JOURNAL of PENSION BENEFITS

ISSUES IN ADMINISTRATION, DESIGN, FUNDING, AND COMPLIANCE
Volume 31 • Number 4 • Summer 2024

Surprise—You Just Missed a PBGC Reportable Events Deadline!

BY HAROLD ASHNER

PBGC reportable events requirements can catch you off guard. This article highlights some "traps for the unwary" so that you won't fall into one of them.

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Complying with Pension Benefit Guaranty Corporation (PBGC) reportable events requirements is not easy, but it is important. Missing a PBGC reportable events deadline can be costly, given the exposure to penalties ranging up to $2,670 per day for as long as the delinquency continues. [89 Fed. Reg. 2132 (Jan. 12, 2024)]

That said, the PBGC is not *required* to (and does not often) assess penalties and has "guideline" penalties—$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 maximum level. However, the PBGC may pursue a higher penalty assessment, up to the maximum level, if there is a willful failure to comply; if there is a pattern or practice of failure to provide material information; or if the harm to participants or the PBGC resulting from a failure to timely provide material information is substantial. All of this is from a 1995 PBGC "Statement of Policy" [*www.pbgc.gov/sites/default/files/*

legacy/docs/071895.pdf] that (as of this writing in June 2024) is still described by the PBGC as representing its "current penalty policy" for reportable events failures. [*www.pbgc.gov/prac/reporting-and-disclosure/reportable-events*]

It is all too common for reportable events deadlines to be missed; indeed, PBGC Staff noted at a May 3, 2023, meeting with representatives of the Joint Committee on Employee Benefits of the American Bar Association that nearly one-third of reports are late. [*www.americanbar.org/groups/committees/employee_benefits/events_cle/practitioner_q_as1/*] There are several reasons for this level of noncompliance. For one thing, reporting is required sporadically rather than on a predictable, periodic basis. Moreover, the events that may trigger reporting go well beyond those directly involving the plan itself; in some cases, they relate only to some foreign or otherwise distant member of the contributing sponsor's controlled group. Also, the rules themselves need to be very carefully read, as they contain requirements that do not always track what one might intuitively expect.

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

PBGC's Reportable Events Regulation—a Brief Q&A Guide

What Is the Purpose of the PBGC's Reportable Events Rules?

A reportable event is an event that *may* be indicative of a need to terminate a plan. The event could involve just the plan itself (for example, an "inability to pay benefits when due" reportable event), just the contributing sponsor of the plan or a member of its controlled group (for example, a "loan default" reportable event), or the plan *and* one or more members of the controlled group (for example, a "failure to make required minimum funding payment" reportable event). When the PBGC receives a reportable event notice, it may seek additional information to enable it to decide whether to take some action, to monitor the situation, or simply to close its file on the matter.

What Are the Events for Which Post-Event Reporting Is Required?

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

- "Active participant reduction" (either a "single-cause" event or an "attrition" event).
- "Failure to make required minimum funding payment."
- "Inability to pay benefits when due."
- "Distribution to a substantial owner."
- "Change in controlled group" (based on entry into a "transaction" that results, or that *will result*, in the change).
- "Liquidation."
- "Extraordinary dividend or stock redemption."
- "Transfer of benefit liabilities."
- "Application for minimum funding waiver."
- "Loan default."
- "Insolvency or similar settlement."

A description of each of these events is provided at 29 CFR Part 4043, Subpart B (that is, PBGC Regulation §§ 4043.20-.35).

Who Is Required to Report?

For post-event reporting, both the plan administrator and *each* contributing sponsor of *each* plan for which the reportable event has occurred is required to report. Thus, the reporting obligation may be placed on two or more persons, and a failure to report will lead to penalty exposure for all such persons. Fortunately, under the PBGC's rules, 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 give the PBGC notice of the event." [PBGC Reg. § 4043.3(a)(3)]

When Is the Report Due and How Do I File It?

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. [PBGC Reg. § 4043.20] The filing must be prepared and submitted electronically using the PBGC's e-filing portal via *login.gov*. [*www.pbgc.gov/prac/e-filing-portal-logingov-faqs*]

What Reporting Waivers and Extensions Are Available?

