

modification. In accordance with Notice 2007–10, these regulations will be effective for any Bulgarian aktsionerno druzhestvo formed on or after January 1, 2007.

Notice 2007–10 also stated that the regulations would be effective for any Bulgarian aktsionerno druzhestvo formed before January 1, 2007, upon a 50 percent or greater change of ownership in such entity subsequent to that date. See section 7805(b)(1)(C) and § 601.601(d)(2)(ii)(b). The temporary regulations therefore provide that a Bulgarian aktsionerno druzhestvo formed before January 1, 2007, will become a per se corporation on the date that, in the aggregate, a 50 percent or more interest in the entity is owned by a person or persons who were not owners of the entity as of January 1, 2007. In the case of a partnership, an interest means a capital or profits interest. In the case of a corporation, an interest means an equity interest in the entity measured by vote or value.

The standard provided by these temporary regulations for determining the application of the regulations to a Bulgarian aktsionerno druzhestvo formed before January 1, 2007, clarifies the standard described in Notice 2007–10 and the standard to be applied with respect to entities listed in § 301.7701–2(b)(8), including those entities listed in TD 8697, TD 9197, and TD 9235. Comments are requested with respect to this clarification.

### Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. Chapter 5) does not apply to this regulation. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble to the notice of proposed rulemaking published in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact.

### Drafting Information

The principal author of these regulations is S. James Hawes of the Office of Associate Chief Counsel (International); however, other personnel from the IRS and the Treasury Department participated in their development.

### List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

### Amendments to the Regulations

■ Accordingly, 26 CFR part 301 is amended as follows:

### PART 301—PROCEDURE AND ADMINISTRATION

■ **Paragraph 1.** The authority citation for part 301 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

■ **Par. 2.** Section 301.7701–2(b)(8)(vi) and (e)(7) are added and the paragraph heading for paragraph (e) is revised to read as follows:

#### § 301.7701–2 Business entities; definitions.

\* \* \* \* \*

(b) \* \* \*

(8) \* \* \*

(vi) [Reserved]. For further guidance, see § 301.7701–2T(b)(8)(vi).

\* \* \* \* \*

(e) Effective/applicability date. \* \* \*

(7) [Reserved]. For further guidance, see § 301.7701–2T(e)(7).

■ **Par. 3.** Section 301.7701–2T is added to read as follows:

#### § 301.7701–2T Business entities; definitions (temporary).

(a) through (b)(8)(v) [Reserved]. For further guidance, see § 301.7701–2(a) through (b)(8)(v).

(b)(8)(vi) *Certain European entities.* The following business entity formed in the following jurisdiction:

Bulgaria, Aktsionerno Druzhestvo.

(c) through (e)(6) [Reserved]. For further guidance, see § 301.7701–2(c) through (e)(6).

(7) The reference to the Bulgarian entity in paragraph (b)(8)(vi) of this section applies to such entities formed on or after January 1, 2007, and to any such entity formed before such date from the date that, in the aggregate, a 50 percent or more interest in such entity is owned by any person or persons who were not owners of the entity as of January 1, 2007. For purposes of the preceding sentence, the term *interest* means—

(i) In the case of a partnership, a capital or profits interest; and

(ii) In the case of a corporation, an equity interest measured by vote or value.

(8) *Expiration date.* The applicability of this section expires on or before March 18, 2011.

**Linda E. Stiff,**

*Deputy Commissioner for Services and Enforcement.*

Approved: March 12, 2008.

**Eric Solomon,**

*Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. E8–5686 Filed 3–20–08; 8:45 am]

BILLING CODE 4830–01–P

### PENSION BENEFIT GUARANTY CORPORATION

#### 29 CFR Parts 4006 and 4007

RIN 1212–AB11

#### Premium Rates; Payment of Premiums; Variable-Rate Premium; Pension Protection Act of 2006

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule.

**SUMMARY:** This is a final rule to amend PBGC's regulations on Premium Rates and Payment of Premiums. The amendments implement provisions of the Pension Protection Act of 2006 (Pub. L. 109–280) that change the variable-rate premium for plan years beginning on or after January 1, 2008, and make other changes to the regulations. (Other provisions of the Pension Protection Act of 2006 that deal with PBGC premiums are the subject of separate rulemaking proceedings.)

**DATES:** Effective April 21, 2008. (For information about applicability of the amendments made by this rule, see Applicability in the **SUPPLEMENTARY INFORMATION**.)

**FOR FURTHER INFORMATION CONTACT:** John H. Hanley, Director, Legislative and Regulatory Department; or Catherine B. Klion, Manager, or Deborah C. Murphy, Attorney, 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 plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA).

Pension plans covered by Title IV must pay premiums to PBGC. The flat-rate premium applies to all covered plans; the variable-rate premium applies only to single-employer plans. Section 4006 of ERISA deals with premium rates, including the computation of premiums. Section 4007 of ERISA deals with the payment of premiums, including premium due dates and interest and penalties on premiums not timely paid, and with recordkeeping and audits.

On August 17, 2006, the President signed into law the Pension Protection Act of 2006, Pub. L. 109-280 (PPA 2006). PPA 2006 makes changes to the funding rules in Title I of ERISA and in the Internal Revenue Code of 1986 (Code) on which the variable-rate premium is based. Section 401(a) of PPA 2006 amends the variable-rate premium provisions of section 4006 of ERISA to conform to those changes in the funding rules and to eliminate the full-funding limit exemption from the variable-rate premium.

On May 31, 2007 (at 72 FR 30308), PBGC published in the **Federal Register** a proposed rule to amend PBGC's regulations on Premium Rates (29 CFR part 4006) and Payment of Premiums (29 CFR part 4007) to implement the amendment to ERISA section 4006 made by PPA 2006. (PPA 2006 also includes other provisions affecting PBGC premiums that were not addressed in the proposed rule, including provisions that cap the variable-rate premium for certain plans of small employers, make permanent the new "termination premium" (created by the Deficit Reduction Act of 2005) that is payable in connection with certain distress and involuntary plan terminations, and authorize PBGC's payment of interest on refunds of overpaid premiums. Those provisions are or will be the subject of other rulemaking actions. See, for example, PBGC's final rule published December 17, 2007 (at 72 FR 71222).) PBGC received comments on the proposed rule from two commenters—an actuary and an organization representing plan sponsors and service providers. The comments are discussed below with the topics they relate to.

The final rule is nearly the same as the proposed rule. In addition to changes prompted by public comments, PBGC has added two definitional cross-references, clarified the definition of "new plan," eliminated unnecessary verbiage from one of the due date rules, clarified the relationship between the funding interest rate transition rule and the premium funding target, extended the small-plan deadline for making certain elections, clarified how

participants are counted for purposes of determining plan size, provided illustrations of the provision on vesting, and clarified the provision dealing with plans to which special funding rules apply. These changes are discussed below. There are also a few merely editorial refinements in the proposed rule's regulatory language.

#### Overview of Regulatory Amendments

For purposes of determining a plan's variable-rate premium (VRP) for a premium payment year beginning after 2007, the rule requires unfunded vested benefits (UVBs) to be measured as of the funding valuation date for the premium payment year. The asset measure underlying the UVB calculation is to be determined for premium purposes the same way it is determined for funding purposes, except that any averaging method adopted for funding purposes is disregarded. The liability measure underlying the UVB calculation is to be determined for premium purposes the same way it is determined for funding purposes, except that only vested benefits are included and a special premium discount rate structure is used. Filers may make an election (irrevocable for five years) to use funding discount rates for premium purposes instead of the special premium discount rates.

The rule revises the premium due date and penalty structure of the existing regulation to give some plans more time to file and others the ability to make VRP filings based on estimated liabilities and then follow up with amended filings to adjust the VRP without penalty. Three special relief rules for VRP filers are eliminated as no longer appropriate or necessary, and two new relief rules are added.

The rule also explains when certain benefits are considered "vested" and makes some other changes unrelated to PPA 2006. For example, the rule provides explicitly that (in the absence of an exemption) a premium filing made on paper or in any other manner other than the prescribed electronic filing method (applicable to all plans for plan years beginning after 2006) does not satisfy the requirement to file. It also clarifies and strengthens recordkeeping and audit provisions.

A more detailed discussion follows.

#### Variable-Rate Premium Determination Dates

Under ERISA section 4006(a)(3)(E)(i) and (ii), a plan's per-participant VRP for a plan year is generally—

\$9.00 for each \$1,000 (or fraction thereof) of unfunded vested benefits ["UVBs"] under the plan as of the close of the preceding plan year.

divided by the plan's participant count as of the close of the preceding plan year. (Under ERISA section 4006(a)(3)(H), added by section 405 of PPA 2006, the per-participant VRP is capped at \$5 times the participant count as of the close of the prior plan year for certain plans of small employers. The cap provision is the subject of another rulemaking.) Under ERISA section 4006(a)(3)(A)(i), the per-participant VRP is multiplied by the number of participants "in [the] plan during the plan year" to yield the total VRP. The existing premium rates regulation treats all of these provisions as referring to a single determination date. In most cases, this is the last day of the prior plan year; it is the first day of the premium payment year (the plan year for which the premium is being paid) for two categories of plans: new and newly covered plans (which are not in existence as covered plans on the last day of the prior plan year) and certain plans involved in plan spinoffs and mergers as of the beginning of the premium payment year (which otherwise would double-count or not count certain participants and UVBs for premium purposes).

