As of: May 01, 2013
Received: April 03, 2013
Status: Posted
Posted: May 01, 2013
Tracking No. 1jx-84kk-lgxa
Comments Due: June 03, 2013
Submission Type: Web

PUBLIC SUBMISSION

Docket: PBGC-2013-0001
Reportable Events and Certain Other Notification Requirements

Comment On: PBGC-2013-0001-0001
Reportable Events and Certain Other Notification Requirements

Document: PBGC-2013-0001-0002
Comment on FR Doc # 2013-07664

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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.

PUBLIC SUBMISSION

As of: May 20, 2013
Received: May 15, 2013
Status: Posted
Posted: May 20, 2013
Tracking No. 1jx-85cp-2nla
Comments Due: June 03, 2013
Submission Type: Web

Docket: PBGC-2013-0001
Reportable Events and Certain Other Notification Requirements

Comment On: PBGC-2013-0001-0001
Reportable Events and Certain Other Notification Requirements

Document: PBGC-2013-0001-0003
Comment on FR Doc # 2013-07664

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General Comment

COMMENTS ON PROPOSED RULES, REGULATIONS OR AGENCY ACTIONS:

I would suggest that you promote electronic filing of reports.

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May 24, 2013

Regulatory Affairs Group
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Pension Benefit Guaranty Corporation
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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.

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