NACCO Industries, Inc.

Mary D. Maloney
Assistant General Counsel and Assistant Secretary

May 31, 2013

VIA Electronic Submission (*reg.comments@pbgc.gov*)
Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200K Street, N.W.
Washington, DC 20005-4026

Re: **PBGC Reportable Events – Comments on Proposed Regulations (RIN 1212-ABO6)**

I am providing comments in connection with the notice of proposed rulemaking issued by the PBGC under 29 CFR Parts 4000, 4001, 4043, 4204, 4206 and 4231 (the "Reportable Event Regulations").

I appreciate the PBGC's attempt to clarify and simplify the reportable event reporting requirements. However, I urge the PBGC to take into consideration the additional clarifications and/or changes described below.

Effect of Reportable Event Regulations on Loan Agreements: The preamble to the Reportable Event Regulations downplays the significance that PBGC reportable events have on loan covenants and defaults. NACCO Industries, Inc. is a publicly-traded holding company with 28 domestic subsidiaries and 8 international subsidiaries/branches. Prior to September 28, 2012, when NACCO spun-off one of its major subsidiaries (Hyster-Yale Materials Handling, Inc.), NACCO had 4 additional domestic subsidiaries and 38 additional international subsidiaries/registered offices. The members of the NACCO and Hyster-Yale controlled groups are parties to six different credit agreements, as well as several private placement note purchase agreements containing various ERISA representations, negative covenants and default events relating to "ERISA Events." In all instances, an ERISA Event is defined to include a PBGC reportable event. In most cases, we are required to provide written notice to the lenders of ANY reportable event, even for those events for which the PBGC has waived the notice requirement. In all cases, the representations and warranties must be true and correct at each borrowing and there is a representation that no non-waived PBGC reportable event has occurred. With respect to events of default, under one agreement the existence of a non-waived PBGC reportable event will result in an immediate default if any plan is less than 60% funded. I agree that, in most other cases, a non-waived PBGC reportable event will not result in an automatic default, but it is up to the creditor (not to the sponsor) to determine whether the reportable event results in a "material adverse effect." These provisions require negotiations with lenders that cost plan sponsors time and money, especially in large, complicated controlled group situations, where an action taken by a distant sister corporation results in a non-waived reportable event that has to be reported to all creditors. I estimate that I annually spend between 5%-10% of my time monitoring and revising corporate events to avoid PBGC reportable events, which time could be better spent on other matters. As a result, it is imperative that the PBGC limit the non-waived reportable events to those that truly present a risk to the PBGC.

Company Financial Soundness Safe Harbor: Under the proposed regulations, a notice of various reportable events is waived by the PBGC if "for each contributing sponsor of the plan, either the sponsor or the sponsor's highest level controlled group parent that is a U.S. entity is financially sound when the event occurs."

Please provide an example. Assume that parent company P has four 100% directly owned subsidiaries, Sub A (who is the sponsor of Plan A that covers only the employees of Sub A); Sub B (who does not sponsor or participate in any pension plan); Sub C (who is the sponsor of Plan C that covers employees of Sub C and Sub D); and Sub D (who is a participating employer under Plan C).

- If Parent Company P is "financially sound" (as defined in the Reportable Event Regulations), but Subs A, B, C and D are not "financially sound," does the waiver apply to a reportable event incurred by Plan A or Plan C (for those reportable events which contain a company financial soundness waiver)?

- If Parent Company P is not "financially sound" and Sub A is "financially sound" and a reportable event occurs with respect to Plan A, does the waiver apply (assuming the reportable event contains a company financial soundness waiver)?

- If Parent Company P, Sub A, Sub B and Sub D are not "financially sound" and Sub C is "financially sound" and a reportable event occurs with respect to Plan C, does the waiver apply (assuming the reportable event contains a company financial soundness waiver)?

Plan-based Financial Soundness Safe Harbor: Under the proposed regulations, a notice of various reportable events is waived by the PBGC if (1) the plan is 100% funded on a PBGC termination basis or (2) the plan is 120% funded on a PBGC premium basis. While I appreciate the PBGC providing a more commonly used method of determining a plan's funding status (since few plans will pay actuaries to run a funding calculation on a plan termination basis), requiring a funding level of 120% is unrealistic and will likely result in many additional unnecessary reportable event filings. As the PBGC is well aware, many pension plans are frozen. If they were 120% funded, the plans would be terminated and the benefits annuitized. Allowing a waiver if a plan is 80% or 90% funded on a PBGC premium basis provides adequate protection for the PBGC.

Active Participant Reduction: As stated above, the PBGC should only require reporting of a reportable event when the event poses a risk to the PBGC. Has the PBGC ever taken action with respect to a reportable event that was based SOLELY on a reduction in the number of active participants that was not accompanied by another reportable event? It is unclear why a reduction in the number of plan participants alone puts the PBGC in jeopardy. Especially now that the majority of pension plans are frozen to new entrants so, by definition, the number of active participants will decrease. While the PBGC understandably should be concerned about the reduction in the number of active participants when the reduction is initiated by an act of the plan sponsor such as a sale of a division or a plant shut down, the following additional waivers should apply:

5875 Landerbrook Drive • Cleveland, Ohio 44124-4017 • Telephone 440/449-9661 • Fax 440/449-9561 •
mmaloney@naccoind.com

- If all benefits under a plan are frozen, the reduction in the number of active participants should only require reporting if the reduction increases plan liabilities (such as triggering plant shut down benefits) or the reduction is caused by another transaction which is an unwaived reportable event (such as a change in a controlled group member).

- If a reduction in active participants is caused by a spin-off of a plan within the controlled group (which is not a reportable event), then the active participant reduction reportable event should be waived in all circumstances. There is zero risk to the PBGC in this situation. All controlled group members remain liable for the benefits under all plans before and after the plan spin-off. (The PBGC acknowledges this in similar circumstances in the proposed regulations by eliminating the reportable event requirement when one controlled group member is merged into another controlled group member.) There are many reasons for such spin-offs including (i) using different investment strategies for different types of participants; (ii) separating union and non-union plans and (iii) better tracking of pension costs for certain subsidiaries or projects.

- Please provide an example of how to calculate the reduction in active participants where the plans have undergone a previous reportable event. For example, Parent Company sponsors Plan P that covers 8,000 employees of Sub A and 2,000 employees of Sub B. In year 1, Parent Company sells Sub A to Company X and transfers the assets and liabilities of Plan P that cover the Sub A employees outside the controlled group to Plan X. Parent Company made a reportable event filing with respect to Plan P in year 1. How does the active participant reduction test apply to Plan P in year 2 and 3?

- If the PBGC does not reduce the plan funding level for the plan-based financial safe-harbor below the 120% PBGC premium level, a different funding level (80%) should be adopted for this reportable event in all circumstances.

Loan Defaults: The PBGC is proposing to expand the loan default reportable event to include "any amendment or waiver by a lender of any loan agreement covenant for the purpose of avoiding a default." The wording of the proposed expansion is entirely too broad, especially for public companies and could raise S.E.C. disclosure issues. If a plan sponsor filed this type of reportable event filing, is it agreeing that it is close to default? Who decides when a waiver or amendment is "for the purpose of avoiding a default?" There may be many reasons to seek a change to a credit agreement. This proposal would require the PBGC to determine a plan sponsor's intent behind a waiver or amendment.

At the very least, the proposal should be modified only to require the reporting of an amendment or waiver to a "material financial covenant," not all covenants. Our credit agreements contain many non-financial covenants (such as compliance with ERISA and similar laws) and different agreements have different non-financial covenants. A plan sponsor may need to negotiate a change with one creditor but this does not force the sponsor to reveal that fact to all creditors. The filing of this type of a reportable event, which would then have to be disclosed to all creditors in the controlled group as a non-waived PBGC "ERISA Event," could trigger defaults (or, at the very least discussions and renegotiations) that otherwise may not occur, especially if the particular covenant was not material in the first place.

Waiver for De Minimis Segments: The reporting requirement for several reportable events is waived if the member involved is de minimums. One portion of the test looks to the "net tangible assets" of the entity(ies) involved. Net tangible assets are defined in PBGC Reg. Section 4204.2 as: "tangible assets (assets other than licenses, patents, copyrights, trade names, trademarks, good will, experimental or organizational expenses, unamoratized debt discounts and expenses and all other assets which, under generally accepted accounting principles, are deemed intangible), less liabilities (other than pension liabilities). Encumbered assets shall be excluded from net tangible assets only to the extent of the amount of the encumbrance." Please clarify whether an investment in a subsidiary is included in tangible assets. The GAAP definition of "intangibles" under SFAS 141 and 142 is specific to acquired intangibles and does not include investments in subsidiaries. However, under Reg. S-X, an investment in a subsidiary is appropriately included in tangible assets as other non-current assets for S.E.C. reporting purposes. The issue arises in the context of a liquidation of a shell company whose only asset is the stock of a lower-tier subsidiary. Under the proposed regulations, there is no longer any funding waiver and whether or not the entity is "de minimis" will depend on whether the net tangible asset test includes or excludes the investment in the subsidiary.

I appreciate the opportunity to comment on the Reportable Event Regulations. Please feel free to contact me at 440/449-9661 if you have any questions about my comments.

Very truly yours,

Mary D. Maloney

5875 Landerbrook Drive • Cleveland, Ohio 44124-4017 • Telephone 440/449-9661 • Fax 440/449-9561 •
mmaloney@naccoind.com

AMERICAN ACADEMY of ACTUARIES

June 3, 2013

Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026

Re: Regulation Identifier Number (RIN) 1212-AB06

To Whom It May Concern:

The American Academy of Actuaries[1] Pension Committee is pleased to present the following comments to the Pension Benefit Guaranty Corporation (PBGC) regarding recent proposed regulations on Reportable Events under ERISA Section 4043. The committee believes PBGC's revamped proposal eliminates many concerns within the pension benefit community about the 2009 proposed regulations. The previous proposal would have eliminated many existing waivers for certain events. The committee commented at the time on the need to avoid unnecessarily increasing the administrative burden on defined benefit plans. Regarding the current proposal, the committee applauds PBGC on its common sense, risk-based approach to reporting, and supports its goal of reducing reporting for events that pose little risk to the pension insurance system.

PBGC has asked for public comment on the proposed rule. The committee has several suggestions, which we respectfully submit for consideration. While PBGC specifically asked for comments related to the appropriateness of the criteria for plan sponsor financial soundness, we are not commenting on those areas as they are outside of the scope of our actuarial expertise.

Combinations of plan sponsor and plan financial soundness

Although the committee is not commenting upon the criteria for the plan sponsor financial soundness safe harbor, we would like to see a proper balance between company soundness and plan soundness. A sponsor that only marginally falls short of both the company and plan financial soundness criteria might pose little risk to PBGC. Perhaps various combinations of a plan sponsor's creditworthiness and a plan's funded status could be made available to satisfy the financial soundness waiver.

[1] The American Academy of Actuaries is a 17,000-member professional association whose mission is to serve the public and the U.S. actuarial profession. The Academy assists public policymakers on all levels by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States.

1850 M Street NW Suite 300 Washington, DC 20036 Telephone 202 223 8196 Facsimile 202 872 1948 www.actuary.org

Thresholds for plan financial soundness
Under the proposed regulations, in order for a plan to be considered financially sound, it must be 100% funded on a termination liability basis or 120% funded on a premium liability basis. PBGC views a plan below those funding levels with a reportable event as posing a risk. Although it is true that PBGC's risk generally increases as funding levels decrease, we believe the proposed thresholds are too high. Very few sponsors would fund to these levels because if the plan sponsor later opted to undergo a standard termination – with no cost to PBGC – any surplus could only be retrieved after paying an onerous excise tax. The proposal would subject to reporting many plans that have higher than average funding levels and as such pose low risk to PBGC. Thus, in the spirit of balancing regulatory benefits with burdens on the public per Executive Order 13563, we urge PBGC to consider reducing the proposed thresholds.

Waivers that require information as of the last day of the prior year
The following waivers in the proposed regulations are based on information that may not be available for reportable events that occur during the early part of a plan year.

- Plan sponsor financial soundness – In order to qualify for this waiver, the plan sponsor (or the sponsor's highest level controlled group parent that is a US entity) must have positive net income for the two most recent fiscal years.
- Plan financial soundness – A plan can qualify for this waiver if the plan had no unfunded plan termination liabilities as of the last day of the prior plan year.

To allow the plan sponsor to determine whether the waivers apply, the waivers should be modified to allow determination of the information as of a prior date. For example, in assessing plan sponsor financial soundness, instead of testing net income for the two most recent fiscal years, net income might be tested for the two most recent fiscal years for which net income has been determined. Similarly, in assessing plan financial soundness, the plan sponsor might be permitted to determine the unfunded plan termination liabilities as of a date earlier than the end of the prior year, such as up to three months prior to the end of the prior year.

Plan financial soundness based on premium liability for the current plan year
The new waivers will permit many plan sponsors to avoid unnecessary reporting based on information already available to them at the start of the event year. But the plan's status may be based on information that is well over a year old, particularly for events occurring late in a plan year. For instance, a plan experiencing a reportable event in November, 2013 will determine its eligibility for the waiver based on its 2012 variable rate premium filing – which is based on assets and liabilities as of January 1, 2012.

We suggest that the plan financial soundness waiver be expanded to also cover plans that could meet the test based on current year premium information, if available, by the event date. This option can be made available regardless of whether the current year's PBGC premium has been filed (similar to termination liability, which need not be based on any filing), as long as the assets do not reflect any contributions past the date of the reportable event.

Failure to make timely funding balance elections
The proposed regulations maintain the existing waiver for missed minimum funding requirements that are corrected within 30 days of the payment due date, and expand the small plan waivers that had previously been provided in technical updates. We suggest that an additional waiver be provided for contributions that are considered to be late solely because of the plan sponsor's failure to timely make a funding balance election.

Under PPA, a plan sponsor needs to notify the enrolled actuary and plan administrator in writing of an election to apply the funding balance to minimum funding requirements. If the election is not made by the contribution due date, the IRS deems it to be a late contribution. As such, a late funding balance use election is subject to reporting under §4043.25 relating to missed contributions (and possibly under §4043.81 relating to missed contributions with outstanding amounts exceeding $1 million, as well).

Failure to make a required cash contribution may indicate that the sponsor is suffering financial difficulty. But PBGC has nonetheless waived reporting if the contribution is made within 30 days; in such cases, the late payment was likely due to administrative oversight. PBGC has noted in the preamble to the proposed regulations that it is persuaded "that missed contributions that are made up within 30 days do not generally pose excessive risk to the pension insurance system." The preamble also notes that IRS Form 5500 filings and PBGC Form 200 both provide other, independent sources of reporting for late contributions.

Similarly, a failure to make a contribution solely due to a late funding balance election should pose no risk to the PBGC or plan participants. The money to cover the minimum required contribution is already in the plan – it just has not been subtracted from the funding balance. In substance, this is simply a bookkeeping entry that has not yet been made. On its own, it does not signal a plan sponsor's financial distress nor a plan's imminent termination. As such, reporting of such an event should provide no value to PBGC.

