From: T. Zavist[SMTP:TZAVIST@TX.RR.COM]
Sent: Sunday, December 27, 2009 10:01:29 AM
To: RegComments
Subject: Regulation Identification Number (RIN) 1212-AB06 Proposed Amendment to 29 CFR Parts 4000, 4001, 4042,4204, 4206, 4211 and 4231 Auto forwarded by a Rule

1416 Esters Rd., Apt. 1040
Irving, TX 75061
December 27, 2009

Mr. John H. Hanley
Director
Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
reg.comments@pbgc.gov<mailto:reg.comments@pbgc.gov>

Re: Regulation Identification Number (RIN) 1212-AB06 Proposed Amendment to 29 CFR Parts 4000, 4001, 4042,4204, 4206, 4211 and 4231

Dear Mr. Hanley:

Thank you for the table in the preamble summarizing the proposed changes to the Pension Benefit Guaranty Corporation (PBGC) reportable event reporting requirements.

The proposal is to eliminate extensions, which currently are until 30 days after the current variable rate premium (VRP) due date. The main effect of the elimination likely will be the late reporting of reportable events. The consequent penalties likely will alienate the public further away from defined benefit pension plans—raising revenue for the PBGC in the short run and further undermining the private pension system in the long run.

Enrolled actuaries are aware of reportable events. Few others are. Enrolled actuaries gather data on an annual cycle, which, for purposes of PBGC reporting, culminates with the annual VRP calculation and the corresponding filing.

When certain reportable events occur (e.g., an active participant reduction, a distribution to a substantial owner, a change in controlled group or a loan default) plan sponsors tend to perceive the event as something that occurs within the context of the ordinary operations of a business, rather than as an event of special significance for the pension plan. They are aware of the event, but they have trouble recognizing it as a reportable event at the time it occurs and therefore realizing that a filing is due on account of it.

Some reportable events can be reported immediately because an enrolled actuary necessarily knows about them when they occur (e.g., a transfer of benefit liabilities, a funding waiver application, a low adjusted funding target attainment percentage, and a transfer to a retiree health account). Others are likely to be communicated to the enrolled actuary soon after they occur (e.g., inability to pay benefits when due or bankruptcy). An enrolled actuary is unable to monitor missed contributions any quicker than trust statements are issued (often monthly). An enrolled actuary generally will not know about the other reportable events except annually.

An active participant reduction, in particular, will tend to be discovered in the reconciliation of the headcount of active participants from one valuation to the next. Plan sponsors typically do not undertake downsizing on account of a pension plan, and they tend not to perceive downsizing as having anything in particular to do with a pension plan. Thus, generally they will not think to alert an enrolled actuary about a downsizing (which typically is also kept confidential during the planning stages). Likewise, mergers and acquisitions typically are kept confidential, and an enrolled actuary may not know about them, especially if any new employees are not, and will not be, in a pension plan.

Therefore, the current extensions until 30 days after the current VRP due date are necessary for practical purposes. Eliminating the extensions will tend to lead to late reporting and fines for being late rather than timely compliance. Likewise, some sort of 30-day period--either a waiver or an extension--is necessary for a late contribution (to give an enrolled actuary time to receive a trust statement).

The PBGC does not necessarily take any action during the time period after it becomes aware of an employer's distress and before a pension plan becomes the responsibility of the PBGC. Quicker information may not make a difference. The PBGC admits an average of three years between a downsizing and a plan termination, so waiting until the regular VRP filing is due gives the PBGC two years on average. This is plenty of time.

Thank you for the opportunity to submit comments. Any comments expressed here are my own professional opinion and not necessarily the opinion of my employer.

Sincerely yours,

Tom

Thomas M. Zavist, FSA, EA

buckconsultants
an ACS company

January 21, 2010

Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street, NW.
Washington, DC 20005–4026

Regulation Identifier Number (RIN) 1212–AB06

To Whom It May Concern:

I am writing on behalf of Buck Consultants, an ACS Company, to present comments on the Proposed PBGC Regulations under 29 CFR Parts 4000, 4001, 4043, 4204, 4206, 4211, and 4231, published in the Federal Register of November 23, 2009, relating to reportable events and certain other notification requirements.

Our comments pertain principally to the elimination of most funding-based notice waivers for reportable events. We feel that, for well funded plans, such notices accomplish little with respect to protecting plan participants or the PBGC and that requiring them for such plans imposes an unnecessary burden on their sponsors.

The following are our comments on specific areas of the proposed regulations we believe should be clarified or changed.

<u>I. Reportable Events for which funding-based notice waivers are currently provided (§§4043.23, .27, .29, .30, .31, .32, .34)</u>

We think that the funding-based waivers for these events should be retained. Plans satisfying these waiver requirements pose little risk to participants or the PBGC in the event of plan termination. We would not object, however, if the PBGC were to tighten the current requirements for these waivers somewhat (for example increasing the 80% funded threshold applicable to certain events to 90%).

<u>II. Missed Contributions (§4043.25)</u>

Buck agrees that notice is warranted for any minimum required contributions not made by the final due date and for unpaid contributions required as a condition for a funding waiver, and is required by statute for any cumulative late payments exceeding $1 million.

However, we oppose the elimination of the current notice waiver for quarterly installments not more that 30 days late, totaling less than $1 million. Additionally, we propose that notice be waived for such installments even if more than 30 days late, if they are eventually paid or satisfied by a funding balance by the final due date for contributions for the plan year.

In our experience, required quarterly installments are often late for reasons unconnected with the plan sponsor's financial ability to make the payment, such as: 1) a late election by the plan sponsor to apply a funding balance towards the installment, 2) retroactively becoming late due to subsequent elections to reduce (deemed or otherwise) or apply funding balances, 3) decisions to apply current year contributions to the prior year in order to increase the current year's funding ratios, or 4) simple administrative or procedural errors. Rarely does a late quarterly installment signal a plan sponsor's actual financial distress or a plan's imminent termination.

Buck feels that a requirement to notify the PBGC of late quarterly installments, no matter how small an amount or how short a time late, would be unduly burdensome for plan sponsors and would not provide the PBGC with any additional meaningful data on the financial condition of plans or their sponsors. We urge the PBGC to waive the notice requirement for any late quarterly installments totaling less than $1 million if the installment is eventually satisfied by the final due date.

III. AFTAP under 60% (§4043.36 - New Reportable Event)

Buck does not disagree with this new notice requirement; however we believe that funding-based waivers, similar to those applying to events in I. above, should also apply to this Reportable Event. Since the funding balances are, with exceptions, subtracted from the assets in the determination of the AFTAP, there may be cases where a well funded plan will have a low AFTAP. For plans satisfying one of the funding-based tests, we believe reporting should be waived for this new reportable event.

Buck appreciates the opportunity to comment on these proposed regulations.

Tamara R. Shelton

Tamara R. Shelton, F.S.A., F.C.A., E.A., M.A.A.A.
Managing Director, Retirement
Buck Consultants, an ACS Company
Tamara.Shelton@buckconsultants.com
phone: 972.628.6820

Hewitt Associates LLC
100 Half Day Road
Lincolnshire, IL 60069
Tel 847.295.5000 Fax 847.295.7634
www.hewitt.com

Hewitt

January 21, 2010

RIN 1212-AB06
Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street, N.W.
Washington, D.C. 20005-4026

Attention: Comments on Proposed Regulations Under ERISA Section 4043 (RIN 1212-AB06)

Hewitt Associates ("Hewitt") is pleased to submit comments on the proposed changes by the Pension Benefit Guaranty Corporation ("PBGC") regarding regulations related to Reportable Events reporting to the PBGC under ERISA Section 4043. The proposed rule was published on November 23, 2009 in the *Federal Register*.

Who We Are

Hewitt Associates (www.hewitt.com) provides leading organizations around the world with expert human resources consulting and outsourcing solutions to help them anticipate and solve their most complex benefits, talent, and related financial challenges. Hewitt consults with companies to design and implement a wide range of human resources, retirement, investment management, health management, compensation, and talent management strategies. With a history of exceptional client service since 1940, Hewitt has offices in 33 countries.

Overall Comments on Proposed Changes

We understand the need to change certain provisions of the existing regulation due to the changes in the Pension Protection Act of 2006 (PPA). However, we believe that the general elimination of the waivers and extensions currently in place for well-funded plans that are applicable to many of the reporting events will place an unnecessary burden on many plan sponsors. Rather than provide additional security to plan participants, these changes will actually discourage employers from maintaining ongoing defined benefit plans. Additionally, the new regulations will likely result in large quantities of information being provided to the PBGC that are not likely to add to the PBGC's ability to recognize and address early signs of financial distress.

We believe many of the reporting waivers and extensions should be readdressed due to the potential for assessment of significant penalties if an event were not reported or not reported timely. The difficult nature of gathering information for these events without any waivers will be difficult and lengthy for many plan sponsors. We also question the need for the PBGC to receive information from so many more plan sponsors than in prior years.

Elimination of Waivers Will Place Undue Burdens on Many Plan Sponsors

The elimination of reporting waivers for well-funded plans will place a great burden on plan sponsors and plan administrators to monitor, collect, and provide information to the PBGC (or subject the plan sponsor to penalties) in situations where there is neither increased risk to the PBGC nor risk of pending plan termination. For example, plan sponsors would need to monitor active participant counts daily, controlled group changes not affecting any pension plans, and even foreign-affiliated company events. For well-funded plans, these events should pose little risk to the PBGC. We believe the additional burdens on

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these plan sponsors is not warranted and places them at a disadvantage to other employers that only sponsor defined contribution plans.

The elimination of the foreign entity waiver will also add a significant burden for monitoring and collecting information on foreign operations. Currently, it is unlikely that multinational organizations coordinate information related to reportable events data for foreign entities with U.S. plan sponsors since there is no need to do so. For foreign parents with only small U.S. operations, it will be particularly complex for the U.S.-based plan sponsor to gather foreign information across the entire controlled group in order to meet the reporting obligation. Collecting this information for large multinational organizations will be complex and time-consuming, if available at all. Add to this that the pension plan (or plans) may be extremely well-funded and in no danger of termination, and it seems unreasonable to require sponsors to collect, analyze, and provide information when an event only relates to a foreign entity.

Therefore, we believe that maintaining funding-based waivers and foreign entity waivers should be continued for most events similar to the current waivers and extensions.

Additional Information Is Burdensome to Plan Sponsors and PBGC
With the proposed additional required information necessary for every reportable event, reporting would require potentially hundreds of pages of information to be filed for an event. For example, for the active participant reduction reportable event, the existing rule requires information that is provided on only a two-page form. The proposed changes would require providing the plan document and amendment(s), the plan valuation report, adjusted funding target attainment percentage (AFTAP) certification, and potentially a discussion of material changes from the prior valuation. This is a substantial increase in information to provide, especially for a plan that is well-funded.

The PBGC estimated that it will receive 1,615 reportable event filings for post-event and advance reportable events under the proposed changes. In 2009, the PBGC received 1,206 filings. We believe the increase in reportable event filings will be much greater than the additional 409 estimated due to the elimination of the well-funded plan waivers, foreign entity waivers, and the changes to the missed contribution reportable event. The number of filings might double or even triple under the proposed changes. With the additional information required to be filed (either all electronically or all on paper), the PBGC will receive hundreds of thousands, perhaps even millions, of pages of information each year. While the collection of information places a burden on plan sponsors, it seems reasonable to expect that such a large volume of information will also place a burden on the PBGC or, perhaps will never be reviewed. The PBGC can (and frequently does) request additional information from plan sponsors in relation to a reportable event. We believe the initial filing requirements should be reduced to a more reasonable amount of information.

Finally, many of the changes to waivers and extensions appear to be to gather information on the plan and the controlled group. However, the existing rules under ERISA Section 4010 already provide detailed controlled group, financial, and plan information. Requiring similar information on an event-by-event basis without reflecting any situations where a sponsor or controlled group would not need to report is overly burdensome, repetitive, and, we believe, unnecessary.