The PBGC's reportable events regulation contains various reporting waivers and extensions, with some across-the-board waivers (for multiemployer plans, for completed single-employer plan terminations, and for those statutory reportable events that are not subject to reporting under the PBGC's regulatory provisions); a number of waivers that apply in much the same way to multiple reportable events (involving small plans, well-funded plans, "*de minimis* 10-percent segments" of controlled groups, "low-default-risk" entities, public companies, and certain foreign entities); and several other event-specific waivers and extensions. In addition, 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." [PBGC Reg. § 4043.4]

It is important to consider carefully all PBGC guidance relating to any waiver or extension on which you intend to rely. For example, the various regulatory provisions regarding the public company waiver [PBGC Reg. §§ 4043.23(c)(4), .27(c)(3), .29(b)(6), .31(c)(6), .32(c)(4)] require the issuance of a timely filed SEC Form 8-K "disclosing the event" (with some restrictions as to the location of the disclosure within the Form 8-K), but nowhere state that there is explicit guidance in the PBGC's reportable events instructions [*www.pbgc.gov/sites/default/files/legacy/docs/Form-10-Instructions.pdf* at pp. 16, 19, 22, 26, and 27] providing details as to the information that, if included as part of the disclosure, "is sufficient for the public company waiver to apply." It can be risky to rely just on the regulatory language to conclude that a reporting waiver applies and that, as a result, there is no need even to look at the forms and instructions governing the filing that *would be* required absent a waiver.

Will My Filing Enjoy Confidentiality Protections?

Under Section 4043(f) of ERISA, any information or documentary material submitted to the PBGC pursuant to the reportable event rules is "exempt from disclosure under [the Freedom of Information Act], and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding," provided, however, that "[n]othing in [Section 4043 of ERISA] is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress." You may want to add a legend on all documents submitted to the PBGC pursuant to the reportable events rules—including those submitted in response to a PBGC request for additional information following the PBGC's review of the initial reportable events filing [*see* PBGC Reg. § 4043.3(d)]—stating that the information is subject to the confidentiality provisions of Section 4043(f) of ERISA and (where applicable) constitutes confidential commercial or financial information.

What Should I Do if I'm Filing Late?

If you file late, although there is no guarantee that you won't face a penalty, there are steps you can take to attempt to reduce the likelihood of a penalty or at least its potential size. It is generally good practice to explain the reason for the lateness; to tell the PBGC about the steps you have taken, or will shortly be taking, to help ensure full and timely compliance going forward; and to make clear (if applicable) that the lateness of the filing has not resulted, and is not expected to result, in any harm or potential harm to participants or the PBGC.

What Information Must You Provide as Part of the Filing?

For all reportable events, you must provide certain identifying information, a brief statement of the pertinent facts relating to the reportable event, and additional information as specified in the instructions for the particular type of event. In most cases, this will require submission of significant financial and actuarial information as so specified. [*www.pbgc.gov/sites/default/files/legacy/docs/Form-10.pdf*; *www.pbgc.gov/sites/default/files/legacy/docs/Form-10-Instructions.pdf*] Although you can certainly provide just the information that is required, it is often good practice to go beyond that by explaining (where applicable) that, and why, the event should not be of any significant concern to the PBGC; doing so may obviate the need for the PBGC to request further information or take some other action. Ideally, the PBGC will review the filing and promptly close its file on the matter.

What Happens When Multiple Plans are Tied to a Particular Event?

Reportable events always occur "for" a particular plan, with the plan administrator and each contributing sponsor of *that* plan required to file, with the funding status of *that* plan often determining whether a funding-based waiver applies, and with the identifying and actuarial information for *that* plan required to be submitted as part of the filing. Where the entity

involved in a particular reportable event is a member of the "plan's controlled group" for two or more plans, there may be two or more plans for which a reportable event occurs and must be reported. (Under PBGC regulations, a "plan's controlled group" means *each* contributing sponsor of the plan and *each* member of *each* such contributing sponsor's controlled group. [PBGC Reg. § 4001.2]

If a reportable event occurs for two or more plans (for example, where an entity that is a member of the plan's controlled group with respect to each of two plans experiences a "loan default" reportable even), 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." [PBGC Reg. § 4043.3(a)(2)] It may be that a waiver or extension applies to one or more, but not all, of these filing obligations, and the information that must be submitted may differ significantly among these filing obligations. Although a single consolidated filing may be made [*see* PBGC Reg. § 4043.3(a)(3)], it must meet all requirements that apply to *each* of the plans for which the reportable event has occurred.

What Happens When Multiple Events are Tied to a Particular Set of Facts?

Where a given set of facts gives rise to two or more reportable events that occur at or about the same time (for example, where a member of the "plan's controlled group" enters into a "transaction" to sell a subsidiary that immediately results in a "change in controlled group" reportable event *and* a "single-cause active participant reduction" reportable event), the reporting requirements for each of the events are separately determined. It is important to keep in mind that these requirements may differ substantially in terms of waivers, extensions, and the information that must be submitted. As is the case where there are multiple plans tied to a particular event, a single consolidated filing may be made if it meets *all* applicable requirements. And things can get quite complicated if there are *both* multiple plans *and* multiple reportable events involved, but a single consolidated filing that meets all applicable requirements is still an option.

