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PBGC Reportable Events: Traps for the Unwary*

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Complying with the Pension Benefit Guaranty Corporation's reportable events rules poses some real challenges. First, reporting is required sporadically rather than on a predictable, periodic basis. Second, the events that may trigger reporting go well beyond those directly involving the plan itself; in some cases, they may relate only to some foreign or otherwise distant member of the contributing sponsor's controlled group. Third, and perhaps most important, the rules themselves need to be very carefully read, as they contain requirements that do not always track what one might intuitively expect.

Failure to comply results in significant penalty exposure. The PBGC has the authority to assess a penalty for a failure to report of up to \$1,100 *per day* for as long as the delinquency continues.¹ Fortunately, the PBGC is not *required* to assess penalties, and has “guideline” penalties² (\$25 per day for the first 90 days and \$50 per day thereafter, with special relief rules for smaller plans) that are far below the statutory maximum. However, the PBGC may well pursue a higher penalty assessment, up the statutory maximum, for a reportable event involving a large company or plan where the failure causes substantial harm to the PBGC or to participants.³

This article provides a brief overview of the PBGC’s reportable events rules and identifies some traps for the unwary. The focus will be primarily on post-event reporting, since advance reporting applies only to a very small group of privately-held controlled groups with significantly underfunded plans.

THE PBGC’S REPORTABLE EVENTS REGULATION— A BRIEF Q&A GUIDE

What is the purpose of the reportable events rules?

A reportable event is an event that *may* be indicative of a need to terminate a plan. The event may involve the plan (*e.g.*, inability to pay benefits when due), a member of the controlled group maintaining the plan (*e.g.*, a loan default by the contributing sponsor or a member of its controlled group), or both (*e.g.*, application for a minimum funding waiver). After the PBGC receives notice of the reportable event, it may seek additional information and will ultimately decide whether to take action, monitor the situation, or simply close its file on the matter.

Who must report?

For post-event reporting, the plan administrator and the contributing sponsor of each plan for which the reportable event has occurred are required to report.⁴ (For advance reporting, only the contributing sponsor of each plan for which a reportable event is going to occur is required to report.⁵) The reporting obligation may thus be placed on two or more persons, and a failure to report will lead to penalty exposure for all such persons.⁶ However, a single filing by any one of those persons can suffice to protect all of them from penalties, as a filing by any person “is deemed to be a filing by all persons required to notify the PBGC.”⁷

When is the report due?

For post-event reporting, the report must be filed within 30 days *after* the person required to report knows, or has reason to know, that the

reportable event has *occurred*.⁸ (For advance reporting, the report must be filed at least 30 days *before* the reportable event's *effective date*.⁹)

What are the events for which reporting is required?

The reportable events for which post-event reporting is required are as follows:

- Active participant reduction (§ 4043.23)
- Failure to make required minimum funding payment (§ 4043.25)
- Inability to pay benefits when due (§ 4043.26)
- Distribution to a substantial owner (§ 4043.27)
- Change in contributing sponsor or controlled group (§ 4043.29)
- Liquidation of contributing sponsor or controlled group member (§ 4043.30)
- Extraordinary dividend or stock redemption (§ 4043.31)
- Transfer of benefit liabilities (§ 4043.32)
- Application for minimum funding waiver (§ 4043.33)
- Loan default (§ 4043.34)
- Bankruptcy or similar settlement (§ 4043.35)

(Advance reporting is required for liquidation (§ 4043.63), extraordinary dividend or stock redemption (§ 4043.64), transfer of benefit liabilities (§ 4043.65), application for minimum funding waiver (§ 4043.66), loan default (§ 4043.67), and bankruptcy or similar settlement (§ 4043.68).)

A detailed description of each event is provided in the cited regulatory provision.

What kinds of reporting waivers and extensions are available?

The PBGC's reportable events regulation contains various reporting waivers and extensions. There is an across-the-board waiver for multiemployer plans,¹⁰ as there is for terminating plans in certain circumstances¹¹ and for certain statutory reportable events.¹² And the PBGC has broad authority to grant waivers or extensions "where it finds convincing evidence that the waiver or extension is appropriate under the circumstances."¹³ Most waivers and extensions in the regulation, however, are tied to particular events. (The waivers and extensions are far more generous for post-event reporting than they are for advance reporting.) In many cases, they are tied to the funding

status of the plan on a PBGC premium basis or some variation thereof. There are also waivers or extensions in certain circumstances where the controlled group member involved meets a financial “de minimis” test, is a foreign entity, or is linked to the contributing sponsor only through foreign entities.

