Bloomberg BNA

Pension & Benefits Reporter™

Reporting

PBGC Issues Reportable Events Final Rule Designed to Uncover Most At-Risk Plans

The Pension Benefit Guaranty Corporation issued a final rule on pension plans' requirements to report various corporate and plan events to the agency that the PBGC says focuses on identifying the minority of defined benefit plans and their sponsors that pose the greatest risk of defaulting on their financial obligations.

The new regulations (RIN 1212-AB06) provide most plan sponsors with increased flexibility to determine whether a waiver from reporting requirements will apply, the PBGC said Sept. 10 in announcing the issuance of the rule, which was published in the Federal Register on Sept. 11 (80 Fed. Reg. 54,980).

The new rule will help the agency get the information it needs and ''will reduce the burden for employers whose pension plans are not at risk,'' Alice Maroni, the PBGC's acting director, said in a news release. It will give ''companies flexibility to use information they have readily at hand to see if they are eligible for a waiver and need not report to'' the PBGC, she said.

The rule will change existing regulations and guidance for pension plans and their sponsors on requirements they face on the reporting to the PBGC of various corporate events, such as loan defaults and controlled group changes, and plan events, such as big drops in the number of active plan participants, missed plan contributions or insufficient funds. The reporting is designed to give the agency a heads-up on events that may indicate the plan or the sponsor is having financial difficulties so the agency can determine if it needs to take action to ensure plan participants continue to receive their benefits.

The final rule, slated for publication in the Federal Register on Sept. 11, finalizes the agency's 2013 proposed rule on reportable events, and will apply to events that occur after Jan. 1, 2016.

'Seat at the Table.' Harold J. Ashner, a partner with Keightley & Ashner LLP, said that with the rule, the ''PBGC is clearly trying to get a 'seat at the table' well in advance of a possible bankruptcy.''

For example, he said the new definition under the final rule of a loan default reportable event, unlike the old definition, captures situations in which there isn't any ''loan default as a result of the lender having waived or agreed to an amendment of a loan agreement provision.''

Ashner, who formerly served as the PBGC's assistant general counsel for legislation and regulations, said that because many corporate loan and other agreements include provisions tied to the PBGC's reportable events regulations, practitioners will need to review these significant regulatory changes very carefully to determine how they may affect existing and future agreements. Though the new rules don't go into effect until 2016, they may impact agreements entered into before 2016, depending on how those agreements were or will be drafted, Ashner said.

Representatives of the ERISA Industry Committee and the American Benefits Council said they were concerned about the final rule's continuation of the proposed rules' scheme of connecting reportable events to plan sponsors' financial statements and metrics rather than to the funding of the plans themselves.

Waiver Structure. The PBGC originally proposed changes to the rule in 2009 (36 BPR 2674, 11/24/09), but re-proposed it in the wake of sharp criticism (37 BPR 250, 2/2/10).

A second proposed rule (RIN 1212–AB06) was issued in 2013 (40 BPR 869, 4/9/13), and it drew withering criticism of its own in comment letters (40 BPR 1440, 6/18/13) and during an agency hearing (40 BPR 1492, 6/25/13).

The final rule provides a new reportable events waiver structure that the PBGC said is more closely focused on risk of default than was the old waiver structure. The rules eliminate some previous reporting requirements, such as those based on a modest level of plan underfunding. In its place, the rules create a ''low-default-risk safe harbor'' based on company financial metrics.

The PBGC said in the rule that this sponsor safe harbor is voluntary and based on existing, readily available financial information that companies already use for many business purposes.

The agency said that with the low-default-risk safe harbor, it ''is establishing a risk tolerance level for certain events faced by plans and plan sponsors that trigger reporting requirements.'' This reporting system is ''analogous to that used by an unsecured creditor in loan arrangements with a borrower so as to be alerted to important issues facing the borrower impacting its ability to meet its loan obligations,'' the PBGC said.

The final rule also provides a safe harbor for plans that don't owe a variable-rate premium, which is referred to as the ''well-funded plan safe harbor.'' Variable-rate premiums are paid by underfunded single-employer plans.

Other waivers included in the proposed rules, such as the public company, small plan, de minimis segment and foreign entity waivers, were retained in the final rule.

With the expansion in the number of waivers available in the final rule, the PBGC estimated that 94 percent of plans covered by the pension insurance system will now qualify for at least one waiver from reporting requirements.

Concerns. Kathryn A. Ricard, senior vice president for retirement security with the ERISA Industry Committee in Washington, said that from the perspective of the large plan sponsors her organization represents, the rules raise concerns in that they continue in the vein of the proposed rules in connecting reportable events waivers to plan sponsors' financial statements and other financial metrics. This, she said, is a mistaken change from existing rules, which appropriately base reportable events on how well funded the plans themselves are.

In addition to basing reportable events on information that isn't relevant to plan funding, Ricard said, the rules pose an unnecessary burden on sponsors, which now must revamp their entire structure and process for tracking and reporting such events.

Ricard added that the type of information that the PBGC will require plan sponsors to track to determine whether they are eligible for a waiver is information that the agency already has access to and therefore won't be helpful to the PBGC in its efforts to protect its plan termination insurance program or plan participants.

Jan Jacobson, senior counsel for retirement policy at the American Benefits Council in Washington, said that her organization continues to be concerned about the negative impact of the growing use of plan sponsor financial soundness as a factor for determining reportable events. While the financial soundness test may decrease the reporting burden on some ''stronger'' companies, she said, it will have the ''effect of increasing the burden on less strong companies.''

Jacobson said the PBGC's primary interest should be to help financially challenged companies recover. Yet, she said, the agency's use of financial soundness as a trigger for additional burdens makes it more difficult for plan sponsors to recover and thus increases the likelihood of liabilities being turned over to the PBGC.

Ricard said that ERIC applauds the PBGC for responding to commenters by making reliance on credit scores optional for plan sponsors. In addition, she said, ERIC was happy with automatic waivers for plan sponsors that don't owe variable-rate premiums under the rules' newly minted well-funded-plan waiver.

However, it was curious, Ricard said, that the PBGC would decide to release final rules while the agency lacked a permanent executive director and only a short time before a new director is likely to be confirmed by the Senate.

W. Thomas Reeder Jr., a health-care counsel at the Internal Revenue Service who has served in benefits-related positions in the government for a number of years, was nominated by President Barack Obama in May to be director of the PBGC (42 BPR 952, 6/2/15), a choice that has been widely applauded and earlier in the summer cleared two Senate committees without opposition (42 BPR 1435, 8/11/15).

By David B. Brandolph

To contact the reporter on this story: David B. Brandolph in Washington at dbrandol@bna.com

To contact the editor responsible for this story: Phil Kushin at pkushin@bna.com

Text of the final rule is at http://src.bna.com/hI.
PBGC's news release is at http://www.pbgc.gov/news/press/releases/pr15-08.html.

BPR ISSN 1069-5117