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**PBGC Termination Options**

- Usual thinking is that there are 2 options but there are really 3
  - Standard
  - Distress
  - Involuntary “PBGC-initiated”

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**PBGC Termination Options**

- Standard
  - Mostly operational
    - follow the rules & submit the filings and PBGC will accept as a standard termination

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## PBGC Termination Options

- Distress
  - Assets not sufficient to pay all benefits
  - Bankruptcy, liquidation or must prove plan sponsor (+ controlled group) unable to support plan
  - PBGC takes over as trustee and pays benefits
  - \$ payable to the PBGC
    - Underfunded amount + unpaid premiums + termination premiums
    - May be able to negotiate less than full payment to PBGC
  - Plan Sponsor initiates the process by applying to the PBGC
    - Burden of proof is on the Plan Sponsor
    - Significant documentation required

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## PBGC Termination Options

- Involuntary "PBGC Initiated"
  - PBGC may terminate if:
    - Failed to meet minimum funding requirements
    - Cannot pay current benefits when due
    - Lump sum paid to substantial owner
    - Loss to PBGC expected to increase unreasonably if not terminate
    - PBGC must terminate if assets unavailable to pay benefits currently due
  - Plan sponsor may (and probably should) reach out to PBGC
    - Do not need to wait until PBGC initiates process

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## Where to Start

- Step 1: Is standard termination possible?
  - Are assets sufficient?
  - Can assets be made sufficient?
    - Additional contributions
    - Majority Owner forego (waiver)
    - Continue plan for several years to allow ongoing contributions & asset growth bring plan into sufficiency

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### Where to Start

- Step 2: Is distress termination possible?
  - Are distress criteria met?
  - Can plan sponsor document distress criteria can be met?
    - Corporate & plan documentation
    - Financial documentation – historical & projections
    - *Including supporting documentation that explains/proves the above*
  - Is the plan sponsor prepared to present his case to the PBGC?

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### Where to Start

- Step 3: Does plan satisfy one of the requirements for PBGC initiated (involuntary) termination?
  - Are one or more of the criteria met?
  - Can plan sponsor document the criteria are met?

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### Where to Start

- Step 4: Request a Pre-filing Consultation with the PBGC
  - Not required but useful and strongly encouraged by the PBGC
  - Focused on distress termination but also addresses PBGC-initiated termination if distress criteria do not appear to be met
  - Informal, conference call with PBGC, plan sponsor and/or advisors
  - Run by PBGC Corporate Finance & Restructuring Department
    - Send email to [distress@pbgc.gov](mailto:distress@pbgc.gov) or call (202) 326-4070 to request

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## Where to Start

- Step 4: Request a Pre-filing Consultation with the PBGC
  - May want to provide most recent valuation and recent financial statement before the call so PBGC can review & be better prepared
  - PBGC's goals are:
    - Assist plan sponsor to determine if plan likely qualifies for distress/involuntary
    - Make sure plan sponsor understands the process & need for documentation
    - PBGC can assign a team to work with plan sponsor/advisors before actual application to help them with the application

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## What is Distress

- Statutory Criteria
  1. Liquidation in bankruptcy or insolvency
  2. Reorganization in bankruptcy w/ court approval of termination
  3. Inability to pay debts when due and continue in business without distress termination
  4. Unreasonably burdensome pension costs solely due to declining covered employment

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## What is Distress

- 3<sup>rd</sup> criteria – cannot continue in business
  - Need to prove plan sponsor cannot continue with current level of pension liabilities *but can reasonably expect to continue in business for at least 5 years* if PBGC takes accepts distress termination
    - High burden of proof
    - Very important to provide business projections & analyses supporting how business will continue
    - May need to bring in other professionals to prepare these analyses

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### What is Distress

- Has plan sponsor done everything else that can be done before applying for distress termination?

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### Distress Process

- Filings
  - Notice of Intent to terminate in a distress termination to interested parties (participants *and* PBGC)
  - Forms 600, 601, EA-D; participant & asset detail
  - Corporate & plan documentation
  - Financial documentation – historical & projections
  - *Including supporting documentation that explains/proves the above*
- Process can take significant time to complete
- If distress criteria not met, plan continues (PBGC will monitor closely)

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### Distress Process

- Not cut & dried like standard termination
- Plan sponsor must be able to document (effectively prove) that plan meets criteria
- PBGC team assigned to the plan prepares an analysis either recommending or not recommending the PBGC to accept
  - Need to convince the team plan qualifies so the more supporting documentation the better
- PBGC manager reviews this analysis & makes final decision

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### PBGC Initiated Process

- PBGC officially initiates but impetus may come from
  - Reportable event filing re liquidation
    - Often not filed or filed late, particularly for smaller plans
    - Actuary (or person who understands filing requirement) may not know of the event until well after the fact
  - Plan sponsor contacts PBGC
    - Possible alternative for a plan sponsor that is in distress but cannot show that it can continue in business for 5 years

