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Annual Funding Notice Replaces SAR for PBGC-Covered Plans

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Section 501(a) of the Pension Protection Act of 2006 (PPA) amended ERISA §101(f) for plan years beginning after December 31, 2007, replacing the SAR with an *Annual Funding Notice* for PBGC-covered pension plans. The first notices are due April 30, 2009 for certain 2008 calendar year plans. Fortunately, the DOL heard concerns of the actuarial and benefits community and issued Field Assistance Bulletin (FAB) No. 2009-01 on February 10, 2009. The FAB included Frequently Asked Questions (FAQs) along with model notices for both single-employer and multiemployer plans and stated that, pending further guidance, use of an appropriately completed model notice will satisfy the new content requirements.

The FAB may be found at <http://www.dol.gov/ebsa/regs/fab2009-1.html>

▲ Which Plans Have PBGC coverage?

Under Title IV of ERISA, the PBGC insures workers in most private-sector defined benefit plans in the event that their plans do not have sufficient assets to pay benefits when the plan is terminated because of the bankruptcy or other financial distress of the sponsoring employer(s). PBGC insures both single-employer and multiemployer defined benefit plans.

There are some exceptions to PBGC coverage:

- Plans established and maintained exclusively for substantial owners - Form 5500-EZ filers among them - are not covered by PBGC. Generally, a substantial owner is anyone who owns the entire interest in an unincorporated business, or a partner or shareholder who owns (directly or indirectly) more than 10 percent of a partnership or corporation.
- Plans of professional services employers that have always had 25 or fewer active participants are not insured. This includes physicians, dentists, chiropractors, osteopaths, optometrists, other licensed practitioners of the healing arts, lawyers, public accountants, public engineers, architects,

draftspersons, actuaries, psychologists, social or physical scientists, and performing artists.

- Unfunded plans are not insured

▲ Earlier Delivery Date than SAR

As noted, the new annual funding notice requirements apply to plan years beginning after 2007. The time by which participants and beneficiaries must receive the notice, however, is driven by the participant count on *each day* during the plan year preceding the year to which the notice relates. [See ERISA §303(g)(2)(B).] So, for 2008 plan year notices, look to the participant count on *each day* of the 2007 plan year.

More than 100 Participants. Plans that covered more than 100 participants must distribute the notice no later than 120 days after the close of the plan year. For calendar year plans, the deadline is Thursday, April 30, 2009, which is 120 days after the close of the 2008 plan year.

100 or Fewer Participants. Plans that covered 100 or fewer participants on each day during the plan year preceding the reporting year are subject to a timing rule that is somewhat - but not entirely - similar to the SAR rule. For these plans, the annual funding notice must be provided no later than the *earlier* of:

- the *date* on which the Form 5500 report *is filed*, or
- the latest date the annual report could be filed, including extensions.

▲ Model Notices

Model notices have been included for single-employer plans (Appendix A) and multiemployer plans (Appendix B) [there are Word versions of the models on the EBSA website]. The models anticipate display of information for the current and two preceding plan years. Since PPA funding rules first became effective for 2008 plan years, the relevant information is not

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available for 2006 and 2007 plan years; therefore, the FAB includes Appendix C with an explanation of the transition period.

In FAQ #2, the FAB advises that use of an appropriately completed model notice will satisfy the content requirements of ERISA §101(f). In addition, the FAB notes that use of the model notice is not mandatory; however, it is expected that most plans will take advantage of the model to show they have acted in good faith and with a reasonable interpretation of the guidelines.

It should be noted that the model Annual Funding Notice for multiemployer plans that has been used prior to 2008 plan years does not contain sufficient information under the new rules and should no longer be used. [FAQ #4].

▲ Notice Content

Participants and beneficiaries are accustomed to the content of the SAR. The new Annual Funding Notice goes far beyond the information provided in the SAR by including data about the plan's investment policy and the funding target attainment percentage. [See FAQs #6-13.] In addition, sections entitled *Summary of Rules Governing Termination of Single-Employer Plans* and *Benefit Payments Guaranteed by the PBGC* appear in the single-employer notice. Financially troubled multiemployer plans must include a section entitled *Summary of Rules Governing Plans in Reorganization and Insolvent Plans*. Actuaries may find that they will be required to generate additional calculations for the notice that traditionally have not been part of the annual valuation work..

The length of the model notice is troublesome - but necessary - to incorporate all of the required data. Large plan filers may find drafting of the notice complicated by the fact that the audit of the plan and the related Form 5500 are incomplete. It's not clear from the FAB that the figures reported on the notice must tie precisely to that reported on Form 5500, but every effort should be made to use the best data available at the time the notice is due.

▲ Distribution of the Notice

The law requires the Notice be distributed to "...the Pension Benefit Guaranty Corporation, to each plan participant and beneficiary, to each labor organization representing such participants or beneficiaries, and in the case of a multiemployer plan, to each employer that has an obligation to contribute to the plan." [ERISA §101(f)(1).]

However, in FAQ #4, the DOL indicates that a single-employer plan with liabilities that do not exceed plan assets by more than \$50 Million is not required to provide the notice to

PBGC, unless the PBGC sends a written request to the plan administrator. Multiemployer plans must continue to provide a copy of the Notice to PBGC, as they have for each plan year beginning after 2004.

In FAQ #5, the DOL notes that it will not take any enforcement action against any insolvent multiemployer plan that is in compliance with the insolvency notice requirements under Title IV of ERISA. However, a plan that emerges from insolvency or that ceases to comply with the insolvency notice requirements is subject to the annual funding notice rules.

The notice may be furnished to recipient.s electronically, as discussed in FAQ #14. In most cases, however, a variety of delivery methods will be utilized to ensure compliance with ERISA and the E-SIGN Act. Generally, ERISA Reg. §2520.104b-1(c) allows for electronic delivery of documents to a participant who has the ability to effectively access documents furnished in an electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee and to whom the access is an integral part of their duties. In addition, other recipients may affirmatively consent to electronic receipt of such documents. A paper copy must be made available to any [electronic] recipient who requests it.

▲ SAR Still Applies

A defined benefit plan that must provide the Annual Funding Notice no longer provides an SAR to plan participants and beneficiaries. Other defined benefit plans as well as defined contribution plans and certain welfare benefit plans must continue to provide the SAR to participants and beneficiaries on an annual basis.