

[Billing Code 7709-02-P]

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4001, 4022, and 4044

RIN 1212-AB23

Title IV Treatment of Rollovers from Defined Contribution Plans to Defined Benefit Plans

AGENCY: Pension Benefit Guaranty Corporation

ACTION: Proposed rule

SUMMARY: This proposed rule would amend PBGC's regulations on allocation of assets and benefits payable in terminated single-employer plans to clarify the treatment of benefits resulting from a rollover distribution from a defined contribution plan or other qualified trust to a defined benefit plan, if the defined benefit plan was terminated and trustee by PBGC. This proposed clarification of Title IV treatment of rollovers is part of PBGC's efforts to enhance retirement security by promoting lifetime income options.

DATES: Comments must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments, identified by Regulatory Information Number (RIN 1212-AB23) may be submitted to any by 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: Catherine B. Klion

(klion.catherine@pbgc.gov), Assistant General Counsel, Office of the General Counsel, 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

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 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. At times, plans

trusted by PBGC include contributions made by employees that fund part of the benefit under the plan.

Mandatory Contributions

A plan may be funded in whole or in part by mandatory contributions. Under section 4044(b)(6) of ERISA, the term “mandatory contributions” means amounts contributed to the plan by a participant, which are required as a condition of employment, as a condition of participation in such plan, or as a condition of obtaining benefits under the plan attributable to employer contributions. See also section 411(c)(2)(C) of the Internal Revenue Code (“Code”) and section 204(c)(2)(C) of ERISA.

Section 411(c)(1) of the Code¹ provides that an employee’s accrued benefit derived from employer contributions as of any date is the excess, if any, of the accrued benefit for the employee as of that date over the accrued benefit derived from contributions made by the employee as of that date. Section 411(c)(2) of the Code provides the rules for determining an employee’s accrued benefit derived from the employee’s mandatory contributions to a defined benefit plan. Section 411(c)(2)(B) provides that the accrued benefit derived from mandatory employee contributions is equal to the employee’s contributions accumulated to normal retirement age using specified rates under section 411(c)(2)(C), and converted to an actuarially equivalent annuity commencing at normal retirement age, using an interest rate under section 417(e)(3) of the Code as of the determination date.²

Typically, mandatory employee contributions are required under the plan as a percentage of the employee’s compensation. They are withheld from the salary of the employee by the

¹References to the Code should be read to include the parallel provision under ERISA.

² Code section 417(e)(3) was amended in 1994 (Pub. L. 103-465) to specify an applicable mortality table, which is part of the determination of actuarial equivalence under IRS guidance. See Prop. Treas. Reg. §1.411(c)-1.

employer and deposited to the employee's credit in the defined benefit plan on an after-tax basis.³ Such mandatory contributions have generally been used to fund a portion of the participant's accrued benefit as determined under the plan's benefit formula and are required in order to receive the portion of the accrued benefit derived from employer contributions.

When a plan terminates in a distress termination or an involuntary termination, each participant's plan benefit is assigned to one or more of six "priority categories" that are described in paragraphs (1) through (6) of section 4044(a) of ERISA.⁴ Participants' accrued benefits derived from mandatory employee contributions are assigned to PC2. Because benefits in PC2 have a higher claim on plan assets than nearly all other benefits under the plan, when an underfunded plan terminates, plan assets are usually (but not always) sufficient to pay accrued benefits derived from mandatory employee contributions.

Although PBGC generally pays benefits only in annuity form, PBGC's regulations allow a return of mandatory employee contributions in a single installment (or a series of installments), provided certain conditions are met (see § 4022.7(b)(2)).

³ Generally, contributions by employees to defined benefit plans (whether mandatory or voluntary) are not deductible for federal income tax purposes. Under Code section 411(d)(5), voluntary contributions are treated in the same manner as employee contributions to a defined contribution plan for which a separate account is maintained; the accrued benefit derived from such contributions is generally determined as the amount of those contributions, plus income, expenses, and gains and losses attributable thereto.

