



## PBGC Provides Limited Relief Regarding Premium Penalties/Premium Elections

*By Harold J. Ashner, APM, Keightley & Ashner, Washington, D.C.*

On September 15, 2011, the Pension Benefit Guaranty Corporation (PBGC) published a notice announcing that it is providing relief from certain premium penalties and in certain situations involving elections of the alternative premium funding target (alternative method) [<http://www.pbgc.gov/Documents/2011-23692.pdf>].

### Seven-Day Grace Period for Certain Premium Penalties

Under PBGC regulations, a late payment penalty generally applies to any payment made after the applicable due date, with the penalty rate set at 1% per month where the late payment is self-corrected and 5% per month where the late payment is made after the date on which the PBGC issues a written notice that there is or may be a premium delinquency (*e.g.*, a premium bill, a letter initiating a premium compliance review, or a letter questioning a failure to make a premium filing). The PBGC's September 15<sup>th</sup> notice provides that, for premiums owed for post-2010 plan years, the PBGC will automatically waive any such penalties that are assessed solely because the payment is late by not more than seven calendar days. This waiver applies only to late payment penalty charges for regular annual premiums; it does not apply to late payment interest charges, to penalties for failure to timely file required premium information, or to penalties for late payment of the special termination premium that may arise in distress or involuntary

terminations.

### Limited Relief for Alternative Method Elections: Background

For post-2007 plan years, the PBGC's regulations allow a plan to calculate its variable-rate premium (VRP) by using the alternative method instead of the standard premium funding target (the standard method). The regulations require that such an election be filed with the PBGC on or before the VRP due date. This election is made by checking box 5 of the Comprehensive Premium Filing. The election, once made, is effective until subsequently revoked, and cannot be revoked for at least five years.

Significant problems arose in connection with alternative method elections for the 2009 plan year, when IRS issued guidance impacting the interest rate that could be used under the alternative method just before the deadline for making the election. In Technical Update 10-2 [<http://www.pbgc.gov/res/other-guidance/tu/tu10-2.html>], the PBGC provided relief to certain "plans that intended to use the [alternative method] to calculate the [VRP]" – *i.e.*, those whose only error was not checking box 5 for the 2008 plan year or for certain 2009 plan years – by treating them as "deemed to have made a valid election to use the [alternative method]."

Premium payers and pension professionals requested further relief from errors relating to alternative method elections, including relief for plan years starting after 2009 and relief for plans that did not qualify for the Technical Update 10-2 relief for 2008 and 2009 plan years.

### **Alternative Method Election Relief for Post-2009 Plan Years**

The PBGC noted that, although it had taken steps to reduce errors relating to alternative method elections for post-2009 plan years, it still occasionally finds such errors. Thus, for post-2009 plan years, the PBGC stated that it “is providing relief similar to, but more expansive, than the relief provided in Technical Update 10-2.”

Specifically, the relief applies where the plan used the alternative method to determine the VRP for the plan year without filing a valid election to do so for that plan year or a prior plan year. (Similar relief is available where the plan used the standard method, but inadvertently made an election to use the alternative method for the applicable plan year.) The PBGC will base its determination of which method was used to determine the VRP for the plan year solely on whether the alternative method or standard method box in line 7d(1) of the Comprehensive Premium Filing was checked. In addition, if an election to use the alternative method is invalid solely because the filing was submitted after the due date, relief is available only if the filing is not an amendment of a timely filing in which the plan used the standard method to determine the VRP and the filing is submitted by the earlier of: (1) the 90th day after the filing due date; and (2) the 30th day after the date of any PBGC notification that no filing has been received.

The PBGC stated that it is contacting plans entitled to this relief to explain the options and actions required, if any (*e.g.*, whether the inconsistent filing

must be amended). Plans that do not qualify for this relief may, according to the notice, “seek reconsideration based on the facts and circumstances.”

### **Alternative Method Election Relief for Pre-2010 Plan Years**

For pre-2010 plan years, there is no relief in this notice under which the PBGC will allow a plan that made an error relating to the alternative method election to use the method it intended (*i.e.*, the alternative method where it used but did not properly elect that method, or the standard method where it inadvertently checked box 5 indicating election of the alternative method even though the plan used the standard method). Thus, the additional premium that may be required under the method the plan did not intend will be owed; the PBGC will, however, waive the late payment penalty (but not the late interest charge) in connection with these errors for 2008 and 2009 plan years, provided that, in the case of a plan entitled to this relief that has not amended the relevant filing and paid the additional premium due, the additional premium is paid within 30 days after the PBGC notifies the plan of this penalty relief.