Since there is no benefit to PBGC for requiring reporting in these cases, and the information will in any event be available through other means, we urge the PBGC to explicitly waive reporting for late funding balance elections, even for large plans and even if not corrected within 30 days. However, the waiver should only apply as long as the missed contribution is still correctable with a current funding balance election.

Failure to make required contributions
When a plan sponsor's unpaid balance of contributions to a plan (including interest) exceeds $1,000,000, the statute requires notification to PBGC within ten days following the due date of the unpaid contribution. We are not aware of any provision for the PBGC to waive this notification requirement. However, while missing contributions may signal financial strain on a plan sponsor, there may be circumstances where the due date was

missed due to simple administrative error, or situations beyond the plan sponsor's control (such as an error by the bank). To reduce onerous filings when there is no real risk to PBGC, we suggest that PBGC allow a simplified Form 200 filing under limited circumstances – such as when the missed contribution has been made by the due date of the Form 200 filing. This simplified Form 200 filing could also be limited to plan sponsors who have not missed any other contributions within a certain period of time. Of course, PBGC retains the right to ask for additional information if warranted.

Multiple active participant reductions

Current regulations sometimes require multiple reports to PBGC when active participant reductions occur in close succession. The 2009 proposed regulations provided a waiver if an active participant reduction had been reported in the previous year. In the preamble to that proposal, PBGC acknowledged that additional reporting was unnecessary because monitoring continues for an extended period after a report is filed. The 2013 proposed regulations eliminate that waiver because the new rules supposedly make it unnecessary. However, we believe the waiver for multiple reports should be reinstated because:

- Q&A 12 of the 2006 Blue Book posits a situation where the active participant count is reduced from 100 in one year to 50 the next, and remains at 50. The Q&A confirms that two separate reportable events have occurred – the first when the active count was reduced from 100 to 50 (more than a 20% reduction over one year), and the second one a year later (more than a 25% reduction over two years). We believe there should be a specific exemption in the newly proposed regulations that would preclude the need for multiple reports in this case.

- The new proposal includes three types of events: a single-cause event, a short-period event, and an attrition event. It is possible that two or more different types of events could occur in a year and require multiple reports. Here too a waiver might be appropriate because PBGC monitoring continues for an extended period after a report is filed. We also note that under the regulations as currently drafted, a reduction that requires a report as a single-cause event or a short-period event could require a second report as an attrition event; this duplicative reporting does not seem to provide any useful information to PBGC. At a minimum, we recommend the regulations clarify that in determining whether a second report is required, any reductions already reported should be disregarded.

As an alternative to reinstating the 2009 proposed waiver, PBGC could clarify how multiple events are to be handled.

The Pension Committee appreciates the opportunity to comment on these proposed regulations and would be happy to discuss any of these items with you at your convenience. Please contact David Goldfarb, the Academy's pension policy analyst (202-785-7868, goldfarb@actuary.org) if you have any questions or would like to discuss these items further.

Sincerely,

Michael F. Pollack, FSA, MAAA, EA, FCA
Chairperson, Pension Committee
American Academy of Actuaries

Comments on Proposed Rule Relating to Reportable Events and Certain Other Notification Requirements

June 3, 2013

Pension Benefit Guaranty Corporation
29 CFR Parts 4000, 4001, 4043, 4204, 4206 and 4231
[RIN 1212-AB06]

The American Society of Pension Professionals & Actuaries ("ASPPA") and the ASPPA College of Pension Actuaries ("ACOPA") appreciate this opportunity to comment on the proposed rule relating to Reportable Events and Certain Other Notification Requirements issued by the Pension Benefit Guaranty Corporation on April 3, 2013 [RIN 1212-AB06].

ASPPA is a national organization of more than 14,000 retirement plan professionals who provide consulting, administrative and investment advisory services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines including consultants, administrators, actuaries, accountants, attorneys and investment professionals. ASPPA is particularly focused on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-based retirement plan system. All credentialed actuarial members of ASPPA are members of ACOPA, which has primary responsibility for the content of comment letters that involve actuarial issues.

ASPPA COPA commends PBGC for the proposed rule's focus on companies and plans that pose substantial risk to PBGC, and applauds the inclusion of the small plan waivers as a means of concentrating on the more challenging underfunded plans. However, small businesses were not provided with an exemption from the requirement to report distributions to substantial owners in excess of $10,000 in the past year. **ASPPA COPA recommends** that the exclusion for reporting payments to substantial owners be expanded to include any payments made to comply with the minimum required distribution rules of IRC 401(a)(9). Not only are these distributions required for the necessary and normal operation of a plan, but failure to make such payments would also be a reportable event.

ASPPA COPA is also concerned about the credit report requirement for the financially sound sponsor safe harbor. The discussion of how the requirement could be met for small employers that are not currently rated says "For a sponsor not currently the subject of credit reporting, PBGC believes it would entail minimal effort and expense to have a CCRC that is commonly used in the business community begin issuing such reports on the sponsor." If PBGC has gathered information on the effort and expense that would be required, that information should be disclosed. We are concerned that the effort and cost will not be minimal. Although sponsors that meet the small plan exception will not be concerned about the financially sound sponsor exception in this rule, once an approach is ensconced in a final rule it may find its way into others, so the requirement should be fully fleshed out, or an exception provided.

These comments were prepared by ASPPA's Defined Benefit Subcommittee of the Government Affairs Committee and the ASPPA College of Pension Actuaries. Please contact Judy A. Miller, MSPA, ACOPA Executive Director, at (703) 516-9300 if you have any comments or questions on the matters discussed above.

Thank you for your time and consideration.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO

/s/
Judy A. Miller, MSPA
ACOPA Executive Director

/s/
Craig P. Hoffman, Esq., APM
General Counsel

/s/
John R. Markley, FSPA, Co-Chair
Gov't Affairs Committee

/s/
Ilene H. Ferenczy, Esq., APM, Co-Chair
Gov't Affairs Committee

/s/
Robert M. Kaplan, CPC, QPA, Co-Chair
Gov't Affairs Committee

CIEBA
The Committee on Investment of Employee Benefit Assets

June 3, 2013

Ms. Catherine B. Klion
Assistant General Counsel
Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005

Re: Reportable Events and Certain Other Notification Requirements (RIN 1212-AB06)

Dear Ms. Klion:

The Committee on Investment of Employee Benefit Assets (CIEBA) appreciates this opportunity to provide comments to the Pension Benefit Guaranty Corporation (PBGC) regarding the recently released notice of proposed rulemaking and request for comments concerning reportable events and certain other notification requirements.

CIEBA represents more than 100 of the country's largest pension funds. Its members manage more than $1.5 trillion of defined benefit and defined contribution plan assets on behalf of 17 million plan participants and beneficiaries. CIEBA members are the senior corporate financial officers who individually manage and administer Employee Retirement Income Security Act (ERISA) - governed corporate retirement plan assets.

Overall Comments on Proposed Changes

As voluntary sponsors of large defined benefit plans, CIEBA members have a strong commitment to the long-term health and viability of the defined benefit pension system and of PBGC. PBGC believes that this proposal "is designed to reduce the burden dramatically on financially sound plans and sponsors (which present a low degree of risk)." Embedded in the PBGC's proposal is an emphasis on the financial soundness of plan sponsors as criteria to impose additional reporting burdens and costs on plan sponsors. We strongly believe that the current regulatory regime, which focuses on the funded status of a plan as criteria for additional reporting requirements, is better suited to protecting plans and their beneficiaries. Rather than providing additional security to plan participants, the use of the financial soundness of a plan sponsor as criteria to add additional regulatory burdens on them will actually discourage employers from maintaining ongoing defined benefit plans and will further promote the trend of companies freezing or terminating their defined benefit plans.

Dun and Bradstreet

When it was debating the Pension Protecting Act of 2006, Congress explicitly considered and rejected the use of credit ratings as a basis for the new, at-risk funding requirements. Rather than focusing on measures of a plan sponsor's financial soundness such as credit ratings, Congress chose to base the new at-risk funding rules on a plan's funded status. Accordingly, we believe that other alternative measures of a plan sponsor's financial soundness, such as Dun & Bradstreet,[1] should be similarly rejected in favor of focusing on a plan's funded status.

Funded Status

CIEBA also believes that the PBGC should focus on a plan's current funded status instead a plan's termination funded status. PBGC proposes a safe harbor for plans that are 100 percent funded on a termination basis. Plans, however, typically do not calculate funding on a termination basis. We strongly oppose measurements based on the PBGC's definition of termination liability. For numerous reasons, we question whether the PBGC's definition is an accurate measurement of termination liabilities. Moreover, even if it were accurate, it is not an appropriate measurement of liability for any purpose for an ongoing plan. This is clearly evidenced by the fact that Congress has never based a funding-related test applicable to ongoing plans on the PBGC's definition of termination liability. To do so here would be inconsistent with Congressional intent, as manifested consistently over many years.

PBGC also proposes a safe harbor for plans that are 120 percent funded on a premium basis while eliminating all existing waivers, such as the waiver for plans that are at least 80 percent funded. CIEBA believes that the proposed funded threshold is far too high and is set at a level that virtually no plans would meet today. Moreover, this unrealistic standard would have immediate and adverse effects on companies that have maintained strong plans in the face of historically low interest rates. Employee benefit plan investors are routinely required to sign contracts (e.g. swaps and future agreements) with certain representations, including that the plan is a tax-qualified plan, that it has not received a notice of termination from PBGC, and that no reportable event has occurred where reporting has not been waived by PBGC. Eliminating the automatic waiver for plans that are 80 percent funded could cause an unintended and unwarranted adverse impact on strong plans that sign these types of contracts when engaging in financial transactions.

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[1] Dun & Bradstreet scores are a measure of a company's ability to pay its bills on time. The score reflects a short-term point of view. Many companies have found that their D&B scores are often wrong and are hard to correct. D&B simply reports information from a variety of sources. It does no due diligence or independent analysis of its own.

Alternative Proposal – Exemption for Publicly Traded Companies

Since 2000, PBGC has recorded a number of extraordinarily large claims. The largest of these claims were from plans in two distressed industries – airline and steel. PBGC was well aware of the weak funding rules that permitted these plans to become massively underfunded.

In fact, the current system of using plan funding levels as a proxy for risk to the insurance program is working well. Approximately two-thirds of all claims are from plans that are less than 50 percent funded – and only 1.5 percent of the claims come from plans that are at least 75 percent funded. Companies already report annually on the funded status of their plans, and PBGC monitors changes in those funding levels.

Currently only 580 plans - 2 percent of total PBGC-insured single-employer plans – account for about 68 percent of all insured participants. These plans are sponsored by publicly held companies that regularly report to the Securities and Exchange Commission (SEC). In their SEC filings, these companies disclose the significant negative impact of current market conditions on their pension plan asset values, the possibility of increased pension expenses, and the need for additional contributions.

Rather than a complicated system of safe harbors, CIEBA proposes that publicly traded companies be exempt from the reportable events requirements. The Administration has issued executive orders that direct agencies to assess the costs and benefits of available regulatory alternatives and to select regulatory approaches that avoid duplicative reporting. Because publicly traded companies already report significant events on their SEC filings and because these filings are already publicly available, there is no reason for plan sponsors to provide duplicative filings to PBGC. As they do currently under their early warning program, when situations warrant further review, PBGC can contact companies for additional information.

Conclusion

CIEBA commends the PBGC's attempt to target reporting requirements on the sponsors and transactions that present the most risk to the insurance system. However, we believe that these proposed rules will <u>not</u> make plan sponsors "less likely to eliminate their defined benefit plans and thereby have a beneficial effect on retirement security generally." These new reporting requirements are duplicative of the reporting that plan sponsors make to the SEC and the proposed safe harbors do not appropriately balance the benefits to the insurance program against the costs to plan sponsors and the PBGC. New, burdensome reporting requirements on plan sponsors will only serve to enhance the trend of plan terminations, resulting in fewer plans to pay premiums to PBGC and leaving only the riskiest plans in the system.

Thank you for your consideration of our views.

Sincerely,

The Committee on Investment of Employee Benefit Assets

June 3, 2013

Pension Benefit Guaranty Corporation
1200 K St NW
Washington, DC 20005-4026

RE: RIN 1212-AB06: Reportable Events and Certain Other Notification Requirements

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we submit this letter to the Pension Benefit Guaranty Corporation (PBGC) in response to a call for comments on the re-issued proposed rule to conform the reportable event regulations under section 4043 of ERISA and a number of other regulations due to statutory changes made by the Pension Protection Act of 2006 (PPA).[1]

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 applaud the PBGC for recognizing the burdens that the original proposal imposed. While we have certain concerns that are detailed below, the newly proposed rule is a clear improvement and demonstrates that the PBGC seriously considered the comments that were submitted and re-examined the issues raised in the comments.

Introduction

In 2009, the PBGC issued a proposed rule (2009 Proposal) that would have increased reporting requirements by eliminating most reporting waivers.[2] The Chamber, along with many

[1] 78 FR 20039, April 3, 2013.
[2] 74 FR 61248, November 23, 2009.

others in the retirement community, objected to these changes as being unduly burdensome on plan sponsors without providing a corresponding benefit to the PBGC.[3]

In January of 2011, the President issued Executive Order 13563 on Improving Regulation and Regulatory Review which required agencies to "consider how best to promote retrospective analys[es] of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned." Subsequently, the PBGC issued a request for comments on how the agency could comply with the executive order.[4] The Chamber responded by highlighting a number of issues that we believed fell within the scope of the executive order, including the 2009 Proposal on reportable events.[5]

In August of 2011, the PBGC issued its Plan for Regulatory Review stating that it would re-propose the 2009 Proposal with an emphasis toward reducing the unnecessary burdens on employers and plans.[6] We are pleased to see that the PBGC has followed through on this statement by issuing re-proposed rules in substantially revised form on April 3, 2013. In addition, we support the determination of the PBGC to hold a public hearing on June 18 to give interested parties further opportunity to weigh in on these issues.

Comments

The Chamber Applauds the PBGC for Revising its Proposal and Allowing for Further Input. A major concern raised by the Chamber to the 2009 Proposal was that the PBGC was suggesting unilateral changes without sufficient explanation or opportunity for discussion or feedback. The changes in the proposal were so significant that we felt it was important that there be a meaningful opportunity for interested parties to be part of the rule-making process. By withdrawing the previous proposal, offering another proposal for comment, and initiating a public hearing, the PBGC has made a substantial effort to ensure that interested parties have a meaningful opportunity to participate in the decisions to make changes to the current rules.

The Chamber Remains Concerned about the Use of Credit Scores or Credit Ratings. The proposed rule creates a new safe harbor that would apply if, when a reportable event occurred for a plan, the applicable financial soundness criteria were met by the plan sponsor. PBGC proposes to use, as one of the five criteria of financial soundness for a company, credit scores reported by commercial credit reporting companies (*e.g.*, Dun & Bradstreet). To satisfy the criterion for the

[3] On January 22, 2010, the Chamber submitted comments to the PBGC on the 2009 Proposal. The Chamber's comments focused on the need for balance between enhanced oversight by the PBGC and the potential burdens on employers. The proposal eliminated most of the automatic waivers and extensions that currently exist. Therefore, the Chamber urged the PBGC to reconsider the proposal and allow the retention of waivers and extensions. In addition, the Chamber urged the PBGC to enter into negotiated rulemaking which would allow all interested parties an opportunity to contribute to the proposed changes.

