

efficient use of airspace. This regulation is within the scope of that authority as it would modify R-4401A, B, and C, Camp Shelby, MS, to provide sufficient restricted airspace to contain hazardous activities.

### Related Airspace Proposal

In addition to the proposed restricted area modification described above, the ANG is also requesting the FAA to modify the Military Operations Areas (MOA) associated with the Camp Shelby range. MOAs are not regulatory airspace and, therefore, are not published in 14 CFR part 73. The ANG is requesting additional MOA airspace above the current De Soto 1 and De Soto 2 MOAs, to extend the MOA airspace supporting the range, up to 17,999 feet MSL. The FAA will seek comment on this separate airspace proposal through nonrulemaking procedures.

### Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, "Environmental Impacts: Policies and Procedures," prior to any FAA final regulatory action.

### List of Subjects in 14 CFR Part 73

Airspace, Prohibited areas, Restricted areas.

### The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 73 as follows:

### PART 73—SPECIAL USE AIRSPACE

1. The authority citation for part 73 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

#### § 73.44 [Amended]

2. § 73.44 is amended as follows:

\* \* \* \* \*

#### R-4401A Camp Shelby, MS [Amended]

By removing the current boundaries and substituting the following:

Boundaries. Beginning at lat. 31°12'55" N., long. 89°11'03" W.; to lat. 31°11'49" N., long. 89°00'00" W.; to lat. 31°10'16" N., long. 88°56'34" W.; to lat. 31°04'37" N., long. 88°56'34" W.; to lat. 31°04'37" N., long. 89°11'00" W.; to the point of beginning.

\* \* \* \* \*

#### R-4401B Camp Shelby, MS [Amended]

By removing the current boundaries and substituting the following:

Boundaries. Beginning at lat. 31°12'55" N., long. 89°11'03" W.; to lat. 31°11'49" N., long. 89°00'00" W.; to lat. 31°10'16" N., long.

88°56'34" W.; to lat. 31°04'37" N., long. 88°56'34" W.; to lat. 31°04'37" N., long. 89°11'00" W.; to the point of beginning.

\* \* \* \* \*

#### R-4401C Camp Shelby, MS [Amended]

By removing the current boundaries and substituting the following:

Boundaries. Beginning at lat. 31°12'55" N., long. 89°11'03" W.; to lat. 31°11'49" N., long. 89°00'00" W.; to lat. 31°10'16" N., long. 88°56'34" W.; to lat. 31°04'37" N., long. 88°56'34" W.; to lat. 31°04'37" N., long. 89°11'00" W.; to the point of beginning.

\* \* \* \* \*

Issued in Washington, DC, on February 12, 2008.

Ellen Crum,

*Acting Manager, Airspace and Rules Group.*

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BILLING CODE 4910–13–P

## PENSION BENEFIT GUARANTY CORPORATION

### 29 CFR Part 4010

#### RIN 1212–AB01

### Annual Financial and Actuarial Information Reporting; Pension Protection Act of 2006

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would amend PBGC's regulation on Annual Financial and Actuarial Information Reporting to implement the provisions of the Pension Protection Act of 2006, Public Law 109–280 ("PPA 2006"), which changed the standards for determining which persons are required to report under ERISA section 4010 (Authority to Require Certain Information) and made other changes to the reporting requirements. In addition to providing proposed guidance on implementing the PPA 2006 changes, PBGC is proposing to waive reporting in certain cases for controlled groups with aggregate plan underfunding of \$15 million or less, to modify the standards for determining which plans are exempted from the actuarial information requirements, to revise the actuarial information requirements to conform with other PPA 2006 changes, and to provide other clarifications.

**DATES:** Comments must be submitted on or before April 21, 2008.

**ADDRESSES:** Comments may be submitted by any of the following methods:

• *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the Web

site instructions for submitting comments.

- *E-mail:* [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov).
- *Fax:* 202–326–4224.
- *Mail or Hand Delivery:* Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026.

All submissions must include the Regulatory Identification Number for this rulemaking (RIN 1212–AB01). Comments received, including personal information provided, will be posted to <http://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, NW., 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:** John H. Hanley, Director, Legislative and Regulatory Department; or Catherine B. Klion, Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026; 202–326–4024. (TTY/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

Pension Benefit Guaranty Corporation (PBGC) administers the pension insurance programs under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). In order to give PBGC an opportunity to anticipate and attempt to minimize potential liabilities that may arise from the termination of significantly underfunded plans, ERISA section 4010 requires the reporting of actuarial and financial information by controlled groups with pension plans that have significant funding problems. That information is exempt from disclosure under section 552 of title 5, United States Code and may not be made public, except as may be relevant to any administrative or judicial action or proceeding.

Pursuant to ERISA section 4010, PBGC issued its regulation on Annual Financial and Actuarial Information Reporting in 1995 (29 CFR part 4010). The regulation specifies the items of identifying, financial, and actuarial information that filers must submit under section 4010. PBGC reviews the

information that is filed and enters it into an electronic database for more detailed analysis. Computer-assisted analysis of this information helps PBGC to anticipate possible major demands on the pension insurance system and to focus PBGC resources on situations that pose the greatest risks to that system. Because other sources of information are usually not as current as the section 4010 information, the section 4010 filing plays a major role in PBGC's ability to protect participant and premium-payer interests.

In March of 2005, PBGC amended part 4010 to require electronic reporting and to make other less significant changes. Reporting is now accomplished through PBGC's secure e-4010 Web-based application.

### PPA 2006 Changes

On August 17, 2006, the President signed into law the Pension Protection Act of 2006, Public Law 109-280 ("PPA 2006"), which made numerous changes in the area of pension law, including changes to ERISA section 4010. Prior to its amendment by PPA 2006, ERISA section 4010(b) required reporting, in general, if: (1) The aggregate unfunded vested benefits of all plans maintained by members of the controlled group exceeded \$50 million, disregarding plans with no unfunded vested benefits (the "\$50 Million Gateway Test"); (2) the conditions specified in ERISA section 302(f) and section 412(n) of the Internal Revenue Code ("Code") for imposing a lien for missed contributions exceeding \$1 million had been met with respect to any plan maintained by any member of the controlled group; or (3) the Internal Revenue Service had granted minimum funding waivers in excess of \$1 million to any plan maintained by any member of the controlled group, and any portion of the waiver(s) was still outstanding.

Section 505 of PPA 2006 amended ERISA section 4010(b)(1), replacing the \$50 Million Gateway Test with a test based on the funding target attainment percentage of each plan in the controlled group. As amended by PPA 2006, ERISA section 4010(b)(1) requires reporting if:

the funding target attainment percentage (as defined in subsection (d) <sup>1</sup>) at the end of

the preceding plan year of a plan maintained by the contributing sponsor or any member of its controlled group is less than 80 percent.

(Current filers are reminded that PBGC regulations provide that if a filer for the immediately preceding information year is not required to file for the current information year, the filer must submit information, in accordance with the instructions on PBGC's Web site, demonstrating why a filing is not required for the current information year. This requirement would apply, for example, to a filer who was required to file for the information year ending on December 31, 2007, based on the \$50 million Gateway Test, but who is not required to file for the information year ending on December 31, 2008, based on the new funding target attainment percentage gateway test.)

Although PPA 2006 did not alter the substance of the other two triggers (found in paragraphs (b)(2) and (b)(3) of ERISA section 4010), it made other changes that affect these provisions. For instance, because PPA 2006 made changes to references in paragraph (b)(2), references in § 4010.4(a) (which describes who must file under part 4010) need to be amended. Similarly, PPA 2006 made changes to the minimum funding waiver provisions, which are referred to in part 4010.

Finally, PPA 2006 added ERISA sections 4010(d)(1) and 4010(e). ERISA section 4010(d)(1) lists three items that must be included in the information filers submit to PBGC.<sup>2</sup> ERISA section 4010(e) requires PBGC to submit to Congress an annual summary report of the information submitted to PBGC pursuant to ERISA section 4010.

### Summary of Proposed Rule

This proposed rule would amend part 4010 of PBGC's regulations to implement the change to ERISA section 4010(b)(1). In particular, this proposed rule provides guidance on how to determine whether reporting is required with respect to a plan based on the plan's funding target attainment percentage. The proposed rule would also make conforming changes to address the PPA 2006 changes affecting the section 4010 reporting triggers based on the imposition of certain liens or on the granting of certain minimum funding waivers.

In conjunction with these changes, PBGC also is proposing: (1) To waive reporting in certain cases for controlled

this proposed rule presumes the reference should have been to ERISA section 303(d)(2).