⁴ Plan assets must be allocated to each priority category in succession, beginning with priority category one (PC1). The benefits assigned to each priority category under section 4044 of ERISA in general are as follows:

- PC1: The portion of a participant's accrued benefit derived from the participant's voluntary contributions.
- PC2: The portion of a participant's accrued benefit derived from the participant's mandatory contributions.
- PC3: The portion of a participant's benefit that was in pay status as of the beginning of the three-year period ending on the termination date (or bankruptcy filing date, if applicable), or that would have been in pay status at the beginning of such three-year period if the participant had retired before the beginning of such three-year period, provided that the benefit was the lowest 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).
- PC4: All other guaranteed benefits.
- PC5: All other nonforfeitable benefits.
- PC6: All other benefits.

Rollover Benefits under the Code and Treasury/IRS Guidance

Section 401(a)(31) of the Code requires a qualified plan to permit a distributee of any eligible rollover distribution to elect a direct rollover of any part of the distribution to an eligible retirement plan.⁵ Payment in the form of a direct rollover to a defined benefit plan is allowed only if the defined benefit plan accepts rollover contributions.⁶ Section 402(c) of the Code permits an individual receiving an eligible rollover distribution from a qualified plan, individual retirement plan, or certain other plans to elect to roll over any portion of that distribution within a specified time to an eligible retirement plan that accepts the rollover (including a defined benefit plan).

On February 21, 2012, the Department of the Treasury and the Internal Revenue Service (IRS) issued Rev. Rul. 2012-4, 2012-8 I.R.B. 386,⁷ which clarified certain qualification requirements under section 401(a) of the Code for use of rollover amounts to provide an additional benefit under a defined benefit plan. Under the facts of the example provided in Rev. Rul. 2012-4, a qualified defined benefit plan provides that it will accept a direct rollover of a distribution from a qualified defined contribution plan maintained by the same employer for an employee or former employee of the employer who separates from service after age 55 with at

⁵ In general, an eligible rollover distribution is a lump sum distribution, or any other distribution of a participant's benefit, that is not one of a series of substantially equal periodic payments made at least annually for a period of 10 years or more. There are several exceptions to the types of distributions that are eligible to be rolled over. See Code section 402(c)(4). An election of a rollover requires a distributable event under the plan, such as the participant's severance from employment or the attainment of normal retirement age. The taxable portion of an eligible rollover distribution from a qualified plan is generally subject to 20 percent mandatory withholding of Federal tax unless a direct rollover to an eligible retirement plan is made. See Code section 3405(c).

⁶ Code section 401(a)(31).

⁷ http://www.irs.gov/irb/2012-08_IRB/ar08.html. Footnote 1 of Rev. Rul. 2012-4 stated that PBGC was developing guidance on the Title IV treatment of benefits under a defined benefit plan resulting from a rollover. This proposed rule is part of the development of that guidance.

least 10 years of service and elects to commence an immediate annuity of the employee's benefit under the plan (including the additional benefit resulting from the direct rollover).⁸

Rev. Rul. 2012-4 treats the amounts rolled over as mandatory employee contributions for purposes of section 411(c) of the Code.⁹ The ruling states that the plan satisfies section 411(c)(2) of the Code with respect to the rollover because –

1. The benefit resulting from the direct rollover is provided as an immediate annuity determined as the actuarial equivalent of the amount rolled over, where actuarial equivalence is determined using the applicable interest rate and mortality table under section 417(e)(3) of the Code; and
2. The plan further provides that, in the event payment is delayed after the rollover, interest on the rollover contribution is accumulated in accordance with the requirements of Code section 411(c)(2)(C)(iii) and the benefit derived from the rollover is not forfeitable upon death prior to the annuity starting date.

Under the ruling, an accrued benefit derived from mandatory employee contributions that is determined under the rules of section 411(c)(2) of the Code does not fail to satisfy the nonforfeitability rules under section 411(a) of the Code and may be excluded from the participant's annual benefit for purposes of the maximum benefit limitation under section 415(b) of the Code.