[4] 76 FR 18134, April 1, 2011.

[5] On April 20, 2011, the Chamber submitted a letter to the PBGC in response to a request for comments on PBGC regulations pursuant to Executive Order 13563. Our letter highlighted concerns about the intended changes and stressed the administrative resources that plan sponsors would have to expend.

[6] 2011 PBGC Plan for Regulatory Review at http://www.pbgc.gov/documents/plan-for-regulatory-review.pdf.

financial soundness safe harbor, the credit score of a plan sponsor would have to reflect a credit score indicating a low likelihood that the company would default on its obligations.[7]

The Chamber has consistently opposed the use of credit ratings in the retirement plan context. The use of credit ratings was initially raised during negotiations over the Pension Protection Act of 2006 (PPA). In that context, credit ratings were suggested to be part of the funding requirements. The Chamber, along with others in the business community, earnestly opposed this provision and it was not included in the PPA.

Subsequently, the PBGC has argued in favor of basing the risk-based premium on the credit worthiness of the plan sponsor.[8] As such, the PBGC has recommended using credit scores/ratings to determine credit worthiness. In this context, the Chamber has also opposed the use of credit ratings. We have argued that a creditworthiness test would inevitably result in the PBGC becoming an entity that makes formal pronouncements about the financial status of American businesses. This role is inappropriate for a government agency. Leaving aside the question of whether the PBGC can establish accurate mechanisms for measuring and adjusting an employer's credit risk across industries and across the country, even modest year-to-year changes in those government credit ratings could have implications well beyond PBGC premiums, potentially affecting stock prices or the company's access to other credit sources.

Understanding that the proposal here is somewhat different from previous recommendations, we, nonetheless, remain concerned about allowing credit scores to be used in any part of the funding or premium determination process. Even with the use proposed here, we believe that there can be the unintended consequence of the government sanctioning private crediting agencies. Consequently, we urge caution in moving down this path. Therefore, we suggest that the agency consider other alternatives for determining financial soundness. For example, the PBGC might consider basing the safe harbor on information found in plan audits. All plans covered by the PBGC are subject to these audits so there would be no additional burden on plan sponsors to determine this information.[9]

The Use of Credit Scores – or Similar Information – Should be Strictly Voluntary. While we appreciate the inclusion of a new safe harbor that could possibly alleviate administrative burdens for certain plan sponsors, we must stress that the safe harbor should remain voluntary and that none of the information detailed in the safe harbor should be required to be provided by any plan sponsor. As such, credit scores – or any similar information – would not have to be provided to the PBGC (other than to prove compliance with the safe harbor). Moreover, we continue to oppose the use of credit scores or credit rating information in any other retirement plan context and insist that the use of them here does not set a precedent for their use elsewhere.

The Safe Harbor Based on Plan Funding Should Maintain the Current Standard of 80% Funding. The proposed rule includes an alternative financial soundness safe harbor based on plan funding. This proposed safe harbor could be satisfied by one of two alternative tests: if the plan is

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[7] 78 FR 20061, Proposed Rule section 4043.9(b)(1).

[8] This proposal has been included in various Presidential budget proposals including, most recently, the President's Fiscal Year 2014 Budget, http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/labor.pdf.

[9] Even though the audit relates to the plan, we believe it would still be helpful in conjunction with the other requirements for plan sponsors to determine the financial soundness of the company.

fully funded on a termination basis on the last day of the plan year preceding the event year or the plan is 120 percent funded on a premium basis for the plan year preceding the event year.[10]

The Chamber fully supports a safe harbor that is based on plan funding. As we have consistently maintained, the only time the PBGC is threatened with additional liability is when a plan is underfunded and thus, the funding of the plan should be the PBGC's primary focus. Nonetheless, we believe that the measures the PBGC has suggested for plan funding are too restrictive.

The measure of termination liability is an unrealistic standard for plan sponsors. For one, plan sponsors do not regularly make this calculation. Thus, they would have to perform this calculation solely for the purpose of determining whether they satisfy the safe harbor. More importantly, plan sponsors do not generally fund for termination liability because they would be at risk of overfunding the plan, and being subject to an excise tax, if interest rates were to increase. Consequently, using termination liability as a standard for the safe harbor would not provide realistic relief for plan sponsors.

While the use of funding based on a premium basis is more realistic, we do not agree with the percentage. The current rule provides several waivers where the plan is funded at 80 percent of the premium basis.[11] As this is the current rule, we do not see any reason to move away from this standard – particularly, to an amount that exceeds 100 percent of funding. As such, we recommend that the safe harbor include an option that allows it to be satisfied if the plan is 80 percent funded on a premium basis.

The Chamber is Concerned about the Removal of Certain Information from the Regulation to the Instruction Form. Currently, the contents of the reportable event notice are included in the regulation.[12] However, the proposed rule removes this information and states that it can be found in the instructions to the reportable events form.[13] We are concerned that removing this information from the regulation will limit the ability of interested parties to weigh in on any changes that are made to the information necessary to be submitted.

There is a good reason executive agencies are not permitted to do through form revision what the agency is expected to do through APA rulemaking. Under the APA, the agency can complete the full analysis needed to ensure that it moves forward with what it views as mission critical work *only* after ensuring it understands the impact to the regulated community. Under the APA, the agency would have to provide (i) a detailed and specific explanation and justification for the changes, (ii) an analysis on the economic impact as well as the impact on small businesses, and (iii) an opportunity for meaningful feedback from the regulated community. Not only do these steps protect the interests of the regulated community but they ensure the agency produces the best possible regulation with the least amount of burden. As such, we are concerned that removing this

[10] 78 FR 20061, Proposed Rule section 4043.3(c).
[11] See ERISA section 4043.23(c)(3)(ii); 4043.27(c)(2)(iii); 4043.29(c)(4)(ii); 4043.30(c)(4)(ii); 4043.31(c)(5)(iv); 4043.34(c)(3)(iv).
[12] ERISA section 4043.3(b).
[13] 78 FR 20061, Proposed Rule section 4043.3(b).

information to the instructions will impede the ability of interested parties to effectively weigh in on any future changes that are made to the contents of the reportable event notice.[14]

The PBGC Should Maintain a Paper Filing Option. The PBGC currently encourages electronic filing and would like to make it mandatory.[15] However, The PBGC does not have a web-based filing application for reportable events (as it does for section 4010 or premium filings) but proposes to allow e-mail filings. As you are aware, the Chamber fully supports electronic delivery for providing participant disclosures. However, we also support the use of paper delivery for plan sponsors that prefer it. Of particular concern is the burden on small plan sponsors who do not regularly use on-line communications. Therefore, we are concerned the PBGC is considering mandating electronic filing for reportable events without a paper filing option.

Conclusion

Again, we applaud the PBGC for withdrawing the 2009 Proposal and making meaningful changes based on input from interested parties. In order to promote a successful retirement system, the concerns of all interested parties must be taken into consideration and all efforts must be made to ensure that any negative impacts are minimized. The newly proposed rules make a significant step in this direction.

We appreciate your consideration of these comments and are encouraged to continue working with the PBGC on this project toward a balanced result.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration & Employee Benefits
U.S. Chamber of Commerce

Aliya Wong
Executive Director
Retirement Policy
U.S. Chamber of Commerce

[14] While the Paperwork Reduction Act provides the opportunity for certain overview and feedback, it does not include the same level of substantial review and opportunity for input as the APA.
[15] 78 FR 20061, Proposed Rule section 4043.5.

ERIC
The
ERISA
Industry
Committee

June 3, 2013

<u>Submitted electronically to regs.comments@pbgc.gov</u>

Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, N.W.
Washington, DC 20005-4026

RE: RIN 1212-AB06 (Reportable Events and Certain Other Notification Requirements)

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to respond to the request of the Pension Benefit Guaranty Corporation ("PBGC") for feedback on the proposed regulations regarding "Reportable Events and Certain Other Notification Requirements" (the "proposed regulations").[1]

ERIC's Interest in Retirement Plans

ERIC is a nonprofit association committed to the advancement of the employee retirement benefit plans of America's largest employers. ERIC's members provide comprehensive retirement benefits to tens of millions of active and retired workers and their families. ERIC has a strong interest in proposals that would affect its members' ability to provide secure pension benefits in a cost-effective manner.

Summary of Comments

ERIC appreciates the efforts of the PBGC in revising the proposed regulations on reportable events that were issued in 2009 (the "2009 proposed regulations") and responding to the concerns of plan sponsors and pension practitioners.[2]

ERIC understands that the PBGC believes that the current regulations should be revised.[3] However, ERIC believes that the current regulations are appropriate and sufficient to protect the interests of the PBGC, and urges the PBGC not to replace these rules with the proposed regulations (or a modified version of the proposed regulations). ERIC therefore submits the following comments:

[1] Pension Benefit Guaranty Corporation, *Reportable Events and Certain Other Notification Requirements*, 78 Fed. Reg. 20039 (Apr. 3, 2013).
[2] *Id*., 74 Fed. Reg. 61427 (Nov. 23, 2009).
[3] 78 Fed. Reg. 20039.

1400 L Street, N.W.
Suite 350
Washington, DC 20005
T (202) 789-1400
F (202) 789-1120
www.eric.org

- The PBGC already has the appropriate tools to identify at risk plans.
    - The Pension Protection Act of 2006 is protecting the interests of the PBGC.
    - For the plans that pose the most risk to the PBGC (*i.e.*, those that are not adequately funded), the PBGC already receives substantial amounts of information.
- The safe harbors for plans in the proposed regulations are not useful.
    - Few companies regularly calculate their plans' unfunded benefit liabilities on a termination basis.
    - The overwhelming majority of plans will not qualify for the safe harbor for plans that are 120 percent funded on a premium basis.
- The safe harbor for companies in the proposed regulations does not properly identify at risk plans and would cause significant hardships for plan sponsors.
    - The proposed safe harbor is not an appropriate measure of a <u>plan's</u> financial health or the risk that a <u>plan</u> poses to the PBGC.
    - The timing required to comply with the proposed regulation is administratively unworkable and would impose a significant burden on plan sponsors and their service providers.
    - The proposal would require companies to change the way they conduct their core businesses.
    - Even if the financial health of a plan <u>sponsor</u> were an appropriate measure of the financial health of a <u>plan</u>, it is inappropriate to rely on Dun & Bradstreet reports (which are dated and not sufficiently reliable) or a plan sponsor's use of secured debt (which is commonly used by financially healthy companies for items such as receivables and inventory) as measures of the plan sponsor's financial health.
- The proposed regulations could require companies to renegotiate their credit and lending arrangements and for plans to have their investment agreements terminated.
- The proposed regulations impose additional costs and burdens on companies that sponsor defined benefit retirement plans, which may cause even more plan sponsors to freeze or terminate their plans.
- It is not appropriate for the PBGC to regulate through forms and instructions.

Since the Pension Protection Act of 2006 (the "PPA"), plan sponsors have increased the rate at which they have been contributing to their plans in order to improve their plans' ERISA funding levels as required by law; some plan sponsors have also been contributing more than the required minimum amount. Instead of helping to further the goals of the PPA, the proposed regulations would instead require plan sponsors to divert a portion of those contributions to pay service providers to help comply with burdensome regulatory requirements that do not materially enhance the financial position of the PBGC.

Furthermore, the financial soundness of a company is not an appropriate standard for pension regulatory requirements. The financial soundness approach taken in the proposed regulations continues a larger trend. For example, the Obama Administration requested authority for the PBGC to set its own premiums up to $25 billion based on ***credit risk***.[4] The PBGC also recommended in the ERISA Section 4010 Report to Congress that "Congress create reporting criteria based on the sponsor's ***financial soundness*** using risk measurement tools already widely-employed in business, such as credit scores, rather than relying solely on the plan's funding percentage."[5] PBGC also implemented a 4062(e) enforcement pilot program based on whether it thinks companies are financially sound. The PBGC states that it "is implementing a pilot program under which going forward, PBGC will generally take no action to enforce section 4062(e) liability against ***creditworthy companies***..."[6]

As explained below, this is not a suitable method to use. Plan sponsors have historically been required to maintain their plans' funded status at certain levels, contribute at least the minimum required amounts to their plans (and, through deduction limits and excise taxes on reversions, been *discouraged* from contrtibuting too much to their plans), and invest plan assets prudently -- and they have structured their businesses around satisfying these obligations. It is not appropriate to impose additional requirements on these same sponsors or to change the standards by which they are judged.

DETAILED COMMENTS

For many years, ERIC has been atuned to and had concerns about the PBGC's approach to reportable events and recent use of a company's financial soundness to evaluate the potential risk to its defined benefit plan. While ERIC understands that the PBGC wishes to change its current regulations, we are very concerned that the approach suggested in the proposed regulations will adversely impact plan sponsors without providing any significant additional benefit to the PBGC.

I. The PBGC already has the appropriate tools to identify at risk plans (*i.e.*, those that are not adequately funded).

The purpose of the reportable events rules is to allow the PBGC, when it learns that a plan is at risk, to negotiate funding improvements, intervene as a creditor, minimize funding shortfalls via involuntary plan termination, and take other protective action.[7]

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[4] Office of Management and Budget, *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2014*, p. 227 (Apr. 2012), available at http://www.whitehouse.gov/omb/budget/Analytical_Perspectives.
[5] Pension Benefit Guaranty Corporation, *4010 Summary Report*, p.5 (Aug. 21, 2012), available at http://www.pbgc.gov/documents/PBGC-4010-report-harkin.pdf (emphasis added).
[6] Pension Benefit Guaranty Corporation, *Frequently Asked Questions 4062(e) Enforcement Pilot Program*, available at http://www.pbgc.gov/about/faq/pg/frequently-asked-questions-4062.html (emphasis added).
[7] 78 Fed. Reg. at 20039.

A. The Pension Protection Act of 2006 is protecting the interests of the PBGC in addition to the benefits earned by the participants.

The Pension Protection Act of 2006 ("PPA") was designed to strengthen the funding of defined benefit plans and reduce the PBGC's deficit.[8] The CRS Report to Congress explains:

> "The Pension Protection Act is the most comprehensive reform of the nation's pension laws since the enactment of the Employee Retirement Income Security Act of 1974 (ERISA, P.L. 93-406). It establishes new funding requirements for defined benefit pensions…Prompted by the default in recent years of several large defined benefit pension plans and the increasing deficit of Pension Benefit Guaranty Corporation (PBGC), the Bush Administration in January 2005 advanced a proposal for pension funding reform, which was designed to increase the minimum funding requirements for pension plans and strengthen the pension insurance system."[9]

As noted in the last sentence above, the PPA was designed to increase the funding of plans in order to strenghthen PBGC and to decrease the frequency of termination and "take over" actions by the PBGC.

Additionally, the PPA increased the reporting of underfunded plans. Before the PPA, companies were required to file the Form 4010 if the plan's aggregate unfunded vested benefits exceeded $50 million. Beginning in 2008, the PPA requires this filing for any PBGC-insured plan that has a funding percentage of less than 80%.

