
PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4041

Purchase of Irrevocable Commitments Prior to Standard Termination

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Request for public comment.

SUMMARY: Practitioners and employers have requested guidance from PBGC on the extent to which plan administrators may purchase irrevocable commitments to provide plan benefits before initiating a standard termination under section 4041(b) of ERISA. PBGC is soliciting public comments to help develop this guidance. The issues on which PBGC seeks comments include the extent to which such purchases of irrevocable commitments violate statutory and regulatory termination requirements, safeguards for participants and beneficiaries, and sanctions for violations.

DATES: Comments must be received on or before January 22, 2010.

ADDRESSES: Comments 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, NW., Washington, DC 20005-4026.

Comments received, including personal information provided, will be posted to <http://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, NW., 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: Constance Markakis or Catherine B. Klion, Attorneys, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, Suite 12300, 1200 K Street, NW., Washington, DC 20005-4026, 202-326-4024. (For TTY-TDD users, call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4024.)

SUPPLEMENTARY INFORMATION: PBGC administers the termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Under section 4041(b) of ERISA, a plan that has sufficient assets to pay all plan liabilities may terminate in a standard termination. Standard termination requirements (including reporting and disclosure requirements and restrictions on distributing plan assets during the termination process) are set forth in the statute, PBGC's regulation on Termination of Single Employer Plans, 29 CFR part 4041, and termination forms and instructions, available on PBGC's Web site, <http://www.pbgc.gov>.

Questions have been raised as to the extent to which a plan administrator may purchase irrevocable commitments for some or all participants during a period of time before initiating a standard termination. Plans sometimes consider purchase of an irrevocable commitment (an obligation by an insurer to pay benefits) to take advantage of favorable interest rates, or to gradually prepare for a termination.

Although PBGC understands these considerations, PBGC has concerns about whether such purchases could circumvent the statutory and regulatory protections afforded participants and beneficiaries under the standard termination process. PBGC has provided only limited informal guidance on this issue.¹ This notice seeks public comment to help develop more comprehensive guidance.

Standard Termination Process

Under part 4041, a single-employer plan may terminate in a standard termination if, in accordance with regulatory requirements, the plan

¹ 2009 Blue Book Q&A 8, available on PBGC's Web site, <http://www.pbgc.gov>. Blue Books are summaries of the questions and answers discussed at meetings between PBGC staff and representatives of the Enrolled Actuaries Program Committee in preparation for the annual Enrolled Actuaries Meetings. The summaries reflect the views of individual staff members and do not represent the official position of PBGC.

administrator provides to affected parties a notice of intent to terminate (NOIT) and a notice of plan benefits (NOPB), files a standard termination notice with PBGC, and distributes plan assets in satisfaction of plan benefits.

Disclosure Requirements

The NOIT must be issued to participants, beneficiaries, alternate payees, and employee organizations representing participants at least 60 days, and no more than 90 days, before the proposed termination date. The NOIT must include a statement that after plan assets have been distributed in full satisfaction of all plan benefits for a participant or beneficiary, including by the purchase of an irrevocable commitment, PBGC no longer guarantees the plan benefits. The NOIT must include the name and address of the insurers from whom (if known), or (if not) from among whom, the plan administrator intends to purchase irrevocable commitments, as well as information on state guaranty association coverage of annuities.²

The NOPB must be issued to participants, beneficiaries, and alternate payees no later than the time the standard termination notice is filed with PBGC. The NOPB must include the proposed termination date, the amount and form of the person's plan benefits, including the amount and form that would be payable at the earliest benefit commencement date, and information on payment in a lump sum. Except in the case of an affected party in pay status for more than a year, the NOPB must include the personal data needed to calculate the affected party's plan benefits, along with a statement requesting that the affected party promptly correct any information believed to be incorrect. If any of the personal data needed is not available, the NOPB must include the best available data, along with a statement informing the affected party of the data not available and giving the affected party an opportunity to provide it.

Standard Termination Notice

The plan must file a standard termination notice (Form 500) with PBGC on or before the 180th day after the proposed termination date. The standard termination notice includes the number of plan participants and beneficiaries as of the proposed termination date, the estimated fair market value of plan assets available to pay for plan benefits as of the proposed

termination date, and the estimated present value of plan benefits (including the estimated cost of annuity contracts to provide plan benefits) as of the proposed distribution date. PBGC has 60 days (unless extended) after receipt of a standard termination notice to review the proposed termination for compliance with applicable requirements.

