

Supporting Statement for Paperwork Reduction Act Submission

AGENCY: Pension Benefit Guaranty Corporation

TITLE: Coverage; ERISA section 4021

STATUS: Request for approval of a proposed collection of information

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1. Need for collection. The Pension Benefit Guaranty Corporation (PBGC) insures and collects premiums from defined benefit pension plans that are covered under title IV of the Employee Retirement Income Security Act of 1974 (ERISA). A defined benefit pension plan (plan) is covered under title IV if it is described in section 4021(a) of ERISA and does not meet one of the exemptions from coverage listed in 4021(b)(1)-(13).

To be described in section 4021(a) of ERISA a plan must:

- be an employee pension benefit plan that is established or maintained by: a commercial employer, an employee organization, or both; and (2) have in practice met the requirements of part I of subchapter D of chapter 1 of the Internal Revenue Code (Code); or
- have been determined by the Secretary of the Treasury to (1) be described in section 401(a) of the Code or, (2) meet the requirements of section 404(a)(2) of the Code.

A plan is exempt from coverage if it is:

- an individual account plan (section 4021(b)(1));
- established and maintained by a government entity (section 4021(b)(2));
- governed by the Railroad Retirement Act of 1935 or 1937 and financed by contributions under that Act (section 4021(b)(2));
- a church plan as defined in section 414(e) of the Code unless it has made an election for coverage under section 410(d) of the Code and has notified PBGC in accordance with procedures prescribed by PBGC that it wishes to have title IV apply to it (section 4021(b)(3));
- established and maintained by a Fraternal Beneficiary Society or a Voluntary Employees' Beneficiary Association and is not funded by employer contributions (section 4021(b)(4));
- a plan that contains an Employee Pension Trust created before June 25, 1959 (section 4021(b)(4));

- a plan that since September 2, 1974 has not been funded with employer contributions (section 4021(b)(5));
- an unfunded “top hat” plan maintained primarily to defer compensation for a select group of management or highly compensated employees (section 4021(b)(6));
- established and maintained outside of the United States primarily for the benefit of nonresident aliens (section 4021(b)(7));
- maintained by an employer to provide retirement benefits in excess of the limitations of section 415 of the Code (section 4021(b)(8));
- established and maintained exclusively for substantial owners (section 4021(b)(9));
- of an international organization exempt from taxation under the International Organizations Immunities Act (section 4021(b)(10));
- maintained solely to comply with workers’ compensation, unemployment compensation or disability insurance law (section 4021(b)(11));
- a defined benefit plan but is described in section 3(35)(B) of ERISA, such that it is treated as an individual account plan (section 4021(b)(12)); and
- established and maintained by a professional service employer and which, since September 2, 1974, has not had over 25 active participants (section 4021(b)(13)).

PBGC is proposing a form, entitled Request for Coverage Determination, for use by a plan sponsor or plan administrator of a plan with an uncertain title IV coverage status. The plan sponsor or plan administrator would use this form to request that PBGC determine under section 4021(a) and (b) of ERISA whether the plan is covered.

2. Use of information.

a. Information required. When completing a Request for Coverage Determination form, a plan sponsor or plan administrator would be required to provide identifying information about the plan (such as name and address), the plan document, and any correspondence with the Internal Revenue Service that is relevant to the plan’s qualification under section 401(a) of the Code. Also, the requester would be asked to state (1) whether the plan had received a coverage determination before and, if yes, the changes to the plan’s organization or operations since the prior determination and (2) whether the plan is already established or proposed but not yet established. Further, the requester would be permitted, but not required, to submit a narrative

statement supporting the plan's position of its title IV coverage or non-coverage. The requester would be provided the opportunity to explain the absence of any required information.

Additional information would be required if the requester is seeking a determination of whether a plan is a: (1) substantial owners plan, (2) a small professional service employer plan, (3) a church plan, or (4) a Puerto Rico-based plan.

