American Federation of Labor and Congress of Industrial Organizations

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February 4, 2008

Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street, N.W.
Washington, DC 20005-4026

Re: Disclosure of Plan Termination Information Proposed Regulation
Regulatory Information Number (RIN 1212-ABI4)

Ladies and Gentlemen:

On behalf of the more than 10 million working men and women of the AFL-CIO, we offer our comments on the proposed regulation regarding the disclosure of plan termination information, issued by the PBGC on December 5, 2007 (72 Fed. Reg. 68542).

The proposed regulation implements Section 506 of the Pension Protection Act of2006, Pub. L. 109-280 (PPA), which amended Sections 4041 and 4042 of the Employee Retirement Income Security Act of 1974 (ERISA).1 The new statutory provisions require the disclosure of certain information when a plan administrator initiates the distress termination of a pension plan or when PBGC seeks to terminate a plan.

Generally, the proposed regulations are appropriate and include reasonable requirements with respect to the content and timing of any written information request and the procedure PBGC will follow upon its receipt of a request for the administrative record. In addition, we support PBGC's interpretation of the scope of the information to disclose when a distress termination is sought. As we explain below, however, we do have some concerns about the proposed regulations and suggested changes for PBGC to include in the final regulations.

Non-Exclusivity of New **Disclosure Obligation**

PPA's addition of Sections 4041 (c)(2)(D) and 4042(c)(3) does not alter any disclosure obligations that might arise under other federal statutes or rules, such as the National Labor

Unless otherwise indicated, all statutory references are to sections of ERISA.

Relations Act, the Bankruptcy Code or the Federal Rules of Civil Procedure. The final regulation should explicitly recognize that limitation.

In the case of a collectively bargained plan, Section 4041 (a)(3) prevents a distress termination if it would violate the terms of an existing collective bargaining agreement.[2] Thus, if an employer wants to terminate a plan, it must obtain the union's consent to the termination or reject the collective bargaining agreement if it is in reorganization under Chapter 11 of the Bankruptcy Code. In either case, the employer has an obligation to provide information to the union under Section 8(a)(5) ofthe National Labor Relations Act (NLRA) or Section 1113 of the Bankruptcy Code. The addition of new Section 4041 (c)(2)(D) does not impact these existing rights and obligations. Moreover, if the employer files a petition to reject the collective bargaining agreement, or a motion to approve the distress termination, in the bankruptcy court, the union may object and the Federal Rules of Civil Procedure, including their discovery provisions, will apply to the proceeding.

Under Section 4042, if no agreement is reached with the plan sponsor or plan administrator, the PBGC may begin a proceeding in the appropriate district court. In that event, the union may seek to intervene and be entitled to discovery under the Federal Rules of Civil Procedure. *See*, e.g. PBGC v. Slater Steels Corp., 220 F.R.D. 339 (N.D. Ind. 2004) and PBGC v. Republic Technologies International, LLC, 211 F.R.D. 307 (N.D. Ohio 2002).

Whether the disclosure obligation arises under the NLRA, the Bankruptcy Code or the Federal Rules of Civil Procedure, the determination of what information must be given and when it must be given should be based on the applicable law governing the particular proceeding, not the new disclosure provisions of ERISA. These new provisions supplement, not displace, a collective bargaining representative's right to request, or an employer's or PBGC's obligation to provide, information regarding a plan termination from either the employer or the PBGC.

Confidentiality Limitation

Section 4041 (c)(2)(D)(ii)(II) permits a court to limit the disclosure of confidential information" ... to any authorized representative of the participants and beneficiaries that agrees to ensure the confidentiality of such information." Section 4042(c)(3)(C)(ii) includes similar language. The proposed regulation follows the statutory language although they do make clear it is the plan sponsor or plan administrator-the party asserting that information is confidentialthat must seek the court order.

We suggest the final regulation recognize that a confidentiality agreement, voluntarily entered into by the appropriate parties,3 can be a substitute for a court order. Including this

29 CFR §4041. 7 sets forth the procedure for challenging a plan termination pursuant to Section 4041(a)(3).

[2] In the case of a distress termination, the parties would be the plan administrator and the authorized representative. For a PBGC-initiated termination, the plan sponsor might also be an appropriate party.

alternative would provide a less costly and more expeditious method of protecting any confidential information.

Reasonable Fees

Sections 4041 (c)(2)(D)(iii)(II) and 4042(c)(3)(D)(ii) each permit a plan administrator or plan sponsor to charge a reasonable fee for information provided in other than electronic form. In the preamble to the proposed regulation, PBGC states that:

> ... the provisions on fees do not give PBGC authority to prescribe what constitutes a reasonable fee. PBGC does not believe it can prescribe such fees in the absence of specific statutory authorization.