The term "unfunded vested benefits" ("UVBs") is defined in ERISA section 4006(a)(3)(E)(iii). In section 4006(a)(3)(E)(iii) before amendment by PPA 2006, "UVBs" is defined as unfunded current liability (a term found in the funding provisions of the Code and Title I of ERISA) determined by counting only vested benefits and using a special interest rate and (under certain circumstances) a special measure of plan assets. PPA 2006 changes the funding rules for single-employer plans, eliminating the concept of current liability for plan years beginning after 2007. (As discussed below, certain plans will not use the new funding rules until a later date.) To conform to this change, PPA 2006 changes the definition of UVBs in ERISA section 4006(a)(3)(E)(iii). As amended by PPA 2006, for plan years beginning after 2007, section 4006(a)(3)(E)(iii) provides that "UVBs"—

means, for a plan year, the excess (if any) of \* \* \* the funding target of the plan as determined under [ERISA] section 303(d) [corresponding to Code section 430(d)] for the plan year by only taking into account vested benefits and by using the interest rate described in [ERISA section 4006(a)(3)(E)(iv)], over \* \* \* the fair market value of plan assets for the plan year which are held by the plan on the valuation date.

New ERISA section 303(g) says that with certain exceptions not relevant here, "all determinations under this section [which includes the definition

of “funding target” in section 303(d)(1) for a plan year shall be made as of the valuation date of the plan for such plan year.” Thus PBGC concludes that the “valuation date” for plan assets referred to in new section 4006(a)(3)(E)(iii) is the valuation date determined under section 303(g)(2). In general (under section 303(g)(2)(A)), the valuation date for a plan year is the first day of the plan year, but certain small plans may designate a different valuation date (under section 303(g)(2)(B)), which may be any day in the plan year.

The change in the definition of UVBs thus creates ambiguity about the date as of which UVBs are to be measured. Section 4006(a)(3)(E)(ii), which was not changed by PPA 2006, refers to two plan years—the “plan year” for which the VRP is being paid (the premium payment year) and the “preceding plan year,” at the close of which UVBs are to be measured. New section 4006(a)(3)(E)(iii) refers only to the “plan year” in defining UVBs. And a plan’s funding target and assets—the elements of UVBs—are to be measured as of the valuation date, which need not be the close of the plan year and which for many plans (those not small enough to elect otherwise) must be the beginning of the plan year.

To resolve the statutory ambiguity, PBGC is adopting a rule regarding the date as of which UVBs are to be measured. In view of the following considerations, PBGC is requiring that UVBs be measured as of the valuation date in the premium payment year rather than a date in the prior plan year.

Historical data indicate that most premium filers use beginning-of-the-plan-year valuation dates for funding purposes; under PPA 2006 many of them will be required to do so. Although funding valuations don’t themselves produce UVB numbers that can be used for VRP purposes, they involve the gathering of the same basic data for analysis, and the valuations are done in the same way, simply using different assumptions. It would be burdensome and impractical to require plans that must do funding valuations as of the first day of a plan year to do separate valuations as of the last day for VRP purposes.

Requiring a funding valuation done as of the first day of the prior plan year to be “rolled forward” to the last day of the prior plan year is likewise burdensome and impractical. Instructions for “roll-forwards” would necessarily be complex, especially in light of the new “segment rate” interest assumption under ERISA sections 303(h)(2)(C) and 4006(a)(3)(E)(iv) as amended by PPA 2006. And “rolled-forward” valuations

would tend to be inaccurate because correcting for the many changes in circumstances that can occur during the course of a year involves a significant element of estimation.

Furthermore, basing the VRP on a valuation done in the premium payment year reflects a plan’s current funding status much better than basing it on a valuation done in the prior year, especially a valuation done as of the first day of the prior year. And with some changes (discussed below) in PBGC’s premium due date and penalty rules, there will be adequate time for plans to compute premiums based on a premium payment year valuation.

Accordingly, this rule requires that UVBs be measured as of the valuation date for the premium payment year (referred to as the “UVB valuation date”) and adjusts premium due dates and penalty rules to accommodate the fact that this UVB valuation date is later (by at least a day and in some cases perhaps as much as a year) than “the close of the preceding plan year,” the date used under section 4006(a)(3)(E) before amendment by PPA 2006. (No change is made in the date as of which participants are counted, which the regulations as amended by this final rule refer to as the “participant count date.”)

#### **Variable-Rate Premium Computation**

As noted above, UVBs under PPA 2006 are based on a plan’s funding target and the market value of its assets. Under new ERISA section 303(d)(1), as set forth in section 102 of PPA 2006, “the funding target of a plan for a plan year is the present value of all benefits accrued or earned under the plan as of the beginning of the plan year.” But new ERISA section 303(g) makes clear that the funding target is to be determined as of the valuation date, which for small plans may not be the beginning of the plan year. PBGC thus believes that what ERISA section 303(d)(1) requires is that the benefits to be valued as of the valuation date are those accrued as of the beginning of the plan year. If the valuation date is later than the first day of the plan year, accruals after the beginning of the plan year are to be ignored.

The situation regarding assets is similar. New ERISA section 4006(a)(3)(E)(iii)(II) refers to “the fair market value of plan assets for the plan year which are held by the plan on the valuation date.” Under new ERISA section 303(g)(4)(B), however, plan assets as of a valuation date later than the first day of the plan year do not include contributions for the plan year made during the plan year but before

the valuation date or interest thereon. PBGC interprets section 4006(a)(3)(E)(iii)(II) as incorporating this rule, as well as the corresponding rule for prior-year contributions in section 303(g)(4)(A). Thus for a valuation date later than the first day of the plan year, UVBs are to reflect neither accruals nor contributions for the plan year.

In general, a plan’s funding target and the value of its assets are to be determined for premium purposes the same way they are for funding purposes except as new ERISA section 4006(a)(3)(E)(iii) and (iv) provides otherwise. In order to distinguish the funding target used for premium purposes from that used for funding purposes, the rule introduces the term “premium funding target.” In general, this means the funding target determined by taking only vested benefits into account and by using the special segment rates described in new ERISA section 4006(a)(3)(E)(iv) (the “standard premium funding target”). Those special segment rates are “spot rates” (based on bond yields for a single recent month), as opposed to the 24-month average segment rates used for funding purposes.

But in certain circumstances (described below), PBGC is permitting filers to use an “alternative premium funding target” that may be less burdensome to use than the standard premium funding target. A plan’s alternative premium funding target is the vested portion of the plan’s funding target under ERISA section 303(d)(1) that is used to determine the plan’s minimum contribution under ERISA section 303 for the premium payment year—that is, an amount calculated using the same assumptions as are used to calculate the plan’s funding target under ERISA section 303(d)(1), but based only on vested benefits, rather than all benefits.

Although instructions for annual reports on Form 5500 series for plan years beginning after 2007 are not final, PBGC expects plans to be required to compute the vested portion of the funding target (broken down by participant category) for Form 5500 filings. PBGC also expects that the final instructions will permit or require benefits to be categorized as vested or non-vested in a manner consistent with the provisions of this rule (discussed below) that explain when certain benefits are considered vested for premium purposes. The advantage to a filer of using the alternative premium funding target will be that, if the plan determines the vested portion of its funding target for purposes of the annual report (Form 5500 series) in a

manner consistent with PBGC's rules, it can use the same number for premium purposes and thus avoid having to do a second calculation for premium purposes alone.

Under the rule, the alternative premium funding target may be used where the plan makes an election to do so that is irrevocable for a period of five years. As financial markets fluctuate, the averaged rates used for the alternative premium funding target will fluctuate above and below the spot rates used for the standard premium funding target. Locking in the election for five years will keep plans from calculating the premium funding target both ways each year and using the smaller number; the reason for permitting use of the alternative premium funding target is to reduce not premiums but the burden of computing premiums. PBGC expects that normal interest rate fluctuations will make premiums computed with the alternative premium funding target—on average, over time—approximately equal to premiums calculated with the standard premium funding target. Requiring a five-year commitment to the use of the alternative premium funding target will give this averaging process time to work. If a plan administrator concludes that the averaging process has not had enough time to work by the end of the minimum five-year election period, the election may be left in place to give the averaging process more time to work.

The proposed rule required that an election (or revocation of an election) to use the alternative premium funding target be made by the end of the first plan year to which it would apply. The final rule changes the election/revocation deadline to the VRP due date for the first plan year to which the election or revocation would apply. This will allow an election or revocation to be made at the same time as a plan's VRP filing for the first plan year to which it applies, even if the plan year ends before the due date (such as for a small plan (as discussed below) or a short plan year). And since the VRP depends on whether an available election or revocation is made, there is no need for the election/revocation deadline to be later than the VRP due date if the VRP due date occurs before the end of the plan year. PBGC plans to provide for such elections and revocations in its electronic premium filing application.

The proposed rule did not explicitly address the applicability of the transition rule in ERISA section 303(h)(2)(G) to the calculation of the premium funding target. Section 303(h)(2)(G) calls for a two-year

transition from the current liability interest rate to the new segment rates for purposes of determining the funding target. However, in describing the interest rate to be used in determining the standard premium funding target, ERISA section 4006(a)(3)(E)(iv) (as added by PPA 2006) refers only to subparagraphs (C) and (D) of ERISA section 303(h)(2), and to the funding interest assumption as a whole. Thus, the fact that there is a transition rule for funding purposes does not mean that there is a transition rule for premium purposes.

Furthermore, since the current liability interest rate is not the interest assumption that has heretofore been used to determine UVBs, a literal application of the section 303(h)(2)(G) transition rule would lead to illogical results. The only reasonable way the transition rule could be applied to the calculation of the standard premium funding target would be by reading into section 303(h)(2)(G) (for premium purposes) a reference to the required interest rate heretofore used to determine UVBs, rather than the current liability interest rate that section 303(h)(2)(G) actually refers to. Accordingly, the proposed rule did not provide for the applicability of the transition rule to the determination of the standard premium funding target, and the premium filing instructions that PBGC submitted for approval by the Office of Management and Budget when the proposed rule was published reflected this. Section 4006.4(b)(2)(ii) of the premium rates regulation, as amended by the final rule, makes this point explicit.

