

Defined Benefit Pension Plan Annual Funding Notice

March 6, 2009

On February 10, the U.S. Department of Labor (DOL) released Field Assistance Bulletin 2009-01 (the FAB), which included model annual funding notices for single-employer and multi-employer defined benefit plans. In the FAB, the DOL confirmed that the requirement to provide an annual funding notice was not extended. Therefore, the first notice is required to be distributed by April 30, 2009 for calendar year plans. Additionally, the FAB includes guidance regarding the distribution and content of the notice. View the text of the FAB online at <http://www.dol.gov/ebsa/regs/fab2009-1.html>.

This LawFlash discusses the annual funding notice for single-employer defined benefit pension plans. A forthcoming LawFlash will discuss the issues that relate to multi-employer pension plans.

Background

The Pension Protection Act (PPA) amended the Employee Retirement Income Security Act of 1974, as amended (ERISA) to require that an annual funding notice be provided to all defined benefit plan participants and beneficiaries, informing them of the plan's funded status. The notice must also be provided to the Pension Benefit Guaranty Corporation (PBGC) and labor organizations representing plan participants. This notice takes the place of the Summary Annual Report, which is no longer required to be distributed to participants.

Notice Deadline

The notice requirements apply to plan years beginning on or after January 1, 2008. Plans are required to furnish funding notices no later than 120 days following the close of each plan year. Therefore, many plans are required to provide their first funding notice no later than April 30, 2009. For small plans with 100 or fewer participants on each day during the plan year preceding the year to which the notice relates, notice must be provided not later than the earlier of (i) the date the plan's IRS Form 5500 is filed, or (ii) the due date (taking into account any extensions) for filing the plan's IRS Form 5500.

Good-Faith Compliance

The FAB indicates that, absent the issuance of regulations, a plan administrator will be treated as complying with the annual funding notice requirements if the plan administrator has complied with the

guidance contained in the FAB and has made a good-faith, reasonable interpretation of the requirements that are not specifically addressed in the FAB.

Contents of the Notice

Listed below is a summary of the information that is required to be provided by the plan administrator in the notice. The model notice from the DOL also includes several “boilerplate” provisions.

- **Funding Target Attainment Percentage.** This percentage is required to be included in the notice and is determined by dividing the plan’s net plan assets by the liabilities on the plan’s valuation date. Pending further guidance, the funding target attainment percentage that must be disclosed in the notice should be calculated in accordance with Section 1.430(i)-1 of the proposed regulations.
- **At-Risk Status.** If a plan is “at risk,” a statement containing the years during which the plan has been at risk is required to be included in the notice.
- **Fair Market Value of Assets.** The fair market value of assets and liabilities for the most recent plan year is required to be included in the notice.
- **Participant Information.** The total number of participants in the plan—including a breakout of active participants, participants in pay status, and deferred vested participants—must be reported. Absent guidance, the number of participants should be determined as of the plan’s valuation date. Additionally, for purposes of determining whether participants are “active,” “retired,” or “separated,” the plan administrator should refer to the IRS Form 5500 instructions for the meaning of the terms.
- **Funding and Investment Policies.** A statement must be included regarding the plan’s funding policy and investment policy, including a chart outlining the plan’s asset allocation among the various types of investments in which a plan is invested (e.g., stocks, bonds, cash).
- **Events with Material Effect on Assets or Liabilities.** If applicable, an explanation of any material events that may affect a plan’s assets or liabilities must be reported.
- **Benefit Payments Guaranteed by PBGC.** While model language is generally provided regarding PBGC-guaranteed payments, some customization is required depending on each plan’s specific terms.

Notices are also permitted to include any additional information that the plan administrator feels is necessary or helpful to participants in understanding the notice, so long as the information does not mislead or misinform participants. Other required notices may also be mailed with the funding notice and should generally include an explanation of any relationship between the two notices.

Other Information Included in the FAB

The FAB was structured in a question-and-answer format and clarified certain unclear items, including the following:

- Although the funding notice is technically required to be provided to the PBGC, the PBGC will not take any enforcement action regarding a plan administrator’s failure to provide the notice to the PBGC for single-employer plans with liabilities that do not exceed plan assets by more than

\$50 million dollars, provided that the plan administrator furnishes the latest available funding notice to the PBGC within 30 days of receiving a written request from the PBGC.

- Plans that have an interest in one or more direct filing entities (DFEs) (such as master trusts or common or collective trusts) must include information in the notice explaining how participants can obtain more information about the DFE investments.
- The annual funding notice is required to include a statement regarding any plan amendment, scheduled benefit increase or reduction, or any other known event if such event is expected to have a material effect on plan assets or liabilities. The DOL indicated in the FAB that an event will be considered to be “material” if it results in a change in plan assets or liabilities of 5% or more.
- The annual funding notice is permitted to be issued electronically in accordance with the DOL electronic disclosure requirements (and such method will be considered to be a safe harbor) or through any other means that is consistent with ERISA and the E-SIGN Act.

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