Reports from the Department of Labor demonstrate that the PPA is working. Contributions to defined benefit plans increased dramatically from $89.8 billion for the 2006 plan year[10] to $131.1 billion for the 2010 plan year.[11] During this time, the number of participants in defined benefit plans *declined* from 42.1 million in 2006 to 41.4 million in 2010.[12] Thus, more money was contributed to defined benefit plans to provide benefits to fewer workers.

As the Department of Labor's data shows, the PPA is protecting the PBGC's interests by increasing the funding and reporting of private-sector defined benefit plans.

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[8] Pub. L. 109–280 (Aug. 17, 2006).

[9] CRS Report for Congress, *Summary of the Pension Protection Act of 2006* (May 1, 2007), available at http://www.aging.senate.gov/crs/pension8.pdf.

[10] U.S. Department of Labor, *Private Pension Plan Bulletin Abstract of 2006 Form 5500 Annual Reports*, Table A1 (Mar. 2012), available at http://www.dol.gov/ebsa/PDF/2006pensionplanbulletin.PDF.

[11] U.S. Department of Labor, *Private Pension Plan Bulletin Abstract of 2010 Form 5500 Annual Reports*, Table A1 (Nov. 2012), available at http://www.dol.gov/ebsa/PDF/2006pensionplanbulletin.PDF.

[12] U.S. Department of Labor, *Private Pension Plan Bulletin Abstract of 2006 Form 5500 Annual Reports*, Table A1 (Mar. 2012); U.S. Department of Labor, *Private Pension Plan Bulletin Abstract of 2010 Form 5500 Annual Reports*, Table A1 (Nov. 2012).

B. For the plans that pose the most risk to the PBGC, the PBGC already receives substantial amounts of information.

The PBGC already receives a significant amount of information to help it determine if a plan is at risk. These include:[13]

- *Notice of Intent to Terminate* – Notifies PBGC about proposed termination and provides information about the termination process at least 60 days before the proposed termination date.

- *Form 600 - Distress Termination: Notice of Intent to Terminate* - Notifies PBGC about proposed termination and provides plan and sponsor data at least 60 days before the proposed termination date.

- *Notice of Request to Bankruptcy Court to Approve Termination* - Notifies PBGC at time Bankruptcy Court is notified about company's request to Bankruptcy Court to approve plan termination based upon reorganization test.

- *Form 200 - Notice of Failure to Make Required Contributions* - Requires submission of information relating to plan and controlled group to PBGC no later than 10 days after the plan has aggregate missed contributions of more than $1 million.

- *Reporting of Substantial Cessation of Operation and of Withdrawal of Substantial Employer* - Advises PBGC of certain cessations of operation and of withdrawals of substantial employers and requests determination of liability.

- *Annual Financial and Actuarial Information Reporting* - Requires submission of actuarial and financial information for certain controlled groups with substantial underfunding.

- *Form 10 - Post-Event Notice of Reportable Events* - Requires submission of information relating to event, plan, and controlled group to PBGC within 30 days after a failure to make a required minimum funding payment, active participant reduction, change in contributing sponsor or controlled group, application for funding waiver, liquidation, bankruptcy, and various other events.

- *Form 10-Advance - Advance Notice of Reportable Events* – Requires submission by certain privately-held companies of information relating to event, plan, and controlled group to PBGC at least 30 days before a change in contributing sponsor or controlled group, liquidation, loan default, transfer of benefit liabilities, and various other events.

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[13] U.S. Department of Labor, Employee Benefits Security Administration, *Reporting and Disclosure Guide for Employee Benefit Plans* (Oct. 2008), available on PBGC's website at http://www.pbgc.gov/prac/reporting-and-disclosure/reporting-and-disclosure-overview.html.

The PBGC also has access to information that is available to the public. The PBGC explained in the preamble to the proposed regulations that "a vast quantity of business and financial information has become available through the internet and other means."[14]

Additionally, the PBGC also has an "Early Warning Program"[15] that focuses on companies that have financial difficulties or a significantly underfunded plan. The PBGC has explained:

> "PBGC has developed specialized tools, technology, and financial expertise so that it can meet companies on their own terms. PBGC staff use financial information services and news databases and technology. PBGC also relies on information sharing among the Department of Labor, the Internal Revenue Service and the Securities and Exchange Commission."[16]

The vast amount of information already available to the PBGC should enable it to identify plans for which it will need to negotiate funding improvements, intervene as a creditor, minimize funding shortfalls via involuntary plan termination, and take other protective action. The additional reportable event filings that the proposed regulations would require will not materially enhance the PBGC's ability to identify at risk plans.

C. The current regulations effectively protect the PBGC and reflect a negotiated rulemaking process.

Negotiated rulemaking is a "means by which representatives of the interests that would be substantially affected by a rule, including the agency responsible for issuing the rule, negotiate in good faith to reach consensus on a proposed rule."[17] Negotiated rulemaking has been twice endorsed by Congress, first in the Negotiated Rulemaking Act of 1990 and subsequently in 1996, when Congress permanently reauthorized the Act.[18] Negotiated rulemaking is considered more effective than adversarial rulemaking because it: (1) increases the acceptability and improves the substance of rules, making it less likely that the rules will be challenged in court; and (2) shortens the amount of time needed to issue final rules.[19]

Negotiated rulemaking has met, if not exceeded these expectations. The results of a major study on the effectiveness of negotiated rulemaking conducted by Laura Langbein and Cornelius Kerwin, professors at American University, showed that, in 13 different categories, participants in the negotiated rulemaking process preferred it by wide margins over traditional adversarial rulemaking.[20]

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[14] 78 Fed. Reg. at 20040.
[15] Pension Benefit Guaranty Corporation, *Early Warning Program Fact Sheet*, available at http://www.pbgc.gov/res/factsheets/page/early-warning.html.
[16] *Id*.
[17] Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. Envtl. L. J. 35. (2000). For more details on how Negotiated Rulemaking is intended to function, see 5 U.S.C. § 561.
[18] Pub. L. No. 101-648; Pub. L. 104-320.
[19] Pub. L. 101-648 § 2.
[20] *See*, Laura Langbein & Cornelius Kerwin, *Regulatory Negotiation versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. Pub. Admin. Res. and Theory 599, 603-604 (July 2000).

Since the Negotiated Rulemaking Act was enacted "agencies across the government have tried and liked it."[21]

The PBGC convened a negotiated rulemaking committee in 1995 and 1996 to discuss proposed changes to the reportable events regulations.[22] The negotiated rulemaking committee proposed substantial changes to the regulations, including new reportable events, while also providing extensions of time and waivers for certain filings.[23] The consensus-based approach worked admirably to create the current regulations; the "PBGC received only one written comment on the proposed rule" and the rule received the Hammer Award from former Vice President Al Gore's National Performance Review.[24]

The PBGC should recognize the value provided by the negotiated rulemaking process and the resulting current regulations. The PBGC should not propose to overhaul the current regulations absent compelling evidence that they are not working.

II. The safe harbors for plans in the proposed regulations are not useful.

The proposed regulations include safe harbors for plans that are either fully funded on a termination basis ("fully funded safe harbor") or that are 120 percent funded on a premium basis ("premium safe harbor").[25]

A. Most companies do not regularly calculate their plans' unfunded benefit liabilities on a plan termination basis.

Under the proposed regulations, a plan will satisfy the fully funded safe harbor if, as of the last day of the prior plan year, the plan had no unfunded benefit liabilities using termination basis assumptions.[26]

Most companies do not regularly calculate their plans' unfunded benefit liabilities on a plan termination basis. As a result, to determine whether this safe harbor is available, companies would have to have their actuaries (or hire actuaries to) perform these additional calculations. Because of the time needed to make the calculations, companies would need to have this calculated *every year* – even though they may not need it during the following year. These calculations take time and cost money -- money that could better be spent funding plans or providing additional benefits. This waste of company assets further contributes to the decision of many employers to reduce or eliminate their commitment to defined benefit pension plans.

The fully funded safe harbor, even if retained, is unworkable in its current form.

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[21] 142 Cong. Rec. S6155, S6158 (June 12, 1996).
[22] See 60 Fed. Reg. 41033 (Aug. 11, 1995).
[23] 61 Fed. Reg. 63988 (Dec. 2, 1996).
[24] *Id*. at 63988; Pension Benefit Guaranty 1996 Annual Report available at http://www.pbgc.gov/docs/1996_annual_report.pdf.
[25] 78 Fed. Reg. at 20061.
[26] *Id.*

First, plans that are not fully funded on a termination basis as of the last day of the prior plan year may be fully funded at the time the reportable event filing is made due to contributions made after the calculation is made and/or investment earnings.

Also, it takes many months to calculate a plan's funded status (whether on a termination basis or for funding purposes): participant census data needs to be updated; non-publicly traded asset classes might need to be valued, and the value of certain asset classes can be subject to a lag in reporting. Thus, even companies that are in a position to calculate their plans' funded status on a termination basis will likely not know whether their plans are fully funded "as of the last day of the prior plan year" until some time during the middle of the current plan year. This effectively means that this safe harbor, even if calculated by an employer, is not useable during a large portion of a given reporting year.

If the PBGC is inclined to retain the fully funded safe harbor, it should base the availability of that safe harbor on the plans' funded status determined either as of the last day of the prior plan year or the first day of the prior plan year. In this way, employers interested in using the fully funded safe harbor who decide to routinely calculate their plans' funded status on a termination basis will be able to know (using the funded status on first day of the prior plan year) whether the safe harbor will be available to them during a calendar year. Employers that choose not to regularly calculate their plans' funded status on a termination basis and who decide, upon the occurrence of a potential reportable event, to calculate their plans funded status on a termination basis, could alternatively use the last day of a plan year using more recent information, if available.

Finally, the termination basis safe harbor is not truly useful for the PBGC. Most employer plans do not terminate. For plans that are at risk of termination, the PBGC has appropriate tools available to it under current law to monitor and manage this risk. Indeed, the current reporting waivers for financially sound plans—e.g., no variable rate premium being due, less than $1 million in unfunded vested benefits, and fair market value of plan assets of at least 80% of vested benefits (for public companies)—are adequate to bring to the PBGC's attention circumstances that might affect plans that present a risk to the PBGC.

The PBGC should recognize that the termination basis safe harbor, in its present form, is not useful for either companies or the PBGC.

B. The overwhelming majority of plans will not qualify for the premium safe harbor.

The premium safe harbor is only available to defined benefit plans where the value of the plan's assets as determined for premium purposes is not less than 120% of the plan's premium funding target for the prior plan year.[27]

A study of the top one hundred U.S. pension plans (the "largest plans") indicates that only approximately 2% of these plans had a funded status of more than 120 percent in 2012.[28] Furthermore, only an additional 2% of the largest plans had a funded status of 105% - 120% in 2012.

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[27] *Id.*

Thus, only 2% of the largest plans would have qualified for the premium safe harbor. Even if PBGC lowered the threshhold to 90%, only around 15% of the largest plans would have qualified in 2012.

The PBGC should maintain the existing threshhold at 80% of the plan's premium funding target for the prior plan year in order for it to remain meaningful.

III. The safe harbor for companies in the proposed regulations does not properly identify at risk plans and would cause significant hardships for plan sponsors.

The proposed regulations' safe harbor for companies (the "company safe harbor") would apply only if, on the determination date, a company met the following criteria:

- The score for the company by a commercial credit reporting company indicates a low likelihood that the entity will default on its obligations.
- The company has no secured debt, other than leases or debt incurred to acquire or improve property and secured only by that property.
- For the most recent two fiscal years, the company has positive net income under generally accepted accounting principles ("GAAP") or International Financial Reporting Standards ("IFRS").
- For the two-year period ending on the determination date, the company has not defaulted on loans with an outstanding balance of $10 million or more.
- For the two-year period ending on the determination date, the company has not failed to make required contributions.

A. The safe harbor for companies is ill-suited for large employers.

For the reasons described above, it is not appropriate for the PBGC to adopt a safe harbor related to the plan sponsor's financial health. However, if the PBGC is inclined to adopt such a safe harbor, it cannot use the one included in the proposed regulations.

1. Commerical credit reporting companies are not sufficiently reliable.

The proposed regulations provide that, in order to qualify for the company safe harbor, the business must receive a score by a commercial credit reporting company that indicates a "low likelihood" that the company will default on its obligations. The preamble to the proposed regulations provides Dun & Bradstreet as an example of a commercial credit reporting company.[29] It also states that the score necessary to qualify for the safe harbor will change over time and that the PBGC will

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[28] Milliman, *2013 Corporate Pension Funding Status*, available at http://www.milliman.com/expertise/employee-benefits/products-tools/pension-funding-study/.
[29] 78 Fed. Reg. at 20044.

notify the public as to what score it has selected.[30] The preamble also states that the Dodd-Frank Wall Street Reform and Consumer Protection Act prevents them from relying on credit ratings in regulations.[31]

Dun & Bradstreet explains that its credit score includes payment trends and public filings to evaluate companies. Their website states that "The credit score uses statistical probabilities to classify risk based on the full spectrum of D&B's business information, including payment trends, company financials, industry position, company size and age and public filings."[32]

The PBGC's proposal to use credit reporting companies, like Dun & Bradstreet, is problematic for a number of reasons.

First, the information received by credit reporting companies is likely to be dated -- in many cases as of the end of the prior fiscal year. The credit reporting company's score is based on the same public financial disclosures, which are issued some time after the events reported in them have occurred. The credit reporting company must then analyze the information provided in the public financials. They do not have timely information from management and do not look at the forecast for the company. If the transaction occurs before the year-end results, the information used by the credit reporting company will be even further out of date.

In addition, credit reporting companies may rely on inaccurate information. Credit reporting companies use payment trends, which may not accurately reflect the company's relationship with its suppliers. For example, a company may have contractually agreed to pay a supplier within 45 days. A report from a supplier that the company paid within 40 days may give the impression that the payment was late (e.g., if the industry average is 30 days), while in fact, the company paid 5 days early.

Finally, large companies do not generally use commercial credit reporting companies. Instead, large companies use credit agencies. They have established relationships with credit agencies and provide them with forecasts and access to management. This enables the credit agencies to perform a more thorough analysis. Because large companies typically do not obtain credit reports, they generally do not monitor them for accuracy as part of their business practices. As a result, if this standard were applied, companies would be required to devote resources to ensuring that the credit reports were accurate and working through the lengthy process to correct any inaccuracies. Because the credit report is evaluated as of the determination date (which is unknown in advance), companies would need to constantly monitor their reports and there would not be sufficient time to correct any inaccuracies if they had a reportable event.

2. Financially healthy companies have secured debt.

The proposed regulations provide that, in order to qualify for the company safe harbor, the business must not have any secured debt other than leases or debt incurred to acquire or improve property. A safe harbor that examines whether a company has secured debt is not appropriate.

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[30] 78 Fed. Reg. at 20044.
[31] 78 Fed. Reg. at 20043.
[32] Dun & Bradstreet, *Using D&B's Recommended Credit Limits*, available at https://www.dnb.com/credit_limit/help/creditline.htm#risk.