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Specific Comments on Post-Event Reportable Events
The following comments provide additional examples and concerns related to specific proposed changes to several of the post-event reportable events. Suggested changes or clarifications of specific provisions are also noted.

Active Participant Reduction
The proposed regulations would eliminate the reporting waivers and reporting extensions applicable to this event. We believe these changes go well beyond those necessary to conform to the changes in PPA.

Under the proposed rules, every plan sponsor would need to monitor active participant headcounts on a daily basis in order to determine if a reduction of 20% or more has occurred. Daily monitoring would be necessary since reporting would be required within 30 days of the date the active participant reduction occurs. Since all reporting extensions would be eliminated, plan sponsors would not be able to rely on using annual participant counts from PBGC premium calculations or annual Form 5500 counts to compare changes in participants. Thus, every plan sponsor, even those with only well-funded plans, would need to establish internal procedures to monitor participant headcounts.

This requirement is overly burdensome. Most plan sponsors and plan administrators do not maintain plan "participant" headcounts on a daily basis. Rather, the participants are determined annually for purposes of premiums, Form 5500 reports, and annual actuarial valuations. In many cases, specific criteria relating to age and service are necessary to determine the plan participants. It would be very difficult and costly to create methods to monitor participant counts on a daily basis based on plan rules or to provide data to load into a pension system or actuarial valuation system daily in order to obtain accurate participant counts.

For a well-funded plan, this filing requirement seems unnecessary. For example, a well-funded plan with few active participants does not pose a significant risk to the PBGC, yet may easily have a 20% reduction in active participants during the year. A plan with 1,000 inactive participants and only 50 active participants would need to report if during the year, 11 active participants have terminated even if the next day, five new employees are added to the plan.

Thus, we believe that a reporting waiver should be maintained based on some funding level similar to the current rules. In addition, the PBGC should clarify that the event need not be monitored on a daily basis but instead, be based on annual participant counts provided for other purposes (e.g., PBGC premiums, annual valuations, or Form 5500 filings) for all situations other than a plant shutdown.

The existing requirements for reporting waivers and extensions provide ample information to the PBGC in situations where participant counts are dramatically decreased specifically due to a plant closing. The requirements under ERISA Sections 4062(e) and 4063(a) provide a mechanism for the PBGC to take action for any underfunded plans in such situation. However, the proposed reportable event waiver applicable if the plan sponsor timely reports under ERISA Section 4062(a) will not provide any Section 4043 relief to plan sponsors. ERISA Section 4062(a) requires reporting within 60 days of the event, but the reportable event is required to be reported within 30 days. For example, assume a plan sponsor intends to report under ERISA Section 4062(a) due to a plant shutdown and thus does not report for the active participant reduction reportable event. Later, it is determined that reporting under Section 4062(a) was not required because operations were not ceased at a single facility triggering a 4062(e) event. At the point in time it is determined that the waiver for post-event reporting no longer exists, the reporting deadline (30 days after the event) may have already passed.

If the PBGC maintains the existing reportable event waivers and extensions, this late reporting situation would not occur. And, it would not impact the required 60-day reporting under ERISA Section 4062(e) and Section 4062(a) either.

If the PBGC keeps the proposed rule change, then we believe the PBGC should consider other extensions of reporting for this event. For instance, reporting should be extended to at least 60 days to match reporting under ERISA Sections 4062(e) and 4062(a), or even later.

Finally, as part of changes to reportable event requirements, we believe that the PBGC should clarify that a spin-off of participants and benefits within the controlled group does not result in a reportable event for an active participant reduction. (See the 2006 Blue Book Q&A 14 (c).) Since reporting under the Transfer of Benefit Liability event would no longer be waived under the proposed changes, the PBGC should also clarify that reporting for a spin-off of participants outside the controlled group is not an active participant reduction (or is waived if reported under the Transfer of Benefit Liability Event).

Missed Contribution
While a missed contribution may in some cases signal an increased risk for the PBGC, it does not in all cases. Currently, reporting is waived if the missed contribution is contributed within 30 days. Under the proposed changes, any amount of a missed contribution by any number of days will trigger reporting of hundreds of pages of information, even if the amount missed has already been contributed to the plan. Under PPA funding rules, any late contributions are already adjusted for interest, thus "making up" for the investment time lost due to late payment. We feel the new rules would place a significant burden on plan sponsors when a contribution was missed in error and has been corrected.

It is possible that a plan sponsor may inadvertently miss the timing of a required contribution. In many instances, this is identified quickly by the plan's actuary and the contribution is correctly made. This could occur in days or weeks. In other situations, a recomputation of a quarterly contribution reflecting complicated funding waivers and funding credit balances could result in an inadvertent underpayment of a quarterly contribution. Again, such amounts are usually identified and corrected quickly in most situations. Finally, it is possible that a plan sponsor may inadvertently contribute the wrong amount (e.g., a transposition of numbers) and correct the error soon after the mistake is made.

The proposed changes do not provide any reporting relief for any of these unintended and corrected situations. As such, we believe the existing 30-day waiver should be maintained (since significant underpayments of more than $1 million are still required to be reported under ERISA Section 303(k)). If this waiver is not maintained, a new waiver should be provided for de minimis underpayments of some amount, for contributions made within a specified period of time, or for amounts less than a specified percentage of the total payment required.

Currently, most plan sponsors are quick to correct any inadvertent late quarterly payment in order to avoid the existing requirements to report to the PBGC if late by 30 days or more. If such waiver of reporting is eliminated, this incentive to correct the contribution quickly will no longer exist. Thus, by requiring sponsors to report under the proposed change (with the additional volumes of information), the PBGC may actually cause a delay in plan contributions and therefore not necessarily be protecting participants' benefits.

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Change in Contributing Sponsor or Controlled Group
We believe that the elimination of waivers and extensions for this reporting requirement is not warranted. Currently, the PBGC monitors corporate transactions as part of the Early Warning Program. The PBGC has general data on all plans each year based on premium filings. Additionally, under ERISA Section 4010, the PBGC is notified of information for controlled groups that sponsor an underfunded plan including controlled group, financial, and plan information. Thus, we believe information currently exists for the PBGC to self-identify transactions that pose a potential risk to the PBGC or result in a change of plan sponsorship.

Reporting this information for well-funded plans is unnecessary and particularly difficult and burdensome for controlled groups that sponsor many plans since reporting information for each plan would be required. For a company with just a few plans, this could result in hundreds or thousands of pages of information to be submitted.

Furthermore, the elimination of the foreign entity waiver for this event creates a significant burden on plan sponsors and potentially notifies the PBGC of inconsequential events. Many U.S. operations are not aware of changes that occur related to some of their foreign subsidiaries. Requiring reporting based on foreign entity changes would require corporate coordination at an international level. Most foreign entities would not necessarily notify the appropriate parties since situations involving U.S. pension plans are not a concern of a foreign entity. Even the determination of whether such an event was de minimis would be difficult to determine in many cases. Finally, the requirement to report such a change within 30 days for an event related to a foreign entity would be very difficult to achieve do to the level of coordination necessary and readily available access to such information.

We propose that the PBGC maintain the existing waivers for well-funded plans and foreign entities. If a complete waiver for foreign entities is not maintained, we believe a de minimis test for foreign entities should be established well in excess of the 10% de minimis segment currently provided.

Another concern is that the existing and proposed post-event reporting requirement for this event is based on 30 days of a legally binding agreement (written or unwritten), whether or not the transaction actually occurs. This timing could result in an event being subject to post-event reporting earlier than is required for advance reporting (which is due 30 days prior to the effective date of the event). The PBGC should allow post-event reporting based on the later of the legally binding agreement and 30 days prior to the effective date of the actual event.

Finally, the PBGC should use this opportunity to clarify situations that are not considered changes in a plan's controlled group. For example, an asset sale where all of a company's assets are sold but the plan is not transferred is generally not considered a change in controlled group (or change in contributing sponsor). (See 2004 Blue Book Q&A 11.)

Transfer of Benefit Liabilities
The PBGC proposes to eliminate all existing waivers for this event. We believe the waiver for fully funded plans should be maintained since the PBGC is not exposed to any additional risk after the transfer. The PBGC will be notified of the change in plan sponsorship via premium-related information. Also, since the Internal Revenue Service (IRS) does not request a 5310-A filing for de minimis mergers (those where the value of assets being transferred equals the present value of the accrued benefits and is less than 3% of assets), we believe that the existing waiver for a de minimis transfer (which currently matches the IRS definition) should be maintained.

The information proposed to be collected for this event is also particularly burdensome and we believe unnecessary. Depending on the size and public nature of the transferee's controlled group, in many cases this information will be difficult to obtain and provide to the PBGC. While the PBGC has proposed that the filer may file a statement that such information is not available with reasonable diligence, it is not clear what steps a filer must take to assess what is reasonable. It is likely very few filers will be able to obtain such information and the PBGC will likely only receive this statement. And, since the name of the controlled group will be provided as part of this reportable event, the PBGC can cross-reference any information already filed for that controlled group, if any. Thus, we recommend the PBGC remove the requirement to provide information on the transferee's controlled group from information to be reported for this event.

The proposed rules also require the plan document, actuarial valuation (with a statement of material modifications), the most recent AFTAP, and most recent month-end market-value statement of plan assets. We believe this information should not be required for plans which, after the transfer, both the transferor and transferee plans are fully funded. (As suggested above, we believe the existing waiver for such plans should be maintained which would also rectify this situation.)

The existing provision, which allows for providing a copy of the 5310-A (if filed with the IRS) to the extent required information for reporting is included, should also be maintained.

Finally, the final rule should clarify the date for determining when a transfer of benefit liabilities has occurred. The determination of whether the plan liabilities represent 3% of all plan liabilities may not occur at the date the transfer is effective. The event should be reportable based on the determination of the actual amount of the asset transfer, at which point the filer will have "knowledge" of the event.

Loan Default

As previously commented for other events, we believe that the current waiver for a foreign entity should be maintained for this event. It may be extremely difficult for a plan sponsor to obtain information on loan defaults for foreign subsidiaries.

The PBGC also proposes to collect financial statements for all controlled group members, unless the information is publicly available. This may require a substantial amount of time and effort, particularly if the loan default is due to a foreign entity only. For plan sponsors that are not required to file information with the PBGC under ERISA Section 4010 for underfunded plans, gathering information for this filing within 30 days would be particularly challenging. Since the PBGC has the ability to follow up to request additional information as necessary, this information should be eliminated from the reportable event filing and requested only in situations where the PBGC determines the information is needed and is not otherwise available.

A related unintended consequence of the proposed rules could be even more important. Some loan covenants contain representations, warranties, and events of default, that are tied to the absence of a non-waived reportable event. Thus, the removal of nearly every waiver of reportable events may potentially be a trigger for a loan to be accelerated or renegotiated. Not only would a loan default possibly trigger this reportable event itself, but more importantly, the increase in reportable events due to the removal of most waivers could result in loan negotiations with negative consequences for the organization. We strongly encourage the PBGC to review this situation in more detail prior to providing final rules.

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Bankruptcy
For this reporting event, we believe that the foreign entity waiver should be maintained. It is unlikely plan sponsors will have knowledge of small events in a foreign operation, and as previously mentioned coordination of such information on a daily basis would be extremely difficult and burdensome for a large multinational organization.

Adjusted Funding Target Attainment Percentage Under 60%
This is a new reporting event with no applicable waivers. If a plan sponsor reports this event to the PBGC, then any subsequent reporting for the same plan year should be waived. For example, if reporting is required due to the presumed AFTAP falling below 60% for the plan year, and the Enrolled Actuary later certifies the AFTAP for the same plan year to be less than 60%, the second reportable event should be waived. In addition, we believe that the reportable event should be waived for subsequent plan years as well since once reported, the PBGC will be able to monitor the plan's funded status without receiving any additional information. Since a plan is frozen and lump sums (or other prohibited payments) cannot generally be paid when a plan's presumed AFTAP or certified AFTAP is less than 60% (other than certain frozen plans), the PBGC is at no additional risk in subsequent plan years. These comments apply for purposes of the proposed advance reporting event as well.

