



Pension Benefit  
Guaranty Corporation

# **Small Business Regulatory Enforcement Fairness Act (SBREFA)**

Compliance Report

March 17, 2020



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PBGC consistently receives “A” ratings from the U.S. Small Business Administration (SBA), Office of the National Ombudsman, on the Corporation’s compliance with SBREFA. The Office of the National Ombudsman rates federal agencies annually and publishes those ratings in the Ombudsman’s reports to Congress.<sup>1</sup>

PBGC demonstrates compliance with SBREFA in the following ways:

**1. Penalty Reduction Policies and Programs**

Section 223 of SBREFA provides that each agency regulating the activities of small entities establish a policy or program to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity.

Late premium payment penalties — reductions. PBGC reduces penalties for late premium payments. This reduces burden, especially for small businesses with small administrative staff. PBGC’s regulation at 29 CFR 4007.8 cuts the penalty rate for late payment of a premium and provides a penalty waiver that applies to underpayments by plans with good compliance histories if corrected promptly after notice from PBGC. PBGC will waive 80 percent of the penalty assessed for such a plan.

Late premium payment penalties—reasonable cause waivers. PBGC’s premium penalty policy, Appendix to 29 CFR part 4007, considers the size of an organization in determining whether “reasonable cause” exists for a penalty waiver. The policy states:

*“If an organization or one or more of its employees is responsible for taking action, the size of the organization may affect what ordinary business care and prudence would require. For example, ordinary business care and prudence would typically require a larger organization to establish more comprehensive backup procedures than a smaller organization for dealing with situations such as computer failure, the loss of important records, and the inability of an individual to carry out assigned responsibilities. Thus, there may be reasonable cause for a small organization’s failure to pay a premium in full and on time even though, if the organization were larger, the exercise of ordinary business care and prudence would have avoided the failure.”*

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<sup>1</sup> See National Ombudsman’s Annual Reports to Congress, 2013-2017 <https://www.sba.gov/document/report-national-ombudsmans-annual-reports-congress>.

Failure to provide notices or other material information penalties—plan size considered.

PBGC's penalty policy statement for failure to file notices or other material information (60 FR 36837), identifies the size of the plan among the facts and circumstances of each case that PBGC considers, assuring that the penalty fits the violation. The policy provides that in most cases, PBGC will increase penalties as the period of delinquency increases, reduce penalties for small plans, and limit total penalties based on plan size.

## **2. Regulatory Enforcement Fairness**

Section 222 of SBREFA created the SBA's Office of the National Ombudsman to work with agencies to ensure that small business concerns are addressed in regulatory compliance and enforcement activities, and that small businesses are made aware of their rights to comment to the SBA's Ombudsman about agency compliance and enforcement activities without reprisal.

Small business non-retaliation policy. PBGC publicizes on its website the right of small entities to invoke their SBREFA rights under its Small Business Non-Retaliation Policy, "*Reminder to Small Businesses: PBGC's Non-Retaliation Policy and SBA's Ombudsman Assistance.*" The policy explains that PBGC is committed to maintaining an environment in which small businesses and others are free to question or complain about PBGC actions or policies without fear of retaliation. The policy also explains that the SBA's Ombudsman is available to assist small entities with federal agency enforcement actions and compliance matters, and that small businesses may request expedited treatment of an enforcement action against them when they believe that delay may threaten the economic viability of the business. It includes information about PBGC's compliance assistance through its Problem Resolution Officer (PRO) and provides contact information for PBGC's PRO and the Office of the National Ombudsman.

PBGC staff are reminded regularly how to direct small businesses to the non-retaliation policy and the SBA Ombudsman. The policy is disseminated to all PBGC employees via PBGC's website, in staff training sessions, and by email directly to PBGC's compliance and enforcement staff. The email emphasizes the importance of the non-retaliation policy, offers assistance with staff training, and includes a copy of PBGC's response to the SBA Ombudsman's Federal Agency Questionnaire as an attachment.

Notice of SBREFA rights. PBGC informs small entities of their SBREFA rights at the time it issues a final agency determination regarding a violation of PBGC's premium payment requirements. The notice is in the form of an enclosure to the letter which transmits the final agency determination.

Regulatory Fairness Representative. Small businesses have direct access via a toll-free phone number and dedicated email address to PBGC's "RegFair" Representative who also serves as the agency's PRO for pension plan practitioners. As described in the Small Business Non-Retaliation Policy, the PRO is available to provide compliance assistance, receive and respond to retaliation allegations by small businesses, and to assist with other types of concerns.

### 3. Compliance Assistance

Section 212 of SBREFA requires agencies to publish a compliance guide with respect to each rule for which “an agency is required to prepare a final regulatory flexibility analysis.”<sup>2</sup> A regulatory flexibility analysis is required for any final rule for which a notice of proposed rulemaking is required unless “the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” PBGC has not prepared a final regulatory flexibility analysis for any final rule because, for each rule for which a notice of proposed rulemaking is required, PBGC has certified that the rule will not have a significant economic impact on a substantial number of small entities. Therefore, the requirement to publish a compliance guide for small business under section 212 of SBREFA has not applied to PBGC’s rules.

However, PBGC considers very seriously the impact of its regulations and policies on small entities. PBGC designs its regulations and policies to anticipate and avoid compliance and enforcement issues for small entities as well as to provide relief from enforcement measures. Consistent with section 213 of SBREFA regarding informal compliance assistance, wherever applicable, PBGC explains the impact of regulatory or policy changes on small entities.

Premium reductions and reporting waivers for small plans. PBGC considers small entities in its premium and reporting regulations by reducing premium amounts where possible and waiving reporting for small plans and employers.

- Reducing the amount of the variable rate premium (VRP). Plans of certain small employers (generally 25 or fewer employees) have the benefit of a “cap” on the VRP and are exempt from the requirements to compute and report VRP data.<sup>3</sup> The predictability of the premium and the exemption from the reporting requirement simplify and reduce the burden on these small employers, particularly in view of the continued increase in premium rates in recent years. (Premium rates are set under ERISA.)
- Waiving “reportable events” notices. PBGC waives reporting for all small plans of 100 or fewer participants of five reportable events (“extraordinary dividend or stock redemption, change in controlled group, active participant reduction, transfer of benefit liabilities, and missed quarterly contributions”).<sup>4</sup>
- Waiving annual financial and actuarial information reporting. “4010 reporting” for underfunded plans is waived for all controlled groups with fewer than 500 participants regardless of a plan’s underfunding.<sup>5</sup> PBGC determined that it could provide reporting relief for smaller plans without compromising the pension insurance system.

Regulatory agenda planning and review. PBGC encourages public participation in the regulatory process and develops a regulatory and deregulatory agenda in accordance with applicable executive orders and the Regulatory Flexibility Act.<sup>6</sup> As part of its regulatory planning and review, PBGC has published Requests for Information (RFIs) in the Federal Register that solicit

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<sup>2</sup> Section 604 of SBREFA

<sup>3</sup> 29 CFR 4006.5(b)

<sup>4</sup> 29 CFR 4043, subpart B.

<sup>5</sup> 29 CFR 4010.11

<sup>6</sup> E.O. 12866, E.O. 13563, E.O. 13771

public comment on its rules. PBGC's 2017 RFI explains that PBGC's regulatory agenda attempts to minimize administrative burdens on plans and participants, improve transparency, simplify filing, provide relief for small businesses, and assist plans to comply with applicable requirements. PBGC's current efforts to reduce regulatory burden are in substantial part a response to public comments. To further encourage input, PBGC created a webpage, "Federal Register Notices Open for Comment," that highlights when there are opportunities to comment on proposed rules, proposed forms and instructions, and other notices seeking comment. PBGC encourages comments on an on-going basis in continuing to look for ways to further improve its regulations.

Several recent regulatory and deregulatory actions that will have a positive impact on small businesses include a *Miscellaneous Corrections, Clarifications, and Improvements* final rule that came out of PBGC's ongoing efforts to review the effectiveness and clarity of its rules. Key changes would eliminate a "4010 reporting" requirement and reduce possible duplicative reporting of a reportable event. PBGC also published two final rules that reduce valuation and reporting burdens for multiemployer plans and provide less burdensome requirements for small multiemployer plans ("*Terminated and Insolvent Multiemployer Plans and Duties of Plan Sponsors*").<sup>7</sup>

The "*Mergers and Transfers Between Multiemployer Plans*" final rule implements statutory procedures giving PBGC new authority to facilitate mergers for seriously underfunded multiemployer plans. Such mergers can improve plans' ability to survive and continue paying participants' benefits. Mergers may be particularly useful for small plans due to economies of scale. PBGC published a final rule on *Missing Participants* to expand its missing participants program to cover defined contribution plans and pension plans of small professional service employers. The program may be particularly helpful to small plans with limited resources by providing alternatives for dealing with the benefits of missing participants on plan termination. The rules also simplify and streamline current requirements.

#### Other compliance assistance.

- PBGC developed a one-page checklist, "*Reportable Events Reference Sheet for Small Plans*" to help small plans identify reportable events.
- PBGC published "*The Federal Pension Insurance Guide for Small Business*," which is intended to help sponsors and administrators of small plans comply with legal requirements.
- PBGC provides customer service assistance to pension plan administrators and plan professionals by e-mail or telephone (via a dedicated toll-free number). The practitioner "Contact Us" information is on the top right of every website page. PBGC extends the hours that customer service representatives are available (by both telephone and email) on and near the peak premium filing due date to handle the increased volume of calls from filers in order to help filers accurately and timely meet their obligations.

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<sup>7</sup> "Terminated and Insolvent Multiemployer Plans and Duties of Plan Sponsors," 85 FR 18715, and "Multiemployer Plans; Electronic Filing Requirements," 80 FR 55743.

- PBGC offers a “Legal Inquiries” webpage, which provides contact information for PBGC’s Office of the General Counsel to contact PBGC attorneys for informal advice on legal issues pertaining to compliance, enforcement and other matters of concern.
- Participants and plan sponsors have direct access to PBGC’s Participant and Plan Sponsor Advocate. The Advocate’s office assists pension plan sponsors and participants in resolving disputes with PBGC, identifies potential legislative changes, and submits an annual report to Congress.
- PBGC offers auto email services to businesses to receive email alerts of updates on pension plan practitioner-related topics (“What’s New for Practitioners”) and to receive email filing reminders for the month(s) selected (“Practitioner Filing Reminders”).
- PBGC continues to improve its processes with our small business customers in mind. For example, PBGC sends acknowledgments for each premium filing received, which includes the results of processing the filings, such as the notification of any balance due or overpaid. In addition, PBGC communicates with businesses about best practices for submitting timely and accurate filings. For example, premium e-filing reminders are displayed in various places on the website, such as at the top of the premium e-filing login page and in the “Ongoing Reminders” section of the “Online Premium Filing With My PAA” webpage, and PBGC’s premium filing instructions contains a “What’s New” section highlighting changes from the previous year.
- PBGC provides compliance assistance and solicits feedback from small businesses and their advisers at professional conferences, through customer surveys, and by conducting focus groups (when appropriate). For example, PBGC staff regularly makes presentations to educate practitioners who serve small businesses at the annual Enrolled Actuaries Meeting, and meetings of the American Society of Enrolled Actuaries, among other practitioner groups that serve small pension plans.
- PBGC’s “Insurance Coverage” webpage provides helpful information to small businesses and others about pension plans that are not covered by PBGC, including “small professional service employer plans” and “substantial owner plans,” and how to request a coverage determination. The webpage links to a form intended to streamline and simplify the coverage determination process. The form’s instructions also explain that under a pilot program, small professional service employers and substantial owners may use the form to request an opinion letter about whether a plan in the process of being created is likely to be covered by PBGC.
- PBGC established on its website a single, searchable, indexed database of its guidance documents pursuant to E.O. 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents.” Small businesses, other employers, plan practitioners, and individuals can use the database to easily search for PBGC guidance documents, as defined in E.O. 13891.

- PBGC offers procurement opportunities that target small businesses. The Procurement Opportunities webpage includes a section entitled “Opportunities for Small Businesses.” In addition, PBGC’s Director of Small and Disadvantaged Business Utilization is available to assist the small business community on procurement opportunities. Because of PBGC’s emphasis on small businesses procurement opportunities, the agency exceeded its 2018 small business goals.