Financially healthy companies often take on significant levels of secured debt in order to obtain the most favorable financing rates that they can. For example, healthy companies often use their inventories or receivables to secure debt. Securing debt in this way is not a sign that a company is in financial distress, but rather a sound business practice used to secure favorable rates, particularly in light of the current interest rate market and federal reserve policy.

In addition, it is not appropriate simply to add "receivables" and "inventory" to the list of exclusions in the safe harbor. Financially sound companies might secure other assets for legitimate business purposes. If the PBGC is going to use secured debt as a marker of a company's financial soundness, the only appropriate way to do so would be based on the percentage of a company's assets that are used as collateral for debt. For example, a company that has "substantially all of its assets" pledged as collateral for debt might not be financially sound.

3. Using net income punishes healthy companies in cyclical indusries.

The proposed regulations unfairly impact financially healthy companies in cyclical industries and those with rare or extraordinary events. For example, some companies are more responsive to the economy and as a result, have more volatile financials. These companies may be well-managed financially, but fail to have positive net income in some years due to this volatility. Additionally, a company may normally have positive net income, but experience a loss due to an infrequent, unusual and significant event. For example, a company may have a loss due to a natural disaster that does not normally occur in its part of the country or an unexpected seizure of property by a foreign government.

For the foregoing reasons, the PBGC should recognize that the proposed safe harbor for companies—which relies on commercial credit reporting agencies, the absence of secured debt, and net income—is ill-suited for large companies. It will force companies to expend resources and adjust their business practices relating to debt, is too unpredictable and is not a useful proxy for the financial soundness of the company as it relates to the risk to the PBGC.

B. The safe harbor for companies is administratively unworkable and would impose a significant burden on plan sponsors and their service providers.

Like the fully funded safe harbor, described above, the usefulness of the safe harbor for companies depends on companies devoting substantial resources to tracking and measuring criteria that they do not currently monitor in connection with their pension plans. Moreover, without the investment of such resources, it would be extremely difficult for a company to be able to predict with any reasonable certainty whether they would be eligible for the company safe harbor until they need to use it. Because the commercial credit reporting companies are relying on payment trends and industry positions, the scores provided by commercial credit reporting companies can be volatile. This is particularly problematic for companies that have cyclical businesses. Additionally, companies will not know in advance what threshhold score the PBGC will select and also might be forced to turn down favorable financing arrangements in order to avoid taking on secured debt.

In order to use the company safe harbor, the person at the company responsible for notifying the PBGC about a reportable event would need to know at any given time: (1) whether there was a reportable event; (2) the company's credit score from a commercial credit reporting company;

(3) what threshhold credit score the PBGC had most recently selected; (4) what secured debt the company has and how that debt is secured; (5) the company's net income for the past two years; (6) whether in the past two years the company has defaulted on any loans and the outstanding balance of those loans; and (7) whether the company has failed to make any required contributions to the plan in the past two years.

The person at the company responsible for notifying the PBGC would be required to get all of this information in sufficient time in advance of making a determination of whether the company was eligible for the company safe harbor – and if not, to prepare the notification to the PBGC. As noted above, there would likely be insufficient time to challenge any inaccuracies related to a credit score. Additionally, they may need to review volumes of agreements (which companies execute on a continual basis) to determine how their debt is secured. The responsible person would also need to work with the employees who handle the company's loans to determine whether there have been any defaults in the past two years and the pension people to determine if there have been any missed required contributions.

The purpose of a safe harbor is to provide a company with an expedited and clear method to comply with a regulation. In this case, the analysis involved with determining whether the safe harbor is available to the employer will require significant additional resources. In the alternative, companies will have to embark on the expensive and time-consuming process of preparing a reportable event filing. The PBGC's proposed approach to a safe harbor for reportable events does not appear to provide a streamlined and efficient alternative to filing a reportable event (which companies may execute in an effort to ensure 100% compliance with the rules). The approach taken by the PBGC in the proposed regulations is burdensome on the company's resources and would require plan sponsors to spend significant resources complying with the requirements rather than funding and prudently managing their plans.

Thus, ERIC urges the PBGC to recognize that the timing it has proposed is administratively unworkable and would impose a significant burden on plan sponsors and their service providers.

C. The safe harbor for companies, as currently structured, is inconsistent with Executive Order 13563 and would interfere with the way companies conduct their businesses.

The approach taken in the proposed regulations with respect to companies is inconsistent with the Executive Order 13563 which requires regulations to promote predictability, reduce uncertainty, and use the least burdensome approach available to accomplish its objectives.[33] The Executive Order states that:

> "[E]ach agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); [and] (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into

[33] The White House, *Executive Order 13563 -- Improving Regulation and Regulatory Review*, §1(a) (Jan. 18, 2011), available at http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order.

account, among other things, and to the extent practicable, the costs of cumulative regulations…"[34]

The proposed regulations would interject pension administration issues into basic and unrelated core business decisions, including loan agreements, capital investments, accounting decisions, and debt securitization. Companies that want to avail themselves of the ability to use the company safe harbor would be forced to make various business decisions with the reportable events safe harbor in mind.

For example, some companies use secured debt for receivables that are not paid within 90 days and for inventory. These business decisions are unrelated to the company's financial health. However, if a company wanted to ensure that they were eligible for the company safe harbor, they would not be able to use this approach and would be forced to incur additional financing costs in order to be able to fall within the safe harbr. Additionally, there may be business decisions that arise in the future which could be impacted (unintentionally) by the proposed regulations.

The proposed regulations would effectively impose new business standards on companies. The PBGC states in the preamble that it is not trying to "reinvent the wheel" and "can and should rely on procedures, documents, and performance standards that are already established and accepted" to the extent possible.[35] While the PBGC claims that it "would not itself evaluate the creditworthiness of plans sponsors", it will do just that. If the PBGC does not think that a company has properly used the company safe harbor, it will evaulate: (1) whether a company has reached the threshold that the PBGC sets for the credit score, (2) the type of secured debt a company has, (3) whether the company had positive net income and used GAAP or IFRS, (4) whether the company defaulted on any loans with an outstanding balance of $10 million or more, and (5) whether the company failed to make required contributions. The requirements to satisfy the company safe harbor would effectively invent new business standards for companies. The methods for complying with the company safe harbor are not normally used by companies and would impose significant burdens on them in order to use the company safe harbor.

A company's compliance with pension regulations should not directly impact unrelated decisions a company makes with its ongoing business concerns. Although we support the mission of the PBGC to ensure compliance with its regulations, under a true "cost-benefit" analysis, this proposed safe harbor will not meet the standards set in Executive Order 13563. These proposed regulations will necessitate a domino of decision-making normally related to pure business endeavors in order to satisfy compliance with a regulatory safe harbor for pension plan administration. Under the PBGC proposal, these business decisions – wholly unrelated to the administration of the pension plan – become intertwined with the ongoing maintenance and compliance requirements of the pension plan.

[34] *Id*. at § 1(b).
[35] 78 Fed. Reg. at 20040.

IV. The proposed regulations could cause companies to have to renegotiate their arrangements and for plans to have their agreements terminated.

A. Companies may have to renegotiate their credit and lending agreements due to the proposed regulations.

In January 2010, ERIC explained to the PBGC that many credit and lending agreements between employers and financial lending institutions provide that the occurrence of a reportable event that is not automatically waived is an event of default with respect to the outstanding loans, or precludes the employer from receiving additional financing under the existing credit agreement.[36]

Since then, many companies have renegotiated their agreements to provide that the occurrence of a reportable event that is not automatically waived is an event of default with respect to the outstanding loans only if the event could result in financial liability in excess of a certain dollar threshold or could cause "a material adverse effect" on the borrower. For example, credit and lending agreements often state:

> "SECTION X. Events of Default. If any of the following events ("Events of Default") shall occur and be continuing:….. The Company or any of its ERISA Affiliates shall incur a Material Adverse Effect, or in the case of clause (i) below, shall be reasonably likely to incur a Material Adverse Effect, as a result of one or more of the following: (i) the occurrence of any ERISA Event [defined to include a Reportable Event]…."

However, given the uncertainty that can arise in the case of a reportable event, lenders may use this opportunity to re-enter into negotiations under the guise of claiming that the reportable event resulted (or at least could result) in a material adverse effect on theborrower. This is particularly true for companies that have well-funded plans but who are going through temporary financial difficulties. In their weakened state, they will be less able to negotiate with lenders or otherwise find alternative sources of credit.

Additionally, if a company believes it qualifies for one of the safe harbors, but is inadvertently incorrect, the PBGC could impose a lien, which would be problematic under the lending agreement. For example, the employee who handles secured debt may inadvertently overlook an item which would disqualify the business for the company safe harbor.

The PBGC should continue to use the current regulations, which companies have considered when entering into their credit and lending agreements.

B. Plans may have certain of their investment agreements terminated as a result of the proposed regulations.

Some complex investment contracts—used by pension plan fiduciaries to manage investment risk—provide that the contract may be terminated in the event of a reportable event that has not been

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[36] ERISA Industry Committee, *Comment Letter to PBGC* (Jan. 22, 2010), available at http://www.eric.org/forms/uploadFiles/1E6C90000000F.filename.ERIC_CommentLetter_PBGC_ReportableEvents_PropRegs012210-final.pdf.

waived. Notably, this provision typically does not provide for any materiality threshold or qualifier. For example, some investment agreements state:

> "In the event that Party B is an ERISA Plan (as defined in Part 4 of this Schedule), whether or not identified as an ERISA Plan on Appendix I hereto (as periodically amended), the following Additional Termination Events shall apply:…Reportable Events. An event occurs in respect of Party B that is a "reportable event" as defined under ERISA Section 4043 ("Reportable Event") and the regulations thereunder, and is not an event for which the reporting requirements of ERISA Section 4043(a) have been waived by the PBGC."

The impact on a plan could be substantial if an investment were terminated pursuant to this provision. For example, the party to the investment agreement may utilize this provision to terminate the agreement at a time that is lucrative to the party and detrimental to the plan.

The PBGC should continue to use the current regulations in order to avoid the disruption of plans' investment agreements.

V. The proposed changes to the rules for controlled groups will result in additional burdens without corresponding gains.

Under the current rules, a reportable event occurs for a plan when there is a transaction that results, or will result, in one or more persons ceasing to be members of the plan's controlled group.[37] The current regulations provide for several useful automatic waivers, including waivers if:

- *De Minimis Waiver* - The person or persons that will cease to be members of the plan's controlled group represent a de minimis 10-percent segment of the plan's old controlled group.
- *Foreign Entity Waiver* - Each person that will cease to be a member of the plan's controlled group is a foreign entity other than a foreign parent.
- *Funding Waiver* –
  - There is no variable rate premium is required to be paid for the plan for the year;
  - The plan has less than $1 million in unfunded vested benefits; or
  - As of the testing date for the event year, the plan would have no unfunded vested benefits if unfunded vested benefits.
- *Public Company Waiver* - The plan sponsor is a public company and the fair market value of the plan's assets is at least 80 percent of the plan's vested benefits amount.

[37] 29 CFR § 4043.29(a).

The proposed regulations would eliminate the Funding Waiver and the Public Company Waiver. Instead, companies would have to satisfy the company safe harbor, the fully funded safe harbor, or the premium safe harbor. As discussed above, these safe harbors are not useful for plans and their sponsors. Thus, the elimination of the Funding Waiver and the Public Company Waiver would negatively impact companies that experienced corporate transactions and will not improve the information already available to the PBGC that it uses to monitor and manage its risks.

As we explained to the PBGC in our January 2010 comment letter, large public companies may enter into dozens of transactions that result in numerous acquisitions, spinoffs, mergers or other corporate restructurings every year.[38] When the plan of a large public company is funded at the 80 percent level or higher, the likelihood of one of these events causing irreparable damage to the plan is minimal, even if the entity involved represents more than a 10 percent segment of the controlled group. By eliminating the existing waivers, the PBGC would be adding significant administrative burdens without a corresponding increase in the security of the pension plan system.

Elimination of these automatic waivers would mean that plan administrators of even well-funded plans would have to monitor every transaction in which every controlled group member engages throughout the year and analyze each such transaction to determine whether:

- It is a "transaction that results, or will result, in one or more persons ceasing to be members of the plan's controlled group" within the meaning of § 4043.29(a);
- It constitutes a transaction that results "solely in a reorganization involving a mere change in identity, form or place of organization" within the meaning of § 4043(a); and
- The entity that will cease to be a member of the controlled group represents a "de minimis 10-percent segment of the plan's old controlled group for the most recent fiscal year(s) ending on or before the date the reportable event occurs" within the meaning of § 4043.29(b).

Under the proposed regulations, the reporting requirement is triggered by the entering into of a legally binding agreement, whether or not written, to engage in a transaction described in the regulation. Thus, the report will in many cases have to be filed with the PBGC well before the event occurs, and must be reported even if the transaction is never consummated.

VI. The proposed regulations impose yet another risk for companies, which may cause even more plan sponsors to freeze or terminate their plans.

The proposed regulations create significant uncertainty for companies. As discussed above, companies will frequently be unable to determine whether they qualify for the company safe harbor or the fully funded safe harbor and the overwhelming majority of plans do not qualify for the premium basis safe harbor.

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[38] ERISA Industry Committee, *Comment Letter to PBGC* (Jan. 22, 2010), available at http://www.eric.org/forms/uploadFiles/1E6C90000000F.filename.ERIC_CommentLetter_PBGC_ReportableEvents_PropRegs012210-final.pdf.

As a result, company officers will need to evaluate whether they want to take the risk of having to file future reportable events, the costs that are involved to do so, and the risks to their lending and investment agreements. Given the other uncertainties that already exist for defined benefit plans, more company officers may decide to freeze or no longer have the company sponsor a defined benefit plan.

ERIC urges the PBGC not to finalize the proposed regulations which are likely to lead to even more companies freezing their defined benefit plans or ceasing to sponsor plans. Instead ERIC believes that the current regulations are more effective at protecting the needs of the PBGC and should therefore be maintained in their current state.

VII. The PBGC should not regulate through forms and instructions.

The preamble to the proposed regulations states that the PBGC plans to replace the current regulatory process by regulating through forms. It states "PBGC also proposes…to make use of prescribed reportable events forms mandatory and to eliminate from the regulation the lists of information items that must be reported."[39]

This process proposed by the PBGC would allow it to change the information that it requests without engaging in the regulatory process. ERIC urges the PBGC to recognize the value provided by the regulated community in the rulemaking process and not seek to eliminate public input when it seeks to change the information that it collects.

ERIC appreciates the opportunity to submit these comments on the proposed regulations. If you have any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400.

Sincerely,

Kathryn Ricard

Kathryn Ricard
Senior Vice President, Retirement Policy

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[39] 78 Fed. Reg. at 20051.