The ruling further provides that, if the plan provided an annuity with respect to the rollover in excess of the amount determined under the rules of section 411(c) of the Code, such as by using a more favorable actuarial conversion basis than required by those rules, the portion

⁸ Rev. Rul. 2012-4 states that if a plan's certified or presumed adjusted funding target attainment percentage under Code section 436(j)(2) were to drop below 60%, the plan would not be permitted to receive direct rollover contributions because such rollover contributions would give rise to additional benefit accruals that are not permitted under Code section 436(e).

⁹ Rev. Rul. 2012-4 states that this contribution of the employee is required as a condition of receiving additional benefits under the defined benefit plan attributable to employer contributions. Thus, if the amount of the rollover is insufficient to provide for the benefit derived from mandatory employee contributions (for example, if the actual return on plan assets is less than the rate that was assumed in determining that benefit), the employer would be required to make additional contributions to fund that benefit.

of the benefit resulting from the rollover amounts that exceeded the benefit derived from mandatory employee contributions as determined under section 411(c)(2) of the Code would be subject to the requirements applicable to a benefit attributable to employer contributions. The ruling notes that, in this case, the liability for the total benefit resulting from the rollover (including the portion of the accrued benefit considered to be derived from employer contributions because it exceeds the amount determined under section 411(c)(2)(B)) would likely exceed the amounts rolled over, requiring additional funding by the employer, and the excess amount over the amount determined under section 411(c)(2)(B) would be included in the annual benefit for purposes of section 415(b) of the Code.

Following clarification by Treasury and IRS of certain qualification requirements concerning rollovers in Rev. Rul. 2012-4, PBGC is proposing to amend its regulations to provide guidance on Title IV treatment of rollovers, both in anticipation of increased use of rollovers, and as part of its efforts to promote retirement security. The availability of a rollover of a participant's retirement savings in a 401(k) or other defined contribution plan to a defined benefit plan expands the opportunities for participants to elect lifetime annuity options.

Overview of Proposed Regulation

PBGC is proposing to amend PBGC's regulations on Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022) and Allocation of Assets in Single-Employer Plans (29 CFR part 4044). The proposed amendments would establish or clarify the rules for treatment of rollovers in plans that terminate underfunded, the most important of which are:

- A benefit resulting from rollover amounts would be treated as an accrued benefit derived from mandatory employee contributions in PC2 (which has a higher claim on plan assets than nearly all other benefits under the plan), to the extent that the benefit is determined using the rules of Code section 411(c)(2)(B).

- Unlike other PC2 benefits, PC2 benefits resulting from rollover amounts would generally not be payable in lump sum form.
- The portion of any benefit resulting from rollover amounts that exceeds the accrued benefit derived from mandatory employee contributions (*i.e.*, the portion derived from employer contributions) would be a guaranteeable benefit in PC3, PC4, or PC5, as applicable.
- The participant's accrued benefit resulting from rollover amounts generally would not be subject to PBGC's maximum guaranteeable benefit limitation under section 4022(b) of ERISA and thus would not be taken into account in applying that limitation. However, the maximum guaranteeable benefit limitation would apply to any benefit resulting from rollover amounts that exceeds the accrued benefit treated as derived from mandatory employee contributions.
- The participant's accrued benefit resulting from rollover amounts generally would not be subject to the five-year phase-in limitation on the guarantee of benefit increases. However, the phase-in limitation would apply to any benefit resulting from rollover amounts that exceeds the accrued benefit treated as derived from mandatory employee contributions, with the phase-in period beginning as of the date the rollover contributions were received by the plan.

A detailed discussion of the proposed regulation follows.

Proposed Regulatory Changes

Benefits Payable in Terminated Single-Employer Plans

This proposed rule would amend PBGC's benefit payments regulation to describe the calculation and payment of a benefit resulting from a distribution that is rolled over into a defined benefit plan that later terminates.¹⁰ Under the proposed rule, PBGC would treat the rollover amounts as mandatory employee contributions and would determine the employee's accrued benefit derived from mandatory employee contributions using the rules of section 411(c)(2)(B) of the Code. This proposed rule relates solely to a benefit resulting from the

¹⁰ The facts of the example in Rev. Rul. 2012-4 involve an employee who separates from service after age 55 with at least ten years of service and elects to commence an immediate annuity. Although this example is used to illustrate the treatment of a direct rollover from a qualified plan into a defined benefit plan, rollovers are permitted in broader circumstances. This proposed rule is not limited to the facts in the example, but it is limited to rollovers that give rise to accrued benefits under a defined benefit plan formula.

rollover of a distribution. It does not affect PBGC's treatment of any other contributions that may be used to fund benefits under a defined benefit plan or the employee's benefit derived from such contributions, regardless of the characterization of those contributions or benefits, or their tax treatment.

