoids the need for PBGC to make case-by-case decisions whether to initiate such “pre-emptive” terminations. Although it is difficult to make assumptions about PBGC’s ability and intent to pursue such terminations if section 403 had not gone into effect, this factor tends to reduce its economic impact.

Second, another PPA 2006 amendment provides that if a plan terminates while the sponsor is in bankruptcy, the amount of benefits guaranteed by PBGC is fixed at the date of the bankruptcy filing rather than at the plan termination date. Because of that provision, if a plant shutdown or other UCE occurred between the bankruptcy filing date and the termination date, the resulting UCEB would not be guaranteed at all, and thus section 403 would have no economic effect.

Third – and perhaps most important – as also discussed above, other PPA 2006 provisions restrict payment of UCEBs if a plan is less than 60 percent funded. If, because of those restrictions, a UCEB was not payable at all, section 403 again would have no economic effect.

As stated above in Applicability, section 403 applies to any UCEB that becomes payable as a result of a UCE that occurs after July 26, 2005. PBGC estimates that, to date, the total effect of section 403 – in terms of lower benefits paid to participants and associated savings for PBGC – is less than \$4 million. Although PBGC cannot predict with certainty which plans with UCEBs will terminate, the funding level of such plans, or what benefits will be affected by the guarantee limits, given the relatively low estimate of the effect of the statutory provision 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 that 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. Virtually all of the statutory changes affect only PBGC and persons who receive benefits from PBGC. Accordingly, sections 603 and 604 of the Regulatory Flexibility Act do not apply.

List of Subjects in 29 CFR Part 4022

Pension insurance, Pensions, Reporting and recordkeeping requirements.

For the reasons given above, PBGC proposes to amend 29 CFR part 4022 as follows:

PART 4022 — BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

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

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

2. In § 4022.2:

a. Amend the definition of “benefit increase” by removing the final “and” in the second sentence and adding in its place, “an unpredictable contingent event benefit, and”; and

b. Add in alphabetical order definitions for *unpredictable contingent event (UCE)* and

unpredictable contingent event benefit (UCEB) to read as follows:

§ 4022.2 Definitions.

* * * * *

Unpredictable contingent event (UCE) has the same meaning as unpredictable contingent event in section 206(g)(1)(C) of ERISA and Treas. Reg. § 1.436-1(j)(9). It includes a plant shutdown (full or partial) or a similar event (such as a full or partial closing of another type of facility, or a layoff or other workforce reduction), or any event other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or occurrence of death or disability.

Unpredictable contingent event benefit (UCEB) has the same meaning as unpredictable contingent event benefit in section 206(g)(1)(C) of ERISA and Treas. Reg. § 1.436-1(j)(9). Thus, a UCEB is any benefit or benefit increase to the extent that it would not be payable but for the occurrence of a UCE. A benefit or benefit increase that is conditioned upon the occurrence of a UCE does not cease to be a UCEB as a result of the contingent event having occurred or its occurrence having become reasonably predictable.

3. § 4022.24(e) is revised to read as follows:

§ 4022.24 Benefit Increases.

* * * * *

(e) Except as provided in § 4022.27(c), for the purposes of §§ 4022.22 through 4022.28, a benefit increase is deemed to be in effect commencing on the later of its adoption date or its effective date.

§ 4022.27 [Redesignated as § 4022.28]

4. Section 4022.27 is redesignated as § 4022.28.

5. New § 4022.27 is added to read as follows:

§ 4022.27 Phase-in of guarantee of unpredictable contingent event benefits.

(a) *Scope.* This section applies to a benefit increase, as defined in § 4022.2 of this part, that is an unpredictable contingent event benefit (UCEB) and that is payable with respect to an unpredictable contingent event (UCE) that occurs after July 26, 2005.

(1) Examples of benefit increases within the scope of this section include unreduced early retirement benefits or other early retirement subsidies, or other benefits to the extent that such benefits would not be payable but for the occurrence of one or more UCEs.

(2) Examples of UCEs within the scope of this section include full and partial closings of plants or other facilities, and permanent workforce reductions, such as permanent layoffs.

Permanent layoffs include layoffs during which an idled employee continues to earn credited service (“creep-type” layoff) for a period of time at the end of which the layoff is deemed to be permanent. Permanent layoffs also include layoffs that become permanent upon the occurrence of an additional event such as a declaration by the employer that the participant’s return to work is unlikely or a failure by the employer to offer the employee suitable work in a specified area.

(3) The examples in this section are not an exclusive list of UCEs or UCEBs and are not intended to narrow the statutory definitions, as further delineated in Treasury Regulations.

(b) *Facts and circumstances.* If PBGC determines that a benefit is a shutdown benefit or other type of UCEB, the benefit will be treated as a UCEB for purposes of this subpart. PBGC will make such determinations based on the facts and circumstances, consistent with these regulations; how a benefit is characterized by the employer or other parties may be relevant but is not determinative.