A plan sponsor or plan administrator requesting a determination of whether a plan is a substantial owners plan, as described in section 4021(b)(9) of ERISA, would be required to state whether the plan covers an individual who is not a substantial owner.¹ Further, the requester would be required to submit: (1) a list of the names of all the participants (active, retired, and term vested) in the plan; (2) documents showing the percentage of ownership interest that each participant currently holds or has held in the plan sponsor during the 60 months before the completion of the form; (3) documents reflecting any stock options for the plan sponsor (if the plan sponsor is a corporation); (4) the partnership agreement or other document (e.g. partnership meeting minutes, state government filing) naming the partners (if the plan sponsor is a partnership); (5) documents indicating whether the owner's spouse is an employee, director, or manager (if the plan sponsor is a corporation (or is taxed as a corporation), and the plan covers only the owner and the owner's spouse); (6) a description of any family relationships between the owner(s) of the plan sponsor and other participants of the plan and the names and the dates of birth of the owners' children (if such family relationships exist); (7) documentation (e.g. a spreadsheet) showing dates and amounts paid to participants (providing their names) within the

¹ For purposes of section 4021(b)(9), a substantial owner is an individual who at some point during the past 60 months was: (1) the owner of the entire interest in an unincorporated trade or business, (2) a partner who owns more than 10 percent of profit or capital interest if the business is a partnership, or (3) an owner of more than 10 percent of the voting stock or of all the stock if the business is a corporation. See section 4021(d) of ERISA.

past six years; and (8) date of termination or planned date of termination (if the plan has or will be terminated). In addition, the requester making this request would be suggested, but not required, to provide: (1) the plan's last three Form 5500s (if not available through EFAST2), (2) the plan's most recent Actuarial Valuation Report, and (3) the plan sponsor's federal tax returns for the last five years.

A plan sponsor or plan administrator requesting a determination of whether a plan is a small professional service employer plan, as described in section 4021(b)(13) of ERISA, would be required to state whether the plan at any time, since September 2, 1974, has had more than 25 active participants. Further, the requester would be required to submit: (1) the plan sponsor's website (if any); (2) name, principal business, services performed, and organizational structure of every employer involved in establishing and maintaining the plan;² (3) a percentage breakdown of the services performed, including the amount of revenue generated from each service (if the plan sponsor provides multiple services); (4) names, occupations, levels of education, and percentages and periods of ownership of all current owners of the plan sponsor; (5) names, occupations, levels of education, and titles of all individuals who control, manage, or direct the plan sponsor; and (6) educational requirements for the plan sponsor's profession and qualifications such as course work, graduate school, specific state licenses, or similar requirements. In addition, the requester making this request would be suggested, but not required, to provide: (1) the plan's last three Form 5500s (if not available through EFAST2); (2) the plan's most recent Actuarial Valuation Report; (3) the plan sponsor's most recent federal tax return; (4) licenses, degrees, or certifications of all individuals who control, manage, or direct the

²For purposes of section 4021(b)(13) of ERISA, a professional service employer is owned or controlled by and offers the services of physicians, dentists, attorneys, public accountants, or other professional individuals. See section 4021(c) of ERISA.

plan sponsor and whose professions are not listed in section 4021(c)(2) of ERISA; (5) documents showing percentages and periods of ownership for all current owners of the plan sponsor; (6) documents supporting the positions of all individuals who control, manage, or direct the plan sponsor; and (7) if the plan sponsor provides multiple services, documents supporting the percentage breakdown of the services performed.

A plan sponsor or plan administrator requesting a determination for a church plan, as described in section 4021(b)(13) of ERISA, would be required to submit the determination from the Internal Revenue Service that the plan is recognized as a church plan under section 414(e) of the Code. The requester would also be required to state whether the plan has made an election for coverage under section 410(d) of the Code. If such an election has been made, the requester would be required to state whether it wishes to have title IV of ERISA apply to it and provide a copy of the election under section 410(d) of the Code.