PBGC's current regulation provides for the return of mandatory employee contributions in a single installment (or a series of installments) if a participant, or a beneficiary of a pre-retirement death benefit, so elects in accordance with the plan's provisions.¹¹ If a participant (or a surviving spouse) elects a return of mandatory employee contributions prior to the annuity starting date in the form of a lump sum, instead of as an annuity, the lump sum benefit is determined under § 4044.12(c)(2) as the amount of the participant's accumulated mandatory contributions.¹² A withdrawal of the participant's accumulated mandatory employee contribution results in an accrued benefit under the plan derived solely from employer contributions.

The proposed regulation generally would not permit participants to receive a lump sum return of mandatory employee contributions attributable to rollover amounts. PBGC would disregard a plan's provisions for the return of employee contributions in a lump sum and would make rollover amounts payable only in the form of an annuity. Because the participant had the chance to take the distribution from a defined contribution plan as a lump sum and chose to roll it

¹¹ In addition, PBGC will pay mandatory employee contributions in a lump sum under a plan's modified cash refund feature, which pays the excess of any accumulated mandatory employee contributions over the pension payments received by a participant upon his death, but only if this is the automatic form of benefit under the plan's provisions (or is in a form that has been elected by a participant who commenced benefits prior to the date of PBGC trusteeship and dies after such date).

¹² PBGC determines the amount of the lump sum benefit based on the participant's accumulated contributions – *i.e.*, the employee's mandatory contributions credited with interest for the period through the plan's termination date (but not less than the minimum lump sum required under section 411(c) of the Code upon withdrawal of mandatory employee contributions). Interest on that sum is thereafter based on PBGC's late-payment interest rate until the participant's distribution date.

into a defined benefit plan to obtain additional annuity benefits, it would seem anomalous to later allow the participant to convert the additional annuity back into a lump sum. Moreover, paying the additional benefit as an annuity is consistent with PBGC's policy of promoting retirement security through preserving lifetime retirement income.

Under the proposed rule, the annuity resulting from rollover amounts would be payable at the same time, and in the same form, as the remainder of the participant's benefit under the plan to avoid administrative burden to PBGC.¹³ In the case of a plan that provides for a pre-retirement death benefit that returns the employee's mandatory contributions in a single installment, PBGC would not allow the spouse of a participant who dies after the plan terminates to elect to withdraw the mandatory contributions attributable to rollover amounts in a single installment; instead, PBGC would include such contributions in the value of the plan's qualified preretirement survivor annuity (QPSA) to the spouse.¹⁴ PBGC would determine whether a payment was de minimis (currently \$5,000 or less under § 4022.7(b)(1)(i)), and if so would base the amount of the payment on the lump sum value of the participant's total benefit payable by PBGC (the benefit resulting from rollover amounts combined with the benefit excluding rollover amounts).

¹³ PBGC would disregard any plan provision that allows an additional annuity resulting from rollover amounts to have an annuity starting date that differs from the annuity starting date for the remainder of the participant's benefit under the plan.

¹⁴ If no QPSA is payable, the mandatory contributions would be payable to a named beneficiary in a life annuity form that would commence at the same time as a QPSA could commence under PBGC's regulations. In the case of a cash refund annuity (*i.e.*, a post-retirement lump sum death benefit of the value of the participant's mandatory contributions in excess of the pension payments received by the participant at the time of death), PBGC would include the value of the mandatory contributions in the qualified joint and survivor annuity (QJSA) to the spouse or, if no QJSA is payable, would pay such amounts to a named beneficiary in a life annuity form that would commence at the same time as a QJSA could commence under PBGC's regulations.