<sup>2</sup> ERISA section 4010(a), which was unaltered by PPA 2006, provides that filers must provide the information specified by PBGC in regulations.

groups with aggregate underfunding of \$15 million or less; (2) to modify the standards for determining which plans are exempted from reporting actuarial information; (3) to modify the reporting requirements in light of the PPA 2006 changes; and (4) to make other clarifications (for instance, the proposed rule would provide guidance for reporting for multiple employer plans and for dealing with certain unusual timing issues with respect to plan years and information years).

The proposed rule would be applicable to information years beginning after December 31, 2007. (In the rare case of a short information year beginning in 2008, such as an information year beginning on January 1, 2008, and ending on March 31, 2008, the employer should contact PBGC to request a reporting extension.) However, the changes made to paragraphs (a) and (b) of § 4010.8 (Plan actuarial information) are effective only for plan years beginning after December 31, 2007.

### Discussion of Proposed Rule

#### Information Year

In the original proposed rule under ERISA section 4010 (60 CFR 35308, July 6, 1995), PBGC introduced the concept of "information year." The information year is the fiscal year, except that in the case of controlled group members with different fiscal years, the information year is the calendar year (§ 4011.5). In the preamble to that original proposed rule, PBGC explained that "information year" serves four purposes:

First, it will help persons determine which plan years and fiscal years to use to identify Filers. Second, it will help Filers determine whether a pension plan qualifies for a filing exemption. Third, it is used to identify the information to be submitted by a Filer. Fourth, it establishes the due date for submission of required information by a Filer. The regulation does not require a Filer to change its fiscal year or the plan year of any pension plan. Further, the regulation does not require a Filer to report financial information on any accounting period other than an existing fiscal year or to report actuarial information for any period other than the existing plan year of a pension plan. Generally, the Information Year is the fiscal year of the Filer. If all members of a controlled group do not report financial information on the same fiscal year, the Information Year is the calendar year.

"Information year" has been integral to the process of reporting under ERISA section 4010 and PBGC finds no indication that PPA 2006 alters this. Therefore, under the proposed rule, reporting will continue to be based on the concept of "information year." Under the proposed rule, reporting

<sup>1</sup> ERISA section 4010(d)(2)(B) was added by section 505 of PPA 2006 and provides that "the term 'funding target attainment percentage' has the meaning provided in section 302(d)(2) [sic]." However, ERISA section 302(d)(2) contains no reference to "funding target attainment percentage" but applies to certain retroactive plan amendments. On the other hand, ERISA section 303(d)(2) is entitled "Funding Target Attainment Percentage" and provides a definition for that term. Therefore,

would be required (unless otherwise waived) if any plan within the controlled group has a funding target attainment percentage of less than 80 percent for the plan year ending within the information year (the “80% Funded Gateway Test”).

The proposed rule also would clarify how the 4010 requirements apply to certain unusual situations, such as when a plan has two plan years that end in the information year or has no plan year that ends in the information year. Under the proposed rule, the last plan year ending on or before the end of the information year would be treated as the plan year that ends within the information year. In addition, in order to prevent circularity, the proposed rule would provide that when a controlled group reports on the basis of two different fiscal years, the determination of whether an entity is exempt is made on the basis of a calendar year information year.

#### *Funding Target Attainment Percentage*

As discussed above, ERISA section 4010(b)(1), as amended by PPA 2006, requires reporting if the funding target attainment percentage at the end of the preceding plan year of a plan maintained by the contributing sponsor or any member of its controlled group is less than 80 percent. ERISA section 303(d)(2) provides that the “funding target attainment percentage” of a plan for a plan year is the ratio (expressed as a percentage) which—

(A) the value of plan assets for the plan year (as reduced under subsection (f)(4)(B)), bears to

(B) the funding target of the plan for the plan year (determined without regard to subsection (i)(1)).

In accordance with ERISA section 303(g)(1), for a plan year, the value of plan assets and the funding target of a plan are determined as of the valuation date of the plan for such plan year. Under ERISA section 303(g)(2), the valuation date for nearly all plans subject to 4010 reporting will be the beginning of the plan year.<sup>3</sup> Thus, while section 4010(b)(1) refers to the funding

target attainment percentage at the end of the preceding plan year, in nearly all cases both elements of the funding target attainment percentage must be calculated as of the beginning of the plan year. This creates an ambiguity with regard to the date as of which the funding target attainment percentage is to be calculated for purposes of section 4010(b)(1).

The proposed rule would resolve this ambiguity by providing that the funding target attainment percentage (for purposes of the 80% Funded Gateway Test) would be determined as of the valuation date for the plan year ending within the information year—generally, the first day of the plan year that ends within the information year. Because plans will need to determine the funding target attainment percentage as of the valuation date for other purposes, measuring the funding target attainment percentage as of the valuation date for the 80% Funded Gateway Test should be less burdensome on prospective filers than requiring a separate determination as of the end of the preceding plan year. In addition, using this measurement date will give controlled groups ample time to determine whether reporting is required pursuant to the 80% Funded Gateway Test and to prepare the section 4010 filing (if required) by the due date.

#### *Reduction of Assets Based on Carryover and Prefunding Balances*

ERISA section 303(d)(2) provides that in determining the funding target attainment percentage of a plan for a plan year, plan assets are reduced by the amount of the prefunding balance and the funding standard carryover balance. Plan sponsors are permitted under ERISA section 303(f) to make certain elections to use, increase, or reduce a prefunding balance or a funding standard carryover balance effective at the beginning of the plan year. Under PPA 2006, the Department of the Treasury (“Treasury”) is to provide guidance on the timing and manner of these elections. On August 31, 2007, Treasury published a proposed rule (Benefit Restrictions for Underfunded Pension Plans) in the **Federal Register** at 72 FR 50544, which would provide guidance on such elections. That rule would require any such election to satisfy certain timing rules. As proposed, those Treasury rules would require an election that affects the funding target attainment percentage for a plan year to be made well before the due date for the section 4010 filing. Therefore, PBGC’s proposed rule assumes that filers will have no difficulty including these elections in determinations made for purposes of

section 4010. However, if under final Treasury regulations it is possible for a plan sponsor to make such an election after the due date for the section 4010 filing, the PBGC would expect controlled groups to anticipate any such election when determining the funding target attainment percentage, regardless of when the election is made.

#### *Certain Plans to Which Special Funding Rules Apply*

Sections 104, 105, and 106 of PPA 2006 defer the effective date of the funding amendments for certain plans described in those sections, which in general deal with plans of cooperatives, plans affected by settlement agreements with PBGC, and plans of government contractors. Section 402 of PPA 2006 applies special funding rules to certain plans of commercial passenger airlines and airline caterers. Section 402 of PPA was amended by the U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Public Law 110–28. None of these provisions affects the applicability of the amendments to ERISA section 4010. The proposed rule provides explicitly that plans in this small group must apply part 4010 in the same manner as all other plans (i.e., without regard to these sections of PPA). However, for purposes of § 4010.8(a)(9) (which specifies what information must be contained in the actuarial valuation report), the filer must provide details of any such funding rules that are applicable to the plan. Where the different funding rules for this small group affect an item described in § 4010.8(a)(9), PBGC would expect that filers could, in consultation with PBGC, provide appropriately modified information.

#### *Minimum Funding Waivers*

ERISA section 4010(b) requires 4010 reporting if the Internal Revenue Service has granted minimum funding waivers in excess of \$1 million to any plan maintained by any member of the controlled group and as of the end of the plan year ending within the information year there is an outstanding balance on the waiver.

In general, the waiver will continue to be included for all five years of the amortization period, unless the waiver amortization bases are reduced to zero pursuant to ERISA section 303(e)(5) or Code section 430(e)(5). PBGC notes that there is some uncertainty as to the effect of PPA 2006 on the carryover balances for funding waivers granted before 2008. The proposed rule makes clear that the statutory amortization period will not be deemed to have ended merely because

<sup>3</sup> ERISA section 303(g)(2) provides that the valuation date of a plan for any plan year is the first day of the plan year, except that certain small plans may designate any date in the plan year to be the valuation date for the plan year and succeeding plan years. For this purpose, small plans are plans with 100 or fewer participants on each day of the plan year, when aggregated with all plans in the controlled group. Because PBGC proposes to exclude controlled groups with under \$15 million in underfunding, plans that would be considered small plans for purposes of determining valuation dates would rarely be subject to reporting under part 4010. Therefore, the valuation date for nearly all plans subject to 4010 reporting would be the beginning of the plan year.

the funding waivers granted with respect to plan years beginning before 2008 are not carried over as a separate amortization base for the post-2007 plan years.