PBGC will issue a notice of noncompliance during the 60-day review period whenever it determines that the plan administrator failed to issue the NOIT or the NOPB in accordance with applicable requirements, the plan administrator failed to file the standard termination notice in accordance with applicable requirements, or as of the proposed distribution date, plan assets will not be sufficient to satisfy all plan benefits. PBGC may decide not to issue a notice of non-compliance based on a failure to meet those reporting or disclosure requirements if it determines that issuance of the notice would be inconsistent with the interests of participants and beneficiaries.

Closeout of Plan

If, by the end of the 60-day review period, PBGC does not issue a notice of noncompliance, the plan administrator must complete the distribution of assets to provide all plan benefits under the plan within 180 days. (If the plan has applied for an IRS determination letter by the time the standard termination notice is filed, distribution must be completed within 120 days after receipt of a favorable determination letter.) Assets are distributed by purchasing irrevocable commitments from an insurer or in another permitted form under the plan (usually payments of lump sums). To comply with Title IV, the plan administrator must select the insurer in accordance with the fiduciary standards of Title I (§ 4041.28(c)(3)).

If plan benefits are provided through the purchase of an irrevocable commitment, the plan administrator or the insurer must, within 30 days after it is available, provide the participant or beneficiary with a certificate or a copy of the annuity contract. If the certificate or contract is not provided within 90 days after the distribution deadline, the plan administrator must, by that date, provide the participant or beneficiary with a notice containing the insurer's name, address, and contact information. The notice must also state that the obligation for providing the benefit has transferred to the insurer and that the participant or beneficiary will receive from the plan administrator or insurer a

certificate or a copy of the annuity contract.

Within 30 days after the last distribution date,³ the plan administrator must file with PBGC a post-distribution certification (Form 501). The latter must include the names of insurers that provided irrevocable commitments, numbers of participants or beneficiaries for whom irrevocable commitments were purchased, and the total value of the irrevocable commitments.

Administration of Plan During Termination Process

From the first day the plan administrator issues a NOIT in a standard termination to the last day of PBGC's 60-day review period, the plan administrator may not purchase irrevocable commitments to provide any plan benefits (§ 4041.22). An exception applies if the participant has separated from active employment or is otherwise permitted under the Code to receive the distribution, the distribution is consistent with prior plan practice, and the distribution is not reasonably expected to jeopardize the plan's sufficiency for plan benefits.

Irrevocable Commitments

An irrevocable commitment is defined in § 4001.2 as "an obligation by an insurer to pay benefits to a named participant or surviving beneficiary, if the obligation cannot be cancelled under the terms of the insurance contract (except for fraud or mistake) without the consent of the participant or beneficiary and is legally enforceable by the participant or beneficiary."

Some plans contain provisions permitting the purchase of immediate annuity contracts that are irrevocable commitments when participants retire. Plans may also purchase deferred annuity contracts that are irrevocable commitments in connection with a plan merger, benefit freeze, or spin-off termination, to annuitize all or part of the accrued benefits of active or deferred vested participants. If the plan purchases irrevocable commitments in those situations, it may hold the certificate or give it to the participant.

A plan may also purchase annuity contracts as a funding or investment vehicle of the plan (e.g., the contract grows at a minimum guaranteed rate during the accumulation phase). Such contracts are not irrevocable commitments and do not transfer the

² If the identity-of-insurer information is not known at the time the NOIT is issued, the plan must provide it in a supplemental notice no later than 45 days before the distribution date.

³ Under § 4041.29, PBGC will assess a penalty for late filing of a post-distribution certification only to the extent the certification is filed more than 90 days after the distribution deadline (including extensions).

liability of the plan for benefits to the insurance company or extinguish PBGC's obligation to guarantee plan benefits. While these contracts are often "unallocated" group annuity contracts, a plan may also purchase such contracts to fund individual participants' benefits. An annuity contract may at times be cashed in for its surrender value (this may occur during the termination process if the asset value is not diminished). However, a plan may not exercise a contract provision for the conversion of the contract to irrevocable commitments before the end of PBGC's 60-day review period, subject to the exception in § 4042.22(b) described above. Purchase of annuity contracts as a funding or investment vehicle of the plan does not raise termination concerns with PBGC.