Traps for the Unwary

Some of the reportable events rules are straightforward and relatively easy to comply with. But there are traps that can prove to be problematic for the unwary practitioner. Consider these examples.

Active Participant Reduction

There are two categories of "active participant reduction" reportable events: a "single-cause event" and an "attrition event." [PBGC Reg. § 4043.23(a)]

1. A single-cause event, which can occur on any day during a plan year, is triggered when, as a result of a *new* single cause (for example, a reorganization or restructuring, the discontinuance of an operation or business, a natural disaster, a mass layoff, or an early retirement incentive program), the ratio of the aggregate number of individuals who ceased to be active participants because of that single cause to the number of active participants at the beginning of the plan year, exceeds 20 percent. It is important to keep in mind that there can be two or more single-cause events in the same plan year based on different single causes, and that PBGC might take the position that the same single cause can result in single-cause events in two or more plan years.
2. An attrition event, which can occur only at the end of a plan year, is triggered if the number of active participants at the end of the plan year, plus the number of individuals who ceased to be active participants during the plan year that are reported to the PBGC as part of a single-cause event, is less than 80 percent of the number of active participants at the beginning of the plan year.

Helpfully, the PBGC's rules allow you to determine the number of active participants at the beginning of a plan year by using the number at the end of the preceding plan year, and the number at the end of a plan year by using the number at the beginning of the next plan year. [PBGC Reg. § 4043.23(b)(1)]

In determining whether this reportable event has occurred, keep in mind that the PBGC has its own definition of "active participant" [PBGC Reg. §§ 4043.2, .23(b)(2), 4006.2] that differs from the definition used for other purposes, such as for purposes of Form 5500 reporting. Relying on some other definition can easily lead to a reporting failure. And keep in mind as well that an active participant reduction reportable event can be triggered based on simply moving active participants from one PBGC-covered plan to another PBGC-covered plan maintained by the same employer, as there is no exception for spinoffs. In

such a situation, there may be no reduction, or even an increase, in the employer's workforce, but a failure to recognize that the spinoff is captured by this reportable event can lead to a reporting failure and penalty exposure.

Failure to Make Required Minimum Funding Payment

This reportable event captures failures to make annual minimum required contributions or required quarterly payments (as well as any other contributions required as a condition of a funding waiver). However, there is a waiver for small plans with respect to failures to make required quarterly payments, along with a waiver for all plans if the payment of any contribution is made within thirty days of its due date, or if the failure is solely because of the plan sponsor's failure to timely make a funding balance election. [PBGC Reg. § 4043.25(a), (c)]

It is not uncommon for a plan of any size to choose to make required contributions just once a year, by the deadline for the annual minimum required contribution, provided that the total of missed contributions, including interest, does not at any time cross over the $1,000,000 threshold that would trigger the creation of a lien under Section 430(k) of the Internal Revenue Code (IRC). The thinking in doing so may be that it's not a problem to skip making quarterly contri-butions in such circumstances, since the only conse-quence of doing so under the funding rules is that the annual contribution amount will be somewhat larger because of the increased interest charge that applies to late quarterly payments for the period of lateness. [IRC § 430(j)(3)(A)] It should not be overlooked, however, that there is another consequence for plans that do not qualify for a waiver, that is, skipping a quarterly contribution necessitates a PBGC reportable event filing.

Inability to Pay Benefits When Due

This reportable event captures two categories of inability to pay benefits when due—a "projected inability" and a "current inability." However, there is a waiver for both categories that applies to plans that are subject to the liquidity shortfall rules. Thus, only smaller plans, which are exempt from the liquidity shortfall rules, are subject to the requirement to report about this reportable even under either of these two categories. [PBGC Reg. § 4043.26(a), (b)] The test for determining whether a "projected inability" occurs is tied to definitions in the liquidity shortfall rules even though only those plans that are exempt from those rules are potentially subject to having to report a projected (or current) inability to pay benefits when due. [PBGC Reg. § 4043.26(a)(2)]

The test for determining whether a "current inability" occurs can trigger reporting in situations where it may be easy to miss the reporting requirement. A current inability occurs whenever the plan "fails to provide any participant or beneficiary the full benefits to which the person is entitled under the terms of the plan, at the time the benefit is due and in the form in which it is due"—language that, if read literally, would capture any benefit payment that is not made in full when it is due. Fortunately, the regulation provides relief by providing that a plan is not treated as being currently unable to pay benefits if its failure to pay is caused solely by: (1) a limitation under the benefit restriction rules [IRC § 436]; (2) the need to verify a person's eligibility for benefits; (3) the inability to locate a person; or (4) any "other administrative delay, to the extent the delay is for less than the shorter of two months or two full benefit payment periods." [PBGC Reg. § 4043.26(a)(1)]

It is not uncommon for a plan to experience an "other administrative delay" that lasts too long (sometimes much too long) to qualify for relief under the above language. And there are ways to "fix" the delay from an IRC perspective under the Employee Plans Compliance Resolution System. But once such an "other administrative delay" lasts longer than allowed under the above language, a reportable event occurs.