To simplify the regulation, the proposed rule would eliminate the provision in the current regulation that provides that a minimum funding waiver is not outstanding under certain circumstances where an agreement requires the maintenance of a specific credit balance. PBGC found that this occurred infrequently. In those cases where it does occur, PBGC will consider waiving the 4010 reporting requirement on a case-by-case basis under § 4010.11.

#### *Reporting Requirements*

In addition to the requirements described in ERISA section 4010(a), which provides that filers must submit certain financial and actuarial information as prescribed by PBGC in regulations, ERISA section 4010(d), as amended by PPA 2006, specifies three items that are required to be filed with PBGC. That section provides that information filed under section 4010 must include:

- (1) The amount of benefit liabilities under the plan determined using the assumptions used by the corporation [PBGC] in determining liabilities;
- (2) The funding target of the plan determined as if the plan has been in at-risk status for at least 5 plan years; and
- (3) The funding target attainment percentage of the plan.

The proposed rule provides detailed guidance on how to determine benefit liabilities as described in item (1), i.e., how to determine benefit liabilities for ongoing plans using the assumptions used by PBGC in determining liabilities. This determination would be similar to that set forth in the current regulation under § 4010.8(d)(2). As with the current regulation, the proposed rule would require filers to use the assumptions prescribed by §§ 4044.51 through 4044.57. However, as explained below, in two respects the proposed regulation would modify or expand upon previous guidance (including informal guidance) given by PBGC or PBGC staff relating to certain assumptions not specified in §§ 4044.51 through 4044.57.

First, the proposed rule provides that solely for purposes of determining the earliest retirement age (ERA) at valuation date and the unreduced retirement age (URA) to be used when determining expected retirement age (XRA), an active participant would be treated as continuing in service after the end of the plan year. This provision would modify informal guidance

provided by PBGC that future expected service should be disregarded when determining XRAs for 4010 liability calculations.<sup>4</sup> This modification would eliminate an inconsistency between how filers compute benefit liabilities for 4010 purposes and how PBGC calculates benefit liabilities as part of its plan monitoring functions. The main impact of this change on 4010 filers would be that they would need to make a one-time modification of their computer programs. The proposed rule includes examples demonstrating how XRA would be calculated and applied in determining benefit liabilities.

Second, the proposed rule provides that a 4010 filer would be permitted to use pre-retirement assumptions other than mortality (such as turnover and disability assumptions) as long as the filer uses the same pre-retirement assumptions used to determine minimum required contributions. This provision would expand informal guidance provided by PBGC that it is permissible for 4010 purposes to use pre-retirement assumptions other than mortality.<sup>5</sup> The informal guidance was silent on which pre-retirement assumptions could be used. In PBGC's experience, most actuaries who choose to use pre-retirement assumptions for 4010 purposes use those same pre-retirement assumptions to determine minimum required contributions. Because the actuary certifies that the funding assumptions represent his best estimate of future experience, this practice is entirely reasonable, and the proposed rule would codify it for consistency.

The proposed rule also would clarify that, with the exception of pre-retirement assumptions, any other assumptions used to determine the minimum required contribution that are not overridden by §§ 4044.51 through 4044.57 must be used when determining benefit liabilities.

In addition to providing detailed guidance on how to determine benefit liabilities, the proposed rule reflects new requirements (under PPA 2006) to provide the funding target of the plan determined as if the plan has been in at-risk status for at least 5 plan years, and the funding target attainment percentage of the plan. Finally, for each plan (other

than an exempt plan), the proposed rule would require filers to report whether the plan, at any time during the plan year, was subject to any of the limitations described in ERISA section 206(g) and, if so, which limitations applied, when such limitations applied, and when they were lifted (if applicable).

As with the current rule, the proposed rule would require submission of the actuarial valuation report for the plan year ending within the filer's information year and would specify what information must be included in or attached to the report. PBGC is proposing to modify the required items of information to better suit the new funding structure instituted by PPA 2006. The required information is information that PBGC expects most actuaries would include in valuation reports once PPA 2006 takes effect (e.g., target normal cost, information on shortfall amortization bases, information on funding assumptions, an age/service scatter). However, because the funding rules have changed so dramatically as a result of PPA 2006, and because Treasury regulations implementing the new funding rules are not yet final, the list of required items may exclude some relevant actuarial information. To allow PBGC to expand the list of required items as it gains more experience with the new funding requirements under PPA 2006, the proposed rule would provide that the online instructions to PBGC's secure e-4010 web-based application may require that additional items be included in (or attached to) the valuation report. PBGC expects that any additional items would be items typically required to be reported on the Form 5500 schedule for defined benefit plan actuarial information (Schedule SB).

Because the new actuarial reporting requirements are geared to the new funding rules, which generally are applicable to plan years beginning after December 31, 2007, the changes made to the actuarial information requirements under § 4010.8(a) and (b) would not apply to plan years beginning before 2008. Information for such plan years would be based upon the prior regulation. (Note that the other paragraphs of § 4010.8 (as proposed), such as the new rules for determining which plans would be exempt from actuarial reporting requirements (§ 4010.8(c)) and the determination of liabilities (§ 4010.8(d)) would apply to all plan years ending within an information year that begins on or after January 1, 2008.)

<sup>4</sup> Q&A 17 in the 2001 Blue Book and Q&A 19 in the 2002 Blue Book, available at [www.pbgc.gov](http://www.pbgc.gov). Blue Books are summaries of the questions and answers discussed at meetings between PBGC staff and representatives of the Enrolled Actuaries Program Committee in preparation for the annual Enrolled Actuaries Meetings. The summaries reflect the views of individual staff members and do not represent the official position of PBGC.

<sup>5</sup> Q&A 25 in the 2000 Blue Book.

### *Waiver for Controlled Groups With Plan Underfunding Not Exceeding \$15 Million*

The Technical Explanation of PPA 2006 prepared by the Staff of the Joint Committee on Taxation states: "It is intended that the PBGC may waive the requirement [for reporting under ERISA section 4010 based upon the 80% Funded Gateway Test] in appropriate circumstances, such as in the case of small plans." Moreover, PBGC seeks to balance the benefit it derives from annual reporting of financial and actuarial information with the burden reporting imposes on filers. As the total underfunding in a filer's controlled group becomes smaller, the benefit PBGC derives from reporting lessens, while the burden on the filer tends to increase relative to the filer's resources. Based on its experience, PBGC has determined that controlled groups with aggregate plan underfunding of \$15 million or less present a level of risk and exposure to PBGC that is sufficiently low to warrant the waiver of reporting based on the 80% Funded Gateway Test.

Therefore, PBGC is proposing to waive reporting for a controlled group if the aggregate plan underfunding does not exceed \$15 million (disregarding those plans with no underfunding); however, the waiver would not apply if reporting is required for any reason other than having a funding target attainment percentage below 80 percent. For this purpose, plan underfunding would equal the "4010 funding shortfall." The proposed rule would define the 4010 funding shortfall as the funding shortfall defined in ERISA section 303(c)(4), but determined without regard to the credit balance reduction under ERISA section 303(f)(4)(B).

### *Exempt Plans*

Section 4010.8(c) of PBGC's current regulation provides that reporting actuarial information is not required for plans with fewer than 500 participants. (It also provides an exemption for overfunded plans.) Through means other than reporting under part 4010, such as through PBGC's early warning program (see Technical Update 00-3, available at [www.pbgc.gov](http://www.pbgc.gov)) and reportable events notices, PBGC has discovered that a number of plans with fewer than 500 participants have significant underfunding and thereby represent significant financial exposure for PBGC. In such cases, PBGC needs actuarial information on these plans to properly evaluate its risk and exposure for the entire controlled group.

Therefore, PBGC is proposing to modify the exemption from reporting actuarial information. Under the proposed rule, actuarial information would not be required if (1) the plan has fewer than 500 participants, and (2) the plan's 4010 funding shortfall does not exceed \$15 million. For this purpose, the 4010 funding shortfall would be determined as of the valuation date for the plan year ending within the information year and would be based upon the same methodology prescribed for purposes of determining whether the \$15 million controlled-group waiver would apply.

The proposed rule retains the exemption from providing actuarial information for plans that have no unfunded benefits. For this purpose, unfunded benefits would be determined in the same manner as they would be determined for purposes of ERISA section 4010(d)(1), which requires the reporting of benefit liabilities using the assumptions used by PBGC. The only difference is that the filer would be allowed to use the retirement age assumptions used by the plan for that plan year for purposes of section 303 of ERISA (without regard to the at-risk assumptions of section 303(i) of ERISA) instead of the retirement age assumptions in § 4044.8(d)(2).

Note that, as under the current regulation, these exemptions from reporting actuarial information do not apply if the plan has a funding waiver or has been more than 10 days late with minimum funding contributions.