Under section 4022 of ERISA, PBGC guarantees the payment of all nonforfeitable benefits provided by a plan, subject to two principal statutory limitations – the maximum guaranteeable benefit limitation and the five-year phase-in limitation.

The amount of the maximum monthly guarantee is set by law and is updated each calendar year. The maximum guaranteeable benefit applicable to a plan is fixed as of that plan's termination date. Under the Pension Protection Act of 2006, if a plan terminates during a plan's sponsor's bankruptcy and the sponsor entered bankruptcy on or after September 16, 2006, the maximum guaranteeable benefit is fixed as of the date the sponsor entered bankruptcy.

The five-year phase-in limitation generally applies to a benefit increase that has been in effect for less than five years. 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. For this purpose, a benefit increase resulting from a plan amendment is deemed to be in effect on the later of the amendment's adoption date or its effective date. Under the Pension Protection Act of 2006, an unpredictable contingent event benefit is generally deemed to be in effect on the date the event occurred.¹⁵

Historically, PBGC has interpreted the statutory limitations to apply to the participant's total nonforfeitable accrued benefit under a plan, including that portion of the benefit funded by traditional after-tax mandatory employee contributions. In the case of rollover amounts, however, PBGC proposes to exempt from these limitations the accrued benefit derived from mandatory employee contributions determined under the rules of Code section 411(c)(2)(B).

¹⁵ See ERISA section 4022(b)(8) and PBGC's proposed rule on Benefits Payable in Terminated Single-Employer Plans; Limitations on Guaranteed Benefits, 76 FR 13304 (Mar. 11, 2011).

The exemption would not apply to any benefit resulting from rollover amounts that exceeds the accrued benefit derived from employee contributions.

Rollovers can help preserve participants' retirement savings until retirement. They provide a valuable means for participants to withdraw their benefits from one retirement plan and contribute them to another. Rollovers to defined benefit plans also provide lifetime-annuity protection at a competitive cost. Consistent with the Administration's initiative on retirement security, PBGC wants to encourage the rollover and annuitization of distributions from defined contribution plans by providing assurances to participants that their benefits attributable to rollover amounts to a defined benefit plan will largely be protected from the limitations that might otherwise apply if the plan terminates and is trustee by PBGC.

There are a number of reasons why PBGC views benefits resulting from the portion of rollover amounts treated as mandatory employee contributions differently from other benefits under a plan. Unlike other mandatory employee contributions, rollover benefits require an affirmative election by the participant to roll over a pension distribution to obtain an additional annuity from a defined benefit plan. If the benefit resulting from rollover amounts caused a participant's total benefit under the plan to exceed PBGC's maximum guaranteeable benefit, participants might be reluctant to roll over benefits from defined contribution plans to defined benefit plans. Applying the five-year phase-in limitation to benefits resulting from rollover amounts similarly might make rollovers unattractive.

The limitations on PBGC's guarantee were designed to protect the pension insurance system from risk of loss. But rollovers do not present the same risk of loss to the insurance program as other benefits. A benefit derived from rollover amounts treated as mandatory employee contributions is considered under Rev. Rul. 2012-4 to be actuarially equivalent to the

rollover amounts received by the defined benefit plan. Therefore, although a plan accepting a rollover becomes liable to pay additional benefits, it simultaneously receives additional funds of equivalent value. That is not true for most new benefit accruals. Accordingly, PBGC's proposal to exempt benefits, to the extent derived from the portion of a rollover treated as mandatory employee contributions, from the maximum guaranteeable benefit and phase-in limitations is a reasonable statutory interpretation.

In accordance with PBGC's statutory interpretation, the proposed rule would amend § 4022.22 to exempt the rollover benefit amount derived from mandatory employee contributions from the maximum guaranteeable benefit limitation. Thus, PBGC would exclude that amount from its determination of the participant's maximum guaranteeable benefit. However, any rollover benefit in excess of the benefit derived from employee contributions (*i.e.*, any portion of the rollover benefit derived from employer contributions) would be combined with the annuity otherwise payable under the plan in determining the participant's maximum guaranteeable benefit.