The alternative premium funding target, on the other hand, is based directly on the funding target under ERISA section 303(d)(1), which will be calculated using the transition rule (unless elected out of under ERISA section 303(h)(2)(G)(iv)). Thus the alternative premium funding target will clearly reflect the provisions of section 303(h)(2)(G), just as it will reflect the provisions of section 303(h)(2)(D)(ii) (election to use the full yield curve instead of segment rates) or section 303(h)(2)(E) (election of "applicable month" for determining the yield curve). PBGC believes that this point is clearly implicit in the language of the proposed rule, and has not changed that language for the final rule.

Since new ERISA section 4006(a)(3)(E)(iii)(II) speaks explicitly of the "fair market value" of assets, PBGC concludes that it would be inconsistent with the statute to permit or require the use of the averaging process described in new ERISA section 303(g)(3)(B) or the

reduction of assets by the prefunding and funding standard carryover balances described in new ERISA section 303(f)(4). (The existing premium rates regulation also provides that credit balances do not reduce assets for premium purposes.)

As noted above, however, PBGC believes that adjustments must be made for contributions as described in new ERISA section 303(g)(4). Similar adjustments are required under the current premium rates regulation. For simplicity, PBGC is providing that the adjustments are to be made using the effective interest rates determined for funding purposes, rather than effective interest rates computed on the basis of the premium segment rates. This will mean that the adjustments do not have to be calculated twice (once for funding purposes and again for premium purposes), and plans can use for premium purposes a figure for the value of assets that they are expected to be entering in the annual report (Form 5500 series). PBGC anticipates that the differences between funding and premium rates and the periods of time over which these rates are applied for this purpose will be small enough to justify this simplification. And as funding rates fluctuate above and below premium rates, the differences in each direction should cancel out over time.

This rule does not include an "alternative calculation method" for rolling forward prior year values to the current year. The alternative calculation method (ACM) in § 4006.4(c) of the current premium rates regulation was instituted when much actuarial valuation work was done using hand calculators and tables of factors. High-speed, high-memory computers are now the norm for handling both data and mathematical computations. Actuarial valuations are thus much faster now. Furthermore, the segment rate methodology for valuing benefits does not lend itself to the kind of formulaic transformation process exemplified by the existing ACM. PBGC accordingly believes that an alternative calculation method is both unnecessary and impracticable under PPA 2006.

Noting that the proposed rule ignored premium payment year accruals in determining the premium funding target for plans with UVB valuation dates after the beginning of the year, one commenter urged that benefit increase amendments adopted after the UVB valuation date but implemented retroactively to the beginning of the premium payment year be ignored for premium purposes. PBGC is not adopting any express provision on this subject. The premium funding target is

based on the funding target under ERISA section 303(d); whether a benefit increase (even if retroactive) is taken into account for premium purposes depends on whether it is taken into account for funding purposes, an issue not addressed in this rule.

#### Due Dates and Penalty Rules

PBGC expects that most plans that are required (or choose) to do funding valuations as of the beginning of the plan year (and whose UVB valuation date is thus the first day of the premium payment year) will be able to determine their UVBs by the VRP due date currently provided for in PBGC's premium payment regulation (generally, the middle of the tenth full calendar month after the beginning of the plan year). But there are some circumstances that can make timely determination of the VRP difficult or impossible: for example, use of a valuation date after the beginning of the plan year (applicable to small plans only) or difficulty in collecting data (e.g., because of the occurrence of unusual events during the preceding year). To deal with such circumstances, PBGC is revising its premium due date and penalty structure to give smaller plans more time to file and larger plans the ability to make VRP filings based on estimated liabilities and then correct them without penalty. The following detailed discussion of the due date and penalty structure is followed by a summary table.

PBGC's current due date structure for flat- and variable-rate premiums is based on two categories of plans: those that owed premiums for 500 or more participants for the plan year preceding the premium payment year ("large" plans) and those that did not. The new structure is based on three categories. The large-plan category remains the same. A new "mid-size" category consists of plans that owed premiums for 100 or more, but fewer than 500, participants for the plan year preceding the premium payment year. A category of "small" plans includes all other plans. The participant count for this purpose will continue to be the prior year's count; the rule provides uniform language for determining both single- and multiemployer plans' participant counts for determining due dates, eliminating a slight language difference in the existing regulation.

The final rule makes clear that the number of participants used for determining plan size is the participant count used for purposes of the flat-rate premium (not the number of participants whose benefits are taken into account in computing the VRP).

Since both flat-rate and variable-rate premium due dates are based on plan size, plan size must be determinable for plans (such as multiemployer plans) that do not compute the VRP.

Furthermore, the VRP does not reflect the number of participants directly except for certain plans of small employers that are subject to a VRP cap based on the number of participants (in which case it is the flat-rate participant count that is used). Tying plan size to the flat-rate premium participant count is consistent with the existing regulation.

The 100-participant break-point between the small and mid-size categories approximates the break-point in the PPA 2006 funding rules between plans that are required to use beginning-of-the-year valuation dates under ERISA section 303(g)(2)(A) and those permitted to use another date under ERISA section 303(g)(2)(B). The correspondence with the valuation date provision is only approximate. Under the valuation date provision, PPA 2006 counts participants on each day of a plan year and aggregates plans within controlled groups; under the premium due date rules, participants are counted in one plan on one day. Furthermore, PPA 2006 funding rules look back to the plan year preceding the valuation year; the PBGC participant count for the plan year preceding the premium payment year is typically as of the last day of the plan year before that. Accordingly, there may be plans that are eligible to elect valuation dates other than the first day of the plan year but that do not fall into PBGC's new small-plan category. But most plans that use valuation dates other than the first day of the plan year are expected to be "small" under the new due date structure, and there is enough flexibility in the due date rules for large and mid-size plans to make premium filing manageable in most cases even for plans with valuation dates after the beginning of the plan year. In unusual cases, where a plan with a valuation date late in the year finds itself in the large or mid-size category, PBGC has authority to waive late premium penalties.

#### Small Plans

For plans in the "small" category, all premiums will be due on the last day of the sixteenth full calendar month that begins on or after the first day of the premium payment year (for calendar-year plans, April 30 of the year following the premium payment year). This will give any small plan at least four months to determine UVBs.

The same due date will apply to both variable- and flat-rate premiums. While

there is no reason these small plans cannot determine the flat-rate premium by the current due date (the 15th day of the tenth full calendar month that begins on or after the first day of the premium payment year), PBGC wants to avoid requiring them to make two filings per year. And for simplicity, PBGC is making no distinction for due date purposes between single-employer plans that pay the VRP and single-employer (and multiemployer) plans that do not. Small single-employer plans that qualify for an exemption from the VRP and small multiemployer plans (which are not subject to the VRP) will have the same deferred due date as small single-employer plans that owe a VRP.

#### Mid-Size Plans

For mid-size plans, the rule retains the current premium due date—the 15th day of the tenth full calendar month that begins on or after the first day of the premium payment year (October 15th for calendar-year plans)—for both flat- and variable-rate premiums. With rare exceptions, these plans will perform valuations as of the first day of the premium payment year, and in most cases should be able to calculate UVBs by the current due date. However, in recognition of the possibility that circumstances might make a final UVB determination by the due date difficult or impossible, the rule permits VRP filings to be made based on estimated liabilities and provides a penalty-free "true-up" period to correct a VRP based on an erroneous estimate.

Under this provision, the VRP penalty is waived for a period of time after the VRP due date if, by the VRP due date, the plan administrator submits an estimate of the VRP that meets certain requirements and pays the estimated amount. The waiver of the penalty covers the period from the VRP due date until the small-plan due date or, if earlier, the filing of the final VRP. Interest is not suspended; if the VRP estimate falls short of the correct amount, interest will accrue on the amount of the underpayment from the date when the payment was due to the date the shortfall was paid, just as with the existing "safe harbor" rule for large plans' flat-rate premium payments.

The requirements for the VRP estimate are that it be based on (1) a final determination of the market value of the plan's assets and (2) a reasonable estimate of the plan's premium funding target for the premium payment year that takes into account the most current data available to the plan's enrolled actuary and is determined in accordance with generally accepted actuarial

principles and practices. The estimate of the premium funding target must be certified by the enrolled actuary and, like other premium information filed with PBGC, is subject to audit. PBGC needs a good estimate of its VRP income for inclusion in its annual report, which is prepared during October (because its fiscal year ends September 30), when most plans (those with calendar plan years) submit VRP filings. Thus, it is important to have assurance that the estimate of the premium funding target has been prepared in good faith.

Since this penalty relief is based on the plan's reporting a final figure for the value of assets by the VRP due date, the relief is lost if there is a mistake in the assets figure so reported, whether the mistaken figure is lower or higher than the true figure. PBGC will consider a request for an appropriate penalty waiver in such a situation and in acting on the request will consider such facts and circumstances as the reason for the mistake, whether assets were over-

understated, and, if assets were overstated, the extent of the overstatement.

Since the provision of a period for "truing up" the VRP without penalty, after a filing based on an estimate, is not an extension of the VRP due date, it does not provide additional time to make an alternative premium funding target election.