### *Multiple Employer Plans*

Over the last decade, PBGC has received a number of inquiries on the application of ERISA section 4010 to contributing sponsors of multiple employer plans. The proposed rule would provide for reduced reporting for certain multiple employer plans. In general, only information on employers that are among the 10 largest employers in terms of participants (for hourly plans) or contributions (for salaried plans) would need to be provided. Of course, PBGC could request additional information pursuant to § 4010.6(b). In addition, the proposed rule would allow a filer to provide the actuarial information on a multiple employer plan by reference if that information (for the same plan year) has been provided by another filer. The proposed rule would clarify that the entire underfunding (i.e., funding shortfall) of a multiple employer plan is counted when determining whether the \$15 million controlled-group waiver applies to an employer that is a contributing sponsor of the multiple employer plan. It also would clarify that filers are not

required to provide identifying or financial information for another contributing sponsor of the multiple employer plan if that other contributing sponsor is not a member of the filer's controlled group.

### *Applicability*

Section 505(e) of PPA 2006 provides that the amendments made by section 505 apply with respect to "years beginning after 2007." We note that this applicability provision of PPA 2006 uses the term "year" rather than "plan year," although the term "plan year" appears in other applicability provisions in PPA 2006. PBGC interprets this section of PPA to mean the amendments apply to any information year beginning after 2007. Therefore, these rules, if adopted, would apply to information years beginning after 2007. In the rare case of a short information year beginning in 2008 (for example, an information year beginning on January 1, 2008, and ending on March 31, 2008), the employer should contact PBGC to obtain a reporting extension. However, the changes made to paragraphs (a) and (b) of § 4010.8 (Plan actuarial information) are effective only for plan years beginning after December 31, 2007.

### *Transition Rules*

Under the proposed rule, a number of valuation determinations (for instance, the 80% Funded Gateway Test, the \$15 million controlled-group waiver, and the \$15 million small-plan exemption from reporting actuarial information) would be made as of the valuation date for the plan year ending within the information year. For these purposes, the valuation determination is based on either the funding target attainment percentage or the 4010 funding shortfall as of the valuation date. The provisions of PPA 2006 defining funding target attainment percentage and funding shortfall apply only to plan years beginning after 2007. Therefore, for plan years beginning in 2007 but ending in information years that begin after 2007 (and thus covered by these proposed rules), the funding target attainment percentage and funding shortfall are not prescribed by statute. As a result, this proposed rule would require employers to use a surrogate for determining the funding target attainment percentage and funding shortfall for plan years beginning before January 1, 2008. PBGC's proposed surrogate would be similar to a rule proposed by Treasury in its proposed benefit restrictions rule. Section 1.436-1(j)(2)(iii) of Treasury's proposed rule provides that, for benefit restriction purposes, the funding target

attainment percentage for a pre-effective plan year is determined as a fraction (expressed as a percentage), the numerator of which is the value of net plan assets, and the denominator of which is the plan's current liability on the valuation date for the last plan year that begins before 2008 (the 2007 plan year). For this purpose, the value of plan assets is determined under Code section 412(c)(2) as in effect for the 2007 plan year, except that the value of plan assets prior to subtraction of the plan's funding standard account credit balance described below can neither be less than 90 percent of the fair market value of plan assets nor greater than 110 percent of the fair market value of plan assets on the valuation date for that plan year. In addition, if a plan has a funding standard account credit balance as of the valuation date for the 2007 plan year, that balance must be subtracted from the asset value described above as of that date unless the value of plan assets is greater than or equal to 90 percent of the plan's current liability determined under Code section 412(l)(7) on the valuation date for the 2007 plan year. Finally, if the employer makes an election to reduce some or all of the funding standard carryover balance as of the first day of the first plan year beginning in 2008 in accordance with § 1.430(f)-1(e) of Treasury's proposed rule, then the present value (determined as of the valuation date for the prior year using the valuation interest rate for that prior year) of the amount so reduced is not treated as part of the funding standard account credit balance when that balance is subtracted from the value of net plan assets.

PBGC's proposed rule would provide that the funding target attainment percentage for section 4010 purposes for plan years beginning before 2008 would equal the funding target attainment percentage as determined under Treasury's proposed special rule (§ 1.436-1(j)(2)(iii) of the regulation as proposed), except that: (1) Current liability would be determined by using the highest allowable interest rate for the plan year; and (2) there would be no special rule providing that if the value of plan assets is greater than or equal to 90 percent of the plan's current liability determined under Code section 412(l)(7) on the valuation date for the 2007 plan year, the value of assets is not reduced by the credit balance.

The surrogate for 4010 funding shortfall would equal the excess, if any, of the plan's current liability over the value of plan assets. For this purpose, both current liability and plan assets would be determined in the same manner as determined for purposes of

PBGC's transition rule for determining funding target attainment percentage, except that assets would not be reduced by the credit balance in the funding standard account (i.e., there would be no reduction as described in 26 CFR 1.436-1(j)(2)(iii)(B)(2) and (3) (as proposed)).

The following example demonstrates how the transition rules would work.

*Example.* Assume Company X, which reports based on a calendar year information year, maintains Plan A, which has a plan year beginning on October 1 and ending on September 30 and an October 1 valuation date. The October 1, 2007 valuation results were as follows: actuarial value of assets of \$115 million, market value of assets of \$100 million and current liability of \$135 million. In addition, assume the funding standard account credit balance as of September 30, 2007, was \$20 million and that the employer does not elect to reduce the October 1, 2008, carryover balance at all.

For the section 4010 report due on April 15, 2009, the proposed rule prescribes that the 80% Funded Gateway Test is based on the plan's funding target attainment percentage as of October 1, 2007. However, because funding target attainment percentage for purposes of ERISA section 303 applies to plan years beginning after 2007, the funding target attainment percentage is determined using a surrogate prescribed in § 4010.4(b)(3) of the proposed rule.

The surrogate funding target attainment percentage is calculated as follows: First, because the 2007 actuarial value of assets is more than 10% above the market value of assets, assets are reduced to \$110 million. Next, assets are reduced by the credit balance resulting in an asset value for the Funding Target Attainment Percentage of \$90 million (\$110 million minus \$20 million). The surrogate Funding Target Attainment Percentage is the ratio of \$90 million to the plan's current liability using the highest permitted rate (\$135 million). So, the surrogate Funding Target Attainment Percentage is 67% (\$90/\$135). Since this is less than 80%, a section 4010 filing is required (unless the aggregate 4010 funding shortfall is less than \$15 million).

(Note that if the employer elects to reduce some, or all, of the October 1, 2008, carryover balance in accordance with the election procedures provided in 26 CFR 1.430(f)-1(e) (as proposed), the discounted value of the waived amount would be subtracted from the \$20 million credit balance before the \$20 million credit balance is subtracted from the \$110 million adjusted asset value.)

The surrogate 4010 funding shortfall is determined under § 4010.11(c)(2) and equals the excess, if any, of liability using the highest permitted rate (\$135 million) over assets (after any adjustments to bring the asset value within 10% of market value). For this calculation, assets are not reduced by the credit balance. Therefore, the 4010 funding shortfall is the excess of \$135 million over \$110 million, or \$25 million.

## Compliance With Rulemaking Guidelines

PBGC has determined that this proposed rule is a "significant regulatory action" under Executive Order 12866. The Office of Management and Budget has therefore reviewed the proposed rule under Executive Order 12866.

Pursuant to section 1(b)(1) of E.O. 12866 (as amended by Executive Order 13422), PBGC has determined that regulatory action is required in this area. Principally, this regulatory action is necessary to implement the changes made to ERISA section 4010 by PPA 2006. The proposed rule would provide guidance without which plan sponsors would have significant difficulty determining whether reporting is required. Moreover, ERISA section 4010 specifically provides that the actuarial and financial information to be reported, as well as the deadline for reporting, are as specified by PBGC in regulations. Finally, the proposed rule would provide exemptions, waivers, and reporting simplifications that reduce reporting burden for numerous plan sponsors.

PBGC certifies under section 605(b) of the Regulatory Flexibility Act that the amendments in this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would implement statutory changes made by Congress. It provides guidance on how to determine whether reporting under ERISA section 4010 is required and what to report. Furthermore, PBGC is providing an exemption for controlled groups that have total plan underfunding of \$15 million or less. 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.

The information requirements relating to reporting under ERISA section 4010 have been approved by the Office of Management and Budget under the Paperwork Reduction Act (OMB control number 1212-0049, expires February 29, 2008).