815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000
www.aflcio.org

Submitted by e-mail to reg.comments@pbgc.gov

June 3, 2013

Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street
Washington, D.C. 20005-4026

Re: Reportable Event and Certain Other Notification Requirements Proposed Rule and Request to Present Oral Comments at Public Hearing
RIN 1212-AB06
Docket ID: PBGC-2013-0001

Ladies and Gentlemen:

These comments on the proposed rule on Reportable Events and Certain Other Notification Requirements ("Proposed Rule")[1] issued by the Pension Benefit Guaranty Corporation ("PBGC") are submitted by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and its 57 affiliated unions. The AFL-CIO, together with its community affiliate Working America, represents more than 12.2 million workers across the country in all sectors of our economy, including those working in manufacturing, construction, transportation, health care, education, hospitality, entertainment and federal, state and local governments. Our affiliated unions negotiate pension benefits for millions of workers, and these benefits are provided through single employer and multiemployer plans. The overwhelming majority of these workers are covered by defined benefit plans.

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1 The Proposed Rule was published in the Federal Register on April 3, 2013 at 78 Fed. Reg. 20039 and it is available at http://www.pbgc.gov/Documents/2013-07664.pdf.

In addition to submitting these comments, the AFL-CIO requests the opportunity to provide oral comments at the public hearing on the Proposed Rules scheduled to be held on June 18, 2013. The witness for the AFL-CIO will be Damon A. Silvers, Policy Director and Special Counsel, and an outline of the topics to be discussed is included as Exhibit A to these comments.

The Proposed Rule essentially overhauls the existing rule that has been effect since the end of 1996. In addition to several tailored exemptions for certain reportable events, the Proposed Rule relies on two broad financial soundness waivers for most events, one tied to the plan sponsor and the other to the plan affected by the particular event. As we explain below, the PBGC's approach of relying on plan sponsor financial soundness to limit disclosure is inappropriate and should not be part of the final regulations on reportable events. In addition, our comments include suggested changes to other parts of the proposed rule.

The Proposed Rule is being issued at a time when the retirement security of working families is increasingly at risk. Workers are more concerned than ever about having enough money to maintain their standard of living in retirement. Our nation's retirement income deficit—the difference between having enough income in retirement to keep the standard of living attained while working and the projected income working families will have available in retirement—is a staggering $6.6 trillion,[2] with more than half (53%) of American households at risk of not being able to maintain their standard of living in retirement.[3]

In our view, defined benefit plans are the best means of providing meaningful retirement income to workers in their retirement. Over the last three decades, however, the private defined benefit pension system has shrunk considerably. The number of plans covering workers in the private sector has dropped dramatically, and only 17 percent of workers participate in defined benefit plans today.[4] Further, employers increasingly are freezing pensions so that no newly hired workers are covered by them and, in some cases, some or all of the remaining workers covered by them accrue no new or limited benefits: In 2012, one-quarter (25%) of workers participating in defined benefit plans were covered by frozen plans.[5] Most recently, some plan sponsors have taken the ultimate step in "de-risking" their obligations by offering lump sum payments to selected groups of retirees in pay status or purchasing annuities to provide those benefits outside of the plan.

Against this backdrop of a fraying private-sector defined benefit system, the PBGC must carefully consider the impact of any regulatory changes it seeks to make. Changes that have the effect of encouraging plan sponsors to limit or end their commitment to their defined benefit plans or discourage other employers from considering adoption of defined benefit plans, without a meaningful gain in retirement security for covered workers, should be avoided.

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[2] Retirement USA, *The Retirement Income Deficit*, http://www.retirement-usa.org/retirement-income-deficit-0 (downloaded 6/2/13).

[3] Center for Retirement Research at Boston College, *National Retirement Risk Index: An Update*, t. 1 (Oct. 2012).

[4] Bureau of Labor Statistics, *Retirement Benefits: March 2012*, t. 2 (2012), http://www.bls.gov/ncs/ebs/benefits/2012/ownership/private/table02a.pdf (downloaded 6/2/13).

[5] Bureau of Labor Statistics, *Retirement Benefits: March 2012*, t. 4 (2012), http://www.bls.gov/ncs/ebs/benefits/2012/ownership/private/table28a.pdf (downloaded 6/2/13).

Plan Sponsor Financial Soundness—Proposed Section 4043.9(b)

The most significant aspect of the Proposed Rule is the introduction of a broad reporting safe harbor based on the financial soundness of the plan sponsor. As proposed by PBGC, a plan sponsor would have to satisfy five criteria in order to be considered "financially sound." The first criterion is receipt of a score made by a commercial credit reporting company indicating a low likelihood that the entity will be unable to meet its financial commitments. The additional criteria are not considered if a plan sponsor does not meet this threshold requirement. Three of the additional criteria are tied to the financial performance of the entity, its indebtedness, and loan payment history and one looks to timely contributions to defined benefit plans. *See* 78 Fed. Reg. at 20043-20045.

The AFL-CIO opposes any plan sponsor financial soundness waiver (or safe harbor) for reportable event submissions to the PBGC. Such an approach threatens to limit the amount of information available to the PBGC in a manner similar to the dynamics that produced the 2008 financial crisis. We believe disclosure requirements aimed at assisting the PBGC's assessment of risk should only be limited when the pension fund itself is adequately funded.

The Proposed Rule and its financial soundness test are not the first time this Administration has sought to inject the concept into consideration with respect to the operations of PBGC. The last three budget proposals made by the Administration (Fiscal Years 2012, 2013 and 2014) each included a provision authorizing PBGC itself to set its premiums and to develop a variable rate premium structure based, in part, on the financial condition of the plan sponsor. The Administration included a similar proposal in its deficit reduction proposal announced in September 2011.[6] This Administration's PBGC proposal also echoes portions of the comprehensive pension reform proposal made in 2005 by the Bush Administration.[7]

None of the Administration's proposed PBGC changes introducing plan sponsor financial soundness tests, however, have been enacted or seriously considered by Congress. And, the opportunity for doing so was clearly presented: Congress passed and the President signed into law changes to PGBC's premium rates and structure as part of the Moving Ahead for Progress in the 21st Century Act ("MAP-21")[8] in 2012.

Transfer of Benefit Liabilities—Proposed Section 4043.32

In Section 4043.32(b)(2) of the Proposed Rule, the PBGC proposes to exclude the payment of lump sums or the purchase of an annuity from the scope of the transfer of benefit liabilities reportable event. The PBGC explains its rationale for this exclusion in the preamble, noting that the benefit restrictions in Section 206(g) of ERISA and Section 436 of the Internal

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[6] *The President's Plan for Economic Growth and Deficit Reduction: Legislative Language and Analysis*, pp. 43-45 (Sept. 2011). http://www.the-dma.org/segment/segmentfiles/retail/PresidentPlanforEconomicGrowthandDeficitReduction.pdf

[7] PBGC, *Impact of Pension Reform Proposals on Claims against the Pension Insurance Program, Losses to Participants, and Contributions*, App. 1, p. 17 (Oct. 26, 2005) http://www.pbgc.gov/docs/impact_of_reform_proposals_1005.pdf

[8] P.L. 112-141.

Revenue Code will limit lump sum payments and annuity purchases by "significantly underfunded plans" and "tend to prevent cashouts and annuitizations that would most seriously reduce a transferor plan's funded percentage," and the payments or purchases satisfy the plan's benefit obligations so "there is no concern about a transferee plan's financial health." 78 Fed. Reg. at 20050.

The proposed exclusion does not, however, adequately take into account the interests of the workers who remain covered by the plan following the lump sum payments or annuity purchases. While we agree that the benefit restriction rules in ERISA and the Code provide some protection, they are not sufficient. A plan's funding level immediately following the payment of lump sums or the purchase of an annuity may be above the critical statutory thresholds but significantly less than what it was before the "de-risking" transaction. Depending upon future economic conditions, investment returns and contributions, the funding level could fall, triggering one or more the statutory benefit restrictions and limiting the future benefits payable to remaining participants.

We suggest that the final rule treat the payment of lump sums or the purchase of an irrevocable commitment to provide an annuity as a transfer of benefit liabilities. By doing so, PBGC will be better informed about these transactions and able to determine whether any regulatory response by the PBGC and the other agencies (the Departments of Labor and the Treasury) to address these de-risking transactions is appropriate. In addition, the agency will have more complete information about these transactions available to policymakers considering whether legislation regarding these transactions is warranted. Today, there are few, if any, clear rules governing these de-risking transactions. The AFL-CIO believes PBGC can and should play an important role in gathering information that might lead to better protection for workers and participants impacted by de-risking transactions.

Forms and Instructions—Proposed Section 4043.5

In Section 4043.5 of the Proposed Rule, the PBGC makes mandatory the use of the forms and instructions it promulgates for the reporting of reportable events. In addition, the forms and accompanying information must be filed electronically.

While the AFL-CIO supports these modifications of the current reportable event regulations, we are concerned about the PBGC's decision to eliminate the listing of the data and information to be submitted from the body of the regulations. Instead, PBGC intends to include the required data and information only in the instructions to the revised mandatory reporting forms.

As explained in the preamble to the Proposed Rule, PBGC expects it may want to change the information that must be submitted with its proposed new reporting requirements and doing so may be done "more quickly than regulations can in response to new developments or experience." 78 Fed. Reg. at 20051.

While PBGC correctly notes that any revised forms or instructions are subject to public comment, the Paperwork Reduction Act ("PRA") process is a far cry from the public notice and comment afforded proposed regulations. The PRA notices appear in the Federal Register, though they are not often highlighted or publicized and interested parties must either request copies of the documents submitted to the Office of Management and Budget for review or locate the documents on the agency's or OMB's website. Too often, PRA notices are easy to miss and they simply do not afford stakeholders an adequate opportunity to review and comment on any changes.

We suggest that the current approach of including the initial information that must be submitted with the required reporting form continue to be included in the regulation. Doing so will afford some limited transparency to the reportable event process, and we do not believe it should be eliminated.

We appreciate the opportunity to comment on the Proposed Rule, and we urge the PBGC to include our suggestions in the final rule. If you have any questions about these comments or need any additional information, please do not hesitate to contact me.

Sincerely,

Shaun C. O'Brien
Assistant Policy Director for Health and Retirement

Topic Outline for Oral Comment
Public Hearing on Reportable Event and
Certain Other Notification Requirements
June 18, 2013

American Federation of Labor-Congress of Industrial Organizations
Damon A. Silvers
Policy Director and Special Counsel

I. Introduction and Concerns (2 minutes)

II. The Plan Sponsor Financial Soundness Waiver to Limit Reporting Is Inappropriate and Should Not Be Included in the Final Rule (5 minutes)

III. De-risking Transactions such as The Payment of Lump Sums or The Purchase of an Annuity Should Be Included as Reportable Events (2 minutes)

IV. Conclusion (1 minute)

THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy

Via Regulations.gov

June 3, 2013

Ms. Catherine B. Klion
Assistant General Counsel, Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street N.W.
Washington, DC 20005-4026

Re: The Pension Benefit Guarantee Corporation, "Proposed Rule for Reportable Events and Certain Other Notification Requirements," RIN 1212-AB06

Dear Ms. Klion:

The Financial Services Roundtable[1] (the "Roundtable") appreciates the opportunity to express our support for the U.S. Chamber of Commerce's (the "Chamber") comment letter to the Pension Benefit Guarantee Corporation (the "PBGC") regarding the Proposed Rule for Reportable Events and Certain Other Notification Requirements (the "Proposal").[2] Section 4002(b)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), the legal authority for reportable events regulation, requires plan sponsors to report to the PBGC a range of corporate and plan events impacting pension plans when they occur. Moreover, Section 4043 of ERISA gives the PBGC authority to define these reportable events and to waive reporting requirements where appropriate.

Today, the Chamber submitted a comment letter addressing a number of potential issues raised by the Proposal including, but not limited to:

- The use of credit scores or credit ratings in connection with new safe harbor financial soundness criteria and in the retirement plan context, generally;

[1] The Financial Services Roundtable represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

[2] Proposed Rule for Reportable Events and Certain Other Notification Requirements, 78 Federal Register 20039 (April 3, 2013).

- The use of a termination liability measure and a 120 percent funding requirement as alternative financial soundness tests for safe harbor; and
- The maintenance of a paper filing option for reportable events reporting.

The Roundtable fully supports the positions and recommendations outlined in the Chamber's comment letter. We believe that it is important for the industry to speak with a singular voice concerning these important issues.

If it would be helpful to discuss the Roundtable's views on these issues, please contact me at Rich@fsround.org or Brian Tate at Brian@fsround.org.

Sincerely yours,

Richard M. Whiting

Executive Director and General Counsel
The Financial Services Roundtable
202-589-2413

AMERICAN BENEFITS COUNCIL

June 3, 2013

Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026

Re: RIN 1212-AB06

Dear Sir or Madam:

On behalf of the American Benefits Council (the "Council"), I am writing to express great concern regarding an element of the proposed regulations regarding "Reportable Events and Certain Other Notification Requirements."

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

There are a number of issues raised by the proposed regulations, but we respectfully focus our attention here on one issue that we see as having by far the broadest effect: the use of the financial soundness of the plan sponsor as a factor in PBGC's exercise of its enforcement and interpretive authority.

The negative impact of the growing use of plan sponsor financial soundness as a factor, such as in this proposed regulation, is easily seen in the PBGC's enforcement policy under ERISA section 4062(e) and in the Administration's recent premium proposals. However, while the financial soundness test could decrease the reporting burden on some "stronger" companies, the proposal has the effect of increasing the burden on "less strong" companies (by imposing more burdensome requirements than would be imposed if the reporting requirements applied equally to all companies). For example, the proposal dramatically increases the amount of information required to be

1501 M Street NW Suite 600 Washington, DC 20005 202-289-6700 Facsimile 202-289-4582 www.americanbenefitscouncil.org

submitted with an initial reportable events notice and tightens reporting waivers based on plan funding status. It also eliminates the extensions tied to actual notice of an event and of the controlled group relationship where the event involves a "foreign-linked entity" or foreign parent. In addition, the Council is concerned that once the precedent of evaluating company health is established in the reportable events area, the government could use a similar test for other purposes, such as the calculation of premium payments. We see this trend as constituting a serious threat to the strength of the defined benefit plan system and to the PBGC.

The financial soundness test is pro-cyclical in nature. There are two main reasons for the long decline of the private defined benefit plan system. First, the increasing volatility of plan funding and accounting obligations makes business planning and capital planning exceedingly difficult, especially for public firms. Second, the funding and accounting rules have a "pro-cyclical" effect, so that when economic challenges are the greatest, the burdens are the highest. Companies concerned about making inevitable future down cycles far worse may need to consider exiting the system. Use of a financial soundness test would exacerbate the second problem.

The financial soundness test is a threat to PBGC. One very clear fact is often overlooked in analyses of threats to the PBGC. No healthy company has ever turned over liabilities to the PBGC. Only unhealthy companies pose a risk to the PBGC. So logically, PBGC's primary interest should be to help financially challenged companies recover so they do not have to turn over their obligations to the PBGC. While we appreciate that use of financial soundness as a trigger for additional burdens may appear logical on the surface, if applied in practice, it makes it more difficult for plan sponsors to recover and thus (1) increases the likelihood of liabilities being turned over to the PBGC and (2) is not in the best interests of plans or participants.

Financially strong companies oppose the use of financial soundness tests. Many financially strong companies have expressed grave concerns to the Council about PBGC's use of financial soundness as a trigger for increased burdens.