(c) *Date phase-in begins.* (1) The date the phase-in of PBGC’s guarantee of a UCEB begins is determined in accordance with subpart B of this part. For purposes of this subpart, a

UCEB is deemed to be in effect as of the latest of —

- (i) The adoption date of the plan provision that provides for the UCEB,
- (ii) The effective date of the UCEB, or
- (iii) The date the UCE occurs.

(2) The date the phase-in of PBGC's guarantee of a UCEB begins is not affected by any delay that may occur in placing participants in pay status due to removal of a restriction under section 436(b) of the Code. See the example in paragraph (e)(8) of this section.

(d) *Date UCE occurs.* For purposes of this section, PBGC will determine the date the UCE occurs based on the plan provisions and the relevant facts and circumstances, such as the nature and level of activity at a facility that is closing and the permanence of the event; the date of the event as conceived, planned, announced, or agreed to by the employer may be relevant but is not determinative.

(1) The date a UCE occurs is determined on a participant-by-participant basis, or on a different basis, such as a facility-wide or company-wide basis, depending upon plan provisions and the facts and circumstances. For example, a benefit triggered by a permanent layoff of a participant would be determined with respect to each participant, and thus layoffs that occur on different dates would generally be distinct UCEs. In contrast, a benefit payable only upon a complete plant shutdown would apply facility-wide, and generally the shutdown date would be the date of the UCE for all participants who work at that plant. Similarly, a benefit payable only upon the complete shutdown of the employer's entire operations would apply plan-wide, and thus the shutdown date of company operations generally would be the date of the UCE for all participants.

(2) For purposes of paragraph (c)(3) of this section, if a benefit is contingent upon more than one UCE, PBGC will apply the rule under Treas. Reg. § 1.436-1(b)(3)(ii) (i.e., the date the

UCE occurs is the date of the latest UCE).

(e) *Examples.* The following examples illustrate the operation of the rules in this section. Except as provided in Example 8, no benefit limitation under Code section 436 applies in any of these examples.

(1) *Date of UCE.* (i) *Facts:* On January 1, 2000, a Company adopts a plan that provides an unreduced early retirement benefit for participants with specified age and service whose continuous service is broken by a permanent plant closing or permanent layoff that occurs on or after January 1, 2001. On January 1, 2007, the Company informally and without announcement decides to close Facility A within a two-year period. On January 1, 2008, the Company's Board of Directors passes a resolution directing the Company's officers to close Facility A on or before September 1, 2008. On June 1, 2008, the Company issues a notice pursuant to the Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. section 2101, *et seq.*, that Facility A will close, and all employees will be permanently laid off, on or about August 1, 2008. The Company and the Union representing the employees enter into collective bargaining concerning the closing of Facility A and on July 1, 2008, they jointly agree and announce that Facility A will close and employees who work there will be permanently laid off as of November 1, 2008. However, due to unanticipated business conditions, Facility A continues to operate until December 31, 2008, when operations cease and all employees are permanently laid off. The plan terminates as of December 1, 2009.

(ii) *Conclusion:* PBGC would determine that the UCE is the facility closing and permanent layoff that occurred on December 31, 2008. Because the date that the UCE occurred (December 31, 2008) is later than both the date the plan provision that established the UCEB was adopted (January 1, 2000) and the date the UCEB became effective (January 1, 2001), December 31, 2008, would be the date the phase-in period under ERISA section 4022 begins.

In light of the plan termination date of December 1, 2009, the guarantee of the UCEBs of participants laid off on December 31, 2008, would be 0 percent phased in.

(2) *Sequential layoffs.* (i) *Facts:* The same facts as Example 1, with these exceptions: Not all employees are laid off on December 31, 2008. The Company and Union agree to and subsequently implement a shutdown in which employees are permanently laid off in stages – one third of the employees are laid off on October 31, 2008, another third are laid off on November 30, 2008, and the remaining one-third are laid off on December 31, 2008.

(ii) *Conclusion:* Because the plan provides that a UCEB is payable in the event of either a permanent layoff or a plant shutdown, PBGC would determine that phase-in begins on the date of the UCE applicable to each of the three groups of employees. Because the first two groups of employees were permanently laid off before the plant closed, October 31, 2008, and November 30, 2008, are the dates that the phase-in period under ERISA section 4022 begins for those groups. Because the third group was permanently laid off on December 31, 2008, the same date the plant closed, the phase-in period would begin on that date for that group. Based on the plan termination date of December 1, 2009, participants laid off on October 31, 2008, and November 30, 2008, would have 20 percent of the UCEBs (or \$20 per month, if greater) guaranteed under the phase-in rule. The guarantee of the UCEBs of participants laid off on December 31, 2008, would be 0 percent phased in.