PBGC is submitting the information requirements relating to these amendments to the Office of Management and Budget for review and approval under the Paperwork Reduction Act. (This submission also includes the information requirements relating to the current collection of 4010 information.) Copies of PBGC's request may be obtained free of charge by contacting the Disclosure Division of the Office of the General Counsel of PBGC,

1200 K Street, NW., Washington, DC 20005, 202-326-4040.

PBGC expects that once the new rules take effect it will receive section 4010 filings from about 300 contributing sponsors or controlled group members annually and that the total annual burden of the collection of information will be about 2,600 hours and \$5,167,500. (Detailed information on these burden estimates is included in PBGC's request.)

Comments on the paperwork provisions under this proposed rule should be mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Pension Benefit Guaranty Corporation, via electronic mail at [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov) or by fax to (202) 395-6974. Although comments may be submitted through April 21, 2008, the Office of Management and Budget requests that comments be received on or before March 21, 2008 to ensure their consideration. Comments may address (among other things)—

- Whether the proposed collection of information is needed for the proper performance of PBGC's functions and will have practical utility;
- The accuracy of PBGC's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancement of the quality, utility, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

#### List of Subjects in 29 CFR Part 4010

Pension insurance, Pensions, Reporting and recordkeeping requirements.

For the reasons given above, PBGC proposes to amend 29 CFR parts 4010 as follows.

#### PART 4010—ANNUAL FINANCIAL AND ACTUARIAL REPORTING

1. The authority citation for part 4010 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1310.

##### § 4010.1 [Amended]

2. Section 4010.1 is amended by removing the words “the PBGC under section 4010 of ERISA” and adding in their place the words “PBGC under

ERISA section 4010”; and by removing the last sentence of the section (beginning with the words “This part applies \* \* \*”).

##### 3. In § 4010.2:

a. The words “of this part” are removed from the definitions of “exempt entity,” “exempt plan,” “filer,” and “information year.”

b. The definition of “exempt entity” is amended by removing the figures “4010.4(d)” and adding in their place the figures “4010.4(c)”.

c. The definition of “information year” is amended by removing the words “the year” and adding in their place the words “the information year”.

d. The definition of “fair market value of the plan's assets” is revised, and five new definitions are added, to read as follows:

##### § 4010.2 Definitions.

\* \* \* \* \*

*4010 funding shortfall* means, with respect to a plan for a plan year, the 4010 funding shortfall as determined under § 4010.11(c).

*At-risk status* means, with respect to a plan for a plan year, at-risk status as defined in ERISA section 303(i)(4).

\* \* \* \* \*

*Fair market value of the plan's assets* means the fair market value of the plan's assets determined without regard to any contributions receivable (i.e., contributions made after the date as of which the fair market value of the plan's assets is determined are not included).

\* \* \* \* \*

*Funding target* means, with respect to a plan for a plan year, the funding target as provided under ERISA section 303(d)(1) determined as of the valuation date for the plan year.

*Funding target attainment percentage* means, with respect to a plan for a plan year, the funding target attainment percentage as determined under § 4010.4(b) for the plan year.

\* \* \* \* \*

*Valuation date* means, with respect to a plan for a plan year, the valuation date as determined under ERISA section 303(g)(2).

##### § 4010.3 [Amended]

4. In § 4010.3, paragraph (a) is amended by revising the paragraph heading to read “*General*.”; by removing the words “exempt plans) and except” and adding in their place the words “exempt plans), and except” (with a comma after the closing parenthesis); by removing the words “waivers have been granted under § 4010.11” and adding in their place the words “one or more waivers under § 4010.11 apply”; by

removing the words “plans maintained by members of a controlled group” and adding in their place the words “plans maintained by members of the controlled group”; by removing the words “the PBGC” (where they appear twice in the paragraph) and adding in their place each time the word “PBGC”; and by removing the words “the PBGC's” and adding in their place the word “PBGC's”.

##### 5. In § 4010.4:

a. Paragraph (a) introductory text is amended by removing the words “paragraph (d)” and adding in their place the words “paragraph (c)”.

b. Paragraph (a)(1) is amended by removing the words “The aggregate unfunded vested benefits of all plans” and adding in their place the words “For any plan”; by removing the words “any exempt plans” and adding in their place the words “an exempt plan”; and by removing the words “group exceed \$50 million (disregarding those plans with no unfunded vested benefits)” and adding in their place the words “group, the funding target attainment percentage for the plan year ending within the information year is less than 80 percent”.

c. Paragraph (a)(2) is amended by removing the words “a controlled group” and adding in their place the words “the controlled group”; and by removing the words “section 302(f)(1)(A) and (B) of ERISA or section 412(n)(1)(A) and (B) of the Code” and adding in their place the words “ERISA section 303(k) or Code section 430(k)”.

d. Paragraph (a)(3) is amended by removing the words “a controlled group” and adding in their place the words “the controlled group”; by removing the words “section 303 of ERISA or section 412(d) of the Code” and adding in their place the words “ERISA section 302(c) or Code section 412(c)”; and by removing the words “(determined in accordance with paragraph (c) of this section)”.

e. Paragraph (c) is removed.

f. Paragraph (d) is redesignated as paragraph (c).

g. Paragraph (b) is revised, and new paragraphs (d), (e), and (f) are added, to read as follows:

##### § 4010.4 Filers.

\* \* \* \* \*

(b) *Funding target attainment percentage*—(1) *General*. Except as provided in paragraph (b)(3) of this section, the funding target attainment percentage for a plan for a plan year equals the funding target attainment percentage as provided under ERISA section 303(d)(2) determined as of the valuation date for the plan year.



(2) *Prefunding balance and funding standard carryover balance elections.* For purposes of determining the funding target attainment percentage for a plan for a plan year, prefunding balances and funding standard carryover balances must reflect any elections (or deemed elections) under ERISA section 303(f) or Code section 430(f) for the plan year, regardless of when the elections (or deemed elections) are made.

(3) *Transition rule for plan years beginning before 2008.* For plan years beginning before 2008, the funding target attainment percentage for a plan for a plan year equals the funding target attainment percentage as determined under 26 CFR 1.436-1(j)(2)(iii), *except*—

(i) Current liability is determined using the highest rate of interest allowable under Code section 412(l)(7) (as in effect for plan years beginning before 2008) for that plan year, regardless of whether that rate was actually used to determine current liability for the plan year; and

(ii) The value of net plan assets is determined without regard to the second sentence of 26 CFR 1.436-1(j)(2)(iii)(B)(2) (*i.e.*, for this purpose, there is no special rule that provides that assets are not reduced by the credit balance if the value of plan assets is greater than or equal to 90 percent of the plan's current liability).

\* \* \* \* \*

(d) *Transition rule; failure to make required contribution; minimum funding waiver.* For plan years beginning before 2008, the reference in paragraph (a)(2) of this section to “ERISA section 303(k) or Code section 430(k)” is replaced by a reference to “ERISA section 302(f)(1)(A) and (B) or Code section 412(n)(1)(A) and (B)”, and the reference in paragraph (a)(3) of this section to “ERISA section 302(c) or Code section 412(c)” is replaced by a reference to “ERISA section 303 or Code section 412(d)” as those provisions are in effect for plan years beginning before 2008.

(e) *Minimum funding waiver*—(1) *General.* For purposes of § 4010.4(a)(3), a portion of the minimum funding waiver for a plan is considered outstanding unless prior to the plan year ending within the information year the statutory amortization period has ended or, as of the valuation date for the plan year ending within the information year, the amortization bases are deemed to be reduced to zero pursuant to ERISA section 303(e)(5) and Code section 430(e)(5). However, the statutory amortization period will not be deemed to have ended merely because the funding waivers granted with respect to

plan years beginning before 2008 are not carried over as a separate amortization base for the post-2007 plan years.

(2) *Example.* Company A sponsors Plan X, which received a minimum funding waiver of \$700,000 for the plan year ending December 31, 2004, and another waiver of \$500,000 for the plan year ending December 31, 2008. Assume that the amortization bases of the waivers are not reduced to zero pursuant to ERISA section 303(e)(5) and Code section 430(e)(5), and the waivers are therefore outstanding for the full five-year statutory amortization period. Also, assume Company A has a calendar information year. For the 2009 information year, Company A must report under ERISA section 4010. However, for the 2010 information year, Company A, assuming no other obligation to report under ERISA section 4010, is not required to report.

(f) *Certain plans to which special funding rules apply.* Except as described in § 4010.8(a)(9)(xiii), the provisions of sections 104, 105, 106, and 402 (as amended by U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. 110-28) of PPA 2006 are disregarded for purposes of this part.