*Large Plans*

The due date and penalty structure for "large" plans is the same as for "mid-size" plans except that the early due date for the flat-rate premium under the existing regulation is retained, along with the related "safe harbor" penalty rules. However, there is a change in the "safe harbor" rules to accommodate the unlikely event that a plan might be in the small-plan category for one year but in the large-plan category for the next year. Under §§ 4007.8(f) and (g)(2)(ii) of the existing premium payment regulation, a plan may be entitled to safe harbor relief if its flat-rate filing is

consistent with its reported participant count for the prior plan year, even if the reported count is later determined to be wrong. But under the new rules, a plan that is small for one year and large for the next year will not have to report its participant count for the first year until after the flat-rate due date for the second year. Thus, to get the benefit of these special safe-harbor rules, a plan in such circumstances would have to make its final filing for the first year two months before it was due. To alleviate this problem, the rule provides safe-harbor relief for any plan whose flat-rate due date for the plan year preceding the premium payment year is later than the large-plan flat-rate due date for the premium payment year.

*Due Date Table*

The following table shows the relevant premium due dates for small, mid-size, and large calendar year plans (as described above) for the 2008 premium payment year:

	Small plans (under 100 participants)	Mid-size plans (100–499 participants)	Large plans (500 or more participants)
Flat-rate premium due .....	April 30, 2009 ...	October 15, 2008 .....	February 29, 2008. See flat-rate premium safe harbor rules.
Flat-rate premium reconciliation due .....	N/A .....	N/A .....	October 15, 2008.
Variable-rate premium due .....	April 30, 2009 ...	October 15, 2008. Estimate may be filed and paid. See rules on correcting VRP without penalty.	October 15, 2008. Estimate may be filed and paid. See rules on correcting VRP without penalty.
Latest VRP penalty starting date. If certain conditions are met, penalty is waived until this date or, if earlier, the date the final VRP is filed.	N/A .....	April 30, 2009 .....	April 30, 2009.

**Special Variable-Rate Premium Rules**

The existing premium rates regulation includes a number of special "exemption" or "relief" rules for VRP filers. One of these—the full-funding limit exemption, which was created by statute—has been eliminated by PPA 2006. Three others—created by PBGC regulation in 1988—have lost their justification, as explained below, and PBGC is eliminating them as well. PBGC is also introducing two new "relief" rules.

The three regulatory special rules that are eliminated are (1) the rule that a plan with fewer than 500 participants for the premium payment year is exempt from reporting its VRP information if the plan has no UVBs (the "small well-funded plan rule"), (2) the rule that a plan with 500 or more participants may report (and compute its VRP on the basis of) accrued rather than vested benefits (the "large plan accrued benefit rule"), and (3) the rule that a plan may value benefits using the

funding interest rate rather than the variable-rate premium interest rate if the funding rate is less than the premium rate (the "funding interest rate rule"). All three represent compromises between the need for accuracy in the determination of the VRP and the reporting of VRP data on the one hand and the need to reduce the burden of compliance on the other.

PBGC needs accurate data about UVBs and assets—now as in 1988—to verify the correctness of the reported VRP and for financial projections. But whereas the cost of determining this information 20 years ago could be very significant, because much actuarial valuation work was done using hand calculators and tables of factors, valuations are now computerized and thus cost less. PBGC's need for accurate data now outweighs the burden of determining and reporting the data. The elimination of these three special rules reflects that change in the balance between need and burden. Furthermore, both the "large plan

accrued benefit rule" and the "funding interest rate rule" overstate UVBs and are used by very few plans—fewer than three dozen plans used each of these two special rules for the 2004 filing year (the last year for which data are available).

In addition, one of the two new "relief" rules that PBGC is introducing—the new alternative premium funding target provision discussed above—provides relief for filers that might otherwise have used any of these three special rules. The alternative premium funding target provision permits the use of funding rates for premium purposes (like the "funding interest rate rule") without the need for a comparison of rates (albeit with a requirement for a five-year commitment). And by using the alternative premium funding target provision, plans that might have used the "large plan accrued benefit rule" or the "small well-funded plan rule" may be able to base premium reporting on

figures that are computed for and included in the annual report (Form 5500 series).

PBGC's second new "relief" rule—in addition to the alternative premium funding target provision—is a reporting relief provision for certain small-employer plans. Section 405 of PPA 2006 caps the VRP for certain plans of small employers, a provision that is the subject of another PBGC rulemaking proceeding. This rule exempts plans that qualify for the VRP cap and pay the full amount of the cap from determining or reporting UVBs.

#### Meaning of "Vested"

As discussed above, the determination of UVBs—both before and after the PPA 2006 amendments—requires that only vested benefits be taken into account. PBGC believes that there is some uncertainty among pension practitioners as to the meaning of the term "vested" as used in ERISA section 4006(a)(3)(E). With a view to reducing uncertainty and promoting consistency in the VRP determination process, § 4006.4(d) of the premium rates regulation, as amended by this final rule, explains—for premium purposes only—when certain benefits are considered vested.

The proposed rule specified two circumstances that would not prevent a participant's benefit from being vested for premium purposes. One circumstance is that the benefit is not protected under Code section 411(d)(6) and thus may be eliminated or reduced by the adoption of a plan amendment or by the occurrence of a condition or event (such as a change in marital status). PBGC considers such a benefit to be vested (if the other conditions of entitlement have been met) so long as the benefit has not actually been eliminated or reduced. The other circumstance—applicable to certain benefits payable upon a participant's death—is that the participant is living. The benefits to which this would apply are (1) a qualified pre-retirement survivor annuity, (2) a post-retirement survivor annuity such as the annuity paid after a participant's death under a joint and survivor or certain and continuous option, and (3) a benefit that returns a participant's accumulated mandatory employee contributions. PBGC considers such benefits to be vested (if the other conditions of entitlement have been met) notwithstanding that the participant is alive. The final rule includes two illustrative examples.

There was a public comment that the vesting provision in the proposed rule did not address two types of benefits as

to which guidance was needed: Pre-retirement lump sum death benefits and disability benefits. PBGC does not intend new § 4006.4(d) (the vesting provision) to be an exhaustive treatment of the subject; the provision is meant merely to provide clarification for the specific cases it mentions. In response to this comment, however, PBGC is expanding § 4006.4(d) to provide that a pre-retirement lump sum death benefit (other than one that returns mandatory employee contributions) is not considered vested for premium purposes where the participant is living and that a disability benefit is not considered vested for premium purposes where the participant is not disabled.

Another commenter stated that many practitioners have not been treating as vested the benefits that PBGC would consider vested under the proposed rule and that PBGC's vesting provision is at odds with the standards (currently under revision) of the American Academy of Actuaries. The commenter expressed a preference that PBGC not adopt the proposed vesting provision and urged that the provision be applied prospectively only. PBGC acknowledges that some actuaries may not be using the interpretation of vesting prescribed by this rule but believes that many are doing so; it is precisely to promote consistency in this regard that the vesting provision—applicable for premium purposes only—is included in the rule.

For plans that have been computing UVBs without counting benefits that are considered vested under PBGC's rule, adoption of the rule may increase UVBs. As stated in Applicability below, the rule is effective for plan years beginning after 2007. Although PBGC has made no determination as to the position it may take regarding the interpretive issue for prior periods, PBGC currently has no plans to focus on this issue in audits of premium filings for plan years beginning before 2008.

#### Recordkeeping and Audits

The rule clarifies and strengthens the provisions of the premium payment regulation dealing with recordkeeping and audits. Most of the changes simply reflect existing recordkeeping and audit practices.

In describing the premium records to be kept, the current premium payment regulation mentions explicitly only those prepared by enrolled actuaries and insurance carriers. The rule broadens this to include plan sponsors and employers required to contribute to a plan for their employees and clarifies, with a list of examples of relevant

records, that PBGC interprets the term "records" broadly. Similarly, the rule refers explicitly to records supporting the amount of premiums that were *required* to be paid and the premium-related information that was *required* to be reported (rather than just what was actually paid or reported). Where a premium or premium-related information is determined through the use of a manual or automated system or process, the rule allows PBGC to require that the operation of the system or process be demonstrated so that its effectiveness, and the reliability of the results produced, can be assessed. In addition, in situations where plan records are deficient, the rule broadens the categories of data on which PBGC may rely to establish the amount of premiums due to include not just participant count data but UVB data.

The rule also makes clear that the 45 days permitted for producing records under § 4007.10(c) applies to records sent to PBGC, not to records audited on-site (which PBGC expects to be produced much more promptly). And the rule broadens the circumstances in which PBGC can require faster submission of records. The existing regulation limits such circumstances to those where collection of money may be jeopardized. This is changed to authorize shorter response times where the interests of PBGC may be prejudiced by delay—such as where PBGC has reason to suspect that records might be destroyed or manipulated.

#### Miscellaneous Provisions

##### *Plans Subject to Special Funding Rules*

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 (amended by section 6615 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. 110-28) applies special funding rules to certain plans of commercial passenger airlines and airline caterers. None of these provisions affects the applicability of the amendments to ERISA section 4006 regarding the determination of the VRP. The rule provides explicitly that plans in this small group must determine UVBs in the same manner as all other plans. The language of this provision has been revised in the final rule to make this point clearer (in light, particularly, of the amendment to

section 402 of PPA 2006, which was made after the proposed rule was cleared for publication in the **Federal Register**).

#### *New and Newly Covered Plans*

The rule eliminates confusing language in the existing regulations that raised questions about the determination of due dates, participant count dates, and premium proration for new and newly covered plans in certain circumstances. The new language makes clear that the first day of a new plan's first plan year for premium purposes is the effective date of the plan. The final rule goes beyond the proposed rule in this regard by revising the definition of "new plan" to eliminate wording that might suggest that a new plan could become effective after the beginning of its first premium payment year. These changes will obviate the need for plan administrators to choose between the effective date and the adoption date as the first day of the plan year for premium filing.