Similarly, the proposed rule would amend § 4022.24 to exempt a participant's rollover benefit derived from mandatory employee contributions from the five-year phase-in limitation. The five-year phase-in limitation would, however, apply to the portion of any rollover benefit derived from employer contributions, with that benefit portion deemed to be in effect on the date the rollover amounts were received by the plan (*i.e.*, when the rollover amounts were treated as providing additional benefit accruals under the plan).

PBGC's regulations provide for a third guarantee limitation, the "accrued-at-normal" limitation, which restricts PBGC's guarantee of temporary supplements. Under § 4022.21, PBGC's guarantee cannot exceed the accrued benefit payable as a straight life annuity at normal

retirement age. PBGC would include the annuity attributable to rollover amounts in the determination of the accrued-at-normal limitation, which would increase the limitation against which the participant's entire benefit is measured, and would apply the accrued-at-normal limitation to the entire benefit, including rollover amounts. This would generally have the effect of increasing the participant's guaranteeable benefit.

Allocation of Assets in Single-Employer Plans

The proposed rule would also amend PBGC's asset allocation regulation to set forth rules for PBGC treatment of rollover benefits when a defined benefit plan terminates with insufficient assets to pay all benefits.

Proposed new § 4044.12(b)(4) and (c)(4) describes the calculation of a participant's total annuity benefit resulting from rollover amounts. For participants and beneficiaries not yet in pay status as of the termination date, the rollover amounts would be credited with interest payable under plan provisions to the plan's termination date, and converted to an annuity benefit payable at the normal retirement age using the plan's interest rates and conversion factors in effect as of the plan's termination date for the conversion of such rollover amounts.

Under the proposed rule, the portion of a participant's accrued benefit resulting from rollover amounts derived from mandatory employee contributions would be determined using the rules of section 411(c) of the Code. Specifically, the participant's accumulated mandatory employee contributions – the participant's rollover amounts credited with interest at 120% of the Federal mid-term rate from the date of the rollover to the plan's termination date – would be converted to an actuarially equivalent straight life annuity under the plan payable at the normal retirement age using the applicable interest rate and mortality table under section 417(e) of the Code as of the plan's termination date. Consistent with Rev. Rul. 2012-4, which defines this

annuity amount as the actuarial equivalent of an employee's rollover amounts to a defined benefit plan, only an annuity benefit determined on this basis would be assigned to PC2.

Rev. Rul. 2012-4 permits a qualified defined benefit plan to offer a subsidy with respect to a rollover by using a more generous annuity conversion factor than under the minimum rules for an actuarially equivalent annuity under section 411(c) of the Code, provided the additional qualification requirements applicable to a benefit derived from employer contributions are met. If, under the plan's provisions, the benefit resulting from rollover amounts exceeds the annuity derived from mandatory employee contributions determined under the rules of section 411(c)(2) of the Code – for example, because the plan uses more generous conversion factors than those under section 417(e) of the Code – the proposed rule would treat the portion of the benefit in excess of the annuity derived from mandatory employee contributions under the rules of section 411(c)(2) as a benefit derived from *employer* contributions for purposes of assigning the benefits to the priority categories under part 4044. The annuity benefit derived from employer contributions would be a guaranteeable benefit in PC3, PC4, or PC5, as applicable, because it is a nonforfeitable benefit (*i.e.*, a benefit for which the participant has satisfied all plan conditions for entitlement as of the plan's termination date). Under section 4022(a) of ERISA, PBGC is required to guarantee all nonforfeitable benefits provided by a plan, subject to the limitations contained in section 4022(b).

Applicability

The amendments made by this proposed rule would apply to terminations initiated on or after the effective date of the final rule. In the interim, PBGC will make determinations under the current regulations, consistent with IRS Rev. Rul. 2012-4, including paying the return of employee contributions under a benefit resulting from rollover amounts in a single sum.

Compliance with Rulemaking Requirements

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

PBGC has determined, in consultation with the Office of Management and Budget, that this rule is not a “significant regulatory action” under Executive Order 12866.