A plan sponsor or plan administrator requesting a determination for a Puerto Rico-based plan, as described in section 1022(i)(1) of ERISA,³ would be required to state: (1) whether each participant in the plan resides or works primarily in Puerto Rico, and (2) whether the plan had made an election for PBGC coverage under 26 CFR 1.401(a)-50. Further, the requester would be required to submit: (1) documents of the election made under 26 CFR 1.401(a)-50 (if such an election had been made); (2) the trust document or agreement, group annuity contract, or other financial document(s) funding the plan; (3) the name and location of the trust and trustee (if the plan is funded by a trust); (4) the name of the contract holder (if the plan is funded by a group annuity contract); (5) the master trust agreement (if the plan is part of such an agreement); (6)

³ Under section 1022(i)(1) of ERISA, a Puerto Rico-based plan generally is not described in section 4021. However, it can make election for coverage under section 1022(i)(2) of ERISA and 26 CFR 1.401(a)-50, and, if it otherwise satisfies the qualification requirements, it will be covered under title IV of ERISA.

documentation) appointing the plan administrator; (7) whether the administrator is an individual, entity, or committee; (8) the qualification letter(s) from the Puerto Rico Department of Treasury; and (9) documentation transferring the plan trust to Puerto Rico from elsewhere in the United States and the date when this transfer occurred (if such a transfer had taken place).

PBGC expects that most, if not all, of the information required under this subsection will be readily available and accessible to a plan sponsor or a plan administrator.

b. Need for information. PBGC needs the information to determine whether a plan is covered under title IV and thus insured by PBGC.

3. Information technology. PBGC will permit, but not require, forms to be made by electronic transmission to the address specified in the instructions for the Request for Coverage Determination.

4. Duplicate or similar information. PBGC believes that there is no information similar to that required for the Request for Coverage Determination that could be used instead of the required information for the purposes of this form. The form allows a requester to reference previously submitted information without resubmitting it.

5. Reducing the burden on small entities. Not applicable. The Request for Coverage Determination will not have a significant impact on a substantial number of small entities.

6. Consequence of reduced collection. Without a Request for Coverage Determination form, a plan sponsor or plan administrator would have no standard means to request a determination of a plan's title IV coverage status. Without the information provided on this form, PBGC would have no way to make such a determination.

7. Consistency with guidelines. The collection of information is conducted in a manner consistent with the guidelines in 5 CFR 1320.5(d)(2).

8. Outside input. On December 4, 2018, PBGC published (at 83 FR 62629) a notice of its intent to request that OMB approve this collection of information and received comments from three commenters. A summary of the substantive comments about the proposed form and instructions, PBGC's responses to them, and the resulting changes to the forms and instructions are below.

One commenter stated that the form will clarify the process for obtaining a coverage determination. The commenter also suggested changing the governing statute to exempt all plans with fewer than 26 participants from coverage. This suggestion goes beyond the scope of the form and instructions.

A second commenter raised a number of general and specific comments related to the form and instructions.

- a. The commenter suggested allowing a prospective plan, meaning a plan not yet in existence, to use the form to request a coverage determination. In response PBGC added Question 4 to Part II of the form asking whether the plan is prospective or already established, and it added information to the instructions about a pilot program. Under this pilot program, a prospective plan may use this form to request an opinion from PBGC as to whether its sponsoring employer is a professional service employer under section 4021(b)(13) of ERISA or whether all of its participants are substantial owners under section 4021(b)(9). This pilot program will begin once the form is approved and end one year thereafter, unless extended by