The PBGC regulation, if read literally, can lead to the conclusion that a "current inability" reportable event occurs when a plan with fully adequate assets miscalculates a monthly benefit or a lump sum benefit and corrects it with a supplemental payment three months (or three years) later. Fortunately, PBGC staff has informally taken the position that such a situation does not constitute a "current liability" reportable event (although staff did not provide any explanation as to how to reconcile that position with the regulatory text). [*www.pbgc.gov/sites/default/files/legacy/docs/2016bluebook.pdf at Q&A 18(b)*]

Change in Controlled Group

This reportable event, often referred to as the "controlled group breakup" reportable event, is of great importance to the PBGC because of its various potential claims against *each* controlled group member *on a joint and several basis*. The event occurs for a plan when there is "a transaction that results, or will result,

in one or more persons' (including any person who is or was a contributing sponsor) ceasing to be a member of the plan's controlled group (other than by merger involving members of the same controlled group)." [PBGC Reg. § 4043.29(a)(1)]

What's critical to keep in mind is that in many cases the event does not occur when the change *becomes effective*. Rather, it can occur earlier when there is a "transaction" *as a result of which* the change *will* become effective, perhaps many months or more down the road and long after you file the reportable event notice. In such circumstances, you may be giving the PBGC a great deal of time to react if it views the transaction as problematic. And PBGC regulations have a very expansive definition of "transaction," in that it includes a "legally binding agreement" and requires you to disregard any conditions to the agreement's effectiveness in determining whether it is "legally binding." [PBGC Reg. § 4043.29(a)(2)] Thus, you may have to report about a "legally binding" agreement that ends up *never* becoming effective in connection with a transaction that—in light of the particular nature of its conditions to effectiveness—clearly could not become effective until long after you report it to the PBGC.

This reportable event captures not only changes in the makeup of the controlled group, such as when a parent that sponsors a plan sells the stock of a non-sponsor subsidiary to a person or entity that is not a part of the plan's controlled group, but also an asset sale transaction where a plan is transferred (for example, in connection with the sale of a division) to such a person or entity with the makeup of the pre-transaction controlled group remaining absolutely intact; from the standpoint of the plan, every "person" that was a member of the plan's pre-transaction controlled group will cease to be a member of the plan's controlled group as a result of the transaction.

According to an example in the PBGC's regulations, the entry into an asset sale agreement is a "change in controlled group" reportable event if the agreement calls for the sale by the contributing sponsor of its assets to a company outside of the controlled group, provided that "[a]fter the sale, [the contributing sponsor] will be dissolved and no longer operating." [PBGC Reg. § 4043.29(c)(3)] The example does not indicate that the agreement itself called for the contributing sponsor to be dissolved or to be no longer operating, and of course a decision as to the future of the contributing sponsor (for example, whether it might take on new operations and continue to exist) may not have been made at the time of entry into the asset sale agreement. Nonetheless, the example states that a "change in controlled group" event has occurred and points out that there may also be a liquidation reportable event in this situation.

As noted in the above-quoted regulatory text, this reportable event does not capture a situation in which an entity ceases to be a member of the plan's controlled groups due to a "merger involving members of the same controlled group." However, it is important to consider whether such a situation (depending on the facts) could be reportable as a different reportable event – liquidation – since that reportable event *does* capture "a liquidation into another controlled group member." [PBGC Reg. § 4043.30(a)(1)] Informal PBGC Staff guidance offers the following explanation, in response to a question about how the *liquidation* of a controlled group member into another controlled group member is different from the *merger* of a controlled group member into another controlled group member: "A liquidation event is different because it is designed to discontinue the business, sell off assets, and extinguish all debts." [*www.pbgc.gov/sites/default/files/legacy/docs/2017bluebook.pdf at Q&A 13(b)*]