For benefits provided through the purchase of irrevocable commitments, the distribution date is the date on which the obligation to provide the benefits passes from the plan to the insurer. Once an insurer has made an irrevocable commitment to pay all benefits to which a participant who is retired or separated from employment is entitled under the plan and who is either receiving plan benefits or entitled to begin receiving plan benefits in the future, the individual ceases to be a participant for purposes of part 4041 (§ 4041.2).⁴ Similarly, an individual ceases to be a beneficiary under the plan for such purposes once an insurer makes an irrevocable commitment to provide all the plan benefits to which the beneficiary is entitled.

Audit and Enforcement

PBGC currently conducts post-termination audits of all plans that terminate in a standard termination with a participant count of 300 or more.

⁴ Under IRS regulations, a plan generally is required to reflect in the plan's funding target and target normal cost the liability for benefits that are funded through insurance contracts held by the plan, and to include in plan assets the value of the corresponding insurance contracts. A plan is permitted, however, to exclude the benefits provided under such contracts and the corresponding contracts to the extent that a participant's or beneficiary's right to receive those benefits is an "irrevocable contractual right" based on premiums paid prior to the valuation date. See Treas. Reg. § 1.430(d)-1(c)(2), 74 FR 53004, 53038 (Oct. 15, 2009). A plan's election under IRS regulations to include or exclude irrevocable commitments in the plan's valuation and minimum funding requirements has no bearing on whether the individuals for whom the irrevocable commitments are purchased are participants for purposes of part 4041. In addition, under IRS regulations, any payment for the purchase of an irrevocable commitment is a "prohibited payment" that is subject to certain funding-based limitations on accelerated benefit distributions under Code section 436(d). Treas. Reg. § 1.436-1(d), 74 FR at 53083.

For plans with fewer than 300 participants, PBGC randomly selects plans to audit. PBGC also may audit a plan when the agency has reason to believe there may be a problem. The focus of the standard termination audits is to ensure that participants receive the benefits to which they were entitled. PBGC also audits compliance with termination disclosure and reporting requirements. Failure to provide required termination-related notices and disclosures is subject to information penalties under section 4071 of ERISA.⁵

Starting in 2006, PBGC has been auditing all plans that make a final distribution of plan assets before or without filing a standard termination notice in accordance with the standard termination regulations. After PBGC identifies such a plan, generally when it fails to pay premiums, it requires the plan to file a standard termination notice and post-distribution certification. PBGC can have difficulty, however, identifying plans that purchase irrevocable commitments prior to termination, particularly when the irrevocable commitments are purchased for a group of participants (e.g., retirees), but not all participants.

Section 4044.4 of PBGC's regulation on Allocation of Assets in Single-Employer Plans (part 4044) provides that a distribution in anticipation of termination is considered to be an allocation of plan assets upon termination. A plan administrator violates ERISA if plan assets are allocated or distributed upon plan termination in a manner other than that prescribed under section 4044 of ERISA and part 4044. The anticipation-of-termination rules generally do not come into play where the plan terminates in a standard termination. Those rules could be relevant, however, where plan assets are not sufficient to pay plan benefits at the time of any distribution upon termination.

PBGC Concerns

ERISA section 4041(a) provides that the rules in section 4041(b) for a

⁵ Under section 4071 of ERISA and PBGC's information penalty regulation (part 4071), PBGC may assess a penalty of up to \$1,100 a day if material information is not timely provided. PBGC's current information penalty policy (60 FR 36837, Jul. 18, 1995) provides for a guideline information penalty of \$25 per day for the first 90 days of delinquency and \$50 per day thereafter. Penalties are reduced proportionately for plans with fewer than 100 participants, and the total penalty is capped at \$100 times the number of plan participants. The guideline penalty may be adjusted up or down based on the facts and circumstances—for example, willful failure to comply, pattern or practice of violation, or substantial harm to participants or PBGC. PBGC may waive an information penalty for "reasonable cause."

standard termination or in section 4041(c) for a distress termination are the exclusive means by which a single-employer plan may voluntarily terminate. Under section 4041(b), PBGC must issue a notice of noncompliance to the plan administrator if it determines that participants and beneficiaries have not received all required notices and information or that there is reason to believe that the plan is not sufficient for benefit liabilities. PBGC has two substantial concerns when a plan purchases irrevocable commitments before initiating a related standard termination.