Asset Transfer to Retiree Health Account or Subsequent Reduction in Funding Ratio
The addition of this reportable event seems to have no relevance to plans which are a cause for a concern to the PBGC. Transfers to retiree health accounts can only occur for plans that are very well-funded (e.g., more than 120% funded). Plans which provide for a multi-year transfer already must commit to maintaining the funded ratio far above a level that would cause a risk to the PBGC. We recommend that the PBGC not treat this as a reportable event.

Conclusion
While we understand the need for some changes to the reportable event rules, we believe that these new rules as currently drafted will not result in taking "steps to encourage plan continuation." These burdensome reporting requirements will create an even greater negative reaction to defined benefit plans, potentially leading to more standard plan terminations leaving fewer plans to fund the PBGC, and leaving only the plans most at risk for the PBGC to insure (those not funded well enough to terminate in a standard plan termination). Our primary concern is the elimination of reasonable waivers and extensions as provided in the current rules. We suggest changes to the proposed requirements that will be more reasonable and better meet the goal of encouraging plan continuation for all plan sponsors.

If the PBGC still believes that additional reporting and changes are necessary to maintain the private defined benefit system in the United States, then a process similar to the 1996 changes should be considered—wherein plan sponsor groups and the PBGC came to a mutually acceptable agreement for the new rules and reporting requirements that addressed both groups concerns.

We appreciate the opportunity to submit these comments. If you have any questions or comments regarding the information provided, please contact me at 1-847-442-3248.

Sincerely,

Hewitt Associates LLC

Monica L. Gajdel
(847) 442-3248
monica.gajdel@hewitt.com

INDEPENDENT ACTUARIES inc.

January 21, 2010

15725 Southwest Greystone Court, Suite 102
Beaverton, Oregon 97006-6016

Voice: 503.520.0848
Fax: 503.520.1147

www.independentactuaries.com

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

Re: Comments on Proposed Regulations – Regulation Identifier Number (RIN) 1212-AB06

Independent Actuaries, Inc. (IAI) appreciates this opportunity to comment on the proposed regulations relating to PBGC reportable events. IAI is an independent pension consulting firm founded in 1994 and located in Beaverton, Oregon. Our eight Enrolled Actuaries and nine other credentialed consulting staff and analysts provide actuarial services primarily for defined benefit plans, and many of these plans are for small employers.

While we admire the PBGC for its efforts to encourage plan continuation, we believe that the proposed changes will have the opposite effect for small employers; complexity and costs of administering defined benefit plans steer employers away from sponsoring such plans. For a small employer, the time and money spent in preparing these filings, or the actions necessary to avoid the filings, may outweigh the employer's perceived benefits of sponsoring a defined benefit plan.

Most of our recommendations pertain to very small plans (25 or fewer participants). Just as small businesses are a critical part the U.S. economy, the pension plans of these employers are a critical part of the retirement security for working Americans.

Summary of Recommendations

The following is a summary of IAI's recommendations, the basis for which is described in greater detail in the Discussion of Issues section.

IAI recommends that the current filing waivers, including that for missed or late quarterly installments if not motivated by financial inability to pay, **be retained for plans with 25 or fewer participants**, as these plans pose little or no risk to the PBGC. These plans typically cover a majority owner, who will elect to forego benefits if the plan is not fully funded upon plan termination.

IAI recommends that the new Low AFTAP reportable event be waived for certain plans. A new plan that grants prior service for benefit accrual will always be required to report this event in its initial year, which could discourage establishment of a plan. Many small plans that are well funded may become subject to a presumed AFTAP of less than 60% merely because the certification could not be completed in a timely manner. Required event filing for these plans would waste the resources of the sponsor and the PBGC.

Discussion of Issues

The removal of automatic waivers for very small plans (25 or fewer participants) will unduly add to the cost and complexity of administering these plans. The cost, in time and money, of adhering to the filing requirements for the reportable events, or changing business practices in order to avoid the filings, may be deterrents to a small employer considering installation of a defined benefit plan. New filings in addition to those already required for an ongoing plan may be the last straw that pushes a sponsor into the decision to terminate the plan.

1. Proposed Elimination of Automatic Filing Waiver for Active Participant Reduction

IAI recommends that the Automatic Filing Waiver for this event be retained for very small plans, in consideration of the facts outlined below.

A small plan waiver is currently available for the active participant reduction event. Normal turnover in a very small plan could trigger this event filing. Requiring small plans to report a reduction of workforce would complicate normal business operations for the plan sponsor and create unnecessary paperwork for the PBGC. The reported information will not provide the PBGC with pertinent information on the financial security of the plan or its sponsor.

For example, a plan that has four participants would be required to file if only one participant terminated employment, and his replacement does not enter the plan within the plan year under the very common 1-year eligibility requirement. The one participant could have terminated due to normal attrition, and have been replaced by another employee, but the participant reduction based on the numbers alone would require filing, with its additional administration efforts and costs.

2. Proposed Elimination of Automatic Filing Waiver for Missed Contribution

IAI recommends that the Automatic Filing Waiver for this event be retained for very small plans, in consideration of the facts outlined below.

A small plan waiver is currently available when the plan sponsor *chooses* not to make quarterly required contributions. Small employers frequently wait until close to the last available date to make contributions in order to strategically manage their cash flow, or delay making the first one or two quarterly deposits until the valuation is complete, to ensure that all contributions are fully deductible. Removing this waiver will require small employers to either change the way they do business and manage their money, or comply with burdensome and costly paperwork, either of which could be a major deterrent to plan sponsorship.

3. Proposed Addition of New Reportable Event – AFTAP less than 60%

The addition of a low AFTAP reportable event is understandable, in general. IAI recommends that an automatic filing waiver for the event be established for new plans, and for certain very small plans, in consideration of the facts outlined below.

IAI recommends an automatic filing waiver for newly established plans. A newly established plan which grants past service credit will always have an AFTAP of 0% in its initial year. A reportable event filing caused solely by a plan design that otherwise best meets the sponsor's needs could deter a plan sponsor from establishing a plan.

IAI recommends an automatic filing waiver for a very small plan if plan assets are sufficient to cover benefits for all participants other than the majority owner. The burden on the sponsor to comply with the proposed regulation is out of proportion with the tiny risk posed to PBGC by this kind of plan.

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We understand that the PBGC is seeking a balance between reporting requirements and undue administration for reportable events. Unfortunately, an elimination of virtually all waivers will tip these reportable events to undue administration. The retirement community is already stretched to educate sponsors and adhere to new IRS reporting, elections, and funding requirements under PPA that have added complexity and costs to administering a defined benefit plan. We fear that these regulations, if implemented as proposed, could cause many more small employers to reconsider sponsoring defined benefit plans. As benefit consultants, we want to do everything we can to make defined benefit plans easier to understand and administer. Please consider our recommendations and help us keep DB plans alive. Please contact us if you have any questions or comments concerning the matters discussed above.

Thank you for your consideration of these comments.

Sincerely,

Sara Ark, ASA, EA, MAAA	Jan Mansheim, QPA
Penelope S. Butler, ASA, EA, MAAA	Elizabeth A. Moore, FSA, EA, MAAA
Steven L. Diess, EA, MAAA	Nina Pileggi, ASA, EA, MAAA
Karen Dunn, EA, MSPA, QPA	Alan J. Stonewall, FSPA, MAAA, EA
Paul L. Engstrom, FSA, EA, MAAA	Carla J. Tate, QPA

TOWERS WATSON

Global Headquarters
875 Third Avenue
New York, NY 10022

T +1 212 725 7550
F +1 212 644 7432

towerswatson.com

January 21, 2010

RIN 1212—AB06
Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200K Street NW.,
Washington, DC 20005-4026

This letter is the response of Towers Watson to proposed changes to PBGC's reportable events regulation under section 4043 of ERISA, as published on November 23, 2009 in the Federal Register. Towers Watson is a leading global professional services company that helps organizations improve performance through effective people, risk and financial management. Established on January 1, 2010, as a combination of the former Watson Wyatt and Towers Perrin, 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 1,500 defined benefit plans in the US. The undersigned have prepared our firm's response with input from others in the firm.

We recognize the concerns that led to these proposed changes, given PBGC's current financial condition and the erosion of the funded status of many defined benefit plans due to the current economic conditions. The severity of recent economic events has no doubt increased concerns about the timeliness of information and the range of plans that could present risks to the agency. However, we urge the agency to remember the protections that were just put in place by the Pension Protection Act of 2006 (PPA), including significant new rules with respect to plan funding, benefit restrictions, reporting and disclosure. These new rules were adopted to prevent a rapid downward spiral in funded status from occurring and to provide more current notification of a plan's funded status to participants and the PBGC. We believe these additional PPA protections should be effective in accomplishing these objectives. While this does not eliminate the agency's need for current information, it does suggest that other available sources of information may be sufficient to meet PBGC's needs without adding to the already significant amount of regulation which applies to defined benefit plan sponsors.

We appreciate the opportunity to comment on the proposed changes. Our comments generally follow the sections contained in the changes outlined in the Federal Register.

Proposed Changes in Automatic Waivers and Extensions

We agree entirely with PBGC's statement on page 61251 of the Federal Register of the need to strike "the correct balance between ensuring relevant information is received timely and increased reporting burden on the regulated community." We believe this should be a key consideration in establishing additional reporting requirements for sponsors of single-employer defined benefit plans. We believe that much of the information necessary for the PBGC to fulfill its mission is already available from other sources, so we are concerned that elimination of the current waivers for certain reportable events will tip the balance toward over-regulation, particularly for reasonably well-funded plans sponsored by public company employers.

We are also concerned that, under the proposals, reporting requirements would be increased in many situations in which there is minimal risk to PBGC. Such a situation would increase costs and risks of inadvertent non-compliance for plan sponsors, while simultaneously drastically increasing the number of reportable event filings PBGC receives (making it potentially more difficult for PBGC to timely identify and act on situations that indicate a real risk to PBGC).

The PBGC already receives (or can access from other governmental organizations or other sources) information on single employer plan sponsors and their plans including:

- Form 5500 and its many schedules
- Form 5310-A filings for transfers of benefit liabilities outside of the controlled group
- ERISA 4010 filings
- Reporting under ERISA § 4063(a) and § 4062(e)
- PBGC's Early Warning Program under Technical Update 00-3
- Annual Funding Notices under ERISA §101(f)
- Estimated and Comprehensive PBGC Premium filings
- National and local media sources

We believe that, in most cases, these sources are sufficient to provide the information PBGC needs to fulfill its mission – particularly for larger, well-funded pension plans sponsored by public companies, supplemented by information PBGC may request in appropriate situations. For example, ERISA Section 101(f) requires sponsors to provide, not later than 120 days after the close of the plan year, a funding notice to participants and the PBGC. Included in this notice is an estimate of year-end assets and liabilities. Further, §101(f) requires that year-end estimates must be adjusted as follows: "in the case of any plan amendment, scheduled benefit increase or reduction, or other known event taking effect in the current plan year and having a material effect on plan liabilities or assets for the year (as defined in regulations by the Secretary), an explanation of the amendment, scheduled increase or reduction, or event, and a projection to the end of such plan year of the effect of the amendment, scheduled increase or reduction, or event on plan liabilities." Given the timeliness and wealth of information provided in this notice, we were surprised that PBGC chose to waive filing of the notice with the PBGC by plans with liabilities that did not exceed assets by more than $50 million. However, we note that the PBGC reserved its right to require filing of the notice within 30 days of a PBGC request.