First, such companies know that they could face business challenges in the future. Currently strong companies do not want burdens imposed in the future when they are least able to afford such burdens. Further, a company may have a very strong plan and experience short term business challenges.

Second, strong companies that want to stay in the system know that the pro-cyclical effects of the financial soundness tests will cause many more plan sponsors to exit the system. That would mean that far fewer companies would be responsible for paying for PBGC liabilities, thus dramatically increasing the burden for those companies.

The reasons that both strong and less strong companies have expressed opposition to the PBGC assessing the financial soundness of private companies are discussed further below.

Financial soundness tests led to de-risking and will lead to more de-risking. For the reasons described above, the imposition of financial soundness tests is a contributing factor to the trend toward plan shrinkage by offering lump sums or providing annuity contracts—generally referred to as "de-risking." In fact, it was the Administration's PBGC premium proposal—based on a financial soundness test—that provided the catalyst for de-risking. The driving force behind the de-risking trend is funding and accounting volatility, but it was the premium proposal that provided the spark. Additional rules that include financial soundness increase risk for sponsors maintaining pension plans, and the economic environment will push companies to further de-risking.

A financial soundness test is similar to charging people higher health insurance premiums after they get sick. There is an initial appeal to the argument that a financial soundness test is needed to focus burdens on the companies creating risk to the PBGC, but that argument falls apart upon scrutiny. As discussed above, by focusing burdens on those least able to afford the burdens, a financial soundness test has the adverse effects of hindering companies' recovery, and severely hurting the plan system and PBGC. The best analogy would be to a system that increases premiums for individuals who get sick. Financial soundness tests make it much harder for a company to recover and therefore increase the likelihood of the obligations being turned over to the PBGC.

It is inappropriate for PBGC to assess the financial soundness of businesses. It is inappropriate for PBGC, on behalf of the Federal government, to judge the financial soundness of companies. There has been some suggestion that the proposed test is simply based on existing commercial measurements but the PBGC is proposing much different criteria.

- The PBGC will decide what credit score is sufficient.
- The PBGC will have to make up its own credit score for the employers with no credit score.
- The "no-secured debt" rule is created by PBGC.
- The "two years of positive net income" test is created by PBGC. And it does not make sense. For example, very profitable companies can have one-time events that result in a misleading loss year. And the application of this rule to non-profits is simply inconsistent with the nature of non-profit organizations.
- The "no loan default rule" is created by PBGC and does not take into account meaningless technical defaults that are waived by the lender and are not indicative of any business issue.

While the Council is in favor of reducing unnecessary reporting, a flawed test that could serve as a precedent for other areas (such as premiums) is worse than extra reporting.

While we do not comment today on whether indeed the use of credit scores is consistent with the requirements of Dodd-Frank, we do note that there are a variety of commercial measurements that are used for a wide variety of specific purposes, none of which are necessarily consistent with or appropriate for the use proposed by the PBGC. But this is certainly an issue meriting a very careful legal review.

The tests for plan "soundness" do not make sense. In this interest rate environment, the plan soundness tests are not realistic. Any plan that is at the proposed funded levels today would be close to 200% funded on a funding basis when interest rates return to historically average levels. In effect, thus, there would be no plan soundness test today under the proposed regulations.

CONCLUSION

In order to avoid accelerating the decline of the defined benefit plan system, PBGC needs to signal its commitment to supporting the system by abandoning its use of a financial soundness test. In addition, the use of a financial soundness test would, by reason of this acceleration, severely hurt the PBGC by eroding PBGC's premium base.

The proposed reportable events regulations need to be withdrawn. While some companies would see reduced reporting, currently the proposal is based on a flawed premise that will hurt the plan system and the PBGC for the reasons outlined above. We respectfully request the opportunity to testify at the PBGC's June 18 hearing on this issue.

Thank you for your consideration of our views.

Sincerely,

Lynn D. Dudley

Lynn D. Dudley

Senior Vice President, Retirement
and International Benefits Policy

PUBLIC SUBMISSION

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Submitter Information

Name: BRIAN P. WARNOCK
Address:
AMERICAN PENSION CORPORATION
1375 PLAINFIELD AVE.
WATCHUNG, NJ, 07069
Email: APC401K@AOL.COM
Phone: 908-757-5151 EX 104
Fax: 908-757-9644
Organization: AMERICAN PENSION CORPORATION
Government Agency Type: Federal
Government Agency: PBGC

General Comment

Get rid of the rule that makes you notify the PBGC every time a required quarterly contribution is not made. Many employers contribute annually for cash flow or convenience, and missing a quarterly contribution does not mean they will not make the required annual contribution.

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Submitter Information

Name: Mark Sokolow
Address:
338 Wedgerock Drive
Webster, TX, 77598
Email: mark@mtsokolow-attorney.com
Submitter's Representative: Mark Sokolow
Organization: Law Office of Mark Sokolow

General Comment

COMMENTS ON PROPOSED RULES, REGULATIONS OR AGENCY ACTIONS:

I would suggest that you promote electronic filing of reports.

MARK SOKOLOW

ATTORNEY AT LAW
338 Wedgerock
Webster, Texas 77598
http://mtsokolow-attorney.com
mark@mtsokolow-attorney.com

TOWERS WATSON

One Stamford Plaza
263 Tresser Boulevard
Stamford, CT 06901-3226

T +203 326 5400

towerswatson.com

May 24, 2013

Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street NW
Washington, DC 20005-4026

RIN 1212-AB06

RE: Proposed Regulations on Reportable Events

Dear Sirs and Mesdames:

This letter is the response of Towers Watson to the request for public comments on the proposed modifications to regulations under ERISA Part 4043 regarding reportable events and certain other notification requirements.

Towers Watson is a leading global professional services company that helps organizations improve performance through effective people, risk and financial management. Towers Watson offers solutions in the areas of employee benefits, talent management, rewards, and risk and capital management. Towers Watson employs approximately 14,000 associates on a worldwide basis. Our more than 600 Enrolled Actuaries under ERISA provide actuarial and consulting services to more than 1,700 defined benefit plans in the U.S. We appreciate this opportunity to comment. The undersigned have prepared our firm's response with input from others in the firm.

Towers Watson strongly agrees with the PBGC's decision to revise the proposal issued in 2009 with the intention of focusing reporting on those situations that present substantial risk to the PBGC. We appreciate PBGC's thoughtful consideration of the balance between the need for information and the cost to plan sponsors (and PBGC) of reporting it, and will discuss below certain changes to the proposal that we believe would help further achieve this balance. We also support PBGC's efforts to standardize and streamline the reporting process, through forms, e-filing and commonality of waivers across multiple events.

Financially Sound Sponsor or Controlled Group Member

The most substantial step the proposal takes in attempting to target reporting requirements at those situations that PBGC believes present risk is to provide waivers for certain post-event reporting in situations where the plan sponsor or highest US controlled group parent are viewed as "financially sound". Financial soundness is determined according to criteria specified in the proposal and PBGC has requested comments on many aspects of this determination.

We strongly support the idea of providing broad waivers in situations where there is no significant risk to PBGC. While we believe that the financial soundness criteria in the proposal represent a reasonable attempt to accomplish this over a spectrum of plan sponsors, we are concerned that the waiver will be unavailable in many situations that do not pose risk to PBGC. This result will unnecessarily use resources of plan sponsors and PBGC alike and thus should be avoided.

While we do not profess to be experts in using financial metrics to evaluate company financial soundness, our experience working with companies does allow us to provide some examples that illustrate the concern we have expressed. While each of the individual criteria seems reasonable, the requirement that all five be met would seem to withhold waivers in many situations that present little risk to PBGC. As one example, consider the requirement to have positive earnings under GAAP or IFRS for the past two years. In our experience, it is not at all uncommon for stable, profitable companies to show accounting losses from time to time for any number of reasons, such as restructurings, normal business cycles and extraordinary events.

As another example, consider the requirement that the entity have no secured debt, disregarding leases or debt incurred to acquire or improve property and secured only by that property. Companies that have unsecured debt available to them will still often provide security as a means of obtaining a lower interest rate. Furthermore, a company may take on the secured debt of an entity it acquires and either carry it or unwind it over time. That secured debt would not be indicative of the acquiring company's financial soundness.

We believe that adding additional criteria based on items such as free cash flow, earnings from continuing operations, net worth and commonly used financial ratios, and requiring companies to meet only a certain number of them (for example, 75%), would better target situations that present real risk and thus achieve a better balance between the need for information and the cost of reporting. If PBGC believes that certain criteria are critical, PBGC could require those criteria plus a percentage (e.g., 50%) of the remaining criteria be satisfied.

With respect to the requirement regarding missed contributions, we recommend that an exception be granted for missed contributions caused solely by the failure to make a timely funding balance election. In such situations there is no requirement that cash be contributed to the plan, as the money is already in the plan. As with missed contributions corrected within 30 days, this "contribution" is missed solely due to administrative oversight. Such situations in no way indicate risk to PBGC.

We note that in certain situations, it may not be possible to determine if the financial soundness criteria is met when an event occurs. For example, net income for the prior fiscal year may not be known by the reporting date for an event that occurs early in the fiscal year. There may be other such timing issues, such as whether an entity is required to file a US tax return for a fiscal year. In such situations we would suggest that the second and third prior years be used.

Plan Financial Soundness

We understand PBGC's experience in taking over plans that were more than 80% funded on a variable premium basis has caused it to propose stricter plan funding based thresholds for reporting waivers. However, we believe that PBGC has increased the threshold far too much and set it at a level that 1) virtually no plans would currently meet, and 2) provides for NO risk to PBGC as opposed to risk that is not substantial enough to require reporting.

We believe that 90% of plan termination liabilities is a more appropriate level at which to provide reporting waivers. We maintain that withholding waivers from plans that are close to 100% funded on a termination basis would essentially assume that all of these plans are at risk of termination any time a reportable event occurs, and does not strike the right balance between PBGC's need for information and the burden on plan sponsors. The reports would also tax the resources of PBGC and prevent it from adequately focusing on the small subset of these situations where a termination that would impose substantial liability on PBGC seems possible. Lastly, we note that a plan termination measurement does not exist for most plans so that this criterion has little practical application.

We also believe that the variable premium rules already contain a risk-based element and that the waivers should reflect that element. Specifically, if a plan is funded well enough so that it is not required to pay variable rate premiums, it should be granted a waiver from reporting. If a plan is viewed as not presenting enough risk to PBGC to pay risk-based premiums then it seems clear that the level of risk presented by the plan is small and thus waivers from post-event reporting are appropriate. This is essentially the same as reducing the proposed 120% threshold to 100%, which is the maximum level at which we believe it should be set

Combined Financial Soundness

As noted previously, we believe that the proposal will require reporting in many situations that do not pose a substantial risk to the PBGC. One reason for this is the separation of the financial soundness waivers for the sponsor and the plan. We understand that keeping these waivers separate can be viewed as reducing the complexity of the waiver provisions, especially when compared to the current rules. However, there will be many circumstances where both the sponsor and the plan come close to, but do not meet, the financial soundness criteria. Such situations would likely not present substantial risk to PBGC, and we recommend that some kind of combination waiver be available. For example, assuming our suggestions above are adopted and the sponsor requirement is 75% of revised criteria and the plan requirement is 90%/100% funded on a termination/ongoing basis, the regulation might provide that situations in which the company meets 65% of the requirements AND the plan is 80%/90% funded would qualify for a waiver.

Another alternative for combined waivers would be to compare measures of the plan to that of the plan sponsor or controlled group. For example, if plan underfunding is only a very small percentage of free cash flow or operating income or net worth, then there would seem to be little risk to PBGC.

Conclusion

We thank you for the opportunity to comment on the proposed regulations. We applaud the goals of the proposals – to make the process more efficient and to require reporting only in those situations that genuinely present risk to PBGC. We believe that the proposal can be improved to better accomplish these goals and have made suggestions to that effect. We would welcome the opportunity to discuss these comments at your convenience.

Michael Pollack

Michael F. Pollack, FSA, EA
Senior Consultant, North America Retirement Actuarial Leadership
mike.pollack@towerswatson.com
(203) 326-5469

Maria M. Sarli

Maria M. Sarli, FSA, EA
U.S. Retirement Resource Actuary
maria.sarli@towerswatson.com
(404) 365-1708

June 3, 2013

Submitted via email to reg.comments@pbgc.gov

Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street NW
Washington, DC 20005-4026

Dear Sir or Madam,

Subject: RIN 1212-AB06—Comments on Proposed Regulation under ERISA Section 4043 Reportable Events and Certain Other Notification Requirements

Aon Hewitt welcomes the opportunity to submit comments on the proposed rule regarding Reportable Events and Certain Other Notification Requirements. The proposed regulation was published in the Federal Register on April 3, 2013.

Who We Are

Aon Hewitt empowers organizations and individuals to secure a better future through innovative talent, retirement, and health solutions. We advise on, design, and execute a wide range of solutions that enable clients to cultivate talent to drive organizational and personal performance and growth, navigate retirement risk while providing new levels of financial security, and redefine health solutions for greater choice, affordability, and wellness. Aon Hewitt is the global leader in human resource solutions, with over 30,000 professionals in 90 countries serving more than 20,000 clients worldwide. For more information on Aon Hewitt, please visit www.aonhewitt.com.

We appreciate the PBGC's reflection of the numerous comments on the previous proposed regulations issued on November 23, 2009. The current proposed regulation includes a number of significant changes from those regulations. However, the proposed regulation would require more ongoing monitoring for plan sponsors, additional reporting, and more information to report than existing reportable event regulations.

The following are our comments on the current proposed rule.

Financially Sound Plan Sponsor or Controlled Group Member

Under the proposed regulation, reporting for five of the eleven post-event reportable events is waived if five criteria are met by either the plan sponsor or controlled group member. A number of modifications should be made to the various criteria relating to this waiver as described below.

Clarify and Expand Determination Date

While it appears that the intent of the waiver for a financially sound plan sponsor is to allow a sponsor to know at the time of the event if a waiver applies, the definition of "determination date" and the determination of the event date for each of the five events to which this waiver applies combine to result in a test which must be reviewed as of the actual event date for each possible event.

Financial soundness is met "as of any date (the determination date) if on the determination date" the criteria are met. [ERISA Section 4043.9(b)] However, each of the events defines the waiver to be measured “when the event occurs.” For all but the active participant reduction attrition reportable event, the event may occur on any day in a year. For example, the “short-period” active participant reduction event may occur at any date during a plan year which would be considered the “event date.” Also, financial soundness is determined "when the event occurs." [ERISA Section 4043.23(d)(2)(ii)] Thus, a plan sponsor would need to determine each of the five plan sponsor financial soundness criteria as of that date.

This would entail gathering information each time an event occurs. For instance, a commercial credit reporting company (CCRC) score would need to be gathered and reviewed as of that date. The amount of secured debt would need to be confirmed even if there was no secured debt other than for acquiring property at the beginning of the year. The net income for the two most recent years would need to be determined and the “most recent” of those years may change as new information becomes available. Also, the “loan event” would need to be reviewed as of the last two years since, for example, it is possible for a loan event which had occurred to fall out of the two-year window. Finally, the two-year period for determining if a contribution was late may change.