What information has to be provided with a reportable event notice?

Certain general information (including identifying information and a brief statement of the pertinent facts relating to the reportable event) is required for all reportable events,¹⁴ with additional information required for each specific reportable event. The PBGC’s reportable events regulation provides for the optional use of PBGC forms when filing a reportable event notice (Form 10 for post-event reporting and Form 10-A for advance reporting).¹⁵ The advantage of using the forms is that they call for reduced initial information submissions. If the PBGC decides that it needs some or all of the information required by the regulation but not by the optional form, the PBGC will request it.¹⁶

What happens when there are multiple plans?

Reportable events always occur “for” a particular plan. It is the plan administrator and contributing sponsor of *that* plan who must report; it is the funding status of *that* plan that determines whether a funding-based waiver or extension applies; and it is the identifying and actuarial (and related) information for *that* plan that must be submitted as part of the filing. In many cases, however, because the entity involved in a particular reportable event is a member of the “plan’s controlled group” for two or more plans, there will be two or more plans for which the reportable event occurs. (A “plan’s controlled group” means *each* contributing sponsor of the plan and *each* member of *each* such contributing sponsor’s controlled group.¹⁷)

When a reportable event occurs for two or more plans, it is important to apply all of the reportable events rules separately to each of those plans because, under PBGC regulations, “the filing obligation with respect to each plan is independent of the filing obligation with respect to any other plan.”¹⁸ Plan A may qualify for a waiver because of its funding status on a PBGC-premium basis, but Plans B and C may not qualify for any waiver. Plan B may qualify for an extension that does not apply to Plan C. And the information that must be submitted for Plan B will differ from that to be submitted for Plan C. A single consolidated filing may be made, but must meet *all* requirements that apply to *each* of the plans for which the reportable event has occurred.¹⁹

What happens when there are multiple events?

Two or more reportable events may occur at or about the same time, perhaps arising out of the same or related facts. The reporting requirements for each of the events are separately determined, and may differ substantially in terms of waivers, extensions, and the information that must be submitted. As is the case where a single reportable event occurs for multiple plans, a single consolidated filing may be made, but must meet *all* requirements that apply to *each* of the reportable events.²⁰ And if there are *both* multiple plans *and* multiple reportable events involved, things can get quite complicated, but a single consolidated filing that meets all applicable requirements is still an option.

SOME TRAPS FOR THE UNWARY

Many of the reportable events rules are straightforward and relatively easy to comply with. But there are also some traps that have proven to be problematic for more than a handful of unwary practitioners. Hopefully, the following brief listing will help practitioners avoid these problems in the future.

Active participant reduction

Reporting is required if the plan's active participant count drops below either of two thresholds: 80% of the count at the beginning of the current plan year or 75% of the count at the beginning of the previous plan year.²¹ Practitioners who are accustomed to dealing with annual participant counts often assume that this reportable event may occur only at the beginning (or end) of a plan year and neglect to monitor the count at other times. It is only the baseline count that is determined at the beginning of a plan year; in contrast, the reportable event itself may occur on any day of the plan year. Thus, there may well be a mid-year reporting obligation (subject, in certain circumstances, to extensions tied to annual Form 5500 or premium filings²²). And reporting may be required in a given plan year not just once, but twice, since there are two thresholds that may be crossed during that year.²³

When there is an active participant reduction—whether reporting to the PBGC under the reportable events regulation is due within the usual 30-day period, is subject to an extension, or is subject to a complete waiver—there may be an entirely separate obligation to report to the PBGC outside of the reportable events regulation. If there is a “cessation of operations” at a “facility in any location” that results in more than 20% of the plan's active participants being separated from employment, the event may trigger employer liability under ERISA Section 4062(e). If so, there is informal guidance in Q&A 21 of the

PBGC's 2006 Enrolled Actuaries Meeting Blue Book (available at <http://pbgc.gov/docs/2006bluebook.pdf>) that the employer must report the Section 4062(e) event, within 60 days after the cessation, pursuant to ERISA Section 4063(a), and that this requirement is independent of any requirement to file a reportable event notice.²⁴ Unfortunately, there is nothing in the reportable events regulation or the implementing forms and instructions that alerts the practitioner to this potential separate reporting obligation.