In summary, we recommend that PBGC retain reasonable waiver and extension rules to target reporting requirements to the situations most likely to pose a risk to PBGC, and make wider use of publicly available information to identify any additional situations in which the PBGC believes it requires more detailed information from a plan sponsor to assess its risk.

Therefore, with respect to all of the post-event notices included in the chart on pages 61249 and 61250, we propose that each relevant event be waived for all larger, well-funded plans based on current waiver rules. In addition, the current extension rules should also apply to these plans. For purposes of applying the current rules to the post-event notices listed in this chart, a larger, well-funded plan could be defined (for example) as a plan with at least 100 participants and with a certified or presumed AFTAP (whichever shall be in effect as of the event) of at least 80%, such AFTAP determined without subtraction of any carryover or prefunding balance. We could also support a threshold for defining a larger plan of 500 participants, aggregating all participants in plans sponsored within the controlled group for this purpose.

On page 61251, the PBGC notes that of the 88 small plans terminated in 2007 distress terminations, 21 involved situations where waivers deprived PBGC of sufficient warning. Under the proposal outlined above, the PBGC would still be able to mitigate these distress situations, as the waivers would only be available to larger, well-funded plans. Such an approach would also mitigate the considerable compliance burdens that would otherwise be imposed on larger, more dynamic organizations to monitor and analyze ongoing changes in the controlled group that are unlikely to have any effect on the risk that a well funded plan poses to PBGC.

Note that the recommendation above would also not make waivers available to plans sponsored by companies subject to advance reporting.

Late Contributions

It appears that PBGC not only intends to eliminate the waiver for smaller missed contributions (i.e., those for which a Form 200 is not required) which are cured within 30 days, but also intends to treat a late election to apply funding standard carryover balance or prefunding balance on a par with a late contribution. The combination of these changes is likely to result in a large number of reportable event filings being required in situations where the risk to PBGC appears to be minimal or nonexistent. It is difficult to see the benefit to the PBGC of having the plan sponsor provide a reportable event filing for a relatively small contribution (or even a larger one) made a few days late due to minor administrative delays (e.g., an unforeseen delay in cutting a check or preparing a wire transfer), when the late contribution has already been cured before the filing can be prepared. The related cost to the plan sponsor of preparing the filing may be significant. This is particularly true if the PBGC intends to require the significantly expanded information discussed on page 61253 for "virtually every reportable events filing" (i.e., current asset statements, AFTAP certifications, valuation reports including or supplemented by the list of information required by regulation § 4010.8(a)(11)).

In addition, it is difficult to see how an increased risk is posed to the PBGC if the sponsor of a plan with a large credit balance available to be applied against a quarterly required contribution completes the election to apply such credit balance "late". Currently, there is enough regulatory uncertainty about the rules for such elections (e.g., interest crediting rules) that some contributions may be determined to have been "late" due solely to regulatory uncertainty as to the amount of credit balance as of the valuation date that must be applied to meet the quarterly required contribution. Moving forward (i.e., after the regulatory uncertainty is resolved) there will still be situations where a plan sponsor may wind up (for a variety of reasons) applying a credit balance to satisfy a contribution, but making the election "late". Because no cash contribution was actually required, the harm to the plan and PBGC appears minimal and does not appear to justify the cost to the plan sponsor of treating that event on a par with a late cash contribution.

Changes Proposed for Reporting Active Participant Reductions

We agree with PBGC's proposals to clarify that the active participant reduction post-event notice would be waived if the PBGC has received an active participant reduction notice within the past year. We think it is unnecessary to potentially provide this notice on a daily basis after the initial notice. We also agree with the proposed change to waive reportable event notices for active participant reductions that are reported under ERISA 4063(a).

Clarification of Certain Reportable Events

We concur that the reportable events described in ERISA sections 4043.25, 4043.26, 4043.32 required clarification on certain issues and support the clarifications included in the proposal.

New Proposed Reportable Events

We can see arguments for including the issuance of an AFTAP certification below 60%, or when a plan is presumed to have an AFTAP below 60%, as a reportable event, but only if such an event freezes plan accruals. Again, however, we believe that this event should be waived for larger, well funded plans as described above (i.e., a plan that is at least 80% funded before funding balances are subtracted from plan assets). Note also that PBGC can already access information about plans which are less than 80% funded through the 4010 filings it receives.

We see no need for the "transfer to retiree health account" notice, as sponsors are required under ERISA § 101(e) to provide this information to the Secretaries of Labor and the Treasury, and PBGC should be able to obtain such information from these agencies. The information required to be supplied includes the amount of excess plan assets and the amount to be transferred, allowing PBGC to identify transfers which might raise concerns and for which additional information may be needed from the plan sponsor.

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Compliance with Rulemaking Guidelines

In this section, PBGC proposes quite a few significant changes to information requested as part of a notice of reportable event. In developing its "wish-list" of items to request from plan sponsors, we caution PBGC to carefully consider the balance mentioned above of the value of the information received vs. the extra cost of administration of these plans. PBGC should be mindful of its goal "to encourage the continuation and maintenance of private-sector defined benefit plans" and not over-burden plan sponsors by requiring lots of information that may only be of marginal value to the PBGC.

In particular, PBGC indicates that "the reportable events regulation requires only the filing of notices and that the economic impact of filing is not significant". Such a statement does not appear to consider a number of possible effects on the plan sponsor including:

- Potential violation of and need to renegotiate (on potentially less favorable terms) loan covenants which contain "reportable event clauses"

- The costs in large organizations of monitoring and analyzing the many changes in the controlled group (including changes in foreign members) that may occur during a year, even though the defined benefit plans may be well funded and not sponsored by organizations joining or leaving the controlled group, and

- The costs of providing some of the information the PBGC proposes to require including, in the case of a change in controlled group, financial statements before and after the controlled group changes.

Thank you for this opportunity to comment on the proposed revisions. If your staff has any questions concerning our comments, please contact either one of us directly.

Sincerely,

Maria M Sarli   Kenneth A. Steiner

Maria M. Sarli, F.S.A.
(404)-365-1708
maria.sarli@towerswatson.com

Kenneth A. Steiner, F.S.A
(703)-258-7626
ken.steiner@towerswatson.com

AMERICAN ACADEMY *of* ACTUARIES

VIA EMAIL: reg.comments@pbgc.gov

January 22, 2010

Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street, NW.
Washington, DC 20005–4026.

RE: Request for Comment on Proposed Regulations on Reportable Events (RIN 1212–AB06)

To Whom It May Concern:

I am writing to you on behalf of the Pension Committee of the American Academy of Actuaries[1] in response to Pension Benefit Guaranty Corporation (PBGC) proposed regulations concerning reportable events under ERISA Section 4043. The Pension Committee appreciates the opportunity to comment on this proposal.

We realize that reportable events may, in some situations, be indicative of financial distress, and that timely reporting to the PBGC increases the opportunities for protecting participants and the pension insurance system. However, our concerns regarding the proposed regulations relate primarily to the balance between the value of the additional reporting (particularly given the existence of, for example, the annual funding notice and Section 4010 reporting) and the increased administrative burden placed on defined benefit plan sponsors (which we believe deters sponsorship of DB plans).

In short, we suggest that the PBGC reconsider providing reporting waivers when an otherwise reportable event poses minimal risk to the system. Below we offer several examples for consideration:

- Most notably, the information received with respect to a well-funded plan is not of sufficient value to require the sponsor to bear the administrative cost associated with ensuring compliance with the proposed reportable event rules. An exemption from those rules for well-funded plans should be provided. Certainly there should be some level of funding (measured by assets as a percentage of liabilities rather than a specific dollar amount) beyond which the occurrence of a reportable event creates little additional risk to plan participants and the pension insurance system.
- Similarly, a transfer, in accordance with Internal Revenue Code (IRC) Section 420(f), of excess pension assets to a health benefit account should not create a reportable event. A transfer is not specifically listed as a reportable event under ERISA Section 4043(c) and is not "indicative of a need to terminate the plan" as specified by ERISA Section 4043(c)(13). Congress, through the Pension Protection Act of 2006 (PPA), agreed that a funding level above 120 percent provided sufficient margin to allow for such transfers. Additional administrative costs and barriers to such transfers, which are only available to well-funded plans, are unnecessary. Further, reporting to the PBGC should not be necessary if post-transfer funding levels fall below 120 percent, as the sponsor would be statutorily required to restore plan funding levels. Instead, failure to restore funding levels to 120 percent could be treated as a reportable event associated with failure to make a required funding payment.
- In certain cases, a missed contribution would not be indicative of an increased risk to the PBGC. Waivers should be considered in cases where contributions are made up within a short period of time or in cases where sufficient credit balances existed at the time to cover the missed payment but the necessary credit

[1] The American Academy of Actuaries is a 16,000-member professional association whose mission is to serve the public on behalf of 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.

balance elections were not made. For example, the waiver that applies under current regulations when payment is made within 30 days of the due date should still apply since there should be no reason to notify the PBGC of a missed payment if it has already been corrected by the time the notice is given.

- Transfers of benefit liabilities often do not create additional risk to the system. As noted above, at a minimum there should be an exemption for plans well-funded after such transfer. Further, *de minimis* transfers and transfers completed in accordance with the IRC Section 414(l) safe harbor should continue to be exempt.
- Even normal employee turnover could create an active participant reduction reportable event. Such an event could occur annually if the sponsor generally has a high rate of turnover (or due to the level of cyclicality in the sponsor's particular industry) or, in the case of a small plan, due to on the terminations of just a few (e.g., two employees out of nine terminating in a year). A reporting waiver for well-funded plans should be provided.

Further, the elimination of many of the extensions of the 30-day reporting deadline when waivers do not apply will create difficulties, particularly for events that are not necessarily planned. For example, some plan sponsors do not have a system for tracking participant counts on a monthly basis and generally only do a complete count in connection with preparing the Form 5500 and PBGC premium filings. Although plan sponsors will know the number of active participants who terminate employment in connection with a significant event, such as a workforce reduction, and would be able to estimate the impact of such an event shortly after the event, normal voluntary and involuntary terminations of employment could play a material role in certain companies. In other situations, a sponsor of numerous plans may know the impact of an active participant reduction across the workforce but not the impact with respect to each of the many plans. A 30-day reporting timeframe is unrealistic for a plan sponsor to determine changes in regular ongoing participant counts, particularly when reporting within that shorter timeframe instead of waiting until the pertinent Form 5500 or PBGC premium filing, and will be of limited value to the PBGC.

In closing, we believe that further increasing the administrative burdens of maintaining defined benefit plans will deter the sponsorship of those plans, and we are concerned that in many cases, such as with well-funded plans, the additional reporting under these proposed regulations does not provide sufficient value to the system to justify the added cost.

We would be happy to discuss any of these items with you at your convenience. Please contact Jessica M. Thomas, the Academy's pension policy analyst (202-785-7868, thomas@actuary.org) if you have any questions or would like to discuss these items further.

Sincerely,

John H. Moore, FSA, MAAA, EA, FCA
Chairperson, Pension Committee
American Academy of Actuaries

AMERICAN BENEFITS COUNCIL

January 22, 2010

Filed Electronically at Regulations.gov

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

Re: Comment on Proposed rule regarding reportable events under ERISA Section 4043 (RIN 1212-AB06)

Dear Sir or Madam:

The American Benefits Council ("Council") appreciates the opportunity to comment on the proposed rule which would make a number of changes to the Pension Benefit Guaranty Corporation's (PBGC's) reportable event regulations published in the Federal Register on November 23, 2009. 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.

We appreciate the PBGC's need for timely and relevant information. We are also acutely aware that the PBGC reportable event requirements have become woven into the very fabric of the American financial system. In particular, and as described more fully below, most loan covenants and credit agreements contain special provisions that are triggered whenever a plan sponsor is required to file a reportable event with the PBGC. As a result, the Council believes it is incumbent on the PBGC to balance its need for additional information against the potential harm such a requirement might have on the financial well-being of the plan sponsor community.