(3) *Skeleton shutdown crews.* (i) *Facts:* The same facts as Example 1, with these exceptions: The plan provides for an unreduced early retirement benefit for age-service qualified participants only in the event of a break in continuous service due to a permanent and complete plant closing. A minimal skeleton crew remains to perform primarily security and basic maintenance functions until March 31, 2009, when skeleton crew members are permanently laid off and the facility is sold to an unrelated investment group that does not assume the plan or

resume business operations at the facility. The plan has no specific provision or past practice governing benefits of skeleton shutdown crews. The plan terminates as of January 1, 2009.

(ii) *Conclusion:* Because the continued employment of the skeleton crew does not effectively continue operations of the facility, PBGC would determine that there is a permanent and complete plant closing (for purposes of the plan's plant closing provision) as of December 31, 2008, which is the date the phase-in period under ERISA section 4022 begins with respect to employees who incurred a break in continuous service at that time. The UCEB of those participants would be a nonforfeitable benefit as of the plan termination date, but PBGC's guarantee of the UCEB would be 0 percent phased in. In the case of the skeleton crew members, such participants would not be eligible for the UCEB because they did not incur a break in continuous service until after the plan termination date. (If the plan had a provision that there is no shutdown until all employees, including any skeleton crew are terminated, or if the plan were reasonably interpreted to so provide in light of past practice, PBGC would determine that the date that the UCE occurred was after the plan termination date. Thus the UCEB would not be a nonforfeitable benefit as of the plan termination date and therefore would not be guaranteeable.)

(4) *Creep-type layoff benefit/bankruptcy of contributing sponsor.* (i) *Facts:* A plan provides that participants who are at least age 55 and whose age plus years of continuous service equal at least 80 are entitled to an unreduced early retirement benefit if their continuous service is broken due to a permanent layoff. The plan further provides that a participant's continuous service is broken due to a permanent layoff when the participant is terminated due to the permanent shutdown of a facility, or the participant has been on layoff status for two years. These provisions were adopted and effective in 1986. Participant A is 56 years old and has 25 years of continuous service when he is laid off in a reduction-in-force on May 15, 2008. He is not recalled to employment, and on May 15, 2010, under the terms of the plan, his continuous

service is broken due to the layoff. He goes into pay status on June 1, 2010, with an unreduced early retirement benefit. The contributing sponsor of Participant A's plan files a bankruptcy petition under Chapter 11 of the U.S. Bankruptcy Code on September 1, 2011, and the plan terminates during the bankruptcy proceedings with a termination date of October 1, 2012. Under section 4022(g) of ERISA, because the plan terminated while the contributing sponsor was in bankruptcy, the five-year phase-in period ended on the bankruptcy filing date.

(ii) *Conclusion:* PBGC would determine that the guarantee of the UCEB is phased in beginning on May 15, 2010, the date of the later of the two UCEs necessary to make this benefit payable (i.e., the first UCE is the initial layoff and the second UCE is the expiration of the two-year period without rehire). Since that date is more than one year (but less than two years) before the September 1, 2011, bankruptcy filing date, 20 percent of Participant A's UCEB (or \$20 per month, if greater) would be guaranteed under the phase-in rule.

(5) *Creep-type layoff benefit with provision for declaration that return to work unlikely.*

(i) *Facts:* A plan provides that participants who are at least age 60 and have at least 20 years of continuous service are entitled to an unreduced early retirement benefit if their continuous service is broken by a permanent layoff. The plan further provides that a participant's continuous service is broken by a permanent layoff if the participant is laid off and the employer declares that the participant's return to work is unlikely. Participants may earn up to 2 years of credited service while on layoff. The plan was adopted and effective in 1990. On March 1, 2009, Participant B, who is age 60 and has 20 years of service, is laid off. On June 15, 2009, the employer declares that Participant B's return to work is unlikely. Participant B retires and goes into pay status as of July 1, 2009. The employer files for bankruptcy on September 1, 2011.

(ii) *Conclusion:* PBGC would determine that the phase-in period of the guarantee of the UCEB would begin on June 15, 2009 – the later of the two UCEs necessary to make the benefit payable (i.e., the first UCE is the initial layoff and the second UCE is the employer’s declaration that it is unlikely that Participant B will return to work). The phase-in period would end on September 1, 2011, the date of the bankruptcy filing. Thus 40 percent of Participant B’s UCEB (or \$40 per month, if greater) would be guaranteed under the phase-in rule.