We recommend redefining the financial soundness determination date to be either the event date or the date as of the end of the prior fiscal year as chosen by the plan sponsor. This would allow many plan sponsors to gather and review criteria at one point in the year to know whether reporting would be required for the five potential reportable events. If reporting were required, allowing a date as of the “event date” would allow a plan sponsor the opportunity to make changes that would eliminate reporting and help to make the company stronger from a PBGC perspective, such as eliminating secured debt that did not meet the criteria for a waiver.

Commercial Credit Reporting Company Score

One of the five criteria for a waiver based on plan sponsor financial soundness is a CCRC score that “indicates a low likelihood that the entity will default on its obligations.” We have several concerns with this score.

According to the preamble, the score necessary to meet this criterion would be subject to changes by the PBGC over time. The proposed regulation does not provide any specific, objective criteria that would be used to change this threshold. Thus, it appears that the PBGC would have the ability to require more companies to report information by simply making this test more difficult to pass. We recommend there must be specific criteria laid out under which the PBGC would change the CCRC score threshold.

In addition, the CCRC score threshold would be published by the PBGC on the PBGC website. Since there is no timing indicated for when such updates would occur, plan sponsors would need to constantly monitor the website for changes in this threshold. The PBGC should provide specific timing for changes in the passing CCRC score.

The PBGC suggests that scores from companies other than Dun & Bradstreet could also be used. The PBGC should publish scores from other companies (such as CreditRiskMonitor) that indicate a company would meet the PBGC “low likelihood” of default criteria.

4 Overlook Point | Lincolnshire, IL 60069
t 847.295.5000 | f 847.295.7634 | aonhewitt.com

Finally, it is important to note that these scores may not be current for various reasons. It is our understanding that these scores may not necessarily be updated frequently, and therefore may not be the best representation of a company's financial soundness at one specific point in time. Each time a plan sponsor has an event to review, they may need to determine if the CCRC score has changed (under the proposed determination date requirements). And, if a company's score has changed for the worse, the sponsor would likely want to review the data used to determine the score. On the other hand, a company may have a score they believe meets the criteria at the point in time they review it and determine that a waiver of reporting applies, yet later find out that the score was out of date.

Moreover, a score many not accurately reflect a business transaction that could provide a more positive snapshot of a company. For example, the current plan sponsor (as of the event date) may have been part of a business transaction which provides greater financial security. Yet, the CCRC score may not yet reflect such a transaction. Since there are no extensions available for most reportable events, a plan sponsor may need to determine the CCRC score using old information and be subject to reporting.

Overall, the accuracy and timeliness of a CCRC score may cause some companies to over-report, creating an unnecessary burden. In addition, some companies may under-report due to no fault of their own. The proposed regulation provides no safe harbor from reporting penalties in relation to reliance on any CCRC score. We recommend the PBGC add a waiver of reporting penalty due to reliance of the sponsor on information available at the time the CCRC score was available.

As discussed further under Positive Net Income Criterion below, we recommend that, as an alternative to a threshold on a CCRC score, the PBGC specify threshold levels of certain financial ratios below which the CCRC score requirement would be deemed to have been met.

Positive Net Income Criterion

The requirement to have two years of positive net income is too narrow in focus. Net income in and of itself is not necessarily an accurate measure of the financial health of a company. A company may have extraordinary income or expense items which are non-cash adjustments and do not give a good indication of whether the company is weak or at risk. For instance, a company may write down goodwill in a given year, resulting in a large one-time accounting charge to the income statement, yet such an item would have no impact on cash. Also, a company that uses mark-to-market accounting for its pension and other postretirement benefit plans would see all actuarial losses (and gains) recognized immediately in the income statement each year, yet these would be non-cash adjustments. More broadly, there are certain accounting items that are recognized on a company's balance sheet in Accumulated Other Comprehensive Income (AOCI) that are periodically "recycled" out of AOCI and into the income statement. Such recycling could cause a company's net income to be zero or negative in a given year, yet it would not actually change the company's net balance sheet position at all.

In addition, net income under U.S. Generally Accepted Accounting Principles (GAAP) is calculated differently than under International Financial Reporting Standards (IFRS). For example, companies accounting for their pension and other postretirement benefit plans under Accounting Standards Codification (ASC) Topic 715-30 are required to recognize actuarial gains and losses in the income statement, either immediately (in the case of a company using mark-to-market accounting) or amortized over time (in the case of a company using the corridor approach). In contrast, companies accounting for their plans under International Accounting Standard 19 (IAS 19) are required to recognize actuarial gains and losses through Other Comprehensive Income (OCI), which does not directly impact the income statement. There are a number of other areas in which the accounting under U.S. GAAP differs from that under IFRS. This results in a lack of comparability, such that there could be two companies in an identical financial situation, with one meeting the reporting waiver criteria and the other not meeting them.

Credit markets have developed loan covenants as a means of protecting creditors. These covenants define triggers that serve as an “early warning” mechanism to flag potential defaults, permitting creditors to take action to protect their interests. Covenants based on ratios such as Debt-to-EBITDA (Earnings Before Interest, Taxes, Depreciation, and Amortization) and Debt-to-Total Capital are commonly tracked by companies that issue debt or borrow from banks. Such covenants provide an alternative risk measure that may be more appropriate for the PBGC’s purposes than the net income requirement.

If the positive net income criterion is retained, we recommend that the PBGC give consideration to adjustments for unusual items or non-cash charges that can create negative net income but that may not give a good indication of a company’s financial strength. Alternatively, we recommend that the PBGC permit the use of widely-used loan covenant ratios such as Debt-to-EBITDA and Debt-to-Total Capital in lieu of the positive net income requirement. We also recommend that, as an alternative to a CCRC threshold, the PBGC could specify threshold levels of such financial ratios below which the CCRC requirement would be deemed to have been met.

No Failure to Make the Minimum Required Contribution Criterion

Under the proposed financial soundness test, for a two-year period, a company must not have failed to make any contribution when due unless reporting is waived. The regulation should be clarified to reflect that late contribution reporting as required under ERISA Section 303(k) (for amounts over $1 million) does not apply. Thus, as long as a contribution of any amount is not more than 30 days late, the criterion would be satisfied.

Also, while a late contribution may be an indication of financial weakness in certain situations, there are other situations where a contribution is considered “late” which cause no added risk to the PBGC and should be included as exceptions to this requirement. First, a mandatory reduction of a funding standard carryover balance or prefunding balance (i.e., a “deemed reduction” of funding balances) can retroactively create a late quarterly contribution. While a plan sponsor can report this to the PBGC within 30 days of the deemed reduction and avoid late reporting penalties, it is possible the sponsor may not become aware of the reporting need within 30 days. While the Failure to Make Required Minimum Funding Payment may apply as a reportable event in this situation, this should not force an otherwise strong company into reporting for other events over the subsequent two years. In addition, a reportable event for a missed contribution would apply when an election to apply funding balances is not made by the due date of the contribution. This situation can be triggered simply by a plan sponsor forgetting to sign the election.

We recommend that the PBGC provide exceptions to the financial soundness requirement to not have a reportable event for missed contributions for two years to reflect these two unique situations where an actual cash contribution was not involved and the event was simply a matter of the retroactive application of the deemed reduction or of the late signature on an election to apply a funding balance. Neither of these two issues impacts the funding of the plan in actuality.

Information for Five Criteria is Burdensome to Gather and Monitor

There are many plan sponsors that are large or have complex financial structures which would make gathering information to check each of the five financial criteria burdensome and time consuming. In order to determine if a potential reporting waiver is available, the current CCRC score would need to be obtained and then verified. Up-to-date information on the type of secured debt would need to be gathered and reviewed. Two years of financial history would need to be obtained and a review of the availability of more current information would need to ensue. Also, the actuary would need to be questioned to determine if any contributions were late. All of this would need to occur no more than 30 days after the plan administrator learns of a reportable event to which these criteria apply. In addition, this information would need to be reviewed for both the plan sponsor and the controlled group member if one entity does not meet the criteria.

Given the information necessary for all five criteria, the amount of time to gather this extensive information and determine its validity would be extremely short.

Overall, the requirement to meet all five criteria is too restrictive. Many financially sound plan sponsors could meet some but not all of the requirements and still be very strong companies. We suggest that the PBGC allow for meeting three to four of the five criteria in order for a financial soundness waiver to apply. This would provide for less of a burden on strong companies to gather and update information (since they would be able to quickly gather the easiest information) yet still identify companies that are potentially problematic. It would also provide some flexibility for companies that have negative net income due to unique circumstances which in no way make the company less strong. Also, it would be more equitable across companies to account for the fact that the determination of net income is not equivalent under various accounting standards (assuming that no other changes are made to the proposed regulation). This alternative approach would not seem to increase the PBGC's risk significantly. If a company is financially weak and poses a concern to the PBGC, it would likely fail more than just one of these plan sponsor financial soundness criteria.

Plan Financial Soundness

The proposed criteria to be a financially sound plan require that a plan be fully funded on a plan termination basis as measured using actual plan termination assumptions under ERISA Section 4044 or at least 120% funded for vested benefits on a premium basis. These criteria are overly restrictive and do not consider the long-term nature of a pension plan. Since assets are measured as the market value of assets for either proposed test, this waiver does not take into consideration market volatility. Also, these criteria seem to require much more significant funding than the legally required minimum basis under the Pension Protection Act of 2006 (PPA) with or without regard to the changes made by the Moving Ahead for Progress in the 21st Century Act (MAP-21). It is unrealistic to require a plan to be funded on a plan termination basis using Section 4044 assumptions since in an actual plan termination, liabilities may be much lower if lump sums are provided to participants. Finally, requiring a plan termination funding level in order to avoid reporting will simply provide more incentive for plan sponsors to terminate a plan when such a funding level is met.

Also, for two of the events, Extraordinary Dividend or Stock Redemption and Change in Contributing Sponsor or Controlled Group, every plan within the controlled group must meet the criteria in order for a waiver to apply. If just one plan is well-funded but not so well-funded that the plan financial soundness criteria are met, reporting for these events would apply even when the plan is at a low risk of underfunding.

We recommend the PBGC consider a slightly lower threshold of plan financial soundness such as 95% to 100% funded on a premium basis or 80% to 90% funded under ERISA Section 4044. This is a reasonable approach to use for purposes of providing a waiver for the five reportable events. If a company were 100% funded on a premium basis, it implies that the plan need not pay any variable premium based on its funding and is essentially not a risk to the PBGC since premiums aren't charged beyond the flat rate. Alternatively, the PBGC could consider a plan financially sound if the minimum required contribution (without regard to MAP-21) for a year was $0, disregarding the use of any funding balances.

Active Participant Reduction Reportable Event

We believe the PBGC should modify the Active Participant Reduction reportable event for a number of reasons.

The PBGC has proposed modifying this event to require reporting within 30 days for a "single-cause event" which includes reorganization, the discontinuance of an operation, a natural disaster, a mass layoff, or an early retirement incentive program. If a natural disaster of this magnitude were to occur, the plan sponsor should not have to focus on gathering various company financial and plan financial information in such a short period. Thus, we recommend that the PBGC remove the requirement for reporting if a reduction in active participants is the result of a natural disaster. Alternatively, if maintained in the final regulation, we believe that a company that experiences a 20% reduction in participants due to a natural disaster should be allowed more than 30 days to report to the PBGC and an extension of reporting should automatically be provided to 180 days after the natural disaster.

The proposed "short-period" event will require plan sponsors to monitor changes in participant counts every thirty days. Combining this 30-day period with the fact that the financial soundness criteria must be measured "as of the event date," the effort to monitor this event to report timely would be a significant burden. Every sponsor would need to perform a 30-day rolling check of participants and then confirm financial soundness as of that date if a reduction occurred. Plan sponsors do not always maintain information regarding which employees are plan participants since, typically, age and service requirements for plan participation apply. Plan administrators may determine which employees are participants but do not report that data on a monthly basis. We believe that the proposed "single-cause event" targets the more "high risk" participant reductions and that monitoring plan participant counts on a rolling 30-day basis is unnecessary. Such reductions, if significant, will be identified in the attrition event. Thus, the short period event should be eliminated since it is burdensome and unnecessary.

Plans that are frozen – for new entrants or for benefit accruals – should be exempt from all but the single-cause active participant reduction reportable event. Plans that no longer have new entrants will eventually run afoul of the reportable event regulations simply due to attrition. The PBGC should not require ongoing reporting for normal reductions in participant counts for such plans. In addition, a waiver of reporting should apply to plans that have less than 100 **active** participants. If a plan has very few active participants (but more than 100 participants including in-pay status or terminated vested participants) a minor change in the number of active participants will trigger reporting. Yet, the reduction in active participants is likely not an event which would cause concern for the PBGC. In the majority of cases, the plan is frozen or the plan is a legacy plan where the company has stopped providing defined benefit pensions and has switched to 401(k) benefits.

Complicated Waivers on a Controlled Group Basis

There are five reportable events that involve reporting at the controlled group level rather than the plan level. These events include Change in Contributing Sponsor or Controlled Group, Liquidation, Loan Default, Extraordinary Dividend or Stock Redemption, and Insolvency. For each of these events, the event is triggered by something that is not specific to the plan and thus, the potential waivers need to be reviewed for every plan within the controlled group. The proposed waiver criteria create additional complications in determining if a waiver applies, and should be clarified for these events. This issue is best illustrated by an example.

Suppose Controlled Group X has two members, A and B. Member A sponsors three defined benefit plans and Member B does not sponsor any plans. Also, the parent organization (X) itself sponsors two defined benefit plans. Controlled Group X sells Member B to another controlled group. This appears to be a reportable event even though Member B does not sponsor a plan since, from the perspective of each plan within the controlled group, one or more persons ceased to be members of the controlled group. Thus, the waiver criteria must be reviewed from the perspective of every plan.

Assume that Member A meets the "financially sound sponsor" waiver criteria. Thus, reporting would be waived for the three plans sponsored by Member A. However, assume that the controlled group cannot meet the financially sound criteria. The two plans maintained by the Parent X would then need to meet waiver criteria. If one plan had less than 100 participants, a waiver would apply. However, if the remaining plan could not meet the "financially sound plan" test, reporting would be required for the entire controlled group.

In a complicated controlled group situation, it would be difficult for a plan administrator to determine if reporting applied and would require significant coordination across plan sponsors and controlled group members to gather information and test the various reporting waivers.

We suggest the PBGC use this opportunity to provide more simplified approaches to reporting waivers for controlled groups.

Closing

We appreciate the opportunity to submit these comments regarding the proposed regulation. If you have any questions regarding these comments, please contact the undersigned at the telephone number or electronic mail address provided below.

Sincerely,

Aon Hewitt

Monica L. Gajdel
FSA, EA, MAAA
Partner
(847) 442-3248
monica.gajdel@aonhewitt.com

Eric Keener
FSA, EA, MAAA
Partner and Chief Actuary
(203) 852-1100
eric.keener@aonhewitt.com

Alan N. Parikh
FSA, EA, CFA
Associate Partner
(847) 442-0235
alan.parikh@aonhewitt.com