In addition, the final rule eliminates one of the alternative due date computation rules for new and newly covered plans (in new § 4007.11(c)). The proposed rule included an alternative under which the due date would be not earlier than 90 days after the plan's coverage date. This alternative is not necessary. The coverage date must fall within the premium payment year in order for premiums to be due at all, and the due date cannot be earlier than sixteen months after the beginning of that year. Thus, the due date will be at least four months (i.e. more than 90 days) after the date on which the plan became covered. Accordingly, an alternative due date that is 90 days after the coverage date would never come into play and can be eliminated from the regulation.

#### *Electronic Filing Requirement*

Effective July 1, 2006, PBGC amended its regulations to require that annual premium filings be made electronically (71 FR 31077, June 1, 2006). (Exemptions from the e-filing requirement may be granted for good cause in appropriate circumstances.) For PBGC's premium processing systems to work effectively and efficiently, information must be received in an electronic format compatible with those systems; the burden of reformatting information received on paper or in other incompatible formats is significant, and the reformatting process gives rise to data errors. The premium payment regulation as amended by this rule therefore provides explicitly that, in the absence of an exemption,

premium filing on paper or in any other manner other than the prescribed electronic filing method does not satisfy the requirement to file. Thus, a penalty under ERISA section 4071 may be assessed for the period from the due date of the premium filing until it is made electronically, even if a timely paper filing is made.

#### *Billing "Grace Period" for Interest*

The rule consolidates paragraphs (b) and (c) of § 4007.7, both of which deal with the "grace period" for interest on premium underpayments where a bill is paid within 30 days. No substantive change is intended.

#### *VRP Rate*

ERISA section 4006(a)(3)(E)(ii) sets the variable-rate premium at \$9 for each \$1,000 (or fraction thereof) of UVBs. Section 4006.3(b) of the existing premium rates regulation omits the phrase "(or fraction thereof)." The requirement is made clear in PBGC's premium instructions; the rule adds this phrase to the regulatory text.

#### *Pre-1996 Penalty Accrual Rules*

The rule eliminates the pre-1996 penalty accrual rules as anachronistic.

#### *Definitional Cross-Reference*

The definition of "participant" in § 4006.6 uses the term "benefit liabilities," which is defined in § 4001.2 of PBGC's regulation on Terminology. Existing § 4006.2 (dealing with defined terms used in the premium rates regulation) does not include a cross-reference to the definition of "benefit liabilities" in § 4001.2. This final rule corrects that omission (which was not corrected in the proposed rule).

#### *Other Changes*

The rule includes a number of clarifying and editorial changes.

#### **Applicability**

The regulatory changes made by this rule, like the statutory changes to the VRP, apply to plan years beginning after 2007.

#### **Compliance With Rulemaking Guidelines**

##### *E.O. 12866*

PBGC has determined, in consultation with the Office of Management and Budget, that this rule is a "significant regulatory action" under Executive Order 12866. The Office of Management and Budget has therefore reviewed the rule under E.O. 12866. Pursuant to section 1(b)(1) of E.O. 12866 (as amended by E.O. 13422), PBGC identifies the following specific

problems that warrant this agency action:

- There is ambiguity in ERISA section 4006(a)(3)(E) regarding the date as of which UVBs are to be measured. This problem is significant because, unless the statutory ambiguity is resolved, it will be unclear what date UVBs are to be measured as of.

- The statute lacks clarity and specificity in describing how UVBs are calculated. This problem is significant because, unless clarity and specificity are provided, it will be unclear how to compute UVBs.

- The statute does not expressly provide for an alternative premium funding target as described above. This problem is significant because the standard premium funding target provided for in the statute is more burdensome to use than the alternative premium funding target described above without generating significantly different premium revenue than the less burdensome alternative premium funding target.

- PBGC's existing premium due date and penalty rules do not accord well with the new rules for the date as of which and manner in which UVBs are to be determined. This problem is significant because, without changes in the due date and penalty rules, some plans may experience difficulties in paying premiums timely and without late payment penalties.

- Some existing PBGC VRP relief rules are anachronistic and some new relief provisions are warranted by statutory changes. This problem is significant because the outmoded relief rules detract from accuracy in determining the VRP and deprive PBGC of VRP data without significantly reducing burden, while statutory changes have made it possible to grant new relief without significant adverse consequences for the PBGC insurance program.

- There is uncertainty as to the meaning of the term "vested" that is used in the statute to describe benefits taken into account in determining the VRP. This problem is significant because, without improved clarity in the meaning of "vested" as applied to VRP determinations, those determinations may be inconsistent.

- PBGC's current recordkeeping and audit rules do not match current recordkeeping and audit practices in scope and specificity, and provide relatively narrow circumstances in which PBGC may require expedited submission of records. This problem is significant because inadequate recordkeeping and audit rules could compromise PBGC's ability to enforce

the premium rules in the statute and PBGC's regulations thereunder.

- PBGC's existing premium payment regulation does not provide explicitly that, in the absence of an exemption, premium filing on paper or in any other manner other than the prescribed electronic filing method does not satisfy the requirement to file. This problem is significant because, in the absence of an explicit statement, filers might believe they had a basis for taking the position that penalties for late filing would not apply if they timely filed on paper or in some other non-approved manner.

#### *Regulatory Flexibility Act*

PBGC certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the amendments in this final rule will not have a significant economic impact on a substantial number of small entities. 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.

Most of the amendments implement statutory changes made by Congress. They provide procedures for calculating, substantiating, and paying the premiums prescribed by statute and impose no significant burden beyond the burden imposed by statute. To the extent that this rule makes changes that are outside the explicit scope of the statute, they affect primarily the requirement to perform and manner of performing VRP calculations. When the VRP provisions were added to PBGC's regulations nearly 20 years ago, these calculations were mostly done using actuarial tables and hand calculators. Today they are almost universally done using high-memory, high-speed computers. The VRP calculations parallel funding calculations that must be done independently of PBGC premium requirements. Thus, the VRP calculations can be done for the most part by plugging in different parameters (such as interest rates) to computer programs that are used for funding purposes. The incremental cost of such calculations for entities of any size is insignificant. Not including a computation option like the existing alternative computation method (ACM) in the new rules does not significantly affect compliance costs because such an option would itself be complex and thus burdensome to use and because a simplified computation method is no longer needed in the current environment of computerized actuarial computations.

Changes that would tend to increase compliance costs (e.g., elimination of the VRP exemption for well-funded

small plans) are offset by changes tending to reduce compliance costs (e.g., the introduction of the reporting exemption for plans of small employers paying the maximum capped VRP).

The shift from prior-year to current-year data and the deferral of the due date for small plans (those with fewer than 100 participants) should not affect the cost of compliance. Under existing rules, UVBs are determined as of the end of the prior year (or in some cases the beginning of the current year) and the VRP is due 9½ months later. Under the new rules, UVBs will be determined as of the UVB valuation date, which for most small plans may be any day in the current year. For plans that choose a valuation date at the beginning of the year, the VRP is now due 16 months later. For those that choose a valuation date at the end of the year, the VRP is now due 4 months later. For a plan that chooses a mid-year valuation date, the VRP is due 10 months later, providing about the same time for data-gathering and computations as under the existing rules. But even a 4-month period between the valuation date and the due date should be adequate for the data-gathering and UVB computations of small plans, and the change in timing should not affect the cost of compliance.

PBGC believes that the changes to the recordkeeping requirements in general simply codify existing practices. The changes to the audit rules will not affect a significant number of plans of any size.

#### *Paperwork Reduction Act*

The information collection requirements under this rule have been approved by the Office of Management and Budget under the Paperwork Reduction Act (OMB control number 1212-0009; expires 02/28/2011). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

PBGC needs premium-related information to identify the plan for which premiums are paid to PBGC, to verify the determination of the premium, and to help the PBGC determine the magnitude of its exposure in the event of plan termination.

The information collection requirements under the premium rates and premium payment regulations that OMB approved included the following changes from those previously approved:

- Filers will be required to include in the addresses of the plan sponsor and plan administrator the countries where

the addresses are located (if other than the United States).

- Filers will no longer be required to report coverage status.

- Filers will be required to provide the plan contact's e-mail address (if any).

- Filers will no longer be required to provide information on participant notices under ERISA section 4011 (that requirement having been eliminated by PPA 2006).

- Filers will be required to report if they qualify for premium proration (for a short plan year) and if so, to report the number of months in the proration period. Proration will be reported separately from credits. (This change will not apply to 2008 estimated flat-rate premium filings.)

- Filers will be required to report plan size (small, mid-size, or large) based on the prior year's participant count (or report that the plan is filing for the first time).

- Filers will have an opportunity to make alternative premium funding target elections as part of the premium filing.

- Filers will be required to report the participant count date.

- Most existing VRP information items will be eliminated in connection with the implementation of the new VRP rules. Items retained will be the identification of any applicable VRP exemption and the amount of UVBs.

- New VRP data required will be qualification for the VRP cap for certain plans of small employers, the UVB valuation date, the premium funding target as of the UVB valuation date, the premium funding target method (standard or alternative), whether the reported premium funding target is an estimate, the segment rates used to compute the premium funding target (or indication that the full yield curve was used), the market value of assets as of the UVB valuation date, the (unprorated) VRP cap (for plans eligible for the cap), and the (unprorated) uncapped VRP (for plans not eligible for the cap).

- For a final filing, filers will be required to report the date and type of event that results in the cessation of the filing obligation.

- The existing item on transfers from disappearing plans will be replaced by two new items: information about transfers from other plans (whether disappearing or not) and information about transfers to other plans. (This change will not apply to 2008 estimated flat-rate premium filings.)

- For frozen plans, filers will be required to identify the type of freeze and its effective date.