6. In § 4010.5:

a. Paragraph (c)(1) is amended by adding to the end of the paragraph the words “(If any two members of the controlled group report financial information on the basis of different fiscal years, the determination of whether an entity is an exempt entity is based on a calendar year information year for purposes of this paragraph (c)(1) and § 4010.4(c).)”.

b. Paragraph (c)(2) is revised and new paragraph (d) is added to read as follows:

#### § 4010.5 Information year.

\* \* \* \* \*

(c) *Controlled group members with different fiscal years.*

\* \* \* \* \*

(2) *Examples.* (i) Companies A and B are the only members of the same controlled group, and both are contributing sponsors to nonexempt plans. Company A has a July 1 fiscal year, and Company B has an October 1 fiscal year. The information year is the calendar year. Company A's financial information with respect to its fiscal year ending June 30, 2009, and Company B's financial information with respect to its fiscal year ending September 30, 2009, must be submitted to PBGC following the end of the 2009 calendar year information year.

(ii) The facts are the same as in example (i) except that Company B is

not a contributing sponsor of a plan and would be an exempt entity using the calendar year as the information year. Because Company B is an exempt entity based on a calendar information year, it is excluded when determining the information year. Thus, the information year is the July 1 fiscal year. Note that Company B is an exempt entity even if it would not be exempt based on the July 1 information year.

(iii) The facts are the same as in example (i) except that Company B would not be an exempt entity using the calendar year information year but would be exempt based on an information year that is the July 1 fiscal year. Since Company B is not exempt based on a calendar year information year, it may not be excluded when determining the information year. Therefore, the information year is the calendar year and Company B is not an exempt entity.

(d) *Special rules for certain plan years.* If a plan maintained by the members of the contributing sponsor's controlled group has two plan years that end in the information year or has no plan year that ends in the information year, the last plan year ending on or immediately before the end of the information year is deemed to be the plan year ending within the information year.

#### § 4010.6 [Amended]

7. In § 4010.6:

a. Paragraphs (a)(1) and (a)(2) are amended by removing the words “the PBGC's website” (which appear once in each paragraph) and adding in their place the words “PBGC's Web site”.

b. Paragraphs (b) and (c) are amended by removing the words “the PBGC” (which appear once in each paragraph) and adding in their place the word “PBGC”.

8. In § 4010.7:

a. Paragraphs (a) introductory text and (b) introductory text are amended by removing the words “the PBGC's website” (which appear once in each paragraph) and adding in their place the words “PBGC's Web site”.

b. Paragraph (b)(2) is amended by removing the words “maintaining the plan” and adding in their place the words “maintaining the plan (if applicable)”; and by removing the words “paragraph (b)(1)” and adding in their place the words “paragraph (b)(1) of this section”.

c. New paragraph (c) is added to read as follows:

#### § 4010.7 Identifying information.

\* \* \* \* \*

(c) *Multiple employer plans.* A filer that is a contributing sponsor of a



multiple employer plan need not provide identifying information for another contributing sponsor of the multiple employer plan if that other contributing sponsor is not a member of the filer's controlled group, and need not provide identifying information for another plan if neither the filer nor any member of the filer's controlled group is a contributing sponsor of that other plan.

9. In § 4010.8:

a. Introductory text is added to the section.

b. Paragraph (a) introductory text is amended by removing the words "For each plan" and adding in their place the words "Except as provided elsewhere in this part, for each plan"; by removing the words "the PBGC's website" and adding in their place the words "PBGC's Web site"; and by removing the words "actuarial information" and adding in their place the words "actuarial information (except as specified below, determined as of the end of the plan year ending within the filer's information year)".

c. Paragraph (a)(3) is amended by removing the words "value of the plan's benefit liabilities" and adding in their place the words "amount of benefit liabilities under the plan"; by removing the words "setting forth separately the value" and adding in their place the words "setting forth separately the amount"; and by removing the words "participants, determined (in accordance with paragraph (d) of this section) at the end of the plan year ending within the filer's information year" and adding in their place the words "participants (for this purpose, the amount of benefit liabilities equals the value of benefit liabilities determined in accordance with paragraph (d) of this section)".

d. Paragraph (a)(4) is amended by removing the words "for interest (*i.e.*, the specific interest rate(s), such as 5%), mortality, retirement age, and loading for administrative expenses, as"; and by removing the word "and" after the semicolon at the end of the paragraph.

e. Paragraphs (a)(5) and (a)(6) are redesignated as paragraphs (a)(9) and (a)(10) respectively.

f. The introductory text of redesignated paragraph (a)(9) is amended by removing the word "information" and adding in its place the words "information for that plan year".

g. Paragraph (v) of redesignated paragraph (a)(9) is redesignated as paragraph (xii) of redesignated paragraph (a)(9).

h. Redesignated paragraph (a)(9)(xii) is amended by removing the words

"retirement factors" and adding in their place the words "retirement factors; in the case of a plan that provides lump sums, other than *de minimis* lump sums, the summary must include information on how annuity benefits are converted to lump sum amounts (for example, whether early retirement subsidies are reflected)".

i. Paragraph (b) introductory text is amended by removing the figures "(a)(5)" and adding in their place the figures "(a)(9)".

j. Paragraphs (b)(1) and (b)(2) are amended by removing the words "the PBGC" (which appear once in each paragraph) and adding in their place the word "PBGC".

k. Paragraph (b)(2) is further amended by removing the figures "(a)(6)" and adding in their place the figures "(a)(10)".

l. Paragraphs (c)(1) and (c)(2) are redesignated as paragraphs (c)(2) and (c)(3) respectively.

m. Redesignated paragraph (c)(2) is amended by removing the words "Has received" and adding in their place the words "The plan has received"; and by removing the words "section 302 of ERISA or section 412 of the Code" and adding in their place the words "ERISA sections 302 and 303 and Code sections 412 and 430".

n. Redesignated paragraph (c)(3) is amended by removing the words "Has no" and adding in their place the words "The plan has no"; and by removing the words "§ 4010.4(e) of this part" and adding in their place the figures "§ 4010.4(a)(3)".

o. Paragraph (d)(3) is amended by removing the words "section 302(d) of ERISA or section 412(l) of the Code" and adding in their place the words "section 303 of ERISA (without regard to the at-risk assumption of section 303(i) of ERISA)".

p. Paragraphs (i), (ii), (iii), (iv), (vi), (vii), and (viii) of redesignated paragraph (a)(9), paragraph (c) introductory text, and paragraph (d)(2) are revised, and a new introductory note before paragraph (a), new paragraphs (5), (6), (7), and (8) of paragraph (a), new paragraphs (v), (ix), (x), (xi), (xiii), and (xiv) of redesignated paragraph (a)(9), new paragraph (c)(1), and new paragraphs (e), (f), and (g) are added, to read as follows:

#### § 4010.8 Plan actuarial information.

The requirements described in paragraphs (a) and (b) of § 4010.8 prior to their amendment to comply with the changes made to ERISA section 4010 by the Pension Protection Act of 2006 (rather than those described in paragraphs (a) and (b) of this section)

are applicable to plan years beginning before 2008.

(a) *Required information.* \* \* \*

(5) The funding target (as of the valuation date) for the plan year ending within the information year determined in accordance with ERISA section 303(i) as if the plan has been in at-risk status for a consecutive period of at least 5 plan years;

(6) The funding target attainment percentage (as of the valuation date) for the plan year ending within the information year;

(7) The adjusted funding target attainment percentage as defined in ERISA section 206(g)(9)(B);

(8) Whether the plan, at any time during the plan year, was subject to any of the limitations described in ERISA section 206(g) and, if so, which limitations applied, when such limitations applied, and when (if applicable) they were lifted;

(9) \* \* \*

(i) The funding target calculated pursuant to ERISA section 303 without regard to subsection 303(i)(1), setting forth separately the value of the liabilities attributable to retirees and beneficiaries receiving payment, terminated vested participants, and active participants (showing vested and nonvested benefits separately);

(ii) A summary of the actuarial assumptions and methods used for purposes of ERISA section 303 and any change in those assumptions and methods since the previous valuation and justifications for any change; in the case of a plan that provides lump sums, other than *de minimis* lump sums, the summary must include the assumptions on which participants are assumed to elect a lump sum and how lump sums are valued;

(iii) The effective interest rate (as defined in ERISA section 303(h)(2)(A));

(iv) The target normal cost calculated pursuant to ERISA section 303 without regard to subsection 303(i)(2);

(v) For the plan year and the four preceding plan years, a statement as to whether the plan was in at-risk status for that plan year;

(vi) In the case of a plan that is in at-risk status, the target normal cost calculated pursuant to ERISA section 303 as if the plan has been in at-risk status for 5 consecutive years;