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### PBGC Initiated Process

- PBGC manages the process
  - No specific forms – PBGC will request plan & financial information
  - Not cut & dried – plan sponsor may need to show it meets the criteria
- Process can take significant time to complete
- PBGC assigns team to review (similar to distress termination process)

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### Standard Termination Notice

- Form 500
- Form 500-EA-S
- Form 500-REP-S
- Copy of Notice of Intent to Terminate (NOIT)
- Sample Notification of Plan Benefits (NOPB)

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## Standard Termination Notice

- By mail:
  - Pension Benefit Guaranty Corporation Standard Termination Compliance Division Processing and Technical Assistance Branch 1200 K Street, NW Washington, DC 20005-4026
- By email:
  - [STfilings@PBGC.gov](mailto:STfilings@PBGC.gov)
- By fax:
  - (202) -326-4001 or (202) -326-4260
- Original signatures no longer required



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## Standard Termination Notice

- Post Distribution Certification Form 501
  - Proof of Distributions.
  - Plan Documents.
  - Explanation if final distribution less than value reported on EAS.
  - Missing Participants Forms, if applicable.
- Files can be uploaded to PBGC's secure link:
  - <http://pbgc.leapfile.com>
  - Use reviewer's email [last.first@PBGC.gov](mailto:last.first@PBGC.gov)

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## Standard Termination Notice

STEP	ISSUING	Earliest Date	Latest Date
Resolution / Plan Amendments	Generally done with NOIT but can be later	with NOIT	PTD if no 204(h) requirement
ERISA 204(h) notice	At least 15 days prior to cessation of accruals (45 for larger plans 100)		PTD/Recalc date - 15 days
Notice of Intent to Terminate	At least 60 but no more than 90 days prior to PTD	DOPT - 90	DOPT - 60 days
Notice of Annuity Information	No later than 45 days prior to distribution of plan assets	Include in NOIT	DO - 45 days
Notice of Plan Benefits	Prior to filing PBGC Form 500	with NOIT	500 Filing Date
PBGC Form 500 et al.	No later than 180 days after PTD		PTD + 180 days
Distribution of Plan Assets	240 days after 500 filed/or 120 days after after LDO if 500 filed no later than Form 500.	Filing Date + 60	Filing Date + 240
PBGC Post Distribution Form 506	No later than 30 days after final distribution, no penalty if 90 days. Proposed change to 60 days.	Distribution Date	DO + 90 days
Notice of Annuity Contracts	No later than 30 days after distribution completed	Distribution Date	DO + 30 days
Missing Participant	Same as form 501	Distribution Date	DO + 30 days*
Final PBGC Premium Filing	Earlier of normal deadline or date 501 filed		501 Filing Date
Final Form 5500 / 5500-IF / 5500-E2 and Schedule SB	7 month after final distribution without ext.	DO + 7 months	DO + 95/2 months
IRS form 5310 et al.	No later than 27th filing to allow extension on PBGC distribution deadline		PTD + 180

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## Dates

- Pick your dates
  - Freeze/Close Entry (if not already frozen)
    - Provide 204(h) notice if plan not previously frozen.
  - Proposed Termination Date (PTD) – based on date or date range that NOIT will be provided.
    - Can be any date including weekends and holidays.
    - If counting forward, no less than 60 no more than 90 from date NOIT issues (counting starts day after)
    - Can be counted backwards instead from desired PTD to determine the earliest and latest date for NOIT.
      - If the 60<sup>th</sup> day before the PTD is a Saturday the notice is timely if issued on the following Monday even though that's only 58 days before the PTD.

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## Dates

- Standard Termination Notice (STN)/500 filing date.
  - Must be filed on or before the 180th day after proposed termination date.
  - Must provide Notice of Plan Benefits by filing date.
  - Can file form 500 before proposed termination date.
- Proposed Distribution Date(PDD)
  - 60 days after Form 500 filed, or Plan Termination date if later.
  - No later than 180 days PBGC 60-day review period, or 240 days after 500/STN filed.
  - PDD referenced on the EA-S and in the Notice of Plan Benefits (NOPB).

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## Dates

- Example of short end time period:
- Sponsor informs TPA on 8/9/19 they want to terminate plan.
  - NOIT to go out in 8/16/19 – 8/22/19 range
  - Plan accruals will be frozen on 8/31/19
  - PTD set for 10/31/19
  - STN mailing date set for 9/2/19
  - Proposed Distribution date will be 11/1/19.
    - Cannot be less than 60 days after PBGC receives STN

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## Dates

- Send out concurrently:
  - Notice of Intent to Terminate - no sig needed.
  - Termination Amendment/Resolution
  - Notice of Plan Benefits (NOPB)
  - Benefit Waivers / Commitment to Fund
  - PBGC forms 500 and 500 REP-S.