• For amended filings, filers will be required to report any change in the beginning and ending dates of the plan year being reported and any change in the plan identifying numbers being reported from those in the original filing.

#### List of Subjects

##### 29 CFR Part 4006

Pension insurance, Pensions.

##### 29 CFR Part 4007

Penalties, Pension insurance, Pensions, Reporting and recordkeeping requirements.

■ For the reasons given above, 29 CFR parts 4006 and 4007 are amended as follows.

#### PART 4006—PREMIUM RATES

■ 1. The authority citation for part 4006 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1306, 1307.

■ 2. In § 4006.2:

■ a. The introductory text is amended by removing the words “chapter: Code” and adding in their place the words “chapter: benefit liabilities, Code”; and by removing the words “irrevocable commitment, multiemployer plan” and adding in their place the words “irrevocable commitment, mandatory employee contributions, multiemployer plan”.

■ b. The definition of “new plan” is amended by removing the words “became effective within” and adding in their place the words “did not exist before”.

■ c. The definition of “short plan year” is revised, and four new definitions are added, to read as follows:

#### § 4006.2 Definitions.

\* \* \* \* \*

*Participant count* of a plan for a plan year means the number of participants in the plan on the participant count date of the plan for the plan year.

*Participant count date* of a plan for a plan year means the date provided for in § 4006.5(c), (d), or (e) as applicable.

*Premium funding target* has the meaning described in § 4006.4(b)(1).

\* \* \* \* \*

*Short plan year* means a plan year of coverage that is shorter than a normal plan year.

*UVB valuation date* of a plan for a plan year means the plan’s funding valuation date for the plan year determined in accordance with ERISA section 303(g)(2).

■ 3. In § 4006.3:

■ a. Paragraph (a) is amended by removing the words “last day of the

plan year preceding the premium payment year,” and adding in their place the words “participant count date”.

■ b. Paragraph (b)(1) is amended by removing the words “\$1,000 of a single-employer plan’s unfunded vested benefits” and adding in their place the words “\$1,000 (or fraction thereof) of a single-employer plan’s unfunded vested benefits for the premium payment year”.

■ 4. Section 4006.4 is revised to read as follows:

#### § 4006.4 Determination of unfunded vested benefits.

(a) *In general.* Except as provided in the exemptions and special rules under § 4006.5, the amount of a plan’s unfunded vested benefits for the premium payment year is the excess (if any) of the plan’s premium funding target for the premium payment year (determined under paragraph (b) of this section) over the fair market value of the plan’s assets for the premium payment year (determined under paragraph (c) of this section). Unfunded vested benefits for the premium payment year must be determined as of the plan’s UVB valuation date for the premium payment year, based on the plan provisions and the plan’s population as of that date. The determination must be made in a manner consistent with generally accepted actuarial principles and practices.

(b) *Premium funding target—* (1) *In general.* A plan’s premium funding target is its standard premium funding target under paragraph (b)(2) of this section or, if an election to use the alternative premium funding target under § 4006.5(g) is in effect, its alternative premium funding target under § 4006.5(g).

(2) *Standard premium funding target.* A plan’s standard premium funding target under this section is the plan’s funding target as determined under ERISA section 303(d) (or 303(i), if applicable) for the premium payment year using the same assumptions that are used for funding purposes, except that—

(i) Only vested benefits are taken into account, and

(ii) The interest rates to be used are the segment rates for the month preceding the month in which the premium payment year begins that are determined in accordance with ERISA section 4006(a)(3)(E)(iv). These are the rates that would be determined under ERISA section 303(h)(2)(C) if ERISA section 303(h)(2)(D) were applied by using the monthly yields for the month preceding the month in which the

premium payment year begins on investment grade corporate bonds with varying maturities and in the top 3 quality levels rather than the average of such yields for a 24-month period. For this purpose, the transition rule in ERISA section 303(h)(2)(G) is inapplicable.

(c) *Value of assets.* The fair market value of a plan’s assets under this section is determined in the same manner as for funding purposes under ERISA section 303(g)(3) and (4), except that averaging as described in ERISA section 303(g)(3)(B) must not be used and prior year contributions are included only to the extent received by the plan by the date the premium is filed. Contribution receipts must be accounted for as described in ERISA section 303(g)(4), using effective interest rates determined under ERISA section 303(h)(2)(A) (not rates that could be determined based on the segment rates described in paragraph (b)(2) of this section).

(d) “*Vested.*” For purposes of ERISA section 4006(a)(3)(E), this part, and part 4007 of this chapter:

(1) A participant’s benefit that is otherwise vested does not fail to be vested merely because of the circumstance that the participant is living, in the case of the following death benefits:

(i) A qualified pre-retirement survivor annuity (as described in ERISA section 205(e)), (ii) A post-retirement survivor annuity that pays some or all of the participant’s benefit amount for a fixed or contingent period (such as a joint and survivor annuity or a certain and continuous annuity), and

(iii) A benefit that returns the participant’s accumulated mandatory employee contributions (as described in ERISA section 204(c)(2)(C)).

(2) A benefit otherwise vested does not fail to be vested merely because of the circumstance that the benefit may be eliminated or reduced by the adoption of a plan amendment or by the occurrence of a condition or event (such as a change in marital status).

(3) A participant’s pre-retirement lump-sum death benefit (other than a benefit described in paragraph (d)(1)(iii) of this section) is not vested if the participant is living.

(4) A participant’s disability benefit is not vested if the participant is not disabled.

(e) Illustration of vesting principles. The vesting principles set forth in paragraph (d) of this section are illustrated by the following examples:

(1) *Example 1.* Under Plan A, if a participant retires at or after age 55 but before

age 62, the participant receives a temporary supplement from retirement until age 62. The supplement is not a QSUPP (qualified social security supplement), as defined in Treasury Reg. § 1.401(a)(4)-12, and is not protected under Code section 411(d)(6). The temporary supplement is considered vested, and its value is included in the premium funding target, for each participant who, on the UVB valuation date, is at least 55 but less than 62, and thus eligible for the supplement. The calculation is unaffected by the fact that the plan could be amended to remove the supplement after the UVB valuation date.

(2) *Example 2.* Plan B provides a qualified pre-retirement survivor annuity (QPSA) upon the death of a participant who has five years of service, at no charge to the participant. The QPSA is considered vested, and its value is included in the premium funding target, for each participant who, on the UVB valuation date, has five years of service and is thus eligible for the QPSA. The calculation is unaffected by the fact that the participant is alive on that date.

(f) *Plans to which special funding rules apply.* Unfunded vested benefits must be determined (whether the standard premium funding target or the alternative premium funding target is used) without regard to the following provisions of the Pension Protection Act of 2006 (Pub. L. 109-280):

(1) Section 104, dealing generally with plans of cooperatives.

(2) Section 105, dealing generally with plans affected by settlement agreements with PBGC.

(3) Section 106, dealing generally with plans of government contractors.

(4) Section 402, dealing generally with plans of commercial passenger airlines and airline caterers.

■ 5. In § 4006.5:

■ a. Paragraph (a) introductory text is amended by removing the words “paragraphs (a)(1)–(a)(5)” and adding in their place the words “paragraphs (a)(1)–(a)(3)”; and by removing the words “determine its unfunded vested benefits” and adding in their place the words “determine or report its unfunded vested benefits”.

■ b. Paragraphs (a)(1) and (a)(5) are removed.

■ c. Paragraphs (a)(2), (a)(3), and (a)(4) are redesignated as paragraphs (a)(1), (a)(2), and (a)(3) respectively.

■ d. Redesignated paragraph (a)(1) is amended by removing the words “benefit liabilities” from the heading and adding in their place the word “participants”; by removing the word “did” and adding in its place the word “does”; and by removing the words “last day of the plan year preceding the premium payment year” and adding in their place the words “UVB valuation date”.

■ e. Redesignated paragraph (a)(2) is amended by removing the figures

“412(i)” where they appear once in the heading and once in the body of the paragraph and adding in their place the figures “412(e)(3)”; by removing the word “was” and adding in its place the word “is”; and by removing the words “last day of the plan year preceding the premium payment year” and adding in their place the words “UVB valuation date”.

■ f. Redesignated paragraph (a)(3)(ii) is amended by removing the words “last day of the plan year preceding the premium payment year” and adding in their place the words “UVB valuation date”.

■ g. The heading of paragraph (e) is amended by removing the words “*Special determination date rule for*” and adding in their place the words “*Participant count date;*”.

■ h. Paragraph (e)(2) introductory text is amended by removing the words “paragraph (e)(2) if” and adding in their place the words “paragraph (e)(2) for a plan year if”.

■ i. Paragraph (e)(2)(ii) is amended by removing the words “on the first day of the plan’s premium payment year” and adding in their place the words “at the beginning of the plan year”.

■ j. Paragraph (f) introductory text is amended by removing the words “year as described” and adding in their place the words “year described”.

■ k. Paragraphs (b), (c), (d), (e)(1), and (f)(1) are revised, and paragraph (g) is added, to read as follows:

**§ 4006.5 Exemptions and special rules.**

\* \* \* \* \*

(b) *Reporting exemption for plans paying capped variable-rate premium.* A plan that qualifies for the variable-rate premium cap described in ERISA section 4006(a)(3)(H) is not required to determine or report its unfunded vested benefits under § 4006.4 if it reports that it qualifies for the cap and pays a variable-rate premium equal to the amount of the cap.

(c) *Participant count date; in general.* Except as provided in paragraphs (d) and (e) of this section, the participant count date of a plan for a plan year is the last day of the prior plan year.

(d) *Participant count date; new and newly-covered plans.* The participant count date of a new plan or a newly-covered plan for a plan year is the first day of the plan year. For this purpose, a new plan’s first plan year begins on the plan’s effective date.