(vii) The value of the plan's assets (reflecting any averaging method) as of the valuation date and the fair market value of the plan's assets as of the valuation date;

(viii) The funding standard carryover balance and the prefunding balance

(maintained pursuant to ERISA section 303(f)(1)) as of the beginning of the plan year and a summary of any changes in such balances in the past year (e.g., amounts used to offset minimum funding requirement, amounts reduced in accordance with any elections under ERISA section 303(f)(5) or Code section 430(f)(5), interest credited to such balances, and excess contributions used to increase such balances);

(ix) A list of amortization bases (shortfall and waiver) under ERISA section 303, including the year the base was established, the original amount, the installment amount, and the remaining balance at the beginning of the plan year;

(x) An age/service scatter for active participants including average compensation information for pay-related plans and average account balance information for hybrid plans presented in a format similar to that described in the instructions to the Form 5500 schedule for single-employer defined benefit plan actuarial information;

(xi) Expected disbursements (benefit payments and expenses) during the plan year;

\* \* \* \* \*

(xiii) Details of any special funding rules that apply to the determination of the plan's minimum required contribution (e.g., special amortization schedules or interest rate assumptions applicable to certain plans of commercial airlines, or provisions for certain plans of rural cooperatives, defense contractors, or employers with PBGC settlement agreements); and

(xiv) Any other similar information as specified in instructions on PBGC's Web site; and

\* \* \* \* \*

(c) *Exempt plan.* The actuarial information specified in this section is not required with respect to a plan if—

(1) The plan—

(i) Has fewer than 500 participants as of the end of the plan year ending within the information year and has a 4010 funding shortfall for the plan year ending within the information year that is not in excess of \$15 million, or

(ii) Has benefit liabilities as of the end of the plan year ending within the filers' information year (determined in accordance with paragraph (d) of this section) equal to or less than the fair market value of the plan's assets;

\* \* \* \* \*

(d) *Value of benefit liabilities.* \* \* \*

\* \* \* \* \*

(2) *Actuarial assumptions and methods.* The value of benefit liabilities shall be determined using the

assumptions and methods prescribed in §§ 4044.51 through 4044.57 of this chapter. In addition to the assumptions described in §§ 4044.51 through 4044.57, the following rules apply:

(i) *Assumptions not included in §§ 4044.51 through 4044.57.* A filer may choose whether to include assumptions for pre-retirement decrements other than mortality (such as turnover or disability assumptions), provided that if such pre-retirement decrements are used, the assumptions used are the same as those used to determine the minimum required contribution under ERISA section 303 for the plan year ending within the filer's information year. Any other assumptions used to determine the minimum required contribution that are not overridden by §§ 4044.51 through 4044.57 (assumed marital status, cost-of-living increase, if applicable, etc.) must be used when determining benefit liabilities.

(ii) *Benefits to be valued.* The value of benefit liabilities includes liabilities for all benefits accrued under the plan (including benefits that are not protected from the anti-cutback provisions of Code section 411(d)(6)) as of the end of the plan year ending within the filer's information year.

(iii) *Future service.* Future service expected to be accrued by an active participant in an ongoing plan during future employment (based on the assumptions used to determine the value of benefit liabilities) must be reflected when determining the earliest retirement age at valuation (ERA) and unreduced retirement age (URA) used to determine expected retirement age (XRA). (For this purpose, ERA, URA, and XRA have the meaning as provided in § 4044.2.) Such expected future service in an ongoing plan (at decrement) is also included in determining an active participant's entitlement to early retirement subsidies and supplements at XRA. (See the examples in paragraph (e) of this section.)

\* \* \* \* \*

(e) *Examples.* The following examples demonstrate how expected retirement age (XRA) is determined and applied for purposes of determining benefit liabilities under paragraph (d) of this section:

(1) *Example 1—(i) Facts.* Plan X has a normal retirement age of 65, but allows benefits to commence as early as age 55 for participants who complete at least 10 years service before termination. Early retirement benefits are reduced (from age 65) for participants with fewer than 25 years of service. Employee A is an active

participant who is age 40 and has completed 5 years of service. Assume the "medium" XRA look-up table applies and that for purposes of § 4010.8(d), the filer has decided not to take pre-retirement decrements other than mortality into account as permitted under § 4010.8(d)(2)(i).

(ii) *Determination of XRA.* If A continues working, the earliest age A could start receiving benefits is age 55. Therefore, A's ERA is 55. Because the earliest that A can receive an unreduced benefit is when A completes 25 years of service (at age 60), A's URA is age 60. Under the medium XRA look-up table, A's XRA is 58.

(iii) *Determination of benefit liabilities.* The benefit liability is the present value of A's benefit accrued as of the measurement date assuming A retires at age 58 and elects to have payments commence immediately. Since A will not be eligible to receive unreduced benefits at that time, the accrued benefit is reduced in accordance with the plan's early retirement reduction provisions, including any subsidies to which A would be entitled under the assumption that A works until age 58.

(2) *Example 2.* Employee B is also an active participant in plan X and is age 40 with 15 years of service. B will complete 25 years of service at age 50. However, because the plan does not allow for benefit commencement before age 55, B's ERA, URA and thus, XRA are all age 55. (Note: the XRA tables in Appendix D to part 4044 do not show URA's below age 60, but links to extended tables can be found on the PBGC's Web site at the bottom of <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/page14763.html>.) The benefit liability is the present value of B's benefit accrued as of the measurement date assuming B retires at age 55 and elects to commence benefits immediately. Since B will be eligible to receive an unreduced benefit at that time, the full unreduced benefit amount is valued.

(3) *Example 3—(i) Facts.* Assume the same facts as in Example 1, except that for purposes of § 4010.8(d), the filer has decided to take pre-retirement decrements other than mortality into account as permitted under § 4010.8(d)(2)(i). For the sake of simplicity, assume the only pre-retirement decrement other than mortality is turnover. The plan's turnover rates go from age 21 to age 54, and the retirement rates go from age 55 to age 65.

(ii) *Determination of XRA.* If A terminates employment at or before age 45, A will not be eligible to receive

benefits until age 65. Therefore, the portion of Employee A that is assumed to terminate before age 45 has an ERA, URA, and XRA of 65. The portion of A that remains in service to age 45, after the application of the applicable turnover decrements, and then terminates at or after age 45, but before age 55, will be entitled to receive a reduced benefit as early as 55. Therefore, the portion of A that is assumed to terminate during this period has an ERA of 55, a URA of 65 and an XRA of 60. Since the turnover rates stop at age 55, the portion of A that remains in service to age 55 is assumed to remain in service until the XRA for that portion of A. For that portion of A, the ERA is 55, the URA is 60 and the XRA is 58. Note that for purposes of § 4010.8(d), the plan's assumed retirement rates are replaced by the XRAs.

(iii) *Determination of benefit liabilities.* The benefit liability for A is the sum of the present value of A's full accrued benefit at age 65 for the portion of A that terminates between age 40 and age 45, the present value of A's accrued benefit reduced for commencement at age 60 for the portion of A that terminates between age 45 and age 54, and the present value of A's accrued benefit reduced for commencement at age 58 for the portion of A that remains employed until age 55.

(4) *Example 4.* Assume the same facts as in Example 3, except that Employee B, the sole active participant, is age 40 with 15 years of service. The portion of B that is assumed to terminate before age 50 would be entitled to receive a reduced benefit as early as age 55 or an unreduced benefit at age 65. That portion of B has an ERA of 55, a URA of 65, and an XRA of 60. The benefit liability for that portion of B is the present value of B's benefit accrued as of the measurement date assuming B commences a reduced benefit at age 60. The portion of B that survives to age 50 would be entitled to receive an unreduced benefit as early as age 55. That portion of B has an ERA, URA and XRA of 55. The benefit liability for this portion of B is the present value of B's benefit accrued as of the measurement date assuming B retires and commences unreduced payments at age 55.

(f) *Multiple employer plans.* If, with respect to a multiple employer plan, the actuarial information required under this section 4010 for the plan year ending within the filer's information year has been filed under part 4010 by another filer, the filer may include this actuarial information by reference. The filer must include a comment in the submission reporting the name, EIN and

plan number of the multiple employer plan and the name of the other filer that submitted this information. The filer is not relieved of responsibility for the filing of the actuarial information. If the information filed by the other filer is incomplete or erroneous, PBGC may assess a filing penalty against the filer.

(g) *Previous filing for plan year.* If the actuarial information for the plan year as required under this § 4010.8 has been submitted by the filer in a previous 4010 submission, the filing may include that actuarial information by reference to the previous submission.