Liquidation

A "liquidation" reportable event occurs not only when a member of the plan's controlled group "[i]nstitutes or has instituted against it a proceeding to be dissolved or is dissolved, whichever occurs first" or "[l]iquidates in a case under the Bankruptcy Code, or under any similar law" [PBGC Reg. § 4043.30(a)(2), (a)(3)], but also where it "[r]esolves to cease all revenue-generating business operations, sell substantially all its assets, or otherwise effect or implement its complete liquidation (including liquidation into another controlled group member) by decision of the member's board of directors (or equivalent body such as the managing partners or owners) or other actor with the power to authorize such cessation of operations, sale, or a liquidation, unless the event would be reported under [the previously quoted provisions at PBGC Reg. § 4043.30(a)(2), (a)(3)]." [PBGC Reg. § 4043.30(a)(1)]

Thus, a "liquidation" reportable event may occur based entirely on a "decision" (as defined above) by a controlled group member to cease all revenue-generating business operations or to sell substantially all its assets, even if any actual liquidation (or even a decision to liquidate) does not occur until much later, if ever. In such circumstances, not filing a reportable

event notice within 30 days of the date of actual or constructive knowledge of that initial "decision" can create significant penalty exposure.

Note also that, as stated in the above quoted text defining this reportable event, and as discussed above in connection with the "change in controlled group" reportable event, this reportable event captures *liquidation* into another controlled group member, in contrast to a *merger* into another controlled group member (which is not captured under this reportable event *or* under the "change in controlled group" reportable event).

Extraordinary Dividend or Stock Redemption

Under Section 4043(c)(11) of ERISA, a reportable event occurs when a member of a plan's controlled group "declares an extraordinary dividend *as defined in Section 1059(c) of title 26*" (emphasis added) or "redeems, in any 12-month period, an aggregate of 10 percent or more of the total combined voting power of all classes of stock entitled to vote, or an aggregate of 10 percent or more of the total value of shares of all classes of stock, of a contributing sponsor and all members of its controlled group." The PBGC, by regulation, has waived this statutory reportable event and substituted, in its place, a regulatory event that refers, as does the waived statutory provision, to an "extraordinary dividend" and to stock redemptions.

However, the triggers governing whether an extraordinary dividend or a stock redemption is a reportable event are completely different from those under the waived statutory event. Under the regulatory event, the declaration of a dividend by a member of the plan's controlled group or the redemption of its stock is a reportable event if "the amount or net value of the distribution, when combined with other such distributions during the same fiscal year of the person, exceeds the person's net income before after-tax gain or loss on any sale of assets, as determined in accordance with generally accepted accounting principles, for the prior fiscal year," subject to an exception under which "a distribution by a person to a member of its controlled group is disregarded." [PBGC Reg.§ 4043.31(a)]

Thus, if you decide, for example, that the declaration of a dividend is not an extraordinary dividend "as defined in Section 1059(c) of title 26" (which is irrelevant for reportable event purposes) and thus does not constitute a reportable event, you may well be creating penalty exposure for a missed reportable event filing.

Loan Default

A "loan default" reportable event occurs, "with respect to a loan with an outstanding balance of $10 million or more to a member of the plan's controlled group," when there is "an acceleration of payment or a default under the loan agreement." [PBGC Reg. § 4043.34(a)(1)] There is no exception for a "technical" default (no matter how minor) or for a very small or short "acceleration of payment." Thus, reporting of this event may be required in many circumstances where the "default" or the "acceleration of payment" is of little or no consequence *except for* the creation of a PBGC reportable event.

More significantly—*and surprisingly*—a "loan default" reportable event can occur when there is actually (or at least effectively) *no* loan default, as the regulatory language also captures situations in which "[t]he lender waives or agrees to an amendment of any covenant in the loan agreement the effect of which is to cure or avoid a breach that *would* trigger a default." [PBGC Reg. § 4043.30(a)(2) (emphasis added)] And the event that can trigger the start of the 30-day reporting period is the lender's waiver or agreement, rather than the date on which the event or circumstance that would otherwise have been a loan default occurs, which could be sometime later. Of course, if that event or circumstance precedes the date of the lender's waiver or agreement, reporting may be due earlier based on the occurrence of the default itself. It is important that company officials and advisors involved in dealing with lenders and loan agreements be made aware of the very broad (and counterintuitive) reach of this reportable event.

Conclusion

A wide variety of events and circumstances, some directly involving the plan and others the plan's contributing sponsor or perhaps some distant controlled group member, can give rise to a requirement to file a reportable event notice with the PBGC. Practitioners should familiarize themselves with the PBGC's reportable events regulation and related guidance, so that they can readily identify events that *may* require reporting, and review that regulation and guidance *very* carefully to determine whether, when, and what reporting is required. ■

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