In particular, the PBGC has proposed a wholesale elimination of reportable event waivers and extensions, along with the creation of two additional reportable events. In its proposal, the PBGC states that it might consider reinstating some waivers and extensions if, over time, the facts warrant such waiver or extension. Because of the potentially disruptive financial consequences of this approach, the Council strongly urges the PBGC to exercise extreme caution before modifying any automatic waivers or extension. Rather than a sweeping elimination of waivers and extensions, it is the Council's position that the PBGC should only modify automatic waivers and extensions in the least harmful ways that are supported by the facts.

The Council asks that the PBGC withdraw its proposed rulemaking and consider creative, targeted modifications to the automatic waivers and extensions that respond to the PBGC's observed issues. The Council further asks the PBGC to carefully balance its need for information against the potential harm that might result from overreaching requirements, and explore alternate ways of obtaining information without expanding reportable event requirements.

The Council is primarily concerned that these proposed changes will have unintended consequences which will result in massive numbers of filings that could trigger debt and credit covenants. Lending institutions certainly retain the right to renegotiate loan covenants. However, at this point it is unclear how those negotiations might proceed. In addition, it is unclear how credit rating agencies might respond to the expanded scope of reportable events. As a minimum, this proposal would generate significant uncertainty regarding plan sponsor access to credit markets, which could increase plan sponsor cost of debt. In the end, it could result in greater liability for the PBGC.

The existing reportable events system, which was set up following a negotiated rulemaking process, has been operating for many years. As mentioned, these loan agreements referenced above and other documents often include covenants triggered by a PBGC reportable event. Under the current system, events that require filing despite the exemptions and extensions can signal significant changes in the company which create more risk for the lender. Hence, many lenders inserted restrictions and default provisions triggered by reportable events. By eliminating the exemptions and extensions, the proposed rule would greatly increase reportable events and the need for companies to, at the very least, renegotiate loan and other credit agreements. A reportable event might trigger an immediate loan repayment or cause the loss of a line of credit. In the extreme, it is possible the finding of a reportable event may trigger a default. This constrained access to credit may also result in more underfunding of defined benefit plans. The impact on any individual company would depend on the results of renegotiations of loan covenants and the perspective of the credit rating agencies.

The Council understands that the PBGC is seeking more filings so that the agency can potentially spot troubled companies before the plan is in trouble but the Council believes the proposal is too extensive and is concerned the new requirements could actually cause harm to some companies. The Council would recommend that existing automatic waivers and extensions be continued. However, the PBGC could require a simple letter or information filing notifying PBGC that the company would be required to file under the reportable event regulations but for the following exemption or extension. The PBGC could then request additional information it believes is necessary from some companies (as is the case with the current system). In addition, the PBGC could consider tiered requirements where the automatic waivers and extensions continue to apply at the current base level of event, but would expire if the severity of the situation reached some secondary level. Although this likely would not resolve every situation, creating a new information request requirement would not cause the problems which could ensue from eliminating all of these exemptions from the reportable event regulations. One of the goals of the PBGC is to promote defined benefit plans and the blanket elimination of so many exemptions would hardly assist this promotion.

Council members are especially concerned about the elimination of waivers for well-funded plans and events involving related foreign corporations. Large, multi-national companies may have related foreign corporations with no reporting obligations to their U.S. counterparts. Some companies with frequent mergers and acquisitions may have multiple reportable events per year under the proposed regulations. Complying with the new requirements will involve significant costs even if credit arrangements are not effected.

The proposed regulations will also shorten the filing period for many reportable events, some by eliminating extension periods. This may also have unintended consequences. For example, some errors in contributions are discovered a few weeks or months after the mistake. The current deadline for a reportable event for missing contributions may encourage employers to replace those contributions (and earnings) before the report must be filed but the new 30-day filing requirement may result in later corrections when the filing is required regardless of when it is corrected. The active participants' reduction reportable events will require companies to more closely track their daily counts of employees instead of relying on calculations already necessary for other PBGC and agency filings, resulting in increased costs.

The Council also has concerns about one of the two new reportable events. The Council understands the rational for requiring a report when the funding status of the plan decreases below 60 percent (one of two new reportable events) but is perplexed about the rationale behind reportable event filings in connection with a transfer of assets to fund retiree health care accounts under Internal Revenue Code Section 420. Before such a transfer occurs, many requirements must be met that ensures that the underlying plan is healthy. As noted by the PBGC, the underlying plan must be at least 120 percent funded after the transfer and remain so during the transfer period. Although the final regulations indicate that the 120 percent valuation is not done on a termination basis, many other valuations are not done on a termination basis. Employers should not be penalized for funding retiree health care accounts with some of the excess assets from overfunded defined benefit plans. Moreover, because the proposal to make a Section

420 transfer a reportable event could also trigger breaches of loan covenants and potential loss of credit lines, the proposed rule making could severely hamper the ability of plan sponsors to make such transfers even when there is no reasonable threat to the well-being of the PBGC. Even in situations where the lending institutions might be willing to renegotiate loan covenants, the proposal imposes generally unnecessary new burdens on plan sponsors.

Thank you again for the opportunity to provide comments on these new proposals. We believe the Council is uniquely situated to provide useful feedback to the PBGC. If we can assist further, please contact Jan Jacobson, senior counsel, retirement policy, of the American Benefits Council.

Sincerely,

Jan Jacobson
Senior Counsel, Retirement Policy
American Benefits Council

4245 North Fairfax Drive, Suite 750
Arlington, VA 22203
P 703.516.9300 F 703.516.9308
www.asppa.org

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

January 22, 2010

Pension Benefit Guaranty Corporation
29 CFR Parts 4000,4001,4043,4204, 4206, 4211 and 4231
[RIN 1212-AB06]

The American Society of Pension Professionals & Actuaries (ASPPA) appreciates 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 November 23, 2009 [RIN 1212-AB06].

ASPPA is a national organization of more than 6,500 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system. All credentialed actuarial members of ASPPA are members of the ASPPA College of Pension Actuaries (ASPPA COPA), which has primary responsibility for the content of comment letters that involve actuarial issues.

Summary of Recommendations

The following is a summary of ASPPA COPA's recommendations which are described in greater detail in the Discussion of Issue section.

I. **Well-funded Plan Exception**

Well funded plans pose little or no risk to PBGC, and should be exempt from the reporting requirements.

II. **Reporting of Active Participant Reductions**

ASPPA® College of Pension Actuaries

The current waivers for small plans and well-funded plans in PBGC regulation §4043.23 (c)(1) and §4043.23 (c)(2) should be retained.

III. **Reporting of Missed Required Contributions**

The final rule should include relief for reporting of missed quarterly contributions by small plans. The final rule should also retain the exception for missed required contributions paid within 30 days of the due date.

IV. **Reporting for AFTAPs less than 60%**

The final rule should waive reporting of an adjusted funding target attainment percentage (AFTAP) of less than 60% if the plan has been in existence for less than five years.

V. **Regulatory Process**

After comments are received and a public hearing held, re-proposed changes should be issued.

Discussion of Issues

I. **Well-funded Plan Exception**

Current regulations provide an exception to most reportable event notice requirements for well-funded plans. The concept of waiving reporting for well-funded plans makes sense because there is little or no risk to PBGC or to the benefit security of plan participants. However, the proposed rule eliminates these waivers.

ASPPA COPA recommends that the broad waiver of the reportable event notice requirements continue to be available to well-funded plans. The current funding-based waivers encourage plan sponsors to maintain well-funded plans to avoid the notice requirements, which is in the best interest of plan participants and the PBGC. The proposed elimination of reporting waivers for plans with no variable rate premium or plans with less than $1 million in unfunded vested benefits indicates PBGC has found plans that meet these criteria pose a significant risk to PBGC. ASPPA COPA asks that PBGC publicly present the data and analysis that lead to the proposed elimination of the waivers, and consider modifying the current criteria to address the risks instead of eliminating the waivers. ASPPA COPA asks that PBGC allow the public to comment on a revised proposal before finalizing the rule.

ASPPA COPA further suggests that plan sponsors be permitted to reflect only the guaranteed portion of benefits for majority owners when determining funded status for purposes of a reporting waiver. Majority owners typically waive unfunded benefits in situations where waiver of the majority owners' unfunded benefits is necessary and sufficient for a standard termination.

II. Reporting of Active Participant Reductions

A reportable event occurs under current law when a plan experiences a decline in the number of active participants to less than 80% of the number at the beginning of the plan year, or less than 75% of the number at the beginning of the prior year (ERISA §4043(c)(3)). Current regulations waive the reporting requirement in certain situations, including plans with fewer than 100 participants at the beginning of the current or prior year, and well-funded plans (PBGC regulation §4043.23 (c)(1) and §4043.23 (c)(2) respectively). The proposed rule would both eliminate these waivers and eliminate the extension of the notice due date (currently 30 days after the latest of the PBGC Form 1 or Form 5500 due dates or the PBGC Form 1-ES due date, if applicable.) As a result, small plans not only would have to provide the notice, but would also be required to do so by the 30th day following the day the event occurs.

A. ***ASPPA COPA recommends*** that the small plan and well-funded plan exceptions be retained. Small plans are particularly sensitive to reductions in workforce that could trigger this reporting requirement, and the reduction would frequently be the result of normal employment patterns rather than the impending collapse of the business and transfer of liability to PBGC. An extreme example is an employer with four employees, all of whom are participants in a plan with a year of service requirement for entry. If one employee leaves for any reason, a new hire will not be participating in the plan until the following year. As a result, there will be a more than 20% reduction in the number of active participants. Under the proposed rule, the notice will be required within 30 days after that employee leaves employment. Normal turnover creating the reduction in active participation will be far more common for small employers who sponsor defined benefit plans than a reduction reflecting a business downturn that signals trouble for PBGC. This reporting requirement will be a burden to the employer and not result in any significant savings or beneficial information to PBGC.

   While ASPPA COPA believes that the small plan waiver should remain in its current form, if the small plan waiver must be modified, ASPPA COPA recommends that the current exception should be retained for plans with less than 50 active participants. A reduction of 10 or fewer active participants does not warrant the cost of producing or processing the required filings.

B. The elimination of the extended due date makes it very likely the employer will not file a timely notice. Small employers, and many larger employers, rely on third party administrators or actuaries to complete required filings. The reduction will only be apparent when data is collected after the end of the year. Extended due dates reflect the reality of the flow of information between plan sponsors and service providers. ***ASPPA COPA recommends*** that the regulations provide an extended due date that is not earlier than the due date of the Form 5500, including extensions, for the plan year in which the event occurs.

III. Reporting of Missed Required Contributions

Current regulations provide a reporting waiver for missed required minimum contributions if the contribution is made within 30 days of the due date. In addition, PBGC Technical Update 09-03 provided a special rule for small plans and missed quarterly contributions for 2009. Technical Update 09-04 extends the special rule to 2010, and indicates that the final version of these proposed rules will supersede the relief in 09-04 when the final rule is issued. The proposed rule would eliminate all waivers for missed required contributions.

ASPPA COPA recommends that the final rule include the waiver of the notice requirement for missed quarterlies in effect for all plans under 100 lives from 1997 through 2008 (Technical Update 97-4). As noted in our letter of March 24, 2009, it is common business practice for small employers to forego making quarterly contributions. Limiting reporting to contributions that are not made by the final contribution due date (8 ½ months after the end of the year) will allow PBGC to focus on employers that are truly in trouble. Furthermore, plan sponsors with end-of-year valuation dates generally do not know the amount of the required quarterly contribution when the first payment is due, and so cannot accurately report in any event. If PBGC is unwilling to restore the relief under Technical Update 97-4, the final rule should be modeled on the relief for reporting of missed quarterly contributions by small plans included in Technical Update 09-03.

ASPPA COPA recommends the final rule also retain the exception for contributions paid within 30 days of the due date. Allowing plan sponsors a reasonable amount of time to cure missed required contributions will eliminate many filings and provides plan sponsors an incentive to promptly contribute missed contributions.

IV. Reporting for AFTAPs less than 60%

Under ERISA §206(g)(4), benefit accruals are frozen when a plan's AFTAP falls below 60%. ERISA §206(g)(6) provides an exception to this restriction for new plans, waiving the restriction for the first five years of a plan's existence. A new proposed regulation §4043.36 creates a reportable event when a plan's AFTAP falls below 60%.

ASPPA COPA recommends that the new plan exception to benefit restrictions in ERISA §206(g)(6) be applied to the reporting requirement for plans with an AFTAP of less than 60%. This exception recognizes that underfunding in new plans is due to the youth of the plan, not financial difficulty of the employer.

V. Regulatory Process

The broad impact of the proposed changes to the current regulations is to remove waivers and extensions from the regulatory process. The preamble indicates that PBGC will monitor the resulting filings and "determine whether some automatic waivers and extensions can be restored (or newly crafted waivers or extensions provided) without jeopardizing efforts to protect the benefits of participants in troubled plans and the pension insurance program." Comments were solicited on whether each individual waiver or extension that was removed "struck the correct balance" between PBGC's need for information and the burden on plan sponsors.

ASPPA COPA has commented on the unjustified burden that will result from several specific changes in sections I through IV of this letter. These proposed additional notice requirements would significantly increase the cost of administration for small defined benefit plans. The increased cost should not be incurred unless it is clear that there will be a compensating benefit to the system. While ASPPA COPA appreciates PBGC's willingness to consider adding back exemptions at a later date, this approach creates confusion for both practitioners and plan sponsors and adds to the cost of administering the plan. This is true even if the exemption is restored at a later date. Because of the substantial reporting burden created by these proposed changes, ***ASPPA COPA recommends*** that, after the comment period has closed and a public hearing is held on these proposed changes, re-proposed rules be issued for another round of public comment.

These comments were prepared by ASPPA's Defined Benefit Subcommittee of the Government Affairs Committee and the ASPPA College of Pension Actuaries. Please contact us if you have any comments or questions on the matters discussed above.

Thank you for your consideration of these comments.

Sincerely,

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

/s/
Judy A. Miller, MSPA
Chief of Actuarial Issues

/s/
Craig P. Hoffman, Esq., APM
General Counsel/Director of Regulatory Affairs

/s/
David M. Lipkin, MSPA
Co-chair, Government Affairs Committee

/s/
Robert M. Richter, Esq., APM
Co-chair, Government Affairs Committee

/s/
James Paul, Esq., APM
Co-chair, Government Affairs Committee

/s/
Mark Dunbar, MSPA
Co-chair, Defined Benefit Subcommittee

BPS&M

Bryan, Pendleton, Swats & McAllister, LLC
A Wells Fargo Company

BENJAMIN R. SEARS
DIRECT LINE: (615) 665-5369
EMAIL: BEN.SEARS@BPSM.COM

January 25, 2010

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

Re: Pension Benefit Guaranty Corporation Proposed Regulations on Pension Protection Act of 2006; Conforming Amendments; Reportable Events and Certain Other Notification Requirements (RIN 1212-AB06) (74 Fed. Reg. 61,248, November 23, 2009)

Dear Sir or Madam:

As a confirmation, enclosed is a copy of our comments on the PBGC proposed regulation above (RIN 1212-AB06), previously submitted by email to reg.comments@pbgc.gov on January 22, 2010.

If any additional information on any of our comments would be helpful, please contact Ben Sears at our Nashville, TN area office by telephone at (615) 665-1640, by email at ben.sears@bpsm.com, or by correspondence at 5301 Virginia Way, Suite 400, Brentwood, TN 37027.

Respectfully submitted,

Bryan, Pendleton, Swats & McAllister L.L.C.
By Benjamin R. Sears

BRYAN, PENDLETON, SWATS & MCALLISTER, LLC
By Benjamin R. Sears

Enclosure

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Sears, Ben R.

From: Sears, Ben R.
Sent: Friday, January 22, 2010 4:12 PM
To: PBGC (reg.comments@pbgc.gov)
Subject: Comments on PBGC Proposed Regulations on reportable events, etc. (RIN 1212-AB06)(74 Fed. Reg. 61,248, 11/23/2009)

SUBMITTED BY EMAIL TO PBGC AT: reg.comments@pbgc.gov

January 22, 2010

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

Re: Pension Benefit Guaranty Corporation Proposed Regulations on Pension Protection Act of 2006; Conforming Amendments; Reportable Events and Certain Other Notification Requirements (RIN 1212-AB06) (74 Fed. Reg. 61,248, November 23, 2009)

Dear Sir or Madam:

Bryan, Pendleton, Swats & McAllister, LLC (BPS&M), Actuaries and Consultants, submits the attached comments on the Pension Benefit Guaranty Corporation proposed regulations to conform the PBGC's reportable events regulation and a number of other PBGC regulations to statutory changes made by the Pension Protection Act of 2006 and to revisions of other PBGC regulations that implement the statutory changes (Regulation Identifier Number RIN 1212-AB06). BPS&M is an actuarial and employee benefit consulting firm with offices in multiple locations.

We hereby submit these comments by email to the PBGC at reg.comments@pbgc.gov
A confirmation copy will be mailed to the mailing address indicated above.

If additional information on any of our attached comments would be helpful, please contact Ben Sears at our Nashville, Tennessee area office by telephone at (615) 665-1640, by email at ben.sears@bpsm.com, or by correspondence at 5301 Virginia Way, Suite 400, Brentwood, Tennessee 37027.

Respectfully submitted,

BRYAN, PENDLETON, SWATS & MCALLISTER, LLC
By Benjamin R. Sears
5301 Virginia Way, Suite 400
Brentwood, TN 37027

COMMENTS OF BRYAN, PENDLETON, SWATS & MCALLISTER, LLC, ON PBGC PROPOSED REGULATIONS ON PENSION PROTECTION ACT OF 2006; CONFORMING AMENDMENTS;

REPORTABLE EVENTS AND CERTAIN OTHER NOTIFICATION REQUIREMENTS (RIN 1212-AB06)

In general, the Proposed Regulations would eliminate most waivers and filing extensions for post-event reporting of reportable events. This would present substantial change and compliance timing challenges for plan sponsors and their advisors who help them comply with the reportable events requirements. We present below our specific comments about this aspect of the Proposed Regulations and our recommendations for appropriate revisions.

1. Permit current extensions for 30 days after the next 5500 due date and 30 days after the current VRP due date for post-event reporting.

In the Proposed Regulations, the PBGC proposes with respect to post-event notices to eliminate various extensions (including the one for 30 days after the next 5500 due date and the one for 30 days after the VRP due date) for the events involving active participant reduction (Section 4043.23); change in contributing sponsor or controlled group (Section 4043.29); liquidation (Section 4043.30); extraordinary distribution or stock redemption (Section 4043.31), and loan default (Section 4043.34). We believe the current extensions for 30 days after the next 5500 due date and for 30 days after the VRP due date that apply to these events should be retained for the following reasons.

These events involve technical determinations (e.g., active participant reductions) which plan sponsors may not identify without assistance. In practical terms, plan sponsors rely on third party advisors who collect information for government form preparation to analyze data collected in that process to help plan sponsors determine if reportable events requiring post-event reporting have occurred. When the third party government form preparer obtains this data from the plan sponsor, the preparer can help identify matters the plan sponsor typically may not have identified. The data gathering process for most defined benefit plans typically takes a significant amount of time, and the current extensions for 30 days after the next 5500 due date and 30 days after the VRP due date allow needed time for data to be gathered and determinations made as to whether reportable events requiring post-event reporting have occurred in the applicable periods.

2. Provide an effective date with a transition period for post event reporting changes.

In relevant part, the Preamble to the Proposed Regulations indicates that the changes made in the Proposed Regulations would apply to post-event reports for reportable events occurring on or after the effective date of the regulations. The Proposed Regulations do not otherwise provide what this effective date may be, but potentially the effective date of regulations would be the date the regulations are issued in final form and published in the Federal Register.

The Proposed Regulations would make substantial changes to the existing rules for reportable events. We urge that a transition period be included as part of the effective date to allow plan sponsors and their advisors to have a reasonable amount of time to implement whatever changes are made in the final regulations. We recommend that the current rules (including existing extensions and waivers for post-event reporting) remain in effect through the end of the plan year ending after the plan year in which the final regulations are issued.

Benjamin R. Sears
Bryan, Pendleton, Swats & McAllister, LLC
Actuaries and Consultants
5301 Virginia Way, Suite 400
Brentwood, TN 37027
Telephone (615) 665-1640
Fax ((615) 665-1650
Email ben.sears@bpsm.com

The
ERISA
Industry
Committee

January 22, 2010

RIN 1212-AB06
Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street, N.W.
Washington, DC 20005-4026

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to submit these comments on the proposal by the Pension Benefit Guaranty Corporation ("PBGC"), published in the *Federal Register* on November 23, 2009, to amend its regulations on Reportable Events and Certain Other Notification Requirements (29 C.F.R. part 4043).

As we discuss below, the regulations as proposed on November 23rd are likely to impinge significantly upon plan sponsors' access to credit and other financial resources, while doing little to augment the agency's ability to predict financial distress. In fact, the proposed regulations are likely to hinder rather than enhance the PBGC's efforts to monitor the financial health of defined benefit plans and plan sponsors, while unduly burdening plan administrators and sponsors.

- ERIC urges the PBGC to withdraw the proposed regulations or leave the current regulations in place until the agency engages in a negotiated rulemaking process similar to the process that led to the formulation of the regulations in 1996. The negotiated rulemaking process has already been shown to be an effective means of developing a consensus on the reportable event regulations and is likely to result in a satisfactory balancing of the competing considerations of disclosure, financial security and administrative ease for all parties, including the PBGC.

- If the PBGC does not choose to withdraw the regulations or engage in a negotiated rulemaking process, then the PBGC should delay the effective date of the proposed regulations to allow employers sufficient time to renegotiate lending arrangements that rely upon the current waiver provisions and to establish special compliance units to monitor events that might trigger the reporting requirements.

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. This ability, in turn, depends on ERIC's members—most of

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

which are sponsors of defined benefit plans—having ready access to existing lines of credit and other sources of cash.

ERIC believes that the current proposal to amend the reportable events regulations would undermine the financial health of its members and divert employer and plan resources from the business of providing benefits, while at the same time compromising the PBGC's ability to recognize and address early signs of financial distress among sponsors of PBGC-insured plans. The current regulations enumerate seven events that require advanced reporting and 15 events that require post-event reporting to the PBGC. Of these, reporting is waived automatically for 10 events based on the size or funded status of the plan. Reporting is also waived in some cases based on the relationship of the entity that has experienced the reportable event to the plan, and in some cases if the plan administrator or plan sponsor is required to report the same event to the PBGC or another agency under a different statutory requirement.

The proposed regulations would eliminate automatic waivers for most of the reportable events, and would add two new reportable events, neither of which would be subject to an automatic waiver. Thus, even plans that are well-funded, and corporate events involving entities that do not participate in or contribute to the plan, would be subject to the reporting requirements.

In particular, the elimination of the automatic waiver for the existing reportable events, is likely to seriously undermine the financial health of plan sponsors and, therefore, indirectly for plan funding levels. It will also make it less, rather than more, likely, that PBGC will be able to predict financial distress in advance and intervene in a timely fashion. ERIC therefore submits these comments, which are divided into the following three general topics:

- Many Plan Sponsors Have Credit Agreements and Lending Arrangements That Rely Upon the Current Waiver Provisions.—see Part 1 below.

- The Current Waivers Avoid Unnecessary Administrative Burdens on Plan Sponsors and Enhance the PBGC's Efforts to Protect Plan Participants.—see Part 2 below.

- If the PBGC Wishes to Amend the Current Reportable Event Regulations, It Should Use a Negotiated Rulemaking Process.—see Part 3 below.[1]

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[1] In addition, the proposed regulations indicate that PBGC may be revising its enforcement position in two respects that would be of critical importance to plan sponsors in certain situations. First, the proposed regulations would create a new reportable event when an enrolled actuary certifies that a plan's adjusted funding target attainment percentage ("AFTAP") is less than 60 percent. The preamble to the proposed regulations suggests that the PBGC may consider terminating the plan as a result solely of the plan's AFTAP falling below the 60 percent threshold. It would be very helpful for plan sponsors to know in advance if this is the agency's intent. Second, the proposed regulations would eliminate the 30-day grace period for reporting missed contributions under section 303 of ERISA. The PBGC may impose a lien on an employer under § 303(k) of ERISA for the employer's failure to make timely contributions to a plan in certain circumstances. Eliminating

ERIC may supplement this submission to make additional recommendations.

1. Many Plan Sponsors Have Credit Agreements and Lending Arrangements That Rely Upon the Current Waiver Provisions.

Many credit 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. Eliminating most of the automatic waivers would therefore dramatically increase the likelihood of employer defaults on outstanding loans and lines of credit.

The PBGC's proposed regulations would thus provide lenders with the opportunity to reopen negotiations of loan terms advantageous to the employer, to deny additional credit under existing lines of credit, and to cancel loans that the lender in retrospect finds disadvantageous, even when the financial condition of the plan sponsor poses little or no risk to the PBGC. This is an unwarranted interference by a government agency in the credit marketplace.

Employers that sponsor defined benefit plans—unlike employers that sponsor only defined contribution plans or do not sponsor any qualified plan—would have more difficulty obtaining loans and retaining access to lines of credit that might otherwise be used to maintain and expand existing operations, finance new ventures, and maintain and improve the employer's financial health. The result would be to diminish, rather than enhance, the ability of defined benefit plan sponsors to adequately fund—as well as to continue to maintain—their pension plans, and to put defined benefit plan sponsors at a serious competitive disadvantage.

The benefit to the PBGC, if any, that would result from the additional disclosure does not justify the potential harm to defined benefit plans and the employers that sponsor such plans. This is particularly true when—as would be the case in many situations in which reporting would be required— the reportable event would not create any meaningful risk that the employer would be unable to meet its plan funding obligations.

- For example, a reportable event occurs under § 4043(b) in the current and proposed regulations when there is an active participant reduction in the plan of 20 percent or more, or a transaction that causes the plan sponsor or another entity in the controlled group to cease being a member of the controlled group. Under the current regulations, however, these reportable events are waived if the plan is at least 80 percent funded, the transaction is *de minimis*, or the entity involved in the transaction is a non-participating foreign entity.

- If these events occur in a situation that is not likely to lead to financial distress for the plan—*i.e.*, in a situation for which there would be a waiver under the current

the 30-day grace period raises questions as to whether the PBGC intends to start imposing these liens earlier and more frequently.

regulations—any advantage the PBGC would gain by notification would be outweighed by the serious damage to the plan sponsor that would result from losing, or at the very least having to renegotiate, its current loan agreements and lines of credit. The same is true for the numerous other reportable events for which there is currently an automatic waiver based on the PBGC's previous assessment that the event is not likely to undermine the financial soundness of the plan (for example: the reportable events for distributions to substantial owners, liquidation of a controlled group member, and extraordinary dividends or stock redemptions).

The proposed regulations, particularly in today's tight credit market, would disadvantage employers who sponsor defined benefit plans by (1) increasing the likelihood that such employers would incur a default under outstanding loans and lines of credit, (2) giving lenders more leverage in renegotiating existing credit agreements with such employers, and (3) making it appear as though sponsors of defined benefit plans do not enjoy the same financial health as employers who sponsor only defined contribution plans (or do not sponsor any qualified plans). Accordingly, employers that do not sponsor defined benefit plans would, by virtue of this proposed government action, have a clear advantage over defined benefit plan sponsors, thus threatening the ability (or even willingness) of employers to continue to sponsor defined benefit plans.

In short, the proposal to eliminate the existing waivers would seriously undermine the financial strength and future growth of plan sponsors and, accordingly, for the fiscal health of defined benefit plans of many employers. These potential problems, which are not immediately obvious, demonstrate the necessity of proceeding with extreme caution and taking action only after attaining a thorough understanding of the potential implications of the proposal through negotiated rulemaking or a similar process.

2. The Current Waivers Avoid Unnecessary Administrative Burdens on Plan Sponsors and Enhance the PBGC's Efforts to Protect Plan Participants.

In addition to compromising existing loan agreements and lines of credit, elimination of the automatic waivers for the vast majority of reportable events would add unnecessary and burdensome information-gathering and recordkeeping requirements for sponsors and administrators of defined benefit plans. These administrative burdens would drain plan sponsors of valuable capital resources and add to the competitive disadvantage already inuring to defined benefit plan sponsors. Many such employers would have to establish special compliance units and add to their work force employees whose primary responsibilities would include monitoring corporate transactions and other events worldwide that might trigger the reporting requirements.

Elimination of the automatic waivers would also threaten to inundate the PBGC with information that will be of little or no use to the agency and undermine its ability to perform its most important functions.

We have described several examples of the potential administrative burdens to employers and plan sponsors below.

a. The Proposed Regulations Would Significantly Increase Administrative Burdens on Employers and Plan Administrators.

1. Controlled Group Restructurings

A reportable event occurs when a member of the employer's controlled group ceases to be a member of the controlled group by reason of a transaction or liquidation. Under the current regulation, reporting is waived if the plan has less than $1 million in unfunded vested benefits or the employer is a public company and the plan is at least 80 percent funded. The proposed regulations would eliminate this waiver and provide a waiver only if the entity that will cease to be a member of the employer's controlled group during the fiscal year represents a *de minimis* 10-percent segment of the controlled group.

Large public companies may enter into dozens of transactions that result in numerous acquisitions, spinoffs, mergers or other corporate restructurings every year. 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.[2] By eliminating the existing waivers, the PBGC would be adding significant administrative burdens without a corresponding increase in retirement plan security:

- Elimination of the automatic waiver 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:

    (a) whether it is a "transaction that results, or will result, in one or more persons ceasing to be member's of the plan's controlled group" within the meaning of § 4043.29(a);

    (b) whether 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

    (c) whether 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 reportable event occurs" within the meaning of § 4043.29(b).

- The proposed regulations would not change the rule that employers are not required to report an event if it will result solely in a reorganization involving a mere change in identity, form, or place of organization. However, this exemption does not, at least on

[2] The only evidence for eliminating the waivers cited in the preamble to the proposed regulations pertains to small plans that were terminated in 2007. See 74 Fed. Reg. 61247, 61251. The PBGC's experience with small plans should not be the basis for regulations affecting large public companies, where there is generally a greater funding cushion and more resources for the plan sponsor to call upon.

its face, apply to reorganizations within an employer's controlled group in which a member ceases to exist because its ownership is transferred to another member or because it is merged into another member. Therefore, the proposed regulations would:

(a) require plan administrators of well-funded plans to monitor all of these internal reorganizations;[3] and

(b) effectively introduce the PBGC into virtually every external and internal corporate transaction representing more than a 10-percent segment of the plan's controlled group, regardless of how well-funded the plan is.

- Under the regulations, the reporting requirement is triggered by the execution 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.

2. Reductions in the Number of Active Participants

The proposed regulations would eliminate the automatic waivers that apply in the event of an active participant reduction (*i.e.*, no variable premium due, less than $1 million in unfunded benefits, plan is 80 percent funded and reduction does not result from a facility closing, small plan). Instead, an employer would be exempt from providing notice under PBGC Reg. § 4043.23 only if the active participant reduction is attributable to a substantial cessation of operations under § 4062(e) of ERISA or the withdrawal of a substantial employer under § 4063(a) of ERISA and is timely reported to the PBGC under § 4063(a) of ERISA.

In addition to adding significant administrative burdens and costs without a sound basis for doing so, this change would also raise several compliance concerns for employers whose plans have historically met the requirements for the automatic waivers for this event, including:

- Without the automatic waivers, the regulations appear to require all employers to monitor, on a daily basis, whether the number of active participants has been reduced to less than 80 percent of the number of active participants at the beginning of the plan year or to less than 75 percent of the number of active participants at the beginning of the previous plan year. The proposed regulations would require employers to provide notice to the PBGC every time the number of active participants dips below this threshold during the plan year. (If employers are not required to monitor the number of active participants on a daily basis under PBGC Reg. § 4043.23, the PBGC should clarify the regulations accordingly.)

[3] At the very least, if the PBGC does not intend for employers to report these events, it should clarify the regulations accordingly.

- A 4063(a) notice must be filed with the PBGC within 60 days after a substantial cessation of operations under § 4062(e) of ERISA occurs. The PBGC has stated that plan sponsors must determine whether and when a substantial cessations of operations has occurred under § 4062(e) based on the facts and circumstances. *See* American Bar Association Joint Committee on Employee Benefits Q&A Session with PBGC, Q&A-17 (May 9, 2007). *See also* 71 Federal Register 34819, 34820 (June 16, 2006). Thus, there is a significant risk that the PBGC would find that an employer that provided what it thought was timely notice under § 4063(a) under ERISA in fact failed to do so, resulting in violations under not only § 4063(a) of ERISA but also § 4043 of ERISA.

3. Transactions Involving Non-Participating Foreign Entities

The proposed regulations eliminate the automatic waiver for reportable events that occur when any foreign entity that is a member of an employer's controlled group ceases to be a member of the controlled group by reason of a transaction or liquidation. The proposed regulations also eliminate the automatic waiver for certain activities of foreign entities that might trigger a reportable event, such as dividend declarations or stock redemptions, loan defaults and bankruptcies. These waivers are eliminated even when the foreign entity is not a parent of the contributing sponsor and is not itself a contributing employer.

Elimination of this waiver will require constant monitoring of foreign controlled group members. Because the foreign entities (to whom the existing waivers apply) rarely, if ever, contribute to the plan or have employees who are covered by the plan, it is unlikely that plan administrators who are responsible for monitoring compliance with the reportable events requirements would become aware that a reportable event has occurred with respect to these foreign entities. Nor is there evidence indicating that the financial health of plans maintained by the domestic members of the controlled group would be endangered by events that only involve non-parent, non-contributing foreign members. The additional administrative burden to the employer and the plan administrator would not be justified by the marginal advantage, at best, that would inure to the PBGC if this automatic waiver were eliminated.

4. Transfers of Benefit Liabilities

An employer is required to file a Form 5310-A with the Internal Revenue Service if (a) a plan within the employer's controlled group transfers benefit liabilities to a person or entity who is not a member of the employer's controlled group and (b) the value of assets transferred during the plan year in which the transfer occurs is 3 percent or more of the assets of the plan before the transfer as of at least one day in that plan's plan year.

Without the current automatic waivers, employers would also have to report such an event to the PBGC under § 4043.32 of the proposed regulations. The PBGC should coordinate with the Service to receive notice of this event through the Form 5310-A instead of imposing additional, unnecessary reporting costs on employers.

b. The Proposed Regulations Would Undermine Rather Than Enhance PBGC's Efforts to Monitor Troubled Plans and Protect Participants.

If the waivers set forth in the current regulations are eliminated, the PBGC is likely to be inundated with notices that (i) report events that have no notable bearing on the funding status of employers' plans and (ii) provide no indication of the financial condition of the employer. Many of the waivers that would be eliminated under the proposed regulations were proposed by the PBGC for this very reason. For example, in 1983, the PBGC determined that "the reporting of active participant reductions is critical only when the plan's unfunded vested liabilities are large, exposing the insurance system to large potential losses." 48 Fed. Reg. 37230 (Aug. 17, 1983).

The PBGC also waived notice requirements for failures to meet minimum funding standards if a plan's unfunded vested benefits would still exceed a certain amount even after the failure. The PBGC adopted this waiver because it had received "a substantial number of notices involving failure to meet minimum funding standards where the amount of unfunded vested liabilities in the plan is relatively insignificant * * * and the exposure for the insurance system * * * is relatively small." *Id.* at 37231.

The amount of insignificant information that the PBGC would receive if it were to eliminate most of the automatic waivers would only overwhelm and frustrate the PBGC's efforts to identify "early warnings that would enable it to mitigate distress situations." 74 Fed. Reg. 61247, 61251 (Nov. 23, 2009). We understand that the PBGC plans to monitor reportable events filings without the waivers to determine whether some automatic waivers and extensions should be restored. However, the costs that would be imposed on employers for the PBGC to engage in this experiment are simply too high, and in some cases, ignore well-documented lessons that the PBGC has already learned from its early years of implementing these notice requirements without these waivers.

Instead, at the very least, we recommend that the PBGC consider restoring the negotiated rulemaking process, such as the one used in 1996 to craft the current regulations, which will permit plan sponsors and other interested parties to share their views on possible ways to provide the PBGC with the information that it seeks without flooding the PBGC with unnecessary information, at extraordinary expense to defined benefit plan sponsors.

3. If the PBGC Wishes to Amend the Current Reportable Event Regulations, It Should Use a Negotiated Rulemaking Process.

a. The Current Regulations Were the Result of Negotiated Rulemaking in 1996

The current reportable event regulations were originally adopted on September 17, 1980. 45 Fed. Reg. 61615 (September 17, 1980). In 1984, the PBGC revised the regulations to delete reporting requirements for multiemployer plans, and to waive the notice requirement for one reportable event and narrow the reporting requirements for two other reportable events with respect to single employer plans. 49 Fed. Reg. 22472 (May 30, 1984).

After 1984, very few changes were made to the regulations until they were reorganized and substantially revised in 1996 pursuant to the consensus of a negotiated rulemaking committee consisting of representatives of employers, participants, pension practitioners, and the PBGC. 61 Fed. Reg. 63988 (Dec. 2, 1996). The negotiated rulemaking process reflected the benefits of shared information, knowledge, and expertise possessed by all the affected parties.

b. The Results of Successful Negotiated Rulemaking Should Not Be Overturned Without Further Negotiated Rulemaking

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."[4] 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. Pub. L. No. 101-648; Pub. L. 104-320. 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. Pub. L. 101-648 § 2.

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. *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." 142 Cong. Rec. S6155, S6158 (June 12, 1996).

The PBGC convened a negotiated rulemaking committee in 1995 and 1996 to discuss proposed changes to the reportable events regulations. *See* 60 Fed. Reg. 41033 (Aug. 11, 1995) 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. 61 Fed. Reg. 63988 (Dec. 2, 1996). The consensus-based approach worked admirably; 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. *Id.* at 63988; Pension Benefit Guaranty 1996 Annual Report available at *http://www.pbgc.gov/docs/1996_annual_report.pdf.*

If the PBGC wishes to overhaul the reportable event regulations, it should do so using the same negotiated rulemaking process that led to satisfactory results in 1996. In addition to the historical precedent for promulgating the regulations through a negotiated rulemaking

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[4] 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

process, the reportable event regulations are particularly well-suited for this process, given the far-reaching implications of the regulations on aspects of employers' businesses about which the PBGC may not be aware.

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ERIC appreciates the opportunity to submit these comments. We will continue to solicit member analysis of these and other proposed regulations to assist the PBGC in fashioning reporting and notification requirements for reportable events under § 4043 of ERISA that would help the PBGC achieve its aims to receive earlier warnings that a pension plan is in distress without imposing significant or unnecessary burdens on employers or diminishing their access to existing lines of credit. If we can be of any further assistance, please let us know.

Sincerely,

Mark J. Ugoretz
President

US Chamber of Commerce

January 22, 2010

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 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).

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.

Introduction

In addition to making changes necessary to comply with statutory changes under the PPA, the proposed rule includes a number of changes aimed at increasing opportunities for the PBGC to become aware of potential funding issues. Given the recent economic situation and the concern for the financial viability of the PBGC, we understand the desire for enhanced oversight. However, we believe that these concerns must be balanced with the potential burdens on employers. In several instances, we believe that the benefits imposed upon plan sponsors will not provide an equivalent benefit to the PBGC.

Comments

The Elimination of Automatic Waivers and Extensions May Increase Financial Hardships for Plan Sponsors. Section 4043.4 of the reportable events regulation provides that the PBGC may grant waivers and extensions on a case-by-case basis. In addition, the existing regulation provides automatic waivers and extensions for a number of reportable events. For example, there is an across-the-board waiver for multiemployer plans; for terminating plans in certain circumstances; and for certain statutory reportable events.[1] There are also waivers or extensions in certain circumstances where the controlled group member involved meets a financial "de minimis" test, is a foreign entity, or is linked to the contributing sponsor only through foreign entities. In addition, the PBGC has broad authority to grant waivers or extensions "where it finds convincing evidence that the waiver or extension is appropriate under the circumstances."[2] Most waivers and extensions in the regulation, however, are tied to particular events. In many cases, they are tied to the funding status of the plan on a PBGC premium basis or some variation thereof. In the proposed regulation, the PBGC proposes to eliminate most of these automatic waivers and extensions. We are very concerned that these changes will create substantial financial burdens on plan sponsors.

The elimination of the automatic waivers and extensions may negatively impact corporate loan and other agreements of plan sponsors. Loan agreements often include a representation that there has been no reportable event for which the reporting requirement has not been waived. Moreover, the agreements often require the representation to continue to be true before any new money is advanced during the life of the agreement. Depending on the terms of the agreement, the occurrence of a reportable event with no applicable waiver may constitute a default or, at a minimum, give the lender the ability to declare a default if the event can be argued to have a material adverse effect on the borrower. Even if the reportable event does not result in a default of the agreement, the plan sponsor will have to report the event and it could negatively impact the plan sponsor's negotiating position and future ability to obtain optimal loan terms.

In addition to loan agreements, other corporate agreements, such as stock purchase or merger agreements, may be impacted as well, if they include a representation that there has been no reportable event for which no waiver applies. Thus, eliminating the waivers may negatively impact current financial agreements of plan sponsors as well as their ability to negotiate future agreements.

These results put employers that choose to sponsor benefit plans – particularly defined benefit plans – at an unfair disadvantage to other employers.

The proposed rule states that the PBGC plans to monitor reportable events filings to determine whether some automatic waivers and extensions can be restored (or newly crafted

[1] 29 C.F.R. 4043.4(b); 29 C.F.R. 4043.4(c); 29 C.F.R. 4043.21, .22, .24, .28, and .31(c)(1).

[2] 29 C.F.R. 4043.4(d).

waivers or extensions provided) without jeopardizing efforts to protect the benefits of participants in troubled plans and the pension insurance program. Rather than eliminating these extensions and waivers at the outset, we suggest that the PBGC undertake a study to ascertain the need to eliminate any of the extensions or waivers. As explained below, we recommend that the PBGC enter a negotiated rulemaking process before making any changes.

Waivers For Well-Funded Plans and Foreign Entities Should Be Retained. There are at least two instances where waivers should be retained. For several reportable events, there are currently waiver for well-funded plans and for transactions involving foreign entities. The elimination of these waivers is unnecessary and unduly burdensome. Therefore, we recommend that both of these waivers be retained.

The purpose of the reportable event notice is to provide the PBGC with advance notice of plans in financial trouble. In the case of a well-funded plan, however, this concern is unnecessary. Moreover, maintaining the waiver provides incentive for plans to stay well-funded to avoid the administration burdens of submitting these reports.

Similarly, notice of transactions involving foreign entities that are unrelated to the plan will not provide the PBGC with information relevant to the plan's risk assessment. However, it will increase the administrative burdens on plan sponsors and require additional monitoring of corporate transactions. For these reasons, the waivers for well-funded plans and foreign entities should be retained.

The Proposed Rule Increases Administrative Burdens for Plan Sponsors and the PBGC. By eliminating so many waivers and extensions, the PBGC will increase the administrative burden on plan sponsors. For all of the eliminated waivers, plan sponsors will now have to file reports. These reports will require additional time and effort. Similarly, the elimination of automatic extensions will require plan sponsors to file reports earlier. The combination of additional filings and less time to do them could create an unreasonable burden on plan sponsors.

For example, plans that currently receive waivers because they are well-funded or are linked to foreign entities will not only have to submit the reports but also monitor and track all corporate activities to ensure compliance with the regulations. These are substantial additional burdens for plan sponsors and there is no evidence that these additional burdens will enhance the PBGC's assessment of at-risk plans.

Another example of an increased administrative burden is in the reporting of an active participant reduction. Reporting is required if the plan's active participant count drops below either of two thresholds: 80% of the count at the beginning of the current plan year or 75% of the count at the beginning of the previous plan year.[3] Currently, if the active participant reduction is not related to a cessation of operations under ERISA section 4062(e), the regulation allows for an automatic extension. The extension is generally linked to another filing requirement (i.e., a tax

[3] 29 C.F.R. 4043.23(a).

filing). Without the automatic extension, plan sponsors will have to monitor the active participant reductions daily in order to ensure timely compliance. Consequently, plan sponsors will have to dedicate additional administrative resources to ensure compliance.

The additional reporting requirements will also create substantial administrative burdens for the PBGC. The agency will now be responsible for processing all of these additional reports which will require significant time and effort. And, yet, it is not clear that this additional effort will create an equal additional benefit.

Any Changes to the Reporting Requirements Should Be Done Through Negotiated Rulemaking. The current regulations are the result of negotiated rulemaking in 1996.[4] Through that process all interested parties were able to weigh in and express their needs and concerns. As a result, the regulations were accepted by all parties. The negotiated rulemaking was so successful that when the final reportable event rules were issued in December 1996, Vice President Al Gore's National Performance Review awarded a Hammer Award to PBGC for the agency's use of negotiated rulemaking.[5]

We recognize that as times change, so do the needs and concerns of interested parties. Therefore, it is often necessary to review and change rules accordingly. However, we do not believe that unilateral changes are in the best interest of any party. The agency has not provided a compelling rationale for these radical changes. As such, it is difficult to meaningfully comment on the specific changes without knowing the reasoning or basis for the proposed changes. Through the process of negotiated rulemaking, however, the PBGC will be able to provide further explanation and all interested parties will be able to provide specific feedback and comment. Consequently, we recommend that the PBGC again enter into the negotiated rulemaking process to ensure that the rules are changed in the most beneficial manner possible and without creating unnecessary administrative and financial burdens.

[4] The regulations were originaly adopted on September 17, 1980. 45 Fed. Reg. 61615 (September 17, 1980). In 1984, minimal changes were made to the regulations. 49 Fed. Reg. 22472 (May 30, 1984). However, in 1996 susbstantial revisions were made through a negotiated rulemaking process. The process included a negotiated rulemaking committee consisting of representatives of employers, participants, pension practitioners, and the PBGC. 61 Fed. Reg. 63988 (Dec. 2, 1996).

[5] 1996 PBGC Annual Report http://www.pbgc.gov/docs/1996_annual_report.pdf; The Vice President's Hammer Award is reserved for teams of federal employees who create an innovative and unique process or program to make government work better and achieve results Americans care about. Hammer Awards go to teams who have shown large impacts on customer service, bottom-line results, streamlining government, saving money and exemplary achievements in government problem-solving.

Conclusion

We appreciate the need for continued oversight to ensure the viability of the PBGC and the defined benefit plan system. However, we believe that the changes proposed here will create administrative and financial burdens that will far outweigh the benefits to the PBGC and the system. To reach consensus on changes that would benefit all parties, we strongly recommend that the agency enter into the negotiated rulemaking process.

We appreciate your consideration of these comments and look forward to continuing to work with you on this important matter.

Sincerely,

Aliya Wong

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

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