(e) *Participant count date; certain mergers and spinoffs.*

(1) The participant count date of a plan described in paragraph (e)(2) of

this section for a plan year is the first day of the plan year.

\* \* \* \* \*

(f) *Proration for certain short plan years.* \* \* \*

(1) *New or newly covered plan.* A new plan becomes effective less than one full year before the beginning of its second plan year, or a newly-covered plan becomes covered on a date other than the first day of its plan year. (Cessation of coverage before the end of a plan year does not give rise to proration under this section.)

\* \* \* \* \*

(g) *Alternative premium funding target.* A plan’s alternative premium funding target is the vested portion of the plan’s funding target under ERISA section 303(d)(1) that is used to determine the plan’s minimum contribution under ERISA section 303 for the premium payment year, that is, the amount that would be determined under ERISA section 303(d)(1) if only vested benefits were taken into account. A plan may elect to compute unfunded vested benefits using the alternative premium funding target instead of the standard premium funding target described in § 4006.4(b)(2), and may revoke such an election, in accordance with the provisions of this paragraph (g). A plan must compute its unfunded vested benefits using the alternative premium funding target instead of the standard premium funding target described in § 4006.4(b)(2) if an election under this paragraph (g) to use the alternative premium funding target is in effect for the premium payment year.

(1) An election under this paragraph (g) to use the alternative premium funding target for a plan must specify the first plan year to which it applies and must be filed by the plan’s variable-rate premium due date for that plan year. The first plan year to which the election applies must begin at least five years after the first plan year to which a revocation of a prior election applied. The election will be effective—

(i) For the plan year for which made and for all plan years that begin less than five years thereafter, and

(ii) For all succeeding plan years until the first plan year to which a revocation of the election applies.

(2) A revocation of an election under this paragraph (g) to use the alternative premium funding target for a plan must specify the first plan year to which it applies and must be filed by the plan’s variable-rate premium due date for that plan year. The first plan year to which the revocation applies must begin at least five years after the first plan year to which the election applied.

- 6. In paragraph (c) of § 4006.6:
  - a. Example 1 is amended by removing the words “July 1, 2000” and adding in their place the words “July 1, 2008”; by removing the words “December 31, 2000” where they appear twice and adding in their place the words “December 31, 2008”; by removing the words “snapshot date” and adding in their place the words “participant count date”; and by removing the words “2001 premium” where they appear twice and adding in their place the words “2009 premium”.
  - b. Example 2 is amended by removing the words “February 1, 2002” where they appear twice and adding in their place the words “February 1, 2010”; by removing the words “July 1, 2000” and adding in their place the words “July 1, 2008”; by removing the words “July 1, 2001” and adding in their place the words “July 1, 2009”; by removing the words “December 31, 2002” and adding in their place the words “December 31, 2010”; by removing the words “snapshot date” and adding in their place the words “participant count date”; and by removing the words “2003 premium” where they appear twice and adding in their place the words “2011 premium”.
  - c. Example 3 is amended by removing the words “January 1, 2004” and adding in their place the words “January 1, 2012”; by removing the words “December 30, 2005” where they appear twice and adding in their place the words “December 30, 2013”; by removing the words “January 9, 2006” and adding in their place the words “January 9, 2014”; by removing the words “December 31, 2005” and adding in their place the words “December 31, 2013”; by removing the words “snapshot date” and adding in their place the words “participant count date”; and by removing the words “2006 premium” where they appear twice and adding in their place the words “2014 premium”.
  - d. Example 4 is amended by removing the words “January 1, 2006” and adding in their place the words “January 1, 2014”; by removing the words “December 31, 2005” and adding in their place the words “December 31, 2013”; and by removing the words “2006 premium” and adding in their place the words “2014 premium”.

**PART 4007—PAYMENT OF PREMIUMS**

- 7. The authority citation for part 4007 continues to read as follows:
 

**Authority:** 29 U.S.C. 1302(b)(3), 1303(a), 1306, 1307.
- 8. In § 4007.2:

- a. Paragraph (a) is amended by removing the word “insurer,”; and by removing the words “multiemployer plan.”.
- b. Paragraph (b) is amended by removing the words “participant, premium payment year” and adding in their place the words “participant, participant count, premium funding target, premium payment year”.
- 9. In § 4007.3:
  - a. The first three sentences (ending with the words “prescribed in the instructions.”) of the text of § 4007.3 are designated as paragraph (a), and the remainder of the text (beginning with the words “Information must be filed electronically”) is designated as paragraph (b).
  - b. Newly designated paragraph (a) is amended by adding the heading “In general.”; and by removing the words “estimation, declaration, reconciliation, and payment” and adding in their place the words “estimation, determination, declaration, and payment”.
  - c. Newly designated paragraph (b) is amended by adding the heading “*Electronic filing.*”; by removing the words “requirement to file electronically does not apply” and adding in their place the words “requirement to file electronically applies to all estimated and final flat-rate and variable-rate premium filings (including amended filings) but does not apply”; and by adding two new sentences to the end of the paragraph to read as follows:

**§ 4007.3 Filing requirement; method of filing.**

\* \* \* \* \*

(b) *Electronic filing.* \* \* \* Unless an exemption applies, filing on paper or in any other manner other than by a prescribed electronic filing method does not satisfy the requirement to file. Failure to file electronically as required is subject to penalty under ERISA section 4071.

- 10. In § 4007.7, paragraph (c) is removed, and paragraph (b) is revised to read as follows:

**§ 4007.7 Late payment interest charges.**

\* \* \* \* \*

(b) With respect to any PBGC bill for a premium underpayment and/or interest thereon, interest will accrue only until the date of the bill if the premium underpayment and interest billed are paid within 30 days after the date of the bill.

- 11. In § 4007.8:
  - a. Paragraph (a) introductory text is amended by adding at the end of the paragraph the words “The penalty rate is—”.

- b. Paragraph (a)(1) introductory text and paragraph (a)(2) are removed, and paragraphs (a)(1)(i) and (a)(1)(ii) are redesignated as paragraphs (a)(1) and (a)(2) respectively.
- c. Paragraph (f) is amended by removing the figures “§ 4007.11(a)(2)(iii)” and adding in their place the figures “§ 4007.11(a)(3)(iii)”; by removing the words “filing is due if fewer” and adding in their place the words “filing is due if either—Fewer”; by removing the period at the end of paragraph (f) and adding in its place “, or”; and by designating as paragraph (f)(1) the portion of the text of paragraph (f) that begins with the words “Fewer than 500”.
- d. Paragraph (i) is amended by removing the figures “§ 4007.11(a)(2)(iii)” and adding in their place the figures “§ 4007.11(a)(3)(iii)”.
- e. New paragraphs (f)(2) and (j) are added to read as follows:

**§ 4007.8 Late payment penalty charges.**

\* \* \* \* \*

(f) *Safe-harbor relief for certain large plans.* \* \* \*

\* \* \* \* \*

(2) The due date for paying the flat-rate premium for the plan year preceding the premium payment year is later than the due date for paying the flat-rate premium for the premium payment year.

\* \* \* \* \*

(j) *Variable-rate premium penalty relief.* This waiver applies in the case of a plan for which a reconciliation filing is required under § 4007.11(a)(2)(ii) or (a)(3)(iv). PBGC will waive the penalty on any underpayment of the variable-rate premium for the period that ends on the earlier of the date the reconciliation filing is due or the date the reconciliation filing is made if, by the date the variable-rate premium for the premium payment year is due under § 4007.11(a)(2)(i) or (a)(3)(ii)—

- (1) The plan administrator reports—
  - (i) The fair market value of the plan’s assets for the premium payment year, and
  - (ii) An estimate of the plan’s premium funding target for the premium payment year that is certified by an enrolled actuary to be a reasonable estimate that takes into account the most current data available to the enrolled actuary and that has been determined in accordance with generally accepted actuarial principles and practices; and
- (2) The plan administrator pays at least the amount of variable-rate premium determined from the value of assets and estimated premium funding target so reported.

■ 12. In § 4007.10:

■ a. Paragraph (c)(3) is amended by removing the words “that collection of unpaid premiums (or any associated interest or penalties) would otherwise be jeopardized” and adding in their place the words “that the interests of PBGC may be prejudiced by a delay in the receipt of the information (e.g., where collection of unpaid premiums (or any associated interest or penalties) would otherwise be jeopardized)”.

■ b. Paragraphs (a)(1), (b), and (c)(1) are revised, and paragraph (a)(4) is added, to read as follows:

**§ 4007.10 Recordkeeping; audits; disclosure of information.**

(a) *Retention of records to support premium payments*—(1) *In general.* The designated recordkeeper under paragraph (a)(3) of this section must retain, for a period of six years after the premium due date, all plan records that are necessary to establish, support, and validate the amount of any premium required to be paid and any information required to be reported (“premium-related information”) under this part and part 4006 of this chapter and under PBGC’s premium filing instructions. Records that must be retained pursuant to this paragraph include, but are not limited to, records that establish the number of plan participants and that support and demonstrate the calculation of unfunded vested benefits.

\* \* \* \* \*

(4) *Records.* (i) Records that must be retained pursuant to paragraph (a)(1) of this section include, but are not limited to, records prepared by the plan administrator, a plan sponsor, an employer required to contribute to the plan with respect to its employees, an enrolled actuary performing services for the plan, or an insurance carrier issuing any contract to pay benefits under the plan.

(ii) For purposes of this section, “records” include, but are not limited to, plan documents; participant data records; personnel and payroll records; actuarial tables, worksheets, and reports; records of computations, projections, and estimates; benefit statements, disclosures, and applications; financial and tax records; insurance contracts; records of plan procedures and practices; and any other records, whether in written, electronic, or other format, that are relevant to the determination of the amount of any premium required to be paid or any premium-related information required to be reported.