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

PBGC estimates that the annual economic impact of this proposed rule would be about \$11,000,000. This is the amount PBGC estimates that participants who roll over benefits from defined contribution plans to defined benefit plans that subsequently terminate and are trustee'd by PBGC in aggregate would gain (and PBGC would lose), as a result of the proposed regulatory change to exclude from the maximum guaranteeable benefit and phase-in limitations any benefit resulting from rollover amounts that does not exceed the accrued benefit derived from mandatory employee contributions.

Since IRS has only recently provided guidance to defined benefit plans on calculating rollover amounts, PBGC has no historic data to draw upon in developing this estimate. Accordingly, PBGC made conservative assumptions based on its judgment about such factors as how many defined benefit plans would allow rollovers from defined contribution plans and how many participants in such plans would roll over benefits from defined contribution plans.

Although it is difficult to predict with any certainty the annual economic impact of the proposed regulatory action, given that the estimate is so far below \$100 million, PBGC has determined that the annual economic impact of the proposed rule would be less than \$100 million.

Regulatory Flexibility Act

The Regulatory Flexibility Act imposes certain requirements with respect to rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposed rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the Regulatory Flexibility Act requires that the agency present an initial regulatory flexibility

analysis at the time of the publication of the proposed rule describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations and governmental jurisdictions.

For purposes of the Regulatory Flexibility Act requirements with respect to this proposed rule, PBGC considers a small entity to be a plan with fewer than 100 participants. This criterion is consistent with certain requirements in Title I of ERISA and the Internal Revenue Code, as well as the definition of a small entity that the Department of Labor has used for purposes of the Regulatory Flexibility Act.

Further, while some large employers that terminate plans may have small plans that terminate along with larger ones, in general most small plans are maintained by small employers. Thus, PBGC believes that assessing the impact of the final rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration (13 CFR 121.201) pursuant to the Small Business Act. PBGC therefore requests comments on the appropriateness of the size standard used in evaluating the impact on small entities of the amendments to the benefit payments regulation to implement this proposed rule.

On the basis of its proposed definition of small entity, 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. Virtually all, if not all, of the effect of this proposed rule will be on PBGC or persons who receive benefits from PBGC. 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.

List of Subjects

29 CFR Part 4001

Pensions.

29 CFR Part 4022

Pension insurance, Pensions.

29 CFR Part 4044

Pension insurance, Pensions.

For the reasons given above, PBGC proposes to amend 29 CFR parts 4001, 4022, 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 definition for “rollover amounts” in alphabetical order to read as follows:

§ 4001.2 Definitions

* * * * *

Rollover amounts means the dollar amount of all or any part of a distribution that is rolled over into a defined benefit plan in accordance with section 401(a)(31) or 402(c) of the Internal Revenue Code.

* * * * *

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, 1322(b), 1341(c)(3)(D), and 1344.

§ 4022.7 [Amended]

4. Amend § 4022.7 as follows:

- a. In paragraph (b)(2)(i), add the phrase “except as provided in paragraph (b)(2)(iii) of this section,” after the words “Notwithstanding any other provision of this part,”;
- b. Add paragraph (b)(2)(iii); and
- c. Revise paragraph (c)(2).

The addition and revision read as follows:

§4022.7 Benefits payable in a single installment.

* * * * *

(b) * * *

(iii) *Rollover amounts.* The rule in paragraph (b)(2) of this section (dealing with return of employee contributions) does not apply to a participant’s accumulated mandatory employee contributions resulting from rollover amounts (as determined under § 4044.12(c)(4)(i) of this chapter) or the benefit derived from such mandatory employee contributions.

* * * * *

(c) * * *

(2) *Exception.* Except in the case of accumulated mandatory employee contributions resulting from rollover amounts (as determined under § 4044.12(c)(4)(i) of this chapter), upon the death of a participant the PBGC may pay in a single installment (or a series of installments) that portion of the participant's accumulated mandatory employee contributions that is payable under the plan in a single installment (or a series of installments) upon the participant's death.

* * * * *

§ 4022.8 Form of payment.