72 Fed.Reg. at 68543.

The absence of any guidance whatsoever from PBGC on reasonable fees is troubling as it could delay the provision and receipt of information through unnecessary disputes about charges. While we hope most information can be provided in electronic form without any charge, we recognize that may not always be the case.[4]

We suggest that PBGC provide, at a minimum, some direction to plan administrators and plan sponsors with respect to what constitutes a reasonable fee by looking to similar disclosure obligations: the plan administrator's obligation under Section 104(b)(4) and PBGC's obligation under the Freedom ofInformation Act (FOIA).

Section 104(b)(4) allows a plan administrator who responds to a participant's written request for certain documents to " ... make a reasonable charge" for providing copies.[5] The regulations under that section (29 CFR § 2520.1 04b-30(b)), in turn, provide a charge is reasonable:

> ... if it is equal to the actual cost per page to the plan for the least expensive means of acceptable reproduction, but in no event may such charge exceed 25 cents per page."

[4] For example, the Distress Termination Filing Instructions indicate that the required Forms 600 and 601 are not filed electronically. These forms and the accompanying documents are part of the information that must be provided under section 4041.5 I(b)(l) ofthe proposed regulation.

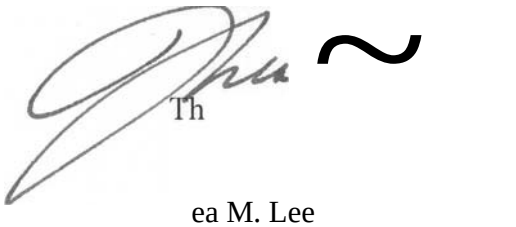
The documents listed in the section include" ... the latest annual report, any terminal report, the bargaining agreement, trust agreement ... or other instruments under which the plan is established or operated." In addition, we acknowledge that Section 104(b)(4), unlike Section 506 ofPPA, explicitly provides that "[t]he Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge .... "

PBGC sets charges for providing copies in response to FOIA requests. Under its FOIA regulations (29 CFR §490 1.31) and online FOIA Guide, the generally applicable schedule is no charge for the first 100 pages and fifteen cents (15 ¢) thereafter.

The modest copying charges included in existing regulations should be considered by plan administrators and plan sponsors as they determine what fees to charge for information provided under Sections 4041 (c)(2)(D)(iii)(II) and 4042(c)(3)(D)(ii). PBGC should, at a minimum, suggest that plan administrators and plan sponsors do so.

We hope our comments are helpful and should there be any questions about them, please do not hesitate to contact me at (202) 637-3907.

Sincerely,



Th ea M. Lee
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Government Affairs Department

U.S. Chamber of Commerce

February 4, 2008

Filed Electronically Via Email, reg.comments@pbgc.gov

Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K St NW
Washington, DC 20005-4026

RE: RIN 1212-AB14, Disclosure of Termination

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we submit this letter in response to a request for comments on the proposed rules issued under ERISA sections 4041 and 4042 which were issued by the Pension Benefit Guaranty Corporation (PBGC) on December 7, 2007.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

We appreciate the clarification that business days will be used for all time periods. The corporation's acknowledgment that using calendar days could be unnecessarily burdensome is very much appreciated.

The proposed regulation included an assumed receipt date of three business days for notices from the PBGC that a plan should be terminated.[1] This date then starts the clock for the 15 days that a plan administrator has to respond to a request for

[1] Proposed Regulation section 4042.4(a)(1).

information.[2] We suggest that the final regulations allow for an exception to the assumed receipt date if the plan sponsor or plan administrator is able to prove that actual receipt occurred after that date. The penalty for failure to provide a timely response can be significant.[3] It is not fair to penalize a plan sponsor or plan administrator who may have missed the deadline because the initial notice from the PBGC was not received in the assumed period.

We are concerned that the confidentiality provisions do not extend to the administrative record provided by the PBGC. This omission counters the purpose of having the confidentiality provision for plan sponsors and administrators. While the administrator may be able to get a court decision to keep certain information confidential, this seems to be an extra and unnecessary step.

Sincerely,

Randy Johnson
Vice President
Labor, Immigration
& Employee Benefits
U.S. Chamber of Commerce

Aliya Wong
Director of Pension Policy
Labor, Immigration,
& Employee Benefits
U.S. Chamber of Commerce

[2] Proposed Regulation section 4042.4(b)(1).
[3] ERISA Regulation section 4071 states that the PBGC may access a penalty for failure to comply in an amount up to $1000/day.