#### 10. In § 4010.9:

a. Paragraph (a) is amended by removing the words "the PBGC's" and adding in their place the word "PBGC's".

b. Paragraph (d) is amended by removing the words "the PBGC" where they appear three times and adding in their place each time the word "PBGC".

c. New paragraph (f) is added at the end of the section to read as follows:

#### § 4010.9 Financial information.

\* \* \* \* \*

(f) *Multiple employer plans.* A filer that is a contributing sponsor of a multiple employer plan need not provide financial information for another contributing sponsor of the multiple employer plan if that other contributing sponsor is not a member of the filer's controlled group.

11. Section 4010.10 is amended by removing the words "the PBGC" where they appear once in the section heading, once in paragraph (a), once in paragraph (b), twice in paragraph (c), twice in paragraph (d), and once in paragraph (e), and adding in their place each time the word "PBGC".

#### 12. In § 4010.11:

a. The existing text of the section is redesignated as paragraph (b).

b. Redesignated paragraph (b) is amended by adding the paragraph heading "*Other waiver authority.*"; by removing the words "the PBGC" where they appear three times and adding in their place each time the word "PBGC"; by removing the word "must" where it appears twice and adding in its place each time the word "should"; and by removing the words "of this part" where they appear twice.

c. The section heading is revised, and new paragraphs (a), (c), (d), and (e) are added, to read as follows:

#### § 4010.11 Waivers, extensions, and exclusions.

(a) *Aggregate underfunding not in excess of \$15 million.* Unless reporting is required by § 4010.4(a)(2) or (a)(3), reporting is waived for an information

year if, for the plan years ending within the information year, the aggregate 4010 funding shortfall for all plans (including any exempt plans) maintained by the members of the contributing sponsor's controlled group (disregarding those plans with no 4010 funding shortfall) does not exceed \$15 million.

\* \* \* \* \*

(c) *4010 funding shortfall for waivers and exemptions—(1) General.* Except as provided in paragraph (c)(2) of this section, a plan's 4010 funding shortfall for a plan year equals the funding shortfall as provided under ERISA section 303(c)(4) determined as of the valuation date for the plan year, except that the value of plan assets is determined without regard to the reduction under ERISA section 303(f)(4)(b).

(2) *Transition rule for plan years beginning before 2008.* For plan years beginning before 2008, a plan's 4010 funding shortfall for a plan year equals the excess, if any, of the plan's current liability over the value of plan assets. For this purpose, both current liability and plan assets are determined in the manner provided in § 4010.4(b)(3), except that assets are not reduced by the credit balance in the funding standard account.

(3) *Multiple employer plans.* For purpose of § 4010.8(c) and paragraph (a) of this section, the entire 4010 funding shortfall of any multiple employer plan for which the filer or any member of the filers controlled group is a contributing sponsor is included.

(d) *Reduced reporting for multiple employer plans—(1) In general.* Reporting is waived for a contributing sponsor of a multiple employer plan if neither the contributing sponsor nor any member of the contributing sponsor's controlled group is a contributing sponsor of any other plan, provided at least one contributing sponsor (or the plan administrator on behalf of a contributing sponsor) provides a timely filing under this part 4010 containing the following information:

(i) Identifying information for each contributing sponsor of the multiple employer plan (as required under § 4010.7) determined as of the plan year ending within the contributing sponsor's information year;

(ii) Actuarial information for the multiple employer plan (as required under § 4010.8) for the plan year ending within the contributing sponsor's information year; and

(iii) Financial information as required § 4010.9 (or such reduced information as PBGC may provide on its Web site) for every contributing sponsor of the

multiple employer plan who, for a salary related plan formula, is one of the ten largest contributing sponsors based on required contributions for the plan year ending within the contributing sponsor's information year, or, for an hourly plan formula, is one of the ten largest contributing sponsors based on number of participants for the plan year ending within the contributing sponsor's information years (using the census data as determined under § 4010.8(d)(1)).

(2) *Information year.* For purposes of this paragraph (d) (including determining when a filing is due), if any two contributing sponsors report financial information on the basis of different fiscal years, the information year shall be the calendar year.

(e) *Terminated plans.* A plan may be excluded for purposes of §§ 4010.4(a)(1) and (3), 4010.8, and 4010.11(a) and (d), if, on or before the last day of the information year, all of the assets (excluding excess assets) have been distributed pursuant to a standard termination under Subpart B of part 4041 of this chapter.

#### § 4010.12 [Amended]

13. Section 4010.12 is amended by removing the words "section 4010(c) of ERISA" and adding in their place the words "ERISA section 4010(c)"; and by removing the words "the PBGC" and adding in their place the word "PBGC".

#### § 4010.13 [Amended]

14. Section 4010.13 is amended by removing the words "section 4071 of ERISA" and adding in their place the words "ERISA section 4071"; and by removing the words "the PBGC" where they appear twice and adding in their place each time the word "PBGC".

Issued in Washington, DC, this 14th day of February, 2008.

**Charles E.F. Millard,**

*Director, Pension Benefit Guaranty Corporation.*

[FR Doc. E8-3124 Filed 2-19-08; 8:45 am]

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## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

#### 37 CFR Part 1

[Docket No.: PTO-P-2005-0027]

RIN 0651-AB99

#### Revision to the Time for Filing of a Biological Deposit and the Date of Availability of a Biological Deposit

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This notice proposes changes to the rules of practice to require that any deposit of biological material be made before publication of a patent application, and that all restrictions on access to the deposited material imposed by the depositor be removed upon publication. The proposed changes will provide that the public has access to biological materials referenced in the disclosure of a patent application to the same extent that access to the remainder of the disclosure is available. The public policy basis for allowing access to a referenced item is the same whether the item is another patent application or a deposited biological material.

**DATES:** To be ensured of consideration, written comments must be received on or before April 21, 2008. No public hearing will be held.

**ADDRESSES:** Comments should be sent by e-mail addressed to [AB99.Comments@uspto.gov](mailto:AB99.Comments@uspto.gov). Comments may also be submitted by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA, 22313-1450, or by facsimile to (571) 273-7754, marked to the attention of Kathleen Kahler Fonda. Although comments may be submitted by mail or facsimile, the Office prefers to receive comments via the Internet. If comments are submitted by mail, the Office prefers that the comments be submitted on a DOS formatted 3½ inch disk accompanied by a paper copy.

Comments may also be sent by e-mail via the Federal eRulemaking Portal. See the Federal eRulemaking Portal Web site (<http://www.regulations.gov>) for additional instructions on providing comments via the Federal eRulemaking Portal.

The comments will be available for public inspection at the Office of the Commissioner for Patents, located in Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia, and will be available via the Office Internet Web site

(address: <http://www.uspto.gov>). Because comments will be made available for public inspection, information that is not desired to be made public, such as an address or phone number, should not be included in the comments.

#### FOR FURTHER INFORMATION CONTACT:

Kathleen Kahler Fonda, Legal Advisor, Office of the Deputy Commissioner for Patent Examination Policy, by telephone at (571) 272-7754; by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA, 22313-1450; or by facsimile to (571) 273-7754, marked to the attention of Kathleen Kahler Fonda.

#### SUPPLEMENTARY INFORMATION:

Under 35 U.S.C. 112, first paragraph, the disclosure of a patent application must contain a written description that enables a person skilled in the art to make and use the claimed invention. The Supreme Court has consistently recognized that, in exchange for the rights associated with a patent grant, an inventor must disclose his invention in such a manner that would allow the public to make and use it without undue experimentation. *See Universal Oil Prods. Co. v. Globe Oil & Refining Co.*, 322 U.S. 471, 484, 61 USPQ 382, 388 (1944) ("But the quid pro quo is disclosure of a process or device in sufficient detail to enable one skilled in the art to practice the invention once the period of the monopoly has expired \* \* \*"); *Brenner v. Manson*, 383 U.S. 519, 534, 148 USPQ 689, 695 (1966) ("The basic quid pro quo contemplated by the Constitution and the Congress for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility."); *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142, 60 USPQ2d 1865, 1873 (2001) ("The disclosure required by the Patent Act is 'the quid pro quo of the right to exclude.'" (quoting *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 484, 181 USPQ 673, 679 (1974))).

The American Inventors Protection Act of 1999 (AIPA) (Title IV of the Intellectual Property and Communications Omnibus Reform Act of 1999 (S. 1948) as introduced in the 106th Congress on November 17, 1999) was incorporated and enacted into law on November 29, 1999, by 1000(a)(9), Division B, of Public Law 106-113, 113 Stat. 1501 (1999). The AIPA provided for publication of patent applications eighteen months after the earliest date for which priority benefit was sought (amending title 35 of the United States Code to add paragraph (b) to section