5. In § 4022.8, add paragraph (f) to read as follows:

* * * * *

(f) *Rollover amounts.* The annuity benefit resulting from rollover amounts (as determined under § 4044.12(c)(4)) is combined with any other benefit under the plan and paid in the same form and at the same time as the other benefit.

§ 4022.22 Maximum guaranteeable benefit.

6. In § 4022.22, add paragraph (d) to read as follows:

* * * * *

(d) *Rollover amounts.* Any portion of a benefit derived from mandatory employee contributions resulting from rollover amounts (as determined under § 4044.12(c)(4)(i) of this chapter) is disregarded in applying the provisions of §§ 4022.22 and 4022.23. However, any portion of a benefit derived from employer contributions resulting from rollover amounts (as determined under § 4044.12(c)(4)(ii) of this chapter) is combined with any other benefit under the plan for purposes of determining the maximum guaranteeable benefit under §§ 4022.22 and 4022.23. For example, assume that a participant has an \$80,000 total annual plan benefit at age 65, of which \$15,000 is derived from mandatory employee contributions resulting from rollover amounts and \$5,000 is derived from employer contributions resulting from rollover amounts. The \$15,000 benefit derived from employee contributions resulting from rollover amounts would be excluded in the determination of the participant's maximum guaranteeable amount. The participant's remaining \$65,000 benefit (including the \$5,000 benefit derived from employer contributions resulting from rollover amounts) would be subject to the maximum guaranteeable benefit limitation. Assuming a PBGC maximum guaranteeable benefit of \$59,000 for a straight life annuity at age 65 (the approximate level for 2014), the participant's maximum guaranteeable

benefit would effectively be increased by the \$15,000 benefit derived from employee contributions resulting from rollover amounts, resulting in total guaranteed benefits of \$74,000. (The \$59,000 maximum guaranteeable benefit limitation would apply to the participant's benefit derived from employer contributions; as a result, \$10,000 of the participant's benefit derived from employer contributions would not be guaranteed by PBGC.)

§ 4022.24 Benefit increases.

7. In § 4022.24, add paragraph (g) to read as follows:

* * * * *

(g) *Rollover amounts.* Any portion of a benefit derived from mandatory employee contributions resulting from rollover amounts (as determined under § 4044.12 (c)(4)(i) of this chapter) is disregarded in applying the provisions of §§ 4022.24 through 4022.26. However, any portion of a benefit derived from employer contributions resulting from rollover amounts (as determined under § 4044.12 (c)(4)(ii) of this chapter) is combined with any other benefit under the plan in applying the provisions of §§ 4022.24 through 4022.26. In such case, the benefit increase is deemed to be in effect on the date the rollover amounts are received by the plan.

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

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

9. In 4044.12, paragraphs (b)(4) and (c)(4) are added to read as follows:

§ 4044.12 Priority category 2 benefits.

* * * * *

(b) * * *

(4) *Rollover amounts.* In the case of a benefit resulting from rollover amounts, notwithstanding the provisions of paragraph (b)(2) of this section, the interest rates and conversion factors in § 4044.12(c)(4) are used to determine the portion of the accrued benefit derived from the employee's contributions and, if any, the portion of the accrued benefit derived from employer contributions.

(c) * * *

(4) *Special rules for benefit resulting from rollover amounts.* (i) *Mandatory employee contributions.* Notwithstanding paragraphs (c)(1) through (3) of this section, in the case of a benefit resulting from rollover amounts, the accrued benefit derived from mandatory employee contributions is determined using the interest rates and conversion factors under section 411(c)(2)(B) and (C) of the Code for purposes of computing an employee's accrued benefit derived from the employee's contributions. The annuity benefit and the pre-retirement death benefit, as determined on this basis, is the benefit resulting from rollover amounts in priority category 2.

(ii) *Employer contributions.* Any portion of a participant's accrued benefit resulting from rollover amounts that is in excess of the accrued benefit derived from mandatory employee contributions determined in accordance with paragraph (c)(4)(i) of this section (*i.e.*, the accrued benefit derived from employer contributions) is a guaranteeable benefit in priority category 3, priority category 4, or priority category 5, as applicable under this part.

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