(iii) When a record to be produced for PBGC inspection and copying exists in more than one format, it must be

produced in the format specified by PBGC.

(b) *PBGC audit*—(1) *In general.* In order to determine the correctness of any premium paid or premium-related information reported or to determine the amount of any premium required to be paid or any premium-related information required to be reported, PBGC may—

(i) Audit any premium filing,  
(ii) Inspect and copy any records that are relevant to the determination of the amount of any premium required to be paid and any premium-related information required to be reported, including (without limitation) the records described in paragraph (a) of this section, and

(iii) Require disclosure of any manual or automated system or process used to determine any premium paid or premium-related information reported, and demonstration of its operation in order to permit PBGC to determine the effectiveness of the system or process and the reliability of information produced by the system or process.

(2) *Deficiencies found on audit.* If, upon audit, PBGC determines that a premium due under this part was underpaid, late payment interest and penalty charges will apply as provided for in this part. If, upon audit, PBGC determines that required information was not timely and accurately reported, a penalty may be assessed under ERISA section 4071.

(3) *Insufficient records.* In determining the premium due, if, in the judgment of PBGC, a plan’s records fail to establish the participant count or (for a single-employer plan) the plan’s unfunded vested benefits for any premium payment year, PBGC may rely on data it obtains from other sources (including the IRS and the Department of Labor) for presumptively establishing the participant count and/or unfunded vested benefits for premium computation purposes.

(c) *Providing record information*—(1) *In general.* A designated recordkeeper must make the records retained pursuant to paragraph (a) of this section available to PBGC promptly upon request for inspection and photocopying (or, for electronic records, inspection, electronic copying, and printout) at the location where they are kept (or another, mutually agreeable, location). If PBGC requests in writing that records retained pursuant to paragraph (a) of this section, or information in such records, be submitted to PBGC, the designated recordkeeper must submit the requested materials to PBGC either electronically or by hand, mail, or commercial delivery service within 45 days of the

date of PBGC’s request therefor, or by a different time specified in the request.

\* \* \* \* \*

■ 13. In § 4007.11, paragraphs (a), (b), and (c) are revised to read as follows:

**§ 4007.11 Due dates.**

(a) *In general.* For flat-rate and variable-rate premiums, the premium filing due date for small plans is prescribed in paragraph (a)(1) of this section, the premium filing due date for mid-size plans is prescribed in paragraph (a)(2) of this section, and the premium filing due dates for large plans are prescribed in paragraph (a)(3) of this section.

(1) *Small plans.* If the plan had fewer than 100 participants for whom flat-rate premiums were payable for the plan year preceding the premium payment year, the due date is the last day of the sixteenth full calendar month following the end of the plan year preceding the premium payment year.

(2) *Mid-size plans.* If the plan had 100 or more but fewer than 500 participants for whom flat-rate premiums were payable for the plan year preceding the premium payment year:

(i) The due date is the fifteenth day of the tenth full calendar month following the end of the plan year preceding the premium payment year.

(ii) If the premium funding target is not known by the date specified in paragraph (a)(2)(i) of this section, a reconciliation filing and any required variable-rate premium payment must be made by the last day of the sixteenth full calendar month following the end of the plan year preceding the premium payment year.

(3) *Large plans.* If the plan had 500 or more participants for whom flat-rate premiums were payable for the plan year preceding the premium payment year:

(i) The due date for the flat-rate premium required by § 4006.3(a) of this chapter is the last day of the second full calendar month following the close of the plan year preceding the premium payment year.

(ii) The due date for the variable-rate premium required by § 4006.3(b) of this chapter for single-employer plans is the fifteenth day of the tenth full calendar month following the end of the plan year preceding the premium payment year.

(iii) If the participant count is not known by the date specified in paragraph (a)(3)(i) of this section, a reconciliation filing and any required flat-rate premium payment must be made by the date specified in paragraph (a)(3)(ii) of this section.

(iv) If the premium funding target is not known by the date specified in paragraph (a)(3)(ii) of this section, a reconciliation filing and any required variable-rate premium payment must be made by the last day of the sixteenth full calendar month following the end of the plan year preceding the premium payment year.

(b) *Due dates for plans that change plan years.* For any plan that changes its plan year, the due date or due dates for the flat-rate premium and any variable-rate premium for the short plan year are as specified in paragraph (a)(1), (a)(2), (a)(3), or (c) of this section (whichever applies). For the plan year that follows a short plan year, each due date is the later of—

(i) The applicable due date specified in paragraph (a)(1), (a)(2), or (a)(3) of this section, or

(ii) 30 days after the date on which the amendment changing the plan year was adopted.

(c) *Due dates for new and newly covered plans.* Notwithstanding paragraph (a) of this section, the due date for the flat-rate premium and any variable-rate premium for the first plan year of coverage of any new plan or newly covered plan is the latest of—

(1) The last day of the sixteenth full calendar month that began on or after the first day of the premium payment year (the effective date, in the case of a new plan), or

(2) 90 days after the date of the plan's adoption.

\* \* \* \* \*

Issued in Washington, DC, this 17th day of March 2008.

**Elaine L. Chao,**

*Chairman, Board of Directors, Pension Benefit Guaranty Corporation.*

Issued on the date set forth above pursuant to a resolution of the Board of Directors authorizing its Chairman to issue this final rule.

**Judith R. Starr,**

*Secretary, Board of Directors, Pension Benefit Guaranty Corporation.*

[FR Doc. E8-5712 Filed 3-20-08; 8:45 am]

BILLING CODE 7709-01-P

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## DEPARTMENT OF THE TREASURY

### Office of International Investment

#### 31 CFR Part 800

#### Regulations Pertaining to Mergers, Acquisitions and Takeovers

**AGENCY:** Department of the Treasury.

**ACTION:** Final rule.

**SUMMARY:** This final regulation amends regulations in part 800 of 31 CFR that implement section 721 of the Defense Production Act of 1950. The regulation amends a provision that pertains to the circumstances under which the Committee on Foreign Investment in the United States completes action following an investigation of a notified transaction, consistent with the amendments to section 721 made by the Foreign Investment and National Security Act of 2007 ("FINSA").

**DATES:** Effective date: March 21, 2008.

**FOR FURTHER INFORMATION CONTACT:**

Nova Daly, Deputy Assistant Secretary, U.S. Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220; telephone: (202) 622-2752; or e-mail: [Nova.Daly@do.treas.gov](mailto:Nova.Daly@do.treas.gov).

**SUPPLEMENTARY INFORMATION:**

**Background**

On July 26, 2007, President Bush signed into law the Foreign Investment and National Security Act of 2007 ("FINSA") (Pub. L. 110-49), which amends section 721 of the Defense Production Act of 1950 (50 U.S.C. App. 2170 *et seq.*) ("section 721"), to codify the structure, role, process, and responsibilities of the Committee on Foreign Investment in the United States ("CFIUS"). Section 721 requires that, upon receipt by Treasury of written notification of a "covered transaction" (*i.e.*, a merger, acquisition, or takeover by or with any foreign person that could result in foreign control of any person engaged in interstate commerce in the United States), the President, acting through CFIUS, shall review the transaction within 30 days to determine its effects on national security, based on any relevant factors, including several new factors FINSA added to an illustrative list contained in section 721. If, during its review, CFIUS determines that (1) the transaction threatens to impair U.S. national security and the threat has not yet been mitigated, (2) the lead agency recommends an investigation and CFIUS concurs, (3) the transaction would result in foreign government control, or (4) the transaction would result in the control of any U.S. critical infrastructure that could impair U.S. national security and the threat has not yet been mitigated, then CFIUS must conduct and complete within 45 days an investigation of the transaction. (The latter two grounds for an investigation do not mandate an investigation if the Secretary or Deputy Secretary of the Treasury and the equivalent lead agency counterparts

jointly determine that the transaction will not impair U.S. national security.)

FINSA does not require CFIUS, upon completion or termination of an investigation, to refer a transaction to the President for a final decision. On January 23, 2008, President Bush signed Executive Order 13456 (further amending Executive Order 11858) that sets forth the circumstances under which a transaction shall be referred to the President for a final decision. Specifically, Section 6(c) of Executive Order 11858, as amended, provides that CFIUS "shall send a report to the President requesting the President's decision with respect to a review or investigation of a transaction in the following circumstances:

(i) The Committee recommends that the President suspend or prohibit the transaction;

(ii) The Committee is unable to reach a decision on whether to recommend that the President suspend or prohibit the transaction; or

(iii) The Committee requests that the President make a determination with regard to the transaction."

The current regulations, by contrast, require CFIUS, upon completion or termination of any investigation, to report to the President and include a recommendation for action. This final regulation conforms the regulations to FINSA and Executive Order 11858, as amended, by removing the requirement to report to the President following completion or termination of an investigation, except in the circumstances set forth in Executive Order 11858.

*Procedural Matters:* It has been determined that this rule is not a significant regulatory action as defined in Executive Order 12866; therefore, a regulatory assessment is not required. Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply. Pursuant to 5 U.S.C. 553(a)(1), this final rule relates to a foreign affairs function of the United States, and therefore is not subject to the delayed effective date provisions of the Administrative Procedures Act.

Section 709 of the Defense Production Act (DPA) (50 U.S.C. App. 2159) states that any regulation issued under the DPA shall be published in the **Federal Register** and opportunity for public comment shall be provided for not less than 30 days. In addition, FINSA requires regulations that carry out section 721 to be promulgated subject to notice and comment. However, this regulation is not being issued pursuant to the DPA or FINSA. Consequently, the