- PBGC. PBGC will post on its website the last date by which the form must be sent to PBGC to request an opinion on a prospective plan.
- b. The commenter recommended that coverage determinations not be automatically applied on a retroactive basis. PBGC applies a coverage determination retroactively to the date when a plan first fits the criteria for coverage. If a plan wishes to demonstrate any changed circumstances affecting its coverage status following its formation, it may do so using the form. PBGC will take that information into consideration when issuing a coverage determination.
 - c. The commenter recommended that PBGC indicate in the instructions whether this form is required to request a coverage determination. In response, PBGC modified the language in the introductory text boxes of the form and instructions from “may be used” to “is used.” PBGC is requesting approval from OMB for use of this form to collect information necessary to make a coverage determination. If PBGC receives an email request that lacks sufficient information for a coverage determination and the missing information is substantial, PBGC may require completion of this form.
 - d. The commenter inquired whether PBGC will make coverage determinations public. PBGC currently does not have plans to make determinations public. But, the form and instructions and the pilot program offering PBGC opinion letters on the professional service employer and substantial owner exemptions are intended to provide more guidance on Title IV coverage
 - e. The commenter recommended clarifying in what format and method PBGC will issue coverage determinations responses. The form of a coverage determination is in

- writing as provided in PBGC's regulation on Rules for Administrative Review of Agency Decision (29 CFR part 4003), and currently PBGC issues coverage determinations by letter. PBGC added this information to the instructions.
- f. The commenter recommended that PBGC allow a streamlined form to be submitted for a coverage determination when a second determination is being requested. To address the situation of a second coverage determination, PBGC added Question 3 to Part II of the form concerning plans with prior coverage determinations. The instructions explain that, "After receiving a determination, a plan need not request a new one, except to demonstrate a change in the plan's organization or operations since the earlier request."
 - g. The commenter recommended that PBGC clarify that requests for coverage determination submitted before the development of this form need not be resubmitted. In response, PBGC added a sentence to Part II of the instructions stating, "After receiving a determination, a plan need not request a new one, except to demonstrate a change in the plan's organization or operations since the earlier request."
 - h. The commenter recommended adding numbers to the questions and requested information in each part of the form. PBGC adopted this suggestion and added numbers.
 - i. The commenter stated that the requirements of this form will affect the number of coverage determination requests that PBGC will receive. The commenter added that a simpler form would generate more submissions and a more complex and onerous form would generate fewer submissions. Further, the commenter recommended,

- “leaning toward a simpler, less complex form with adequate, but minimal, information necessary to complete a proper coverage determination.” PBGC agrees. As described above in Question 2, the questions and requested items on the form are necessary for PBGC to make a coverage determination.
- j. The commenter stated that the form and instructions, where requesting pieces of information, inconsistently referred to “documents” and “copies of documents.” The commenter recommended adding language to differentiate between required legal documents and information that could be submitted in a spreadsheet or other form. In response, PBGC deleted all uses of “copy of” and “copies of” and indicated that a spreadsheet may be provided to show dates and amounts paid to participants.
 - k. The commenter recommended adding boxes in Part I of the form for “Enrolled actuary for the plan”, “Plan attorney,” and “Third party administrator” as possible requesters and asked for clarification of the term “authorized contact person” as used in Part I of the form. PBGC added clarification of this term to Part I of the instructions but did not add boxes for additional possible filers. The form is intended to be completed by an individual with first-hand knowledge of the requested information. It may be completed by the authorized contact person, but it must be signed by the filer.
 - l. A commenter raised that the question in Part II of the form that asked if the requester had provided all relevant information was confusing, and a requester would not be able to make this assessment. The commenter recommended shifting the question to Part IX. In response, PBGC deleted the question and added the following sentence to

Part IX of the instructions, “If a filer fails to provide complete and accurate information, then PBGC’s determination cannot be relied upon.”

- m. In Part III, 4th section, 1st box, the commenter asked for clarification of the term “participants” as used in the request for “List of the names of all the participants.” In response, PBGC changed this wording to, “List of the names of all the participants (active, retired, and term vested) in the plan.” The commenter also asked PBGC to reconsider whether this information is for necessary, in light of the privacy concerns raised by asking for individuals’ names. This information is necessary for PBGC to make a determination under section 4021(b)(9) of ERISA. For this type of determination, PBGC must assess whether each participant qualifies as a substantial owner under section 4021(d). It could not make this assessment independently without knowing the names of participants. All participant names submitted with this form will be protected in accordance with the Privacy Act.
- n. In Part III of the form concerning the substantial ownership rules, the commenter recommended that PBGC clarify what information is needed where non-corporate plan sponsors are operating in community property states. The required information listed on the form is used for a coverage determination involving non-corporate plan sponsors operating in community property states. For example, the form requests documentation showing each participant’s ownership in the plan sponsor and a description of any family relationships between the owners of the plan sponsor and participants. Further, the commenter recommended the instructions state that spousal ownership is determined in accordance with relevant state law. PBGC did not adopt

this recommendation, as PBGC determines ownership in these situations on a case-by-case basis.

- o. In Part III, 4th section, the commenter recommended that PBGC replace the requirement to provide a partnership agreement with a listing of the partners. In response, to provide more flexibility, PBGC has changed the wording of this requirement to read, “The partnership agreement or other document (e.g. partnership meeting minutes, state government filing) naming the partners (if the plan sponsor is a partnership).”
- p. In Part IV, 2nd section, the commenter recommended that PBGC clarify that the request for “documents showing dates and amounts paid to participants within the last six years” may be satisfied by the submission of a spreadsheet. PBGC will accept a spreadsheet and made this clarification. In considering the commenter’s suggestion, PBGC moved this information request, the request for a description of any family relationships between the owner(s) of the plan sponsor and other participants of the plan and the names and the dates of birth of the owners’ children, and the request for the plan’s date of termination or planned date of termination to the information required for a determination of a substantial owners plan in Part III.

A third commenter raised that in certain plans, called floor-offset plans, participants may receive benefits that ultimately net to zero after the application of the plans’ offset provision. The commenter recommended that PBGC state in the instructions that such individuals do not count as participants for purposes of the substantial owners and small professional service employer exemptions. PBGC did not adopt this suggestion. Determining whether an individual

in the situation that the commenter described is a participant would require careful analysis of the plan document and other information.

9. Payment to respondents. PBGC will provide no payments or gifts to the respondents in connection with this collection of information.

10. Confidentiality. Information provided to PBGC is confidential to the extent provided by the Freedom of Information Act and the Privacy Act. PBGC's rules providing and restricting access to its records are set forth in 29 CFR part 4901.

11. Personal questions. The collection of information does not call for submission of information of a sensitive or private nature.

12. Hour burden on the public. PBGC estimates that over the next three years 425 plans will submit a Request for Coverage Determination form each year. PBGC further estimates that the average burden of this collection of information will be 10 hours per plan, with a total annual burden of 4,250 hours (10 hours times 425 plans). The majority of the time spent on this collection will be applied to gathering plan information and other supporting documentation. The estimated dollar equivalent of this hour burden, based on an assumed blended average hourly rate of \$75 for administrative, clerical, and supervisory time, is \$318,750.

13. Cost burden on the public. PBGC estimates that over the next three years, respondents will contract out 4,250 hours annually (10 hours times 425 plans) to complete the form, draft the narrative statement, and review the supporting documentation. Assuming an average rate of \$350 for plan attorney and actuary costs, PBGC estimates the total annual cost of preparing a Request for Coverage Determination form will be \$1,487,500 (4,250 hours times

\$350) for an average annual cost or \$3,500 per respondent. No capital or start-up costs are necessary for this form.

14. Cost to the government. The cost to the government for the Request for Coverage Determination form is \$0.

15. Explanation of burden changes. There are no burden changes as this is an initial information collection.

16. Publication plans. There are no plans for tabulation or publication.

17. Display of expiration date. PBGC is not seeking approval to avoid displaying the expiration date for OMB approval of this information collection.

18. Exceptions to certification statement. There are no exceptions to the certification statement.