Change in contributing sponsor or controlled group

The reportable event entitled "change in contributing sponsor or controlled group"²⁵ is often referred to by practitioners as the "controlled group breakup" reportable event. And a controlled group breakup is the classic situation contemplated by this reportable event, *e.g.*, where a subsidiary that is not the contributing sponsor of any plan is sold to another controlled group. But this reportable event also can cover a transaction where a plan is transferred from one controlled group to another as part of an asset sale, with both of the controlled groups remaining absolutely intact. The test for reporting is whether there is a "transaction that results, or will result, in one or more persons ceasing to be members of the plan's controlled group,"²⁶ and from the perspective of the plan *all* members of the plan's controlled group will cease to be members of its controlled group once the transaction becomes effective.²⁷

The practitioner must pay special attention to the timing of reporting of this event. The reportable event is not the *actual* controlled group breakup or transfer of plan sponsorship, but rather the transaction *as a result of which* the controlled group *will* break up or the plan *will* be transferred. Thus, reporting is due 30 days after the date of actual or constructive knowledge that there is a legally binding agreement, regardless of any later closing or effective date.²⁸ Interestingly, where advance reporting applies, post-event reporting (tied to the legally binding agreement) may therefore be due *before* advance reporting (tied to the effective date) is due.²⁹

Extraordinary dividend

There is a statutory reportable event for an "extraordinary dividend" based on the IRC definition at 26 U.S.C. § 1059(c).³⁰ The PBGC waived reporting for this statutory reportable event, and instead created a regulatory reportable event with the same "extraordinary dividend" name but a different definition.³¹ Reporting is required, in the case of cash distributions, only if the dividend exceeds the company's adjusted net income on both a one-year and a four-year basis. In the

case of non-cash distributions, the trigger is a distribution of more than 10% of the total net assets of the company making the distribution.

What the practitioner might well overlook is the broad reach of this reportable event in terms of the recipient of the dividend. The regulatory language defines a dividend as a “distribution to one or more shareholders,” but goes on to provide that a “payment by a person to a member of its controlled group is treated as a distribution to its shareholder(s).”³² This means that a transfer to anyone in the controlled group—up, down, or sideways—may be reportable if it crosses over the applicable threshold.³³ Indeed, even an intra-controlled group sale for less than full value could result in a reporting obligation.³⁴

Transfer of benefit liabilities

The PBGC’s reportable events regulation contains a very generous waiver for the “transfer of benefit liabilities” reportable event. So long as the “safe harbor” PBGC assumptions are used in complying with IRC § 414(l), the transfer need not be reported, regardless of the level of underfunding involved or the relative financial positions of the controlled groups maintaining the plans from and to which the benefit liabilities are being transferred.³⁵ Unfortunately, the practitioner who relies on this waiver in not filing a reportable event notice may be exposing the client to penalties.

Why is this? Because there is informal guidance in Q&A 14 of the PBGC’s 2006 Enrolled Actuaries Meeting Blue Book (available at <http://pbgc.gov/docs/2006bluebook.pdf>) that a transfer of benefit liabilities involving a spinoff of active participants constitutes an active participant reduction (if one of the applicable thresholds is crossed), even though the transferring participants have not lost their jobs but have merely been moved to another plan. And the active participant reduction reportable event has a different set of waivers, none of which may apply. The lesson here is to be sure to consider *all* potentially applicable reportable events before concluding on the basis of a waiver for *one* of those events that no reporting is required.