The first concern is that the purchase circumvents the statutory and regulatory protections afforded under the standard termination process. A participant whose plan benefits are fully satisfied through purchase of an irrevocable commitment prior to the first day a NOIT is issued in a related termination would not receive disclosures required as part of the standard termination process, including advance notice of the termination, advance information about the insurer, and a statement that PBGC no longer guarantees those plan benefits. Such participants may not have the same opportunity to correct personal information used to calculate their benefits or provide personal data not available to the plan. In addition, PBGC would not receive information necessary to determine whether participants received the correct benefits, including information on the number of persons for whom irrevocable commitments were purchased and the benefits provided through the purchase of irrevocable commitments.

The second concern is that plan assets could be insufficient for plan benefits at the time of any distribution upon termination, since plan assets used to purchase irrevocable commitments (and the investment returns on those assets) would no longer be available to pay other plan benefits. If the plan was sufficient for guaranteed benefits, it might still terminate as a distress termination, but some participants would lose nonguaranteed benefits. If the plan was not sufficient for guaranteed benefits, PBGC might have to terminate and trustee the plan, and some participants and PBGC could be harmed. This concern generally does not arise with irrevocable commitments purchased after the first day a NOIT is provided, because the exception in § 4041.22(b) applies only if the distribution is not reasonably expected to jeopardize the plan's sufficiency.

Neither concern applies if a plan purchases an annuity contract as a funding or investment vehicle of the

plan before or after the NOIT is provided, so long as it is not an irrevocable commitment. However, the same concerns would arise if the plan converted such a contract to irrevocable commitments before or after initiating a standard termination.

Request for Comments

PBGC is soliciting comments on issues related to a purchase of irrevocable commitments before the initiation of a standard termination. PBGC seeks comments on any and all relevant issues, including the following:

(1) Factors PBGC should take into account in determining whether a purchase of irrevocable commitments before the initiation of a standard termination is related to (*i.e.*, in preparation of) the standard termination (*e.g.*, plan annuitizes plan benefits of all retirees or terminated vested participants with no connection to any other plan transaction, such as a merger).

(2) Whether there should be a rebuttable presumption that a purchase of irrevocable commitments made within a specific time period (*e.g.*, a year) before the first day a NOIT is issued in a standard termination is related to a standard termination and if so, what time period.

(3) Whether there should be a safe harbor for a purchase of irrevocable commitments under specified circumstances before the first day a NOIT is issued in a standard termination. If so, what time period should apply (*e.g.*, one year, two years, or three years before a NOIT is issued)? Whether a safe harbor should be conditioned on the purpose of the purchase (*e.g.*, to lock in rates with an insurer in order to ensure plan sufficiency). Whether a safe harbor should be limited to plans in which the plan assets exceed plan benefits by a certain margin. If so, by what margin and as of what date? What reporting and disclosure requirements should be required with a safe harbor?

(4) How PBGC can better identify plans that purchase irrevocable commitments for some or all participants shortly before initiating a standard termination.

(5) Appropriate enforcement actions in the case of a purchase of irrevocable commitments before the initiation of a related standard termination.

(6) Appropriate information penalties for failures to provide notices and disclosures required as part of the termination process, including guideline information penalty amounts, and aggravating and mitigating factors (*e.g.*, before purchasing irrevocable commitments, the plan administrator provided participants with the information required in the NOIT and NOPB, or the plan reported information to PBGC about irrevocable commitments purchased).

(7) In the case of a permissible purchase of irrevocable commitments in accordance with § 4041.22(b) made after a NOIT is issued, what information should the plan be required to provide to participants? To PBGC? ⁶

(8) What are employers' experiences with "locking in" rates for purchases of irrevocable commitments? What are the costs of locking in rates and how long do locked-in rates remain in effect? In the case of annuity contracts that are purchased as an investment vehicle, can plans lock in rates for the conversion of these contracts to irrevocable commitments at a future date and if so, at what costs and for how long?

Issued in Washington, DC, this 18th day of November 2009.

Vincent K. Snowbarger,

Acting Director, Pension Benefit Guaranty Corporation.

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⁶ 2007 Blue Book Q&A 6 provides informal guidance that PBGC staff interprets § 4041.24(a) as