(6) *Shutdown benefit with special post-employment eligibility provision.* (i) *Facts:* A plan provides that, in the event of a permanent shutdown of a plant, a participant age 60 or older who terminates employment due to the shutdown and who has at least 20 years of service is entitled to an unreduced early retirement benefit. The plan also provides that a participant with at least 20 years of service who terminates employment due to a plant shutdown at a time when the participant is under age 60 also will be entitled to an unreduced early retirement benefit, provided the participant’s commencement of benefits is on or after attainment of age 60 and the time required to attain age 60 does not exceed the participant’s years of service with the plan sponsor. The plan imposes no other conditions on receipt of the benefit. Plan provisions were adopted and effective in 1991. On January 1, 2006, Participant C’s plant is permanently shut down. At the time of the shutdown, Participant C had 20 years of service and was age 58. On June 1, 2007, Participant C reaches age 60 and retires. The plan terminates as of September 1, 2007.

(ii) *Conclusion:* PBGC would determine that the guarantee of the shutdown benefit is phased in from January 1, 2006, which is the date of the only UCE (the permanent shutdown of the plant) necessary to make the benefit payable. Thus 20 percent of Participant C’s UCEB (or \$20 per month, if greater) would be guaranteed under the phase-in rule.

(7) *Phase-in of retroactive UCEB.* (i) *Facts:* As the result of a settlement in a class-

action lawsuit, a plan provision is adopted on September 1, 2011, to provide that age/service-qualified participants are entitled to an unreduced early retirement benefit if permanently laid off due to a plant shutdown occurring after January 1, 2008. Benefits under the provision are payable prospectively only, beginning March 1, 2012. Participant A, who was age/service-qualified, was permanently laid off due to a plant shutdown occurring on January 1, 2009, and therefore he is scheduled to be placed in pay status as of March 1, 2012. The plan is a calendar year plan. The unreduced early retirement benefit is paid to Participant A beginning on March 1, 2012. The plan terminates as of February 1, 2014. The termination is not a PPA 2006 bankruptcy termination.

(ii) *Conclusion*: PBGC would determine that the guarantee of the UCEB is phased in beginning on March 1, 2012. This is the date the benefit was effective (since it was the first date on which the new benefit was payable), and it is later than the adoption date of the plan provision (September 1, 2011) and the date of the UCE (January 1, 2009). The guarantee of the unreduced early retirement benefit is 20% phased in.

(8) *Removal of IRC section 436 restriction*. (i) *Facts*: A plan provision was adopted on September 1, 1989, to provide that age/service-qualified participants are entitled to an unreduced early retirement benefit if permanently laid off due to a plant shutdown occurring after January 1, 1990. Participant A, who was age/service-qualified, was permanently laid off due to a plant shutdown occurring on April 1, 2011. The plan is a calendar year plan. Under the rules of Code section 436 (ERISA section 206(g)) and Treasury regulations thereunder, a plan cannot provide a UCEB payable with respect to an unpredictable contingent event, if the event occurs during a plan year in which the plan's adjusted funding target attainment percentage is less than 60%. On January 30, 2011, the plan's enrolled actuary issued a certification stating that the plan's adjusted funding target attainment percentage for 2011 is 58%. Therefore, the plan

restricts payment of the unreduced early retirement benefit payable with respect to the shutdown on April 1, 2011. On August 15, 2011, the plan sponsor makes an additional contribution to the plan that is designated as a contribution under Code section 436(b)(2) to eliminate the restriction on payment of the shutdown benefits. On September 15, 2011, the plan's enrolled actuary issues a certification stating that, due to the additional section 436(b)(2) contribution, the plan's adjusted funding target attainment percentage for 2011 is 60%. On October 1, 2011, Participant A is placed in pay status for the unreduced early retirement benefit and, as required under Code section 436 and Treasury regulations thereunder, is in addition paid retroactively the unreduced benefit for the period May 1, 2011 (the date the unreduced early retirements would have become payable) through September 1, 2011. The plan terminates as of February 1, 2014. The termination is not a PPA 2006 bankruptcy termination.

(ii) *Conclusion:* PBGC would determine that the guarantee of the UCEB is phased in beginning on April 1, 2011, the date the UCE occurred. Because April 1, 2011, is later than both the date the plan provision that established the UCEB was adopted (September 1, 1989) and the date the UCEB became effective (January 1, 1990), it would be the date the phase-in period under ERISA section 4022 begins. Commencement of the phase-in period is not affected by the delay in providing the unreduced early retirement benefit to Participant A due to the operation of the rules of Code section 436 and the Treasury regulations thereunder. The guarantee of the unreduced early retirement benefit is 40% phased in.

6. In § 4022.62(c)(2)(i) , add a sentence after the third sentence to read as follows:

§ 4022.62 Estimated guaranteed benefit.

* * * * *

(c) * * *

(2) * * *

(i) * * * “New benefits” also result from increases that become payable by reason of the occurrence of an unpredictable contingent event (provided the event occurred after July 26, 2005), to the extent the increase would not be payable but for the occurrence of the event; in the case of such new benefits, the date of the occurrence of the unpredictable contingent event is treated as the amendment date for purposes of Table I. * * *

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