Loan default

Only certain loan defaults are reportable—the default must be on a loan with an outstanding balance of \$10 million or more, and even then it is reportable only if: (1) it results from failure to make a payment (unless the payment is made within 30 days), (2) the lender accelerates the loan for any reason, or (3) the lender issues a written notice of default based on one of several specified reasons.³⁶ And there are waivers where the default is cured, where the debtor is a foreign entity other than a

parent, or where the plan meets one of several funding-based tests tied to PBGC premium rules.³⁷

What the practitioner needs to keep in mind is that the event occurs when the default occurs—not when the 30-day period for making the late payment ends, not when the lender issues a notice of default or accelerates the loan, and not when the cure period ends.³⁸ This means that the report is due 30 days after the contributing sponsor or plan administrator knows or has reason to know of the default itself, without regard to any of the subsequent events that may make the default reportable. The PBGC provides an extension until *one day* after the end of the cure period (in the case of a payment failure default) or *one day* after the date of the loan acceleration or notice of default,³⁹ but the 30-day clock starts to run long before it is known whether the event will have to be reported. So for loan defaults, the “real” deadline for reporting—once it is known that a report is required—may be essentially immediate rather than within the usual 30 days.

CONCLUSION

Filing a reportable event notice is generally easy, but recognizing that one must be filed may not be. Practitioners should familiarize themselves with the PBGC’s reportable events regulation so that they can readily identify events that *may* require reporting, and review that regulation *very* carefully to determine whether, when, and what reporting is required.

NOTE

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1. ERISA Section 4071; 29 U.S.C. § 1371.
2. 60 Fed. Reg. 36837 (July 18, 1995).
3. *Id.* at 36838.
4. 29 C.F.R. § 4043.20.
5. 29 C.F.R. § 4043.61(a).
6. 29 C.F.R. § 4043.3(e).
7. 29 C.F.R. § 4043.3(a)(3).
8. 29 C.F.R. § 4043.20.
9. 29 C.F.R. § 4043.61(a).
10. 29 C.F.R. § 4043.4(b).
11. 29 C.F.R. § 4043.4(c).
12. 29 C.F.R. §§ 4043.21, .22, .24, .28, and .31(c)(1).
13. 29 C.F.R. § 4043.4(d).
14. 29 C.F.R. § 4043.3(b).

15. 29 C.F.R. § 4043.3(c).
16. *See* 29 C.F.R. § 4043.3(d).
17. 29 C.F.R. § 4001.2 (under definition of “controlled group”).
18. 29 C.F.R. § 4043.3(a)(2).
19. *See* 29 C.F.R. § 4043.3(a)(3).
20. *See id.*
21. 29 C.F.R. § 4043.23(a).
22. 29 C.F.R. § 4043.23(d).
23. Q&A 12 of the 2006 PBGC Enrolled Actuaries Meeting Blue Book (available at <http://pbgc.gov/docs/2006bluebook.pdf>).
24. The PBGC noted (without any elaboration) the separate nature of these reporting requirements in the preamble to a final rule that adopted a new formula for determining liability when there is a Section 4062(e) event. *See* 71 Fed. Reg. 34819 (June 16, 2006). For informal guidance on the time, form, and manner of the Section 4062(e) reporting requirement, practitioners should consult Q&A 22 of the PBGC’s 2006 Enrolled Actuaries Meeting Blue Book (available at <http://pbgc.gov/docs/2006bluebook.pdf>).
25. 29 C.F.R. § 4043.29.
26. 29 C.F.R. § 4043.29(a).
27. 29 C.F.R. § 4043.29(e)(2); Q&A 23 of the 1998 PBGC Enrolled Actuaries Meeting Blue Book (available at <http://www.pbgc.gov/docs/1998bluebook.pdf>).
28. Q&A 24 of the 1998 PBGC Enrolled Actuaries Meeting Blue Book (available at <http://www.pbgc.gov/docs/1998bluebook.pdf>).
29. *Id.*
30. ERISA Section 4043(c)(11); 29 U.S.C. § 1343(c)(11).
31. *See* 29 C.F.R. § 4043.31(a), (c)(1).
32. 29 C.F.R. § 4043.31(e)(3).
33. Q&A 21 of the 1998 PBGC Enrolled Actuaries Meeting Blue Book (available at <http://www.pbgc.gov/docs/1998bluebook.pdf>).
34. *Id.* at Q&A 22.
35. 29 C.F.R. § 4043.32(c)(3).
36. 29 C.F.R. § 4043.34(a).
37. 29 C.F.R. § 4043.34(c).
38. 29 C.F.R. § 4043.34(d)(1); Q&A 25 of the 1998 PBGC Enrolled Actuaries Meeting Blue Book (available at <http://www.pbgc.gov/docs/1998bluebook.pdf>).
39. 29 C.F.R. § 4043.34(d)(2).

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