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## Dates

- On the long end, with a PTD of 10/31/19 the form 500 filing can be made as late as 4/28/20 (180 days after PTD) and proposed distribution date as late as 12/24/20 (240 days after STN/500 filing).

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## Notice Of Intent to Terminate

- Who gets the NOIT?
  - Participants
  - Beneficiaries of deceased participants
  - Alternate payee under QDRO
  - Employee organization that represents any group of participants.

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## Notice Of Intent to Terminate

- Model NOIT in Appendix B of instructions.
  - Statement about intent to terminate.
  - Statement about plan sufficiency.
  - Name/EIN of all contributing sponsors.
  - Plan number.
  - Statement for current retirees.
  - Statement on Proposed Termination Date.
  - Contact Person.

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## Notice Of Intent to Terminate

- One of the following statements:
  - Benefit accruals will cease as of the termination date, but will continue if the plan does not terminate.
  - A plan amendment has been adopted under which benefit accruals will cease, in accordance with section 204(h) of ERISA, as of " " whether or not the plan is terminated.
  - Benefit accruals ceased, in accordance with section 204(h) of ERISA, as of " ".

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## Notice Of Intent to Terminate

- How to obtain an SPD.
- Notification of Plan Benefits (NOPB), either
  - You will receive notification at a later date, or
  - The plan administrator has attached a written notification regarding your plan benefits.
- Identity of Insurers
- End of PBGC Guarantee
- Attach Notice of State Guaranty Association Coverage of Annuities

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### Notice Of Intent to Terminate

- NOIT may be issued by hand delivery, first class mail, electronic media and commercial delivery.
  - Use last known address.
  - Posting is not permissible.

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### Notice Of Intent to Terminate

- Consider having sponsor sign a 'NOIT certification' to confirm dates NOIT was issued:
  - As Plan Administrator, I hereby confirm this Notice to terminate the Plan was distributed to all Plan Participants on or after the earliest date and on or before the latest date listed below:  
 Earliest Date: 8/16/19    Latest Date: 8/22/19

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### Termination Amendment

- Freeze plan 15 days from amendment adoption date.
- Clarify any issues such as final year benefit accruals based on freeze date compensation.
- Fully Vest Participants under termination
  - '100% vesting conditioned upon finalization of the Plan Termination'.

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### Termination Amendment

- Calculate PVAB/HAB as of PDD – will plan have excess or insufficient assets?
  - Ask for current asset value and project to PDD.
- Excess Assets:
  - Check document to see what how excess assets are treated.
  - Amend to provide clarity or make allowable changes to existing language

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### Termination Amendment

#### • REALLOCATE EXCESS

- Non-specific language in term amendment:
  - 'such excess shall be allocated to the Participants in a non-discriminatory manner that complies with the Internal Revenue Code and regulations thereunder.
  - can add language about aggregation with PS plan.
- Some prefer more specific language.
- In some cases may require specific language
  - Amending from revert to reallocate, but only want to reallocate a specific amount.

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### Termination Amendment

- Reallocation treated just like any other accrual increase and subject to all of the Code.
  - 401(a)(26)
  - 410(b) and Top Heavy
    - Stand alone or aggregated with a DC plan.
  - 401(a)(4)
- If there are regular plan accruals in the year of termination such accruals will be combined with the excess asset accrual for testing.

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## Termination Amendment

- 401(a)(4) options
  - Safe Harbor – also pass 410(b)
    - i.e. pro-rata on PV of 1% x Hi 3 or multiply by YOCs limited to 5.
    - Pro-rata on PVAB
      - » Problematic if PVAB's were non-discriminatory only because DB was aggregated with DC for (a)4
  - DB Stand-alone testing

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## Termination Amendment

- Aggregate with DC Plan
  - Make sure sponsor understands DC allocations will be required in for the year of termination.
  - Timing can be tricky.
    - Excess asset benefits are tested for 2019 calendar year.
    - Distribution will occur in November 2019, will do final testing in early 2020.
  - Estimate and leave wiggle room, particularly for 401(a)(26).
  - 401(a)(4) can often work out with PS plan allocations if there is a PS plan.

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## Termination Amendment

- **REVERT EXCESS**
  - Can't amend from allocate to revert at termination.
  - All DB/CB plan documents should default with excess assets reverting back to company with the exception of owner only plans.
  - Revert excess language must be in effect for 5 years (or life of plan if less) found in 4044(d)(2)(A) & (B)
  - Can amend to allow a specific portion of the excess to be reallocated to participants.

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### Termination Amendment

- Reversions are subject to 20% excise tax provided the Plan either...
  - Establishes a Qualified Replacement Plan (QRP) under 4980(d)(2)
    - An existing plan satisfies the requirement.
  - Or Increases benefits meeting requirements under 4980(d)(3).
    - Pro-rata increases to qualified participants, not less than 20% of excess is allocated and certain limitations to non-actives.

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### Termination Amendment

- **Insufficient Assets**
- Benefits must be fully funded to terminate in standard termination.
  - Election to make sufficient by 'forgoing benefits'.
  - Must be a Majority owner to 'waive' benefits.
  - If no majority owners, or if company plans on fully funding benefits with a Plan contribution, EA may include the value of a 'commitment to fund' as a plan asset.
    - See Appendix D of Form 500 Instructions

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### Termination Amendment

- in the event assets are insufficient, the full Present Value of Accrued Benefits will be paid to participants who are non-majority owners. The benefits for participants who are majority owners shall be reduced to the extent needed for assets to be sufficient.

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### Majority Owner 'Waiver'

- Must be in writing
- Spouse must consent to waive QJSA.
- Election window: Date Notice of Intent (NOIT) issued up to distribution date.
- Owner status determined at time of election, no lookback.
  - Timing vital if stock sale occurring.
- Consistent with any prior QDRO

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### Majority Owner 'Waiver'

- I, 'owner name', a majority owner within the meaning of Section 4022(b)(5)(A)(iii) of the Employee Retirement Income Security Act of 1974 ("ERISA"), hereby elects to irrevocably forfeit my rights to any benefit already accrued so that the assets available to pay benefits to the Participants of the terminated 'plan name' are sufficient to cover all liabilities of such plan. Such election shall not result in any reversion of assets to 'company name'.
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### Majority Owner 'Waiver'

- I, 'spouse name', spouse of the majority owner/Participant named above have been informed of the potential reduction in my spouse's Accrued Benefit and that any survivor benefit to which I may be entitled shall be based on my spouse's Accrued Benefit as calculated pursuant to this election. I agree with and knowingly consent to the above election.

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### Majority Owner 'Waiver'

- IRS does not recognize '**waivers**' for purposes of minimum funding
  - **Waiving benefits to allow plan to terminate does not reduce benefit liabilities used to calculate to calculate required funding under IRC 430**

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### Notification of Plan Benefits

- Must issue NOPB to each affected party no later than when the Form 500/Standard Termination is filed with PBGC.
  - Participants
  - Beneficiaries of deceased Participants
  - QDRO Alternate Payees
- Must issue NOPB by distribution date for anyone who becomes an affected party after the STN is filed.

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### Notification of Plan Benefits

- General Plan Information included on all NOPB categories.
- Categories:
  - Persons in pay status as of PTD.
  - Persons who have validly elected a form and ASD as of PTD or for who benefits will be payable in non-consensual lump sum.
  - All others not in pay status.

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### Notification of Plan Benefits

- For Participants not in pay status will potentially have 5 types of NOPB samples to send with STN filing:
  - Actives
    - Consensual
    - non-consensual
  - Terminated (date of termination must be on NOPB)
    - Consensual
    - non-consensual
  - Zero benefits

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### Review Period

- The PA may not distribute plan assets in connection with termination until PBGC's review period ends.
- However, PA must continue to carry out normal plan operations during termination process.
- While plan cannot purchase annuity contracts or pay any plan benefits (other than death benefits) in any form other than as an annuity, there's an exception for terms if consistent with prior practice, and not likely to jeopardize the plan's sufficiency for plan benefits.

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### Qualified Replacement Plan

- 4980(d)(2) - QRP transfer is either
  - 25% of the excess amount, or
  - Can reduce 25% by benefit increases adopted in the 60 day period ending on PTD.
- Revenue ruling 2003-85
  - Clarifies that a terminated plan QRP transfer can be more than 25% - up to 100%.

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## Qualified Replacement Plan

- QRP Requirements
  - 95% of actives in terminated plan are active Participants in QRP.
  - Direct transfer occurs before any reversion.
  - No less than 25% being transferred
    - or 25% less benefit increases adopted in 60-day period ending on PTD.
  - Transfer amount not includible as income, no deduction and not treated as an employer reversion.

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## Qualified Replacement Plan

- QRP Allocation Requirements
  - Allocation in year of transfer, or
  - Credit to suspense account and allocate no less rapidly than ratably over 7 years
    - Include income credited to suspense account
  - If unable to allocate to a participant due to 415, allocate to other participants.
    - If can't allocate to other participants due to 415 **shall be allocated as provided in 415\***

\* Old 415 language had 415 suspense accounts. Is it a valid interpretation that if you allocate at 415 max for 7 years you still have a valid QRP and can go over 7 years?

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## Qualified Replacement Plan

- If any amount not allocated when QR Plan **terminates**, remaining amounts allocated to participants up to 415.
  - Unallocated amounts treated as reversion
- Not a solution if company will no longer exist OR key players will no longer have compensation....

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