

been exhausted. If an amendment decreased benefits, amounts previously allocated with respect to each participant in excess of the value of the reduced benefit shall be reduced accordingly. In the subcategory in which assets are exhausted, the assets shall be distributed among the participants according to the ratio that the value of each participant's benefit or benefits in that subcategory bears to the total value of all benefits in that subcategory.

(f) *Applying assets to basic-type or nonbasic-type benefits within priority categories.* The assets allocated to a participant's benefit or benefits within each priority category shall first be applied to pay for the participant's basic-type benefit or benefits assigned to that priority category. Any assets allocated on behalf of that participant remaining after satisfying the participant's basic-type benefit or benefits in that priority category shall then be applied to pay for the participant's nonbasic-type benefit or benefits assigned to that priority category. If the assets allocable to a participant's basic-type benefit or benefits in all priority categories are insufficient to pay for all of the participant's guaranteed benefits, the assets allocated to that participant's benefit in priority category 4 shall be applied, first, to the guaranteed portion of the participant's benefit in priority category 4. The remaining assets allocated to that participant's benefit in priority category 4, if any, shall be applied to the non-guaranteed portion of the participant's benefit.

(g) *Allocation to established subclasses.* Notwithstanding paragraphs (e) and (f) of this section, the assets of a plan that has established subclasses within any priority category may be allocated to the plan's subclasses in accordance with the rules set forth in § 4044.17.

EFFECTIVE DATE NOTE: At 76 FR 34605, June 14, 2011, the last sentence of § 4044.10(b) was amended by adding before the period at the end: “, but, in a PPA 2006 bankruptcy termination, subject to the limitations in sections 4022(g) and 4044(e) of ERISA (and corresponding provisions of these regulations)”, effective July 14, 2011

#### § 4044.11 Priority category 1 benefits.

(a) *Definition.* The benefits in priority category 1 are participants' accrued benefits derived from voluntary employee contributions.

(b) *Assigning benefits.* Absent an election described in the next sentence, the benefit assigned to priority category 1 with respect to each participant is the balance of the separate account maintained for the participant's voluntary contributions. If a participant has elected to receive an annuity in lieu of his or her account balance, the benefit assigned to priority category 1 with respect to that participant is the present value of that annuity.

#### § 4044.12 Priority category 2 benefits.

(a) *Definition.* The benefits in priority category 2 are participants' accrued benefits derived from mandatory employee contributions, whether to be paid as an annuity benefit with a pre-retirement death benefit that returns mandatory employee contributions or, if a participant so elects under the terms of the plan and subpart A of part 4022 of this chapter, as a lump sum benefit. Benefits are primarily basic-type benefits although nonbasic-type benefits may also be included as follows:

(1) *Basic-type benefits.* The basic-type benefit in priority category 2 with respect to each participant is the sum of the values of the annuity benefit and the pre-retirement death benefit determined under the provisions of paragraph (c)(1) of this section.

(2) *Nonbasic-type benefits.* If a participant elects to receive a lump sum benefit and if the value of the lump sum benefit exceeds the value of the basic-type benefit in priority category 2 determined with respect to the participant, the excess is a nonbasic-type benefit. There is no nonbasic-type benefit in priority category 2 for a participant who does not elect to receive a lump sum benefit.

(b) *Conversion of mandatory employee contributions to an annuity benefit.* Subject to the limitation set forth in paragraph (b)(3) of this section, a participant's accumulated mandatory employee contributions shall be converted to an annuity form of benefit payable at the normal retirement age or, if the plan provides for early retirement, at

the expected retirement age. The conversion shall be made using the interest rates and factors specified in paragraph (b)(2) of this section. The form of the annuity benefit (e.g., straight life annuity, joint and survivor annuity, cash refund annuity, etc.) is the form that the participant or beneficiary is entitled to on the termination date. If the participant does not have a nonforfeitable right to a benefit, other than the return of his or her mandatory contributions in a lump sum, the annuity form of benefit is the form the participant would be entitled to if the participant had a nonforfeitable right to an annuity benefit under the plan on the termination date.

(1) *Accumulated mandatory employee contributions.* Subject to any addition for the cost of ancillary benefits plus interest, as provided in the following sentence, the amount of the accumulated mandatory employee contributions for each participant is the participant's total nonforfeitable mandatory employee contributions remaining in the plan on the termination date plus interest, if any, under the plan provisions. Mandatory employee contributions, if any, used after the effective date of the minimum vesting standards in section 203 of ERISA and section 411 of the Code for costs or to provide ancillary benefits such as life insurance or health insurance, plus interest under the plan provisions, shall be added to the contributions that remain in the plan to determine the accumulated mandatory employee contributions.

(2) *Interest rates and conversion factors.* The interest rates and conversion factors used in the administration of the plan shall be used to convert a participant's accumulated mandatory contributions to the annuity form of benefit. In the absence of plan rules and factors, the interest rates and conversion factors established by the IRS for allocation of accrued benefits between employer and employee contributions under the provisions of section 204(c) of ERISA and section 411(c) of the Code shall be used.

(3) *Minimum accrued benefit.* The annuity benefit derived from mandatory employee contributions may not be less than the minimum accrued benefit

under the provisions of section 204(c) of ERISA and section 411(c) of the Code.

(c) *Assigning benefits.* If a participant or beneficiary elects to receive a lump sum benefit, his or her benefit shall be determined under paragraph (c)(2) of this section. Otherwise, the benefits with respect to a participant shall be determined under paragraph (c)(1) of this section.

(1) *Annuity benefit and pre-retirement death benefit.* The annuity benefit and the pre-retirement death benefit assigned to priority category 2 with respect to a participant are determined as follows:

(i) The annuity benefit is the benefit computed under paragraph (b) of this section.

(ii) Except for adjustments necessary to meet the minimum lump sum requirements as hereafter provided, the pre-retirement death benefit is the benefit under the plan that returns all or a portion of the participant's mandatory employee contributions upon the death of the participant before retirement. A benefit that became payable in a single installment (or substantially so) because the participant died before the termination date is a liability of the plan within the meaning of § 4044.3(a) and should not be assigned to priority category 2. A benefit payable upon a participant's death that is included in the annuity form of the benefit derived from mandatory employee contributions (e.g., the survivor's portion of a joint and survivor annuity or the cash refund portion of a cash refund annuity) is assigned to priority category 2 as part of the annuity benefit under paragraph (c)(1)(i) of this section and is not assigned as a death benefit. The pre-retirement death benefit may not be less than the minimum lump sum required upon withdrawal of mandatory employee contributions by the IRS under section 204(c) of ERISA and section 411(c) of the Code.

(2) *Lump sum benefit.* Except for adjustments necessary to meet the minimum lump sum requirements as hereafter provided, if a participant elects to receive a lump sum benefit under the provisions of the plan, the amount of the benefit that is assigned to priority category 2 with respect to the participant is—

(i) The combined value of the annuity benefit and the pre-retirement death benefit determined according to paragraph (c)(1) (which constitutes the basic-type benefit) plus

(ii) The amount, if any, of the participant's accumulated mandatory employee contributions that exceeds the combined value of the annuity benefit and the pre-retirement death benefit (which constitutes the nonbasic-type benefit), but not more than

(iii) The amount of the participant's accumulated mandatory contributions.

(3) For purposes of paragraph (c)(2) of this section, accumulated mandatory contributions means the contributions with interest, if any, payable under plan provisions to the participant or beneficiary on termination of the plan or, in the absence of such provisions, the amount that is payable if the participant withdrew his or her contributions on the termination date. The lump sum benefit may not be less than the minimum lump required by the IRS under section 204(c) of ERISA and section 411(c) of the Code upon withdrawal of mandatory employee contributions.

**§ 4044.13 Priority category 3 benefits.**

(a) *Definition.* The benefits in priority category 3 are those annuity benefits that were in pay status before the beginning of the 3-year period ending on the termination date, and those annuity benefits that could have been in pay status (then or as of the next payment date under the plan's rules for starting benefit payments) for participants who, before the beginning of the 3-year period ending on the termination date, had reached their Earliest PBGC Retirement Date (as determined under § 4022.10 of this chapter based on plan provisions in effect on the day before the beginning of the 3-year period ending on the termination date). Benefit increases that were effective throughout the 5-year period ending on the termination date, including automatic benefit increases during that period to the extent provided in paragraph (b)(5) of this section, shall be included in determining the priority category 3 benefit. Benefits are primarily basic-type benefits, although nonbasic-type benefits will be included if any portion of a participant's priority cat-

egory 3 benefit is not guaranteeable under the provisions of subpart A of part 4022 and § 4022.21 of this chapter.

(b) *Assigning benefits.* The annuity benefit that is assigned to priority category 3 with respect to each participant is the lowest annuity that was paid or payable under the rules in paragraphs (b)(2) through (b)(6) of this section.

(1) *Eligibility of participants and beneficiaries.* A participant or beneficiary is eligible for a priority category 3 benefit if either of the following applies:

(i) The participant's (or beneficiary's) benefit was in pay status before the beginning of the 3-year period ending on the termination date.

(ii) Before the beginning of the 3-year period ending on the termination date, the participant was eligible for an annuity benefit that could have been in pay status and had reached his or her Earliest PBGC Retirement Date (as determined in § 4022.10 of this chapter, based on plan provisions in effect on the day before the beginning of the 3-year period ending on the termination date). Whether a participant was eligible to receive an annuity before the beginning of the 3-year period shall be determined using the plan provisions in effect on the day before the beginning of the 3-year period.

(iii) If a participant described in either of the preceding two paragraphs died during the 3-year period ending on the date of the plan termination and his or her beneficiary is entitled to an annuity, the beneficiary is eligible for a priority category 3 benefit.

(2) *Plan provisions governing determination of benefit.* In determining the amount of the priority category 3 annuity with respect to a participant, the plan administrator shall use the participant's age, service, actual or expected retirement age, and other relevant facts as of the following dates:

(i) Except as provided in the next sentence, for a participant or beneficiary whose benefit was in pay status before the beginning of the 3-year period ending on the termination date, the priority category 3 benefit shall be determined according to plan provisions in effect on the date the benefit commenced. Benefit